

## Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 14 July 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

### **Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014**

*Portfolio: Attorney-General*

*Introduced: House of Representatives, 5 March 2014*

#### **Purpose**

2.1 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (the bill) seeks to amend the *Proceeds of Crime Act 2002* (the POC Act) to implement recommendations made by the Parliamentary Joint Committee on Law Enforcement (the PJC-LE) in its final report on its inquiry into Commonwealth unexplained wealth legislation and arrangements.

2.2 Schedule 1 of the bill amends the POC Act to implement the PJC-LE's recommendations to:

- include a statement in the objects clause about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in appropriate circumstances;
- amend legal expense and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings so as to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crime order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the PJC-LE to seek further information from federal agencies in relation to such a report.

2.3 Schedule 1 would also amend the POC Act in ways that do not relate to specific recommendations of the PJC-LE, which include:

- clarifying that unexplained wealth orders may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensuring that provisions in the POC Act that determine when restraining orders cease to have effect take account of the following matters: the new provisions allowing charges to be created and registered over restrained property to secure the payment of unexplained wealth amounts; and the fact that unexplained wealth restraining orders may sometimes be made after an unexplained wealth order (not only before);
- further streamlining the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked under section 44 of the POC Act);
- removing redundant affidavit requirements in support of applications for preliminary unexplained wealth orders;
- ensuring that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made must be provided to the person who is subject to the order in light of changes to the affidavit requirements for preliminary unexplained wealth orders outlined above; and
- amending the POC Act to extend the purposes under section 266A for which information obtained under the coercive powers of the POC Act can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose.

2.4 Schedule 2 of the Bill seeks to correct minor drafting errors in the POC Act that were identified during the drafting of the Bill.

## **Background**

2.5 The committee reported on the bill in its *Fourth Report of the 44th Parliament*.

2.6 The committee noted that a number of the measures in this bill were re-introduced as a result of the lapsing of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the 2012 bill) at the end of the 43rd Parliament.

2.7 The committee reiterated its concerns that the unexplained wealth scheme in the POC Act sought to be amended by the bill may involve the determination of a criminal charge, and that the operation of the presumption of unlawful conduct involves a significant limitation on the right to a fair hearing. The committee also reiterated its expectation that statements of compatibility include sufficient justification for proposed limitations on rights, particularly where the committee has previously raised concerns with a measure.

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## **Committee view on compatibility**

### ***Right to a fair hearing***

#### *Presumption of innocence*

2.8 The committee sought clarification from the Minister for Justice as to why it is necessary to ensure a court is not prevented from making an unexplained wealth order in the absence of the person who is the subject of the order, including evidence or examples of where preventing the court from doing so has frustrated the objectives of the scheme.

### **Minister's response**

The Committee has sought my clarification in relation to amendments in the Bill designed to ensure a court is not prevented from making an unexplained wealth order where a person who is subject to the order fails to appear at an unexplained wealth proceeding. The Committee notes that a possible consequence of this measure is that a person may be the subject of an unexplained wealth order without being notified of it. The Committee further notes that it has concerns regarding the compatibility of this measure with the right to a fair hearing, given that the scheme operates on the basis of a presumption of unlawful conduct which a person must rebut in order to avoid the making of an unexplained wealth order against them.

These amendments are designed to clarify the existing provisions in the *Proceeds of Crime Act 2002* (the POC Act) to ensure that a person cannot frustrate unexplained wealth proceedings by simply failing to appear before the court. They will operate in conjunction with existing provisions in the POC Act which protect the rights of a person who is subject to an application for an unexplained wealth order by imposing notification requirements on the proceeds of crime authority that has applied for an order against that person.

Under the current provisions in the POC Act, the process for seeking an unexplained wealth order commences with a proceeds of crime authority (either the Australian Federal Police or the Commonwealth Director of Public Prosecutions) making an application for an unexplained wealth restraining order (followed by a preliminary unexplained wealth order), or a preliminary unexplained wealth order. As the Committee has noted in its Report, these preliminary orders may be sought *ex parte* in some circumstances to ensure that a person does not disperse his or her assets during the time between the preliminary order being sought, and the time a final unexplained wealth order is made.

Section 179N of the POC Act sets out the notice requirements if a proceeds of crime authority has made an application for an unexplained wealth order. Subsection 179N (2) currently provides that if a court makes a preliminary unexplained wealth order, the proceeds of crime authority that has applied for the order must, within seven days:

- give written notice of the order to the person who would be subject to the final unexplained wealth order if it were made, and
- provide to the person a copy of the application for the unexplained wealth order, and affidavits used to support that order.

Subsection 179N (3) provides that the proceeds of crime authority must also ensure that the person is provided with a copy of other affidavits used to support the application for the preliminary order. The provision of this information must occur within a reasonable time before the hearing in relation to whether the unexplained wealth order is to be made.

The Bill makes two amendments to extend the period in which notice can be provided. New subsection 179N (2A) will allow a court to make an order extending the time limit for serving notice by up to 28 days where the court is satisfied that it is appropriate to do so, if a proceeds of crime authority applies before the end of the original period for serving the notice. New subsection 179N (2B) will provide that the court may extend the notice period more than once. Extending the time limit for giving notice aims to cover situations where, for example, a suspect is attempting to avoid service of the notice or is temporarily absent from the jurisdiction. A court will have the discretion as to whether to extend the time limit for serving notice, meaning that independent consideration will be given as to whether an extension is appropriate.

The Committee has requested examples of where the absence of a person who has failed to appear as required by a preliminary unexplained wealth order has frustrated the objective of the unexplained wealth scheme. The 2012 report of the Parliamentary Joint Committee on Law Enforcement from its inquiry into Commonwealth unexplained wealth legislation and arrangements noted that the unexplained wealth provisions of the POC Act are not working as intended. To date, no unexplained wealth applications have been made by proceeds of crime authorities. The aim of the Bill is to generally strengthen Commonwealth unexplained wealth laws to ensure the Commonwealth's unexplained wealth scheme is as effective as possible.<sup>1</sup>

## **Committee response**

### **2.9 The committee thanks the Minister for Justice for his response and has concluded its examination of this bill.**

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1 See Appendix 2, Letter from The Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith, 29 April 2014, pp 1-3.