The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

Consideration of Legislation Referred to the Committee

Inquiry into the Provisions of the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002

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CHAPTER 1

INTRODUCTION

1.1 The *Proceeds of Crime Bill 2001* was introduced into the House of Representatives on 20 September 2001.

1.2 On 26 September 2001, the Senate Selection of Bills Committee recommended,[1] and the Senate subsequently agreed to, the referral of the provisions of the *Proceeds of Crime Bill 2001* to the Legal and Constitutional Legislation Committee ('the Committee') for inquiry and report by 22 November 2001.

1.3 On 8 October 2001, the House of Representatives was dissolved for the federal election. On that date, business of the House, including the Bill, lapsed. However, business of the Senate continued, notwithstanding the dissolution of the House of Representatives. That is, all references to committees proceed, subject to any other orders of the Senate in relation to specific items of business.

1.4 On 11 February 2002, the eve of the 40th Parliament, Committee business of the 39th Parliament ceased. Following the opening of the 40th Parliament on 12 February 2002, the Committee agreed to recommend to the Senate that its inquiry into the *Proceeds of Crime Bill 2001* be re-referred to the Committee. However, on 14 February 2002,[2] the Senate proposed the referral of the provisions of the *Proceeds of Crime Bill 2002* ('the principal bill') and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002* ('the cognate bill') to the Committee, with a reporting date of 14 March 2002. Referral was contingent upon the introduction of the bills in the House of Representatives.

1.5 As neither the principal nor cognate bills were introduced in the House of Representatives until 13 March 2002, the Committee sought,[3] and the Senate subsequently agreed to, an extension of time to report until 10 April 2002.

1.6 On 10 April 2002, the Committee tabled an Interim Report. The Committee noted that responses to questions taken on notice by some witnesses were only received by the Committee during the week before it was to report and the Committee needed to fully consider the significant nature of the issues contained in those responses. The Committee advised the Senate that it intended to table its final report on these bills on or before 26 April 2002.

Reasons for referral

1.7 The Selection of Bills Committee outlined the following issues for consideration in the 2001 Bill:[4]

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1 Selection of Bills Committee, *Report*, No. 15 of 2001

2 Journals of the Senate, *No. 1*, 12 February 2002

3 The Senate agreed to the extension of time to report on 13 March 2002

4 Selection of Bills Committee, *Report*, No. 15 of 2001

- The principle of civil forfeiture where if, a person can be shown, on the civil standard, to have engaged in a serious offence [defined to be drug offences, money laundering, people smuggling, property offences involving more than $10,000 and several offences against the *Financial Transaction Reports Act 1988* (FTR) involving at least $50,000] all the property which remains the subject of a restraining order, because it has not been shown to be lawfully derived, is forfeited.
- The principle that literary proceeds orders can be made where the court is satisfied to the civil standard that the person has committed an indictable offence and that the person has derived literary proceeds.
- Production orders requiring documents to be produced even though they might incriminate the person (where use immunity is provided to the producer).
- Examination orders which can be made by a court once a restraining order is in place requiring the suspect, an owner of restrained property or a spouse of any such person to answer the questions of an approved examiner and the DPP about the affairs of any person.
- A new scheme providing legal assistance through a Legal Aid Commission under a proceeds aid agreement between the Commonwealth and the States and Territories.[5]

Background to the Bills

1.8 A meeting of the Australasian Police Ministers Council (APMC) in 1983 recommended that all jurisdictions develop legislation to combat the accumulation of criminal wealth. A three-tiered approach was developed and enacted, including the *Proceeds of Crime Act 1987*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Financial Transactions Reports Act 1988*.[6]

Proceeds of Crime Act 1987

1.9 As outlined above, the *Proceeds of Crime Bill 1987* was part of a package of bills, each of which contained measures that were designed to "significantly advance the fight against organised crime" and when taken together, were considered to "constitute a comprehensive package which is designed to effectively suppress organised crime in Australia".[7]

1.10 The Bill, when taken together with the Mutual Assistance in Criminal Matters Bill, enabled Australian freezing and confiscation orders to be enforced overseas and orders made

5 This particular concern of the Selection of Bills Committee is no longer relevant. The *Proceeds of Crime Bill 2002* has simplified the provisions in relation to legal assistance, removing this scheme and replacing it with a direct application for legal aid. The new provisions are discussed more fully in Chapter 3.

6 See *Submission 8*, Australian Federal Police, p. 1

7 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 1987*, 30 April 1987, p. 2314

in foreign countries in relation to foreign offences to be enforced against assets located in Australia.[8]

1.11 The Bill was assented to on 15 September 1987.

'Confiscation that Counts' – A Review of the Proceeds of Crime Act 1987 (ALRC Report)

1.12 In 1997, the Attorney-General, the Hon. Daryl Williams AM QC MP, referred to the Australian Law Reform Commission (ALRC) for inquiry and report the *Proceeds of Crime Act 1987* (amongst a number of acts). In conducting its inquiry, the Commission was requested to inquire into and report on:[9]

- The need for appropriate recognition of the rights of third parties;
- The relationship between forfeiture and restitution or compensation to victims of crime;
- The control of restrained assets and the prevention of their unreasonable dissipation on legal expenses;
- Other provisions in Commonwealth law for non-conviction based forfeiture, including whether the civil forfeiture regime contained in Division 3 of Part XIII of the *Customs Act 1901* (Customs Act) should be integrated into the Proceeds of Crime Act;
- Possible legislation to cover literary proceeds;
- The adequacy of police powers; and
- The appropriateness of current Commonwealth laws dealing with the loss of Commonwealth superannuation entitlements and benefits following a conviction for a 'corruption offence'.

1.13 The ALRC outlined that the Attorney-General, in commissioning the inquiry, "pointed to the need for effective provision for forfeiture of the proceeds of crime in serving Australia's efforts to counter serious crime both inside and outside of Australia".[10] With respect to the latter, the Attorney-General pointed to Australia's international obligations, particularly under:[11]

- The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; and

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8 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 1987*, 30 April 1987, p. 2314

9 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 11

10 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 12

11 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 12

- Bilateral treaties dealing with mutual assistance in criminal matters.

1.14 The ALRC concluded that the solely conviction-based confiscation regime under the Act "fails to meet either the objectives of the [Proceeds of Crime] Act or public policy expectations"[12] and that the Act "is inadequate to bring to account the profits obtained by means of continuous or serial wrongdoing, particularly activities related to drugs, fraud and money laundering".[13] In addition, the ALRC stated that the Commission "is in no doubt that the [Proceeds of Crime] Act and Customs Act regimes have fallen well short of depriving wrongdoers of their ill-gotten gains".[14]

1.15 As a result, the ALRC recommended, amongst other things, supplementing the Proceeds of Crime Act with a civil forfeiture regime:[15]

> Recommendation 9
>
> - A non-conviction based regime should be incorporated into the [Proceeds of Crime] Act to enable confiscation, on the basis of proof to the civil standard, of profits derived from engagement in prescribed unlawful conduct.
>
> - Prescribed unlawful conduct should include all conduct that presently constitutes a prescribed narcotics dealing for the purposes of Division 3 of Part XIII of the Customs Act.
>
> - Prescribed unlawful conduct should include other conduct, related to conduct that is unlawful under criminal or civil law, that is of a kind ordinarily engaged in by a person continuously or serially for the purpose of profit.
>
> - Identification of the range of such conduct that should be so prescribed as prescribed unlawful conduct should be the subject of consideration by the expert committee proposed in Recommendation 8.
>
> Recommendation 10
>
> - Under the proposed non-conviction based civil forfeiture regime, the court should be required, upon a finding that a person has engaged in prescribed unlawful conduct, to
>
> - order the forfeiture of all property the subject of the restraining order
>
> - make any pecuniary penalty order sought in relation to profits from that conduct.

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12 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 15, para 1.27

13 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 78, para 4.172; See also, House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

14 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 75, para 4.142

15 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 81

1.16 In keeping with the arguments made by the ALRC, the main limiting factor in the current legislation, according to the Commonwealth Director of Public Prosecutions (DPP), has been the fact that the legislation is conviction based.[16] As a result, there can be no assets recovery unless and until there has been a criminal conviction. This limiting factor, according to the DPP has "reduced the range of cases that can be pursued under the current Act, and the amount of assets available to be recovered".[17]

1.17 These criticisms are also supported by the National Crime Authority (NCA) and the Australian Federal Police (AFP). The NCA considers that because the Proceeds of Crime Act requires a criminal conviction as a precondition to confiscation, this precludes any possibility of recovering proceeds of crime from "many of those persons who possess or control the vast bulk of them".[18] Limitations of the current legislation are explored more fully in Chapter 3.

1.18 The principal and cognate Bills would provide the Commonwealth with access to a civil forfeiture regime for the proceeds of crime.

Commonwealth Legislation

1.19 Limited civil forfeiture provisions are provided for in the *Customs Act 1901*.[19] The NCA state that section 229A of the Customs Act contains "a system of civil forfeiture that is analogous to the asset-directed civil forfeiture provisions in the Proceeds of Crime Bill".[20] The provision provides for the forfeiture of cash, cheques or goods proven to the civil standard (balance of probabilities) to have been derived from dealings with prohibited narcotic imports, without the need for a criminal charge or conviction.[21]

1.20 The Customs Act also contains person-directed civil forfeiture provisions under Division 3, Part XIII of the Act. Again, the NCA states that these provisions are "analogous to the provisions in the Proceeds of Crime Bill".[22] These provisions enable the Commonwealth to commence civil proceedings against a specified person for the recovery of pecuniary penalties equal to the benefit derived by him or her from dealings with prohibited narcotic imports. The civil action can be brought irrespective of whether the person has been charged with, or convicted of a criminal offence.[23]

1.21 However, the NCA states that the these civil forfeiture provisions in the Customs Act have fallen into disuse because they "lack the necessary features to recover proceeds of

16 *Submission 4*, Commonwealth Director of Public Prosecutions, p. 2

17 *Submission 4*, Commonwealth Director of Public Prosecutions, p. 2

18 *Submission 6*, National Crime Authority, p. 4. The NCA stated that this is the result of factors including advancements in technology and globalisation whereby the principal profit-takers from major criminal enterprises are increasingly able to distance themselves and their profits from the individual criminal acts, thereby evading conviction and so placing their profits beyond the reach of conviction-based laws.

19 See, section 229A of the *Customs Act 1901*

20 *Submission 6*, National Crime Authority, pp. 6-7

21 *Submission 6*, National Crime Authority, p. 7

22 *Submission 6*, National Crime Authority, p. 7

23 *Submission 6*, National Crime Authority, p. 7

crime from contemporary criminals".[24] The ALRC Report also concluded that the provisions in the Customs Act were "too narrowly drawn".[25]

State and Territory Legislation

New South Wales

1.22 In 1990, the NSW Government, following recommendations by royal commissioners, concluded that conviction-based confiscation laws were inadequate and therefore enacted the *Drug Trafficking (Civil Proceedings) Act 1990*. This Act introduced a scheme of civil forfeiture similar to the person-directed provisions in the *Proceeds of Crime Bill 2001*, but its application was limited to drug offences.

1.23 In 1997, the NSW legislation was renamed the *Criminal Assets Recovery Act 1990* ('CARA') and extended to all "serious offences".[26] In recent years, both the number of individual orders made and the amounts recovered under CARA have surpassed the combined totals achieved under all other confiscation laws throughout Australia.[27] For example, in 1997-98 the NSW Crime Commission obtained:[28]

- 166 restraining orders, 46 pecuniary orders and 128 forfeiture orders; and
- a total of $11 025 605 was recovered (although up to $1 million of this may be subject to applications for exclusion from forfeiture).

Victoria

1.24 In 1997, Victoria enacted the *Confiscation Act 1997*. Like the original NSW legislation, the Victorian Act applies only to serious drug offences. In addition, the Victorian laws can only be applied after a person has been charged with a serious drug offence. It is the view of the NCA that these two limitations have severely undermined the legislation and the civil forfeiture provisions in the *Confiscation Act 1997* have not been used on any single occasion over the last 4 years.[29] Victoria's Minister for Police has recently announced that the government is undertaking a review of its confiscation laws and is considering expanding them.[30]

Western Australia

1.25 In 2000, Western Australia enacted the *Criminal Property Confiscation Act 2000*, which replaced its conviction-based laws with a civil forfeiture regime. The Western Australian civil forfeiture regime is considered to be "the most far-reaching of the proceeds legislation available" insofar as it has "a reduced threshold for triggers for investigations and

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24 *Submission 6*, National Crime Authority, p. 7

25 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 78

26 See *Submission 6*, National Crime Authority, p. 8

27 *Submission 6*, National Crime Authority, p. 8

28 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 72, para 4.125, p. 366, para 22.44

29 *Submission 6*, National Crime Authority, pp. 8-9

30 *Submission 6*, National Crime Authority, p. 9

its scope is significantly broader".[31] The Committee understands that since its implementation, this legislation has been regarded as very effective (see Chapter 3 below).

Other possible civil forfeiture laws

1.26 The Committee understands that the Australian Capital Territory, Queensland, South Australia and the Northern Territory are also considering the introduction of civil forfeiture laws.

International Obligations

1.27 As outlined by the NCA, over the past decade Australia has ratified two international treaties that require it to adopt such measures "as may be necessary" to identify, trace, seize and confiscate proceeds of crime and any property used, or intended to be used, to commit crime:[32]

1. *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* ('UN Drug Convention') – these obligations are limited to the proceeds of drug offences and property used or intended to be used to commit drug offences;[33] and

2. *European Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime 1990*, ('European Money Laundering Convention') – these obligations extend to the proceeds of "any criminal offence" or property used or intended to be used to commit "any criminal offence".[34]

1.28 In addition, the NCA outlined that in December 2000, Australia joined 123 other countries in signing the *UN Convention Against Transnational Organised Crime* ('TOC Convention'). Article 12 provides that:

> 1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds;
>
> (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.
>
> 2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

1.29 The United Nations summarised the Convention for the Suppression of the Financing of Terrorism as applying to "the offence of direct involvement or complicity in the

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31 *Transcript of evidence*, 31 January 2002, Australian Federal Police, p. 16

32 *Submission 6*, National Crime Authority, p. 3

33 See *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, Article 5

34 See *European Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime 1990*, Articles 2 - 5

intentional and unlawful provision or collection of funds".[35] The collection of funds may be attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the Convention. This may also be an act "intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act".[36]

1.30 The United Nations states that "the provision or collection of funds in this manner is an offence whether or not the funds are actually used to carry out the proscribed acts".[37] However, the Convention only applies where an act of this nature involves any of the international elements defined by the Convention.

1.31 As for the UN Drug Convention, the European Money Laundering Convention and the TOC Convention, the Convention for the Suppression of the Financing of Terrorism requires State Parties to "take appropriate measures" for the "identification, detection, freezing or seizure and forfeiture" of funds.[38]

1.32 Australia signed the Convention for the Suppression of the Financing of Terrorism on 15 October 2001. However, the Convention has not yet been ratified.

1.33 The Attorney-General, in his second reading speech, also stated that the provisions of the Bill relating to freezing and confiscating property associated with terrorism "implement relevant parts of the International Convention for the Suppression of the Financing of Terrorism and United Nations Security Council Resolution 1373".[39]

1.34 The United Nations Security Council Resolution 1373 was adopted by the Security Council at its 4385th meeting on 28 September 2001. The relevant provisions of the resolution are:[40]

> 1. *Decides* that all States shall:
>
> a) Prevent and suppress the financing of terrorist acts;
>
> b) Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

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35 United Nations Treaty Collection, http://untreaty.un.org/English/Terrorism.asp

36 United Nations Treaty Collection, http://untreaty.un.org/English/Terrorism.asp

37 United Nations Treaty Collection, http://untreaty.un.org/English/Terrorism.asp

38 United Nations, *International Convention for the Suppression of the Financing of Terrorism*, Article 8(1)-8(2)

39 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

40 The Security Council also decided that all States should afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts and noted with concern the close connection between international terrorism and transnational organised crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials etc.

c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; or entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

"A Safer More Secure Australia"

1.35 On 30 October 2001, the Prime Minister, the Hon. John Howard, MP stated that if the Coalition Government were re-elected in November 2001, it would "implement legislation for the return of proceeds of crime to ensure ill-gotten gains seized from criminals are invested in the fight against crime and into supporting drug treatment and diversionary programs for drug addicts".[41]

1.36 The provisions of the Bill reflect this election promise.

Differences between the Proceeds of Crime Bill 2001 and the Proceeds of Crime Bill 2002

1.37 As mentioned above, the Bill was re-introduced in the House of Representatives on 13 March 2002. According to the Attorney-General's Department, the 2002 Bill differed from the Bill introduced in September 2001 for the following reasons:[42]

- Changed circumstances post 11 September 2001 – as part of the Government's anti-terrorism package, the Bill introduces measures to enhance the capacity of law enforcement agencies to restrain and confiscate assets relating to terrorism;
- Implementing the Coalition's election commitment to direct confiscated proceeds of crime to "supporting national and community programs in the fight against crime" and "additional drug treatment and diversionary programs";
- Streamlining and improving aspects of the original Bill, in particular, the legal assistance provisions have been simplified;
- Law enforcement agencies have raised additional issues aimed at strengthening and aligning provisions within the Bill, for example, removing Derivative Use Immunity (DUI) from production orders to bring them into line with compulsory examinations; and

41 The Hon. John Howard, MP, *Media Release*, "A Safer More Secure Australia", 30 October 2001

42 Attorney-General's Department, *Proceeds of Crime Bill 2002 – Comparison with the Proceeds of Crime Bill 2001*, March 2002, p. 1

- The need to address a number of minor errors, inconsistencies and omissions.

Conduct of the inquiry

1.38 The Committee advertised the inquiry on 15-16th December 2001 in *The Weekend Australian*. The closing date for submissions was 15 January 2002. However, due to the absence of the consequential amendments and transitional provisions bill, and the possibility of government amendments, all submitters and interested parties were notified by the Secretariat that the closing date had been extended to 22 February 2002.

1.39 Following the introduction of the *Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, the Secretariat wrote to previous submitters and interested parties alerting them to the introduction of the Bills. Close of submissions was again extended to 22 March 2002 and submitters were assured that should they choose not to comment on the 2002 Bills, their submissions on the 2001 Bill would still be taken into consideration in so far as they related to the 2002 Bills.

1.40 The Committee received 26 submissions, including supplementary submissions covering both the 2001 and 2002 Bills, which are listed at Appendix 1.

1.41 The Committee held public hearings in Canberra on 31 January 2002 and in Sydney on 27 March 2002. A list of witnesses who appeared at these hearings is at Appendix 2.

Note on references

1.42 References in this Report to submissions, are to individual submissions as received by the Committee, and not to a bound volume.

1.43 References to the Hansard transcript are to the proof Hansard. Page numbers vary between the proof and the official Hansard transcript.

CHAPTER 2

PROVISIONS OF THE BILLS

2.1 As noted in the previous chapter, the *Proceeds of Crime Bill 2002* ('the principal Bill') and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002* ('the cognate Bill'), if enacted, will provide the Commonwealth with access to a civil forfeiture regime for the proceeds of crime. This section of the Report provides an overview of the main provisions of the Bills that constitute the new fundamentals of the proposed system.

Purpose of the principal Bill

2.2 The Attorney-General, in his second reading speech, stated:

> The purpose of the *Proceeds of Crime Bill* 2002 is to greatly strengthen and improve Commonwealth laws for the confiscation of proceeds of crime. The Bill also makes special provision for the confiscation of property used in, intended to be used in, or derived from terrorist offences which are a form of organised crime of particular focus since the tragic events in the United States on September 11.
>
> The primary motive for organised crime is profit. Each year in Australia, drug trafficking, money laundering, fraud, people smuggling and other forms of serious crime generate billions of dollars. This money is derived at the expense of the rest of the community. It is earned through the harm, suffering and human misery of others. It is used to finance future criminal activity. It is tax-free.
>
> Criminals have no legal or moral entitlement to the proceeds of their crimes. The need for strong and effective laws for the confiscation of proceeds of crime is self-evident. The purpose of such laws is to discourage and deter crime by reducing profits; to prevent crime by diminishing the capacity of offenders to finance future criminal activities and to remedy the unjust enrichment of criminals who profit at society's expense.[1]

2.3 The principal Bill deals not only with a new civil forfeiture regime (broadly similar to that which has been operating in New South Wales since 1997), but includes improved provisions for conviction-based confiscation.[2]

2.4 The Attorney-General explained that civil forfeiture can occur "where a court is satisfied that it is more probable than not that a serious offence has been committed".[3] Such a finding by a court does not constitute a conviction and no criminal consequences can flow

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1 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, pp. 1021-1022

2 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

3 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

from it. That is, "the object or focus of the proceedings is the recovery of assets and profits, not putting people in gaol".[4]

2.5 The *Proceeds of Crime Bill 2002* will, if enacted, eventually replace the *Proceeds of Crime Act 1987* which will continue to apply to proceedings commenced under that Act.[5]

Objectives of the principal bill

2.6 Section 5 of the principal Bill outlines the main objectives of the Bill as follows:

a) To deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and

b) To deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and

c) To punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and

d) To prevent the reinvestment of proceeds, instruments, benefits and literary proceeds in further criminal activities; and

e) To enable law enforcement authorities effectively to trace proceeds, instruments, benefits and literary proceeds; and

f) To give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; and other international agreements relating to proceeds of crime; and

g) To provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories.

Provisions of the principal bill

2.7 The chapters of the principal Bill outline the confiscation scheme, procedures and powers for information gathering, administrative arrangements and other miscellaneous items.

2.8 At the outset, the principal Bill states that when enacted, the Bill will apply to offences and criminal convictions for an offence which occurred both before and after the Act commences (clause 14).[6] In addition, clause 15 of the Bill provides that the Act is intended to

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4 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

5 See House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2001*, 20 September 2001, p. 30182

6 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 6

operate in parallel with State and Territory laws (to the extent that the State or Territory law is capable of operating concurrently with the Act).

The confiscation scheme

2.9 The principal Bill provides that confiscation may be by restraining order, forfeiture order, by forfeiture on conviction of a serious offence, pecuniary penalty order or literary proceeds order.[7]

Restraining Orders

2.10 The purpose of a restraining order is to "ensure that property is preserved and cannot be dealt with to defeat an ultimate confiscation".[8]

2.11 A court may make a restraining order where there are 'reasonable grounds'[9] to suspect that a person has committed a serious offence or an indictable offence[10] (clauses 18 and 19 respectively), within the six years preceding, except if the offence in question is a terrorism offence, in which case, a statute of limitations does not apply.[11]

2.12 'Serious offence' is defined in section 338 of the Bill to include a limited number of offences, which are generally serial in nature and often use the proceeds of one offence to commit the next. Generally, those offences are drug trafficking, money laundering and serious fraud. Paragraph (b) specifies offences against the *Migration Act 1958* relating to people smuggling and the organised harbouring of illegal entrants. Four financial transaction reports offences are also included in the definition of 'serious offence' and are more thoroughly outlined below. A terrorism offence as defined is also a serious offence for the purposes of the Bill. In addition to the defined offences, an inchoate offence in relation to a defined 'serious offence' is defined by paragraph (g) to itself be a serious offence, and paragraph (h) allows other indictable offences to be prescribed as serious offences for the purposes of the Bill.[12]

2.13 The Attorney-General's Department stated that the proposed terrorism offences are contained in the Security Legislation Amendment (Terrorism) Bill 2002 (items 3 - 4) and the Suppression of the Financing of Terrorism Bills (item 3). The provisions are providing or

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7 See *Proceeds of Crime Bill 2002*, Chapter 2

8 Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 6

9 The Explanatory Memorandum to the principal Bill states that subclause 18(4) further explains the "reasonable grounds" referred to in paragraph 18(1)(d). It provides that it is not necessary for these grounds to be based on a finding as to the commission of a particular serious offence ie. The conduct need only be characterised in very general terms and there need not be a specified perpetrator. See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 8

10 The Explanatory Memorandum states that this definition refers to 'indictable offences of Commonwealth concern' and establishes that where the proceeds of a State or Territory indictable offence are dealt with in contravention of a specified Commonwealth law, that State or Territory offence becomes an 'indictable offence of Commonwealth concern'. For this to occur, the proceeds must be dealt with in a way that contravenes a Commonwealth law on the importation or exportation of goods; a communication using a postal, telegraphic service or bank transaction (that isn't State banking). See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 116

11 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 7

12 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 117-118

receiving training connected with terrorist acts (s 101.2); directing organisations concerned with terrorist acts (s 101.3); possession of things connected with terrorist acts (s 101.4); collecting or making documents likely to facilitate terrorist acts (s 101.5); other acts done in preparation or planning of terrorist acts (s 101.6); directing, assisting, membership of a proscribed organisation (s 102.4); and providing or collecting funds to facilitate terrorist acts (s 103.1).[13]

2.14 Terrorism offences differ from other serious offences covered under the Bill because of the likely international connections and concern about the commission of any of these offences:[14]

> It is therefore important that Australian legislation be very specific about the steps that are being taken to implement international anti-financing of terrorism measures. The removal of the six year limitation on bringing applications under the civil forfeiture regime in relation to terrorism offences is in recognition that in some cases it is likely to take a very long period of time to unravel complex terrorist financing arrangements, particularly where they span across international borders.

2.15 A restraining order may also be made where a person is reasonably suspected of having committed an indictable offence or a foreign indictable offence, and the person has derived literary proceeds[15] from that offence (clause 20).[16] This is designed to "prevent criminals from exploiting their notoriety for commercial purposes".[17] For example, where criminals sell their story to the media. In such a case, there is no time limit as to when the offence for which the person was convicted or is reasonably suspected of having committed, took place but literary proceeds that may be confiscated are limited to those accrued after the Act commences.[18]

2.16 The Bill also allows for a court to make a restraining order where a person has been convicted of or charged with (or is about to be charged with) an indictable offence (proposed clause 17).[19]

2.17 At the time of applying for a restraining order, the DPP does not have to prove that the property is effectively controlled by the person, or that the property is the proceeds or instrument of the offence or offences.[20]

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13 See, *Submission 14B*, Commonwealth Attorney-General's Department, p. 3

14 See, *Submission 14B*, Commonwealth Attorney-General's Department, p. 3

15 Clause 153 defines 'literary proceeds' to be any benefit that a person derives from the commercial exploitation of his or her notoriety, or the notoriety of his or her accomplice, resulting from the person's involvement in the commission of an indictable offence or a foreign indictable offence. Subclause 153(2) states that such exploitation may take the form of a written or electronic publication, (which would include books, newspapers, magazines, world wide web, or other written or pictorial matter), any media from which visual images or words or sounds can be produced (which would include radio, film, video or television productions, compact discs, tapes, world wide web), or any live entertainment, representation or interview. However, the benefits must have been derived in Australia.

16 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 9-10

17 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

18 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 10

19 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 6

2.18 A restraining order is a condition precedent to the court issuing an examination order and may operate in relation to property which is not yet in the possession of the suspect at the time the order is made (subclause 17(6)).[21]

2.19 However, the principal Bill provides that property that is the subject of a restraining order may be used to meet certain expenses or debts such as living expenses, mortgage repayments and maintenance for any dependants that the person may have (subclause 24(1)).[22]

2.20 Only the DPP may apply for a restraining order and he/she may do so either on notice to the owner of the property or *ex parte*.[23] At this stage, the principal Bill also enables a person whose property is the subject of a restraining order under clauses 17, 18 or 19 to have his or her specified property excluded from that order (clause 29). However, the property able to be excluded and the grounds which must be shown for that property to be excluded, depend upon the basis on which the restraining order was made, details of which are lengthy and are outlined thoroughly in the Explanatory Memorandum to the Bill.[24]

2.21 In all cases where a person applies to have property excluded from an order, the person bears the onus of proof that the property was obtained by legitimate means (subclause 317(1)).[25]

Forfeiture Orders

2.22 A court, on the application of the DPP, is required to make a 'civil-forfeiture' order against property which has been restrained under the Bill for at least six months if there are 'reasonable grounds' to suspect that the person engaged in conduct which constituted a serious offence (subclause 47(1)).[26]

2.23 To make a civil forfeiture order, the court must find to the civil standard ('on the balance of probabilities') that the person engaged in conduct constituting a serious offence within the last six years. However, the Explanatory Memorandum explains that the serious offence need not be the same offence on which the restraining order was based, and a particular offence need not be proved. It is sufficient for the court to be satisfied that any serious offence has been committed.[27]

2.24 In addition, the raising of a doubt as to whether a person engaged in conduct constituting a serious offence is not a sufficient ground on which a court can find that a person did not engage in such conduct (subclause 47(3)).[28]

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20 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 6

21 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 6

22 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 11-12. See also, Chapter 3 below

23 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 12

24 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 13-15

25 See, Proceeds of Crime Bill 2002, p. 211

26 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 22

27 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 22

28 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 23

2.25 A court may also make a forfeiture order, in relation to the proceeds or instruments of an indictable offence of which a person has been convicted (clause 48). However, the application of the clause is not restricted to the property of the person convicted of the particular offence - property in the possession of a third party which falls within the definition of proceeds or instrument, is also liable to forfeiture.[29]

2.26 Civil forfeiture orders may also be made in circumstances where conduct involves indictable offences (clause 49). In such a case, it is not necessary for the court to make a finding either that a particular offence has been committed or that a particular person committed any offence. [30]

2.27 Notably, the mere fact that a person has been acquitted of an offence with which he or she has been charged does not affect the court's power to make a forfeiture order under clause 47 or clause 49 in relation to the offence (clause 51).[31] However, a dependant of a person whose property is the subject of a civil-forfeiture order (whether based on a serious offence or an indictable offence) may seek payment from the Commonwealth to compensate that person for the hardship that would be caused by the forfeiture order (clause 72). The court must be satisfied that the amount would relieve the hardship.[32] A court may also make orders excluding specified property from a forfeiture order (clause 73).[33]

2.28 Similar to clause 51, clause 80 also provides that where a civil-forfeiture order is made against a person in respect of a particular offence, the person's conviction for an offence and the subsequent quashing of that conviction do not affect the forfeiture order. This applies to both civil forfeiture based on conduct constituting a serious offence and civil forfeiture based on conduct constituting an indictable offence where there is an identified suspect and offence.[34]

Forfeiture on Conviction of a Serious Offence

2.29 Forfeiture of restrained property may also occur without a forfeiture order in certain circumstances ('automatic forfeiture') (clause 92). This can only occur where the suspect has been convicted of a serious offence and the property is the subject of a restraining order. Automatic forfeiture occurs at the end of the period of six months from the date of conviction (although this may be extended).[35]

Pecuniary Penalty Orders (PPO)

2.30 A court may make a Pecuniary Penalty Order (PPO) on application by the DPP in certain circumstances (subclause 116(1)). A PPO is an order that requires a person to pay an

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29 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 23

30 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 23-24

31 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 24

32 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 30

33 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 31-32

34 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 34

35 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 36

amount of money to the Commonwealth, where the court is satisfied that the person has derived a benefit from the commission of an indictable offence.[36]

Literary Proceeds Orders

2.31 Subclause 152(1) empowers the court to make a literary proceeds[37] order against a person who has been convicted of an indictable offence, or in relation to whom there are reasonable grounds to suspect that he or she has committed an indictable offence, when that person has derived literary proceeds in relation to the offence.[38]

Information gathering

2.32 The principal Bill outlines a number of different methods for gathering information, including examinations, production orders, notices to financial institutions, monitoring orders and search and seizure (many of which are currently contained in the *Proceeds of Crime Act 1987*).[39] The Attorney-General described these methods as "providing law enforcement with a real time window into accounts suspected of being used for money laundering".[40]

2.33 The information obtained under these orders is protected both by the Privacy Act and by offences of unlawful disclosure created under the Bill which carry penalties of 5 years imprisonment.[41]

Examinations

2.34 Where a restraining order is in force, a court may make an order, on application by the DPP, for the examination of any person (clause 180). That includes a person who owns the property, or who claims an interest in property that is the subject of the restraining order, and a person named in a restraining order as a suspect. It may include the spouses of those persons. Those persons and their spouses can be examined about the "affairs" (for example the interests, transactions, and ventures) including the nature and location of any property of any of the persons. Examinations may also include lawyers, accountants, bankers and other advisers of the relevant persons.[42]

2.35 Rules relating to answers given or documents produced in an examination and their use in civil or criminal proceedings against the person are outlined at clause 198 but this clause also sets out exceptions to that rule. The clause does not confer "derivative-use immunity". This means that any information that is obtained directly or indirectly as a result of the giving of the answer or production of the document, may be used in further civil or

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36 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 43

37 See footnote 15, above

38 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 55

39 See *Proceeds of Crime Bill 2002*, Chapter 3

40 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

41 See, House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime Bill 2002*, 13 March 2002, p. 1022

42 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 63

criminal proceedings against the individual concerned.[43] Derivative use immunity and the lesser protection of use immunity are described in greater detail in Chapter 3.

Production Orders

2.36 Procedures for the making and granting of applications for production orders are outlined at clause 202 and provide that a magistrate may make a production order requiring a person to produce, or make available for inspection, one or more property-tracking documents[44] to an authorised officer (subclause 202(1)).

2.37 A production order can only require the production of documents that are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business. The Explanatory Memorandum states that this restriction on the type of documents that can be required has been made because the privilege against self-incrimination does not apply to production orders and only a use immunity is conferred preventing their admissibility in certain criminal proceedings. No derivative use immunity has been conferred and therefore no documents in the custody of an individual that relate to the affairs of an individual can be compelled to be produced. These must be sought under an examination order or seized under the search powers.[45]

Notices to Financial Institutions

2.38 This is a new form of investigative power, which may be exercised to allow an investigator to make a decision on whether to take action under the Act, such as to seek a warrant or production order. The Explanatory Memorandum explains that one of the reasons for the Notice is for AFP or NCA investigators to discover if a person holds an account with a particular institution. The provisions are based on Recommendation 76 of the ALRC Report.[46]

2.39 In such a case, a financial institution[47] or one of its officers, employees or agents are protected from any action, suit or proceeding in relation to any action taken by the institution

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43 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 68

44 The definition of property-tracking document is included in subclause 202(5). The Explanatory Memorandum states that it is based on the definition of property-tracking document in section 4 of the *Criminal Assets Recovery Act 1990* (NSW) and is intended to be wide enough to include property that could be the subject of a restraining order. See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 69-70

45 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 69. See also, Clause 206: Subclause 206(1) provides that it is not an excuse for failing to produce, or to make available, a document as required by a production order, that the production or making available of the document would tend to incriminate the person or make him or her liable to a penalty, or constitute a breach of an obligation not to disclose the existence or contents of the document, or breach legal professional privilege.

Subclause 206(2) provides a use immunity, that is, any document produced or made available is not admissible in evidence in criminal proceedings against a natural person except for the offences of giving false or misleading information or documents under the *Criminal Cod*e.

46 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 72

47 'Financial institution' is defined in the Bill in section 338: Financial Institution means: (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or (b) the Reserve Bank of Australia; or (c) a society registered or incorporated as a co-operative housing society or similar society under a law of a State or Territory; or (d) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution; or (e) a body corporate that is a financial corporation within the meaning of paragraph 51(xx) of the Constitution; or (f) a body corporate that, if it had been incorporated in Australia,

or person in relation to its or their response to a notice under clause 213, or in the mistaken belief that action was required under the notice (clause 215). The same parties are also protected from prosecution for money laundering offences in respect of the information provided in response to a notice under clause 213.[48]

2.40 Importantly, it is also an offence for a person given a notice to disclose the existence or nature of the notice where the notice specifies that information about the notice must not be disclosed (clause 217). The maximum penalty that can be imposed in relation to this offence is 2 years' imprisonment, a fine of 120 penalty units, or both.[49]

Monitoring Orders

2.41 Clause 219 sets out the procedure for the making of a monitoring order. A judge of a court with jurisdiction to deal with criminal matters on indictment may make a monitoring order that a financial institution provide information about transactions conducted during a particular period through an account held by a particular person with the institution (subclause 219(1)).[50]

2.42 The same protections from suit as for notices to financial institutions are provided (clause 221) and offences for the disclosure of the existence and operation of a monitoring order are outlined at clause 223.[51]

Search and Seizure

2.43 A magistrate may issue a search warrant if satisfied by information on oath that there are 'reasonable grounds' for suspecting that there is, or will be within 72 hours, tainted property or evidential material at the premises (subclause 225(1)). The 72 hour limit permits a warrant to be obtained in advance where intelligence suggests that evidential material is to be taken to specified premises. A search warrant may be issued only on application by an authorised officer of an enforcement agency (subclause 225(3)).[52]

Administration

2.44 The Administration chapter of the principal Bill primarily deals with the powers and duties of the Official Trustee. It also deals with legal assistance, the confiscated assets account, charges over restrained property for payment of certain amounts and enforcement of interstate orders in certain territories.[53]

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would be a financial corporation within the meaning of paragraph 51(xx) of the Constitution. The Committee notes that the Government is proposing to have this definition extend to TABs and casinos.

48 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 73

49 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 73

50 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 74

51 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 74-75

52 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 76

53 See *Proceeds of Crime Bill 2002*, Chapter 4

Legal Assistance

2.45 The Official Trustee is required to reimburse legal aid commissions from the suspect's restrained assets for the cost of representing the suspect in criminal proceedings and proceedings under the Act (clause 292).[54] Where a legal aid commission provides legal assistance to a person under clause 292, the legal aid commission can also recover from the Confiscated Assets Account the amount of legal costs that exceeds the value of the restrained assets (subclause 293(1)). The issues surrounding legal assistance are discussed in Chapter 3.

Confiscated Assets Account

2.46 A 'Confiscated Assets Account' is established by the Bill (clause 295), into which the proceeds of confiscated assets, money paid to the Commonwealth and money received from a State or Territory etc. will be credited.[55] Payments out of the account include, amongst others, those approved by the Minister for programs relating to law enforcement, drug treatment and diversion, legal aid commission costs, compensation for third parties.[56]

Miscellaneous

2.47 The miscellaneous provisions of the principal Bill deal with the right of state and territory courts to have jurisdiction in relation to matters arising under the Bill and clauses in relation to proceedings and the standard of proof.[57]

2.48 Importantly, subsection 317(2) states that any question of fact to be decided by a court in relation to an application under the Bill is to be decided to the civil standard (on the balance of probabilities).[58]

Provisions of the cognate bill

2.49 As is usual with consequential legislation, the cognate Bill operates by way of schedules. The cognate Bill contains 7 schedules relating to money laundering offences, international cooperation, record retention, bankruptcy legislation, family law and consequential and transitional amendments.

Money laundering offences

2.50 The cognate Bill amends the *Criminal Code Act 1995* to insert new money laundering offences replacing those in the *Proceeds of Crime Act 1987*[59] with "updated provisions based on the recommendations of the Australian Law Reform Commission".[60]

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54 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 95

55 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 96-97

56 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, pp. 97-98

57 See *Proceeds of Crime Bill 2002*, Chapter 5

58 See, Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 104

59 The money laundering offences in the *Proceeds of Crime Act 1987* are outlined in sections 81 and 82 of the Act

60 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, 13 March 2002, p. 1023

2.51 The schedule outlines money laundering offences that are graded according both to the level of knowledge required of the offender and the value of the property involved in the dealing constituting the laundering. For example, proposed s. 400.3 deals with money or property worth $1,000,000 or more and a person is guilty of an offence if the person deals with money or other property and either the money or property is, and the person believes it to be, proceeds of crime, or the person intends that the money or property will become an instrument of crime. The penalty for this offence is a maximum of 25 years imprisonment and/or $165,000 fine for individuals and $825,000 for a body corporate. The penalty of imprisonment is increased by 5 years on the existing penalty.[61]

2.52 The penalty for the offence of dealing in proceeds of crime - money or property worth $1,000,000 or more, is lessened to a maximum of 12 years imprisonment and/or fine of $79,200 for individuals and $325,000 for a body corporate where the person is reckless to the fact that the money or property is the proceeds of crime, or the fact that there is a risk that it will become an instrument of crime. Where the person is negligent as to the fact that the money or property is the proceeds of crime, or the fact that there is a risk that it will become an instrument of crime, the penalty is again lessened to a maximum of 5 years imprisonment and/or a fine of $33,000 for individuals and $165,000 for a body corporate.[62]

2.53 This system of grading according to the value of the property involved and the level of knowledge of the offence is continued for proposed s. 400.4 – 400.8 to include offences of $100,000 or more, $50,000 or more, $10,000 or more, $1,000 or more and money or property of any value.[63] The Attorney-General stated that this system "will permit prosecutors to more accurately reflect the level of culpability of the offender in the charges they prefer and courts will be provided with a greater degree of guidance in their sentencing".[64]

2.54 In accord with recommendations 25 and 26 of the ALRC Report, proposed section 400.9 inserts a lesser money laundering offence of possession etc. of property reasonably suspected of being proceeds of crime which is based on the existing s. 82 of the *Proceeds of Crime Act 1987*.[65] This proposed offence applies to those who receive, possess, conceal or dispose of, or bring into Australia any money or other property that may reasonably be suspected of being proceeds of Commonwealth or foreign crimes, as well as the taking of money outside Australia.[66] The penalty for this offence is a maximum of 2 years imprisonment and/or a fine of $5,500 for individuals and $27,500 for corporations.

2.55 As with the creation of other new offences in recent years, proposed s. 400.11 provides for absolute liability in relation to indictable offences. This proposed section is more

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61 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 5

62 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 5

63 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, pp. 5-7

64 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, 13 March 2002, p. 1023

65 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 7

66 This includes the proceeds of State and Territory offences where they involve the import or export of goods, postal or telegraphic communications or a transaction in the course of banking

of a technicality and ensures that the prosecution does not have to prove knowledge about whether the offences relevant to the money laundering are indictable.[67]

2.56 Consistent with the above system of 'grading', proposed s. 400.14 provides for an alternative verdict mechanism in relation to money laundering offences. This is a standard provision which is used elsewhere in the *Criminal Code Act 1995* to "ensure that where the trier of fact concludes that the defendant is not guilty of say a more serious offence, but is guilty of a lesser offence, the trier may make that finding".[68] For example:[69]

> This means that if the trier considered the prosecution overestimated the value of the relevant property, and the actual value makes the charge no longer appropriate, it is open for the trier to convict the defendant of an appropriate offence with a lower penalty.

International cooperative arrangements

2.57 Schedule 2 amalgamates and co-locates the provisions relating to international cooperative arrangements currently in the *Proceeds of Crime Act 1987* with those in the *Mutual Assistance in Criminal Matters Act 1987* ('MA Act'). These provisions provide for the registration and enforcement of foreign restraining and confiscation orders in Australia in relation to the confiscation of assets located in Australia, which are the proceeds of a foreign offence.[70] In addition, they enable authorised agencies, at the request of a foreign country, to apply for and use a number of information gathering tools in relation to foreign serious offences where it is reasonably suspected that the proceeds, instrument or property-tracking documents are located within Australia.[71]

2.58 The Attorney-General can authorise the DPP to apply for the registration of a foreign forfeiture order or a foreign pecuniary penalty order made in respect of a foreign serious offence and apply for registration of a foreign civil based forfeiture or pecuniary penalty order.[72] These provisions are limited to those countries specified in the regulations to the Bill in order to ensure that the Commonwealth is enforcing civil orders made on a similar basis to the Bill.[73]

2.59 One of the protections for innocent third parties is provided at proposed s. 34C. This proposed section enables third parties who were not involved in the commission of the offence to which the forfeiture order relates to either have their interest in the property

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67 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 8

68 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 8

69 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 8

70 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 9

71 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 9

72 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 13

73 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 13

transferred to them by the Commonwealth or to be recompensed for their interest in the forfeited property. This proposed section applies to both civil and conviction based orders.[74]

2.60 Another of the information gathering tools is the new form of investigative power of notices to financial institutions. Subdivision D of the cognate Bill enables notices to financial institutions to be used in relation to proceedings or possible proceedings under Division 2 of Part VI of the MA Act.[75]

2.61 In addition, proposed s. 34V makes it an offence for a person given a notice under proposed s. 34R to disclose the existence or nature of the notice where the notice specifies that information about the notice must not be disclosed. The maximum penalty that can be imposed in relation to this offence is 2 years' imprisonment and/or a fine of 120 penalty units.[76]

2.62 Provisions in the *Proceeds of Crime Act 1987* relating to the enforcement of forfeiture orders made under the *International War Crimes Tribunal Act 1995* have also been relocated to that Act.[77]

Record Retention

2.63 Schedule 3 of the cognate bill re-enacts the document retention provisions in the *Proceeds of Crime Act 1987* in the *Financial Transaction Reports Act 1988*, which already contains record retention provisions.[78] Generally, these provisions oblige financial institutions to retain relevant documents relating to financial transactions for the minimum retention period. Failure to do so may mean that the financial institution is guilty of an offence that is punishable by a fine.

Bankruptcy

2.64 Schedule 4 gives priority to recovery of forfeited property or pecuniary or literary proceeds due under the Bill in bankruptcy proceedings.[79] The Attorney-General stated that this is to ensure that "bankruptcy is not used as a means of thwarting confiscation of the proceeds of crime by using them to satisfy creditors in a bankruptcy":[80]

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74 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 15

75 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 18

76 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 20

77 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 10

78 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, pp. 28-32

79 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, pp. 32-37

80 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, 13 March 2002, p. 1023

> Although this may be seen by some as restricting the funds available to satisfy creditors, the property in question is not derived from lawful activity and the bankrupt has no legal or moral entitlement to that property.

2.65 Proposed s. 114A excludes property covered by a restraining order or forfeiture order from the property able to be used to pay the debts of the bankrupt. Legitimate creditors can however, continue to apply to a court to have property excluded from restraining orders to satisfy the liability.[81]

Property settlement and spousal maintenance proceedings

2.66 Schedule 5 amends the *Family Law Act 1975* to ensure that property settlements and spousal maintenance cannot be used to defeat confiscation proceedings.[82]

2.67 Proposed s. 79B imposes an ongoing obligation on the parties to a marriage who are instituting property settlement or spousal maintenance proceedings under Part VII of the Family Law Act to disclose in the application the existence of a relevant forfeiture application or proceeds of crime order. The effect of the disclosure is to stay the proceedings until the relevant proceeds of crime proceedings are finalised so that a court does not deal with property which may be forfeited under the Bill in the property settlement or spousal maintenance proceedings.[83]

2.68 Proposed s. 79D does allow for a stay to be lifted (in whole or in part) with the consent of the DPP in cases where only a small portion of the property of the marriage is affected by the proceeds of crime proceedings.[84]

Consequential Amendments

2.69 Schedule 6 outlines a number of consequential amendments, one of which affects the *Administrative Decisions (Judicial Review) Act 1977*. This provision states that the Administrative Decisions (Judicial Review) Act does not apply to the decisions of the DPP or an approved examiner in relation to compulsory examinations about the financial affairs of people under the Proceeds of Crime Act. However, decisions will still be reviewable under the prerogative writs and s. 39B of the *Judiciary Act 1903*.[85]

2.70 This schedule also amends the *Taxation Administration Act 1953* by, amongst other things, expanding the definition of "proceeds of crime order" for the purposes of section 3E(1)(b) of the Taxation Administration Act. S. 3E(1)(b) gives the Commissioner of Taxation a discretion to disclose information acquired under a taxation law to an authorised law enforcement agency. The new definition gives the Commissioner a further discretion to

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81 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, 13 March 2002, p. 1023

82 House of Representatives' *Hansard*, Second Reading Speech, *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, 13 March 2002, p. 1023

83 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 39

84 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 39

85 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 40

disclose information for the purposes of the Commonwealth's civil forfeiture regime established by Chapter 2 of the Bill.[86]

2.71 Another notable amendment in this schedule is that made to the *Telecommunications (Interception) Act 1979*. This amendment establishes a reference in the Telecommunications (Interception) Act to s. 17 of the Bill. S. 17 of the Bill enables a restraining order to be made on the basis that a person has been or is about to be charged with an indictable offence or convicted of such an offence. The effect of this reference is that telecommunications interception material can be used only for conviction-based restraining orders and not for civil-based forfeiture.[87] The implications of this provision are discussed in Chapter 3.

2.72 The Committee received evidence on a number of the provisions outlined above and the relevant issues are discussed in the following chapter.

86 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 46

87 See, Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Explanatory Memorandum*, p. 47

CHAPTER 3

ISSUES RAISED BY THE BILLS

Introduction

3.1 The majority of submissions to the inquiry indicated their support for the proposal to introduce a Commonwealth civil forfeiture regime for the proceeds of crime. The proposal constitutes the most significant and far-reaching reform to Commonwealth proceeds of crime legislation since its inception in 1987.

3.2 While most submissions and witnesses agreed that introduction of a Commonwealth civil forfeiture regime will be a positive development in the fight against organised crime, there were some concerns expressed about the extent to which the Bills impinge on the civil liberties of citizens. In particular, the following specific issues were raised:

- Introduction of civil forfeiture;
- Removal of derivative use immunity;
- Reversal of the onus of proof;
- Privacy concerns for information gathering;
- Changes to legal assistance; and
- Conduct of examinations by the Director of Public Prosecutions.

3.3 This chapter deals with the concerns raised in respect of each of these areas. It concludes by considering three other issues raised by law enforcement agencies that are not civil liberties issues. These relate to changes to the use of telephone intercept material, changes to offences involving money laundering and racketeer influenced and corrupt organisations (RICO).

Introduction of civil forfeiture

3.4 The most notable feature of the new Bills is the proposal to introduce a civil forfeiture regime. This will enable the courts to order confiscation of property in cases in which it considers there are reasonable grounds to suspect that, on the balance of probabilities, that property was acquired through committal of a serious offence, even when the owner of the property has not been convicted of the offence. Nor need the courts establish a direct relationship between the offence and the property subject to restraint or forfeiture.

3.5 The civil forfeiture regime will operate in parallel with the conviction–based scheme in the existing *Proceeds of Crime Act 1987,* the provisions of which will be strengthened through the new Bills.

3.6 Civil forfeiture is not a new concept. Such provisions are already incorporated into some Commonwealth legislation, for example the *Customs Act 1901* (in relation to the profits of drug importation*)* as well as in some recent New South Wales, Victorian and Western

Australian legislation.[1] Civil forfeiture provisions have also been incorporated into legislation in the United Kingdom, the United States of America and the Republic of Ireland, amongst others. [2]

3.7 Some concerns were raised in evidence to the Committee in relation to the confiscation of assets from a person, without first establishing (through a criminal trial) that the person is guilty of the crimes of which they are accused.[3]

> The Association is opposed to the introduction of a Commonwealth civil forfeiture scheme which applies to such a wide range of conduct that may fall within the scope of the provisions of the Bill. Forfeiture of a person's property is a substantial penalty and should, in general, only occur where there has at least been a conviction for a particular criminal offence.[4]

3.8 The New South Wales Bar Association also questioned the need for a civil forfeiture regime and suggested that the failure of conviction-based approaches may owe as much to failure to allocate them adequate resources as to the limitations of the legislation itself.

> A number of provisions in the Bill, and in particular the civil forfeiture provisions, are adopted from the *Criminal Assets Recovery Act 1990 (NSW)*. The body that administers that legislation in this state is the New South Wales Crime Commission. It is again the experience of those who practice in this area in this State, that the Commission makes extensive use of qualified and trained financial investigators. A question that should be firmly answered is whether the perceived limited range of cases under the existing Act is due to the lack of financial investigative work done by investigative agencies in the past.
>
> …The Association also questions, and submits that the Committee should seriously question, the need for the introduction of a non-conviction-based forfeiture scheme.[5]

3.9 In addition, the New South Wales Bar Association suggested[6] that law enforcement agencies were relying on only six cases to support their claim that a civil forfeiture regime was necessary. In response, the AFP approximated the number of cases it could have investigated had the legislation been available:[7]

> In the year 2000-2001, the AFP investigated over 10,000 potential breaches of Commonwealth law. Of that figure, approximately one-tenth related to the kinds of serious offences that would fall within the purview of this bill. Currently available to us, of that one-tenth, the figures for prosecution within that same period range from 5 to 15. If you look at the de-escalation of effectiveness, it tells the story quite tellingly. Within that difference of 5 to 15, which I think is less than one per cent,

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1 The *Drug Trafficking (Civil Proceedings) Act 1990* (NSW); the *Confiscation Act 1997* (Vic); and the *Criminal Property Confiscation Act 2000* (WA). See also Chapter 1 of this Report

2 Details are provided in *Submission 6*, National Crime Authority, pp.11-13

3 *Submission 1*, Australian Civil Liberties Union, p. 1. See also, *Submission 11*, Mr Ralph McFadyen

4 *Submission 15,* New South Wales Bar Association, p. 4

5 *Submission 15*, New South Wales Bar Association, pp. 3-4

6 *Transcript of evidence, 27 March 2002,* New South Wales Bar Association, p. 18

7 *Transcript of evidence, 27 March 2002*, Australian Federal Police, p. 27

> the remaining nine per cent would probably include a whole range of investigations that we could have pursued if we had the legislation available.

3.10 The Australian Federal Police subsequently supplied information to the Committee of examples of 15 cases in which civil forfeiture would have been likely to result in seizure of property where it had not been possible to obtain a criminal conviction. This was not an exhaustive list, however, all cases showed the intensive use of AFP resources with limited gain. [8] For example:[9]

> A joint investigation involving a number of international agencies has focused on the activities of a well-organised cocaine syndicate operating in Sydney. This syndicate is believed to have been responsible for previous large scale importations, and is currently suspected of planning other importations. The principal members of this syndicate have a long association with narcotic importations and currently appear to live well beyond their means with significant unexplained wealth and assets. Currently, it does not appear likely that a prosecution could be mounted to the normal criminal standard, resulting in their criminal activity and accumulation of wealth going untouched.
>
> Under the proposed Bill, evidence is available which would enable police to proceed against these assets on the balance of probabilities that they have engaged in serious criminal conduct. This action would need to rely upon telephone intercept material, amongst other evidence. To date, this investigation has cost the AFP approximately 40,640 hours of manpower.

3.11 Most of the evidence to the Committee supported the introduction of a civil forfeiture regime because of the failure of existing conviction–based laws to locate and confiscate the proceeds of crime.

> The Commonwealth has had a comprehensive Proceeds of Crime Act since 1987. However experience has shown that there are significant limitations in relying solely upon the present legislation.
>
> The main limiting factor has been the fact that the legislation is conviction based. There can be no assets recovery unless and until there has been a criminal conviction. That has reduced the range of cases that can be pursued under the current Act, and the amount of assets available to be recovered.[10]

3.12 It was suggested that conviction–based regimes are becoming less rather than more effective as technological advances and globalisation enable those profiting from criminal activity to distance themselves from individual criminal acts. In this way they can escape conviction and, in a conviction- based regime, can therefore place their property beyond the reach of the law.

> As criminal syndicates become more sophisticated current limitations have become more pronounced, the introduction of an effective civil forfeiture regime and the

8 *Submission 8B,* Australian Federal Police, pp. 3-7

9 *Submission 8B,* Australian Federal Police, pp. 3-7

10 *Submission 4,* Commonwealth Director of Public Prosecutions, p. 2

> enhancement of tools available to investigators could dramatically increase the law enforcement result.[11]

3.13 Property derived from illegal activity, it was suggested, is used to expand the activity through which it was acquired, so that its confiscation may not only punish those who have acquired it illegally but also serve to reduce the scope for further criminal activity.

> Experience has also shown that unless the financial base of crime is disrupted, then the ill gotten gains will only be used in future criminal enterprises. The individuals who take part can be prosecuted and contained, but unless their finances are removed, the criminal syndicates only replace them and the criminal enterprise will continue.[12]

3.14 Where civil forfeiture regimes have been introduced they appear to be much more effective than conviction- based laws in locating and confiscating the proceeds of crime[13] although, given the short time in which some of them have been operating in Australia no definitive conclusion can be reached about the extent of their efficacy.[14]

3.15 The Australian Federal Police Association (AFPA) suggested[15] that the effectiveness of the proposed legislation could be further enhanced by inclusion of an 'unexplained wealth' provision allowing the confiscation of unexplained wealth even where a serious offence had not been identified. Such a provision is already incorporated in the Western Australian legislation.

3.16 Some evidence to the Committee suggested that, notwithstanding the important civil liberties concerns raised by the legislation, the Bills should proceed, because if they did not then the Commonwealth law enforcement agencies would use equivalent civil forfeiture procedures in State legislation and thus attain their objectives through indirect means. In this view the debate has moved on from the implications of civil forfeiture to the need to ensure that the Commonwealth is as well equipped as the States to combat organised crime.

> There is no doubt that with joint operations you could get into a position where you could be using state proceeds of crime legislation rather than Commonwealth legislation, if it does not have the amendments that we have spoken about.[16]

Removal of derivative use immunity

3.17 The need for the removal of derivative use immunity (DUI) from the Proceeds of Crime Act was discussed extensively in submissions and at public hearings.

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11 *Submission 8*, Australian Federal Police, p. 2

12 *Submission 8*, Australian Federal Police, pp.1-2

13 For the situation in Western Australia, for example, see *Transcript of evidence, 27 March 2002,* Western Australian Police Service, p. 8

14 For details of recent confiscations of property under Australian state civil forfeiture laws see *Transcript of evidence, 31 January 2002,* National Crime Authority, p. 22

15 *Submission 7,* Australian Federal Police Association, p. 6

16 *Transcript of evidence, 27 March 2002,* Australian Federal Police Association, p. 4

3.18 The 2001 Bill proposed the removal of DUI during compulsory examinations. The principal Bill extended the removal to cover documents produced in response to a production order.

3.19 Immunity is the term used to describe the protection in the law against self incrimination. The retention of DUI in this legislation would mean that a person who provided information during examination or through the production of documents could not have that information used against him/her. If further material were discovered as a result of the initial information provided, that also would be inadmissible as evidence, however incriminating it might be.

3.20 The Bills remove DUI but retain use immunity. This protection is more circumscribed than DUI. It affords a person immunity in subsequent proceedings for the specific answer to a question provided under compulsory examination or the content of a specific document produced in response to a production order. However, the information obtained in this way can be used in further investigations and should these further investigations produce incriminating material this material will be admissible as evidence.[17]

3.21 The protection against self-incrimination is, like the presumption of innocence, an important safeguard for citizens. However, it is not protected by the Constitution and, like other rights and privileges, may be removed by legislative action, as has frequently happened in Australian legislatures in every Australian State.

3.22 Law enforcement agencies maintain that the existence of DUI has proved a major stumbling block in attempts to retrieve illegally acquired property under the Proceeds of Crime Act 1987.

> **The NCA submits that the existing provision of derivative use immunity under POCA has severely undermined the entire legislative scheme.** It has resulted in significant disuse of the examination powers. In those relatively few cases where the powers are exercised, this usually only occurs after a considerable passage of time because of the need to prevent possible contamination of the criminal case – examinations typically only take place after the defendant has been convicted. By this time, assets are likely to have been dissipated or placed beyond retrieval and the defendant is likely to have no practical incentive to comply with the examination order.[18]

3.23 For this reason, law enforcement agencies pressed for its removal from the new legislation.

> Removal of derivative use immunity is important to the AFP for a number of reasons. Its retention poses a substantial risk to prosecution of criminal offences. Its retention makes it possible for a person to absolve themselves, if you like, of their criminal activity and thereby taint evidence that would otherwise have been admissible. That is why we suggest its removal removes that risk from our activities.[19]

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17 See *Submission 6*, National Crime Authority, p. 21 and *Submission 8*, Australian Federal Police, p. 5 for further discussion of DUI and UI

18 *Submission 6,* National Crime Authority, p. 26

19 *Transcript of evidence, 31 January 2002,* Australian Federal Police, p. 20

> If there is provision for derivative use protection in the new legislation…that would severely restrict the utility of the examination powers, and that, in turn, would reduce the effectiveness of the entire civil forfeiture regime. What may look on its face to be a minor change to the Bill could have a very significant impact in practice.[20]

3.24 The strong views of the law enforcement agencies have been recognised through the removal of DUI from both compulsory examinations and from production orders in the principal Bill. However, under the principal Bill production orders can only be used to obtain documents from a body corporate or documents used or intended to be used for carrying on a business. Individuals cannot be compelled to produce other documents. Use immunity remains for both compulsory examinations and for production orders.

3.25 In relation to examinations, internal guidelines drafted by the DPP provide further protection to individuals by ensuring that they are not required to disclose general information unrelated to the confiscation action being undertaken. Nor can they be required to divulge details of confidential communications with their lawyers, except in specific, narrowly circumscribed situations. Further reference to the DPP guidelines is made later in this chapter when discussing the conduct of examinations by the DPP.

Reverse onus of proof

3.26 The civil forfeiture provisions of the Bill permit the forfeiture of property in cases in which no conviction has been recorded and even in cases in which no prosecution is brought or where prosecution fails. In these circumstances forfeiture can take place if the court finds, on the balance of probabilities, that there were reasonable grounds to suspect that the property in question was acquired through committal of a serious offence.

3.27 The Explanatory Memorandum to the principal Bill is very unclear about the conditions under which forfeiture orders may be issued. Clause 47 is the relevant clause. The Explanatory Memorandum appears to suggest, in paragraph 1, that 'reasonable grounds to suspect' are sufficient grounds for forfeiture. But in paragraph 3 the Explanatory Memorandum refers to the civil standard (the balance of probabilities). The latter interpretation is consistent with clause 317, which indicates that, throughout the legislation, the civil standard is to apply. The confusion resulting from this lack of clarity was evident in submissions and in evidence taken at public hearings.

3.28 Once a court has ordered forfeiture then the onus is on the individual concerned to show that the property was acquired legitimately. This is discussed in greater detail in chapter 2.

3.29 There was some concern, in submissions and at public hearings, that this reversal of the onus of proof, by removing the presumption of innocence, was contrary to fundamental principles entrenched in Australian law.

> …the Australian Civil Liberties Union remains concerned that the format of the bill allows confiscation of assets from persons without first establishing in a court of law that they are guilty of the crimes of which they are accused. If seizure of assets is to take place, it should first be established in a court of law that the accused are

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20 *Submission 4,* Commonwealth Director of Public Prosecutions, p. 5

> guilty as charged, and the tradition of "innocent until proven guilty" must be preserved.[21]

3.30 A related concern was that the principal Bill removes the requirement to identify a specific offence in relation to civil forfeiture where there are reasonable grounds to suspect that a person has committed a serious offence within the last six years. It is not necessary to particularise the offence committed, nor to link it to the property being seized. Furthermore, the definition of 'serious offence' is very wide ranging. All of these changes assist the Commonwealth and increase the difficulties of the individual in proving innocence.

> Clause 47 provides that such property may be forfeited if, 6 months after the making of the restraining order, the court is satisfied that there are reasonable grounds to suspect that the person engaged in one or more serious offences, although it is not necessary for the court to be satisfied that a particular offence was committed, and the order can be made based on a finding that 'some serious offence or other' has been committed. Forfeiture must be ordered under the clause where there is only a reasonable suspicion a person committed a serious offence, there is no need for a conviction. The Association considers that to forfeit a property on the basis of a mere suspicion, although said to be on reasonable grounds, is far too less a threshold for forfeiture.[22]

3.31 Supporters of the legislation pointed out however that the reversal of the onus of proof provisions are quite narrowly circumscribed in the Bill. A defendant will be required to show the lawful origin of property **only after** the Director of Public Prosecutions has established (according to the civil standard) that there is a nexus between the property in question and serious criminal activity.

> Of course, the prosecution carries the initial onus of proving, on the balance of probabilities, that nexus [between serious criminal conduct and property].[23]

3.32 Other protections for people faced with restraint or forfeiture of their property were listed in supplementary material supplied to the Committee by the Australian Federal Police.[24] These included provisions governing:

- Exclusion of property from a restraining or forfeiture order;
- Allowance of living expenses from restrained property (in some circumstances);
- Relief from hardship for dependents resulting from restraining or forfeiture orders; and
- Compensation for forfeited property later shown to be legally acquired.

3.33 Similar provisions govern pecuniary penalty orders and literary proceeds orders.

3.34 The National Crime Authority listed four factors which, it claimed, justify placing the onus of proof on a defendant in relation to the lawful origin of property in confiscation proceedings. These were:

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21 *Submission 1,* Australian Council of Civil Liberties, p.1

22 *Submission 15,* New South Wales Bar Association, pp. 6-7

23 *Transcript of evidence, 31 January 2002,* Commonwealth Director of Public Prosecutions, p. 9

24 Australian Federal Police, *Protection of Innocent Interests/3rd Parties*, pp. 1-2

- The general lack of direct evidence in relation to the derivation of proceeds of crime;

- The increasing ease with which the illicit origin of proceeds of crime can be concealed or disguised through money laundering, particularly as a result of globalisation and advancements in technology;

- The fact that details about the actual acquisition (lawful or otherwise) of property, including the source of funds used to purchase the property, are likely to be peculiarly within the knowledge of the person who acquired the property; and

- The ease with which a lawful owner of property should be able to establish that his or her interest in the property was lawfully acquired.[25]

3.35 The National Crime Authority also pointed out that reverse onus provisions are widely used both in Australia and overseas in comparable situations.

> Placing the onus of proof on a defendant in relation to the lawful origin of property once the state has established some relevant nexus to criminal activity is an internationally accepted feature of confiscation laws. Reverse onus provisions and rebuttable presumptions to the same effect are standard mechanisms in civil forfeiture and conviction – based laws around the world. Such mechanisms have been widely accepted as not only necessary, but also fair and reasonable, by legislatures and judiciaries in Australia and overseas.[26]

Privacy concerns for notices to financial institutions

3.36 In its submission, the Australian Privacy Charter Council (the Council) raised financial privacy concerns with respect to the provision of notices to financial institutions.[27] The Council stated that it is concerned that "these provisions represent a further erosion of the financial privacy of individuals without sufficient safeguards or accountability". It is the view of the Council that judicial authorisation should be required for the issue of a notice to a financial institution.[28]The Council argued that judicial authorisation is required for existing provisions such as production orders, monitoring orders and search warrants and therefore, should also apply to notices to financial institutions.[29]

3.37 The Council also recommended that there should be a requirement to report publicly, at least annually, on the number and general nature of "notices" and that there should be an 'after the event' requirement to notify individuals that a "notice" has been served in relation to them, once there is no longer any prejudice to a current investigation.[30]

3.38 The Council concluded that:

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25 *Submission 6*, National Crime Authority, p. 14

26 *Submission 6,* National Crime Authority, p. 14

27 *Submission 12*, Australian Privacy Charter Council, p. 2

28 *Submission 12*, Australian Privacy Charter Council, p. 2

29 *Submission 12*, Australian Privacy Charter Council, p. 1

30 *Submission 12*, Australian Privacy Charter Council, p. 2

> These measures would help to ensure that the broad and intrusive information gathering powers under the Act are used sparingly, and that the agencies concerned can be held to account for their use[31]

3.39 The Committee acknowledges the concerns raised in relation to notices to financial institutions. It notes however that notices to financial institutions do not have the coercive power of other instruments, such as search warrants, and that they do have additional limitations, such as a six month time frame. They will not provide access to all the records held by a financial institution. The principal Bill creates a new offence (in clause 217) of disclosure of the existence or nature of a notice. The Committee considers therefore that, on balance, these protections provide sufficient safeguard against the erosion of the financial privacy of individuals resulting from the issuing of notices without judicial authorisation.

Changes to legal assistance

3.40 Under the provisions of the principal Bill people facing restraint or forfeiture of their assets will be able to seek legal assistance by applying for legal aid. Their application will be considered against the usual legal aid criteria but restrained property will be excluded from the means test and, where restrained property is subsequently forfeited, some can be used to meet the costs of legal aid. Where these costs exceed the amount of restrained property the balance will be paid from the Confiscated Assets Account, to which all confiscated property is initially assigned.

3.41 Where the restrained property is subsequently found not to have been illegally acquired and is returned to the owner then, the Attorney-General's Department advises:

> …those assets would be taken into consideration in determining the amount of any final contribution that person may be required to make towards the cost of the legal assistance provided. Depending on the outcome of the means test assessment, a contribution covering the full cost of the grant may be imposed.[32]

3.42 The Committee considers it unreasonable that a person found to have acquired property lawfully and not through criminal activity should be required to bear the costs of proving their innocence.

Recommendation 1

The Committee **recommends** that consideration be given to amending the legal aid provisions of the Bill to address this issue.

3.43 The Confiscated Assets Account is to be used to fund a range of programs, as discussed in the previous chapter. The Australian Federal Police Association would prefer to see the funds directed specifically to law enforcement related purposes along the lines of the Western Australian *Criminal Property Confiscation Act 2000*.[33] However, the Committee

31 *Submission 12*, Australian Privacy Charter Council, p. 2

32 *Submission 14B*, Commonwealth Attorney-General's Department, p. 1

33 *Submission 7,* Australian Federal Police Association, p. 7

considers that the proposed amendments will ensure that adequate resources are directed to law enforcement.

3.44 This proposal replaces the more cumbersome approach to legal assistance envisaged in the 2001 Bill, which established three separate schemes through which such assistance might be provided.[34]

3.45 There is a number of advantages to the latest proposal apart from its simplicity. These have been recognised in evidence to the Committee.

3.46 Firstly, it allows access to legal assistance by people whose property is under threat while at the same time denying them the opportunity to squander that property in legal challenges, which is a common occurrence under the existing legislation.

> The dissipation of restrained assets on legal expenses has been a significant difficulty under the act. That is addressed in the bill by provisions restricting the release of restrained assets to costs incurred in defending a criminal charge, proceedings relating to an examination or to defending civil forfeiture related proceedings. Only property that is not proceeds or an instrument of an offence can be released.[35]

3.47 It has been suggested that in some cases where the people concerned had obtained the property as a result of serious crime and expected it to be confiscated they had nothing to lose by squandering it in this way, and frequently did so.

> The problem under the existing Act is that a person who is facing criminal proceedings which they are likely to lose, and whose assets have been restrained, has no incentive to show restraint in funding their criminal defence. If the person can get access to restrained funds they may as well use those funds on legal expenses on the basis that they are likely to lose them anyway.
>
> In theory the court which orders the release of money has power to ensure that the money is used properly. In practice, the courts are often reluctant to do anything that might be seen as restricting the way in which a person defends criminal charges.
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> The result is that a lot of money which should have been confiscated under the current Act has been spent on funding unsuccessful legal challenges and a lot of DPP resources and court time has been spent dealing with them.
>
> Under the current Bill, the legal aid authorities will be given the role of ensuring that money provided for legal costs is used in an appropriate way … In the DPP's view, the legal aid authorities are the agencies best placed to perform that role.[36]

3.48 The Legal Aid Commissions (LACs) have all agreed to this proposal. Neither they nor their other clients will be disadvantaged by it, as the costs will not be met from their regular budgets. At the same time, the guidelines under which the LACs operate will prevent excessive expenditure from restrained property or from the Confiscated Assets Account. The

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34 These are described in Chapter 4, Part 4-2, Divisions 1 and 2 of the *Proceeds of Crime Bill 2001*

35 *Transcript of evidence*, *31 January 2002*, Commonwealth Attorney–General's Department, p. 3

36 *Submission 4*, Commonwealth Director of Public Prosecutions, p. 4

guidelines prescribe the types of matters for which LACs may provide assistance and establish means tests and merits tests. Although they may draw on the Confiscated Assets Account, LACs may only do so when authorised by the Attorney-General or by a senior officer acting for him/her. The possibility of excessive expenditure on a particular case is minimised (but not prevented) by the public accountability provisions under which LACs operate.[37]

3.49 Although most of the evidence to the Committee was commenting on the original, more cumbersome approach to legal assistance in the 2001 Bill rather than the simplified version in the principal Bill the essential principles are the same in both Bills. Thus the Committee has assumed that the support expressed for the original proposal can be assumed to extend to the arrangements set out in the principal Bill and described above.

3.50 Support was not universal however. The NSW Bar Association, for example, argued that in NSW in comparable circumstances people quite often have only a part of their restrained property forfeited. If the Commonwealth legislation were to proceed then people in this situation will be denied the opportunity to use legitimately acquired restrained property to pay for legal assistance.

> The fact of the matter is that when one conducts a financial investigation of most people who are, let us say, guilty of significant criminal activity, one frequently finds that they have some assets that are legitimately obtained and some that are not. The problem is that at the time that they are charged, or a restraining order is initially obtained, it is not possible for law enforcement to know with precision what is likely to be shown to be legitimately obtained, nor is it feasible for the defendant to provide that evidence.
>
> …One sees considerable reference to the New South Wales Criminal Assets Recovery Act, and to the New South Wales Crime Commission and its success in recovering property. One of the points I make about that is that many of those cases are settled. They are settled not on the basis that all of the property is forfeited but on the basis, quite frequently, that property is retained by the person and some of it is forfeited. That is quite a frequent occurrence in this state. If all of the property is not forfeited at the end of the day then the person has been denied the opportunity to use property to which they should have had access to fund their defence.[38]

Conduct of examinations by the Director of Public Prosecutions (DPP)

3.51 The 2001 and principal bills enhance the power of the Director of Public Prosecutions (DPP), especially with respect to the conduct of examinations.

3.52 The DPP will be able to apply for an order for the compulsory examination of a person whose property has been restrained, a person with an interest in a restrained property, a person who is the suspect for the offence to which the restraining order relates and the spouse of any of these. The people concerned will be compelled to answer questions put during examination and will not be protected from self incrimination by derivative use

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37 Information on guidelines governing the Legal Aid Commissions is set out in Submission 14C, Commonwealth Attorney-General's Department

38 *Transcript of evidence, 27 March 2002,* New South Wales Bar Association, p. 19

immunity. When examined, the onus will be on examinees to establish that the property in question was acquired legally.

3.53 The DPP's examination powers include the power to search under warrant, the power to compel the production of documents and the power to obtain information from a financial institution.

3.54 While some concerns were raised with the Committee about these additional powers they were not opposed. There appear to be three reasons for this.

3.55 The first is the recognition that effective examination powers are critical to the success of a civil forfeiture regime. The wide ranging powers conferred on the DPP are particularly important given that most people who take part in organised crime do not hold the proceeds in their own names but through trusts, companies and family arrangements. It is important therefore that the DPP be able to cast its net wider than the individual suspected of acquiring property through committal of a serious offence and that the people examined should be compelled to answer questions put to them.

3.56 The second reason is that the DPP's powers are closely regulated and subject to judicial authorisation. Before an examination can take place a restraining order must be in place and a court must make an examination order (on the application of the DPP) in respect of the person to be examined. Production orders, monitoring orders and search warrants are likewise subject to judicial authority.

3.57 The third reason is the protections afforded in the legislation to the people being examined. While they are not protected by derivative use immunity the lesser protection of use immunity applies. Further protection is provided through the DPP's guidelines. Other protections include the entitlement to apply for exclusion from restraint and forfeiture orders and the provision allowing relief to dependents suffering hardship, as discussed earlier in this chapter in relation to reverse onus of proof.

Other issues

3.58 Three issues of concern to law enforcement agencies but which are not civil liberties issues are discussed below. They are the use of telephone intercept material, changes to money laundering offences and racketeer influenced and corrupt organisations (RICO).

Use of telephone intercept material in cases of civil forfeiture

3.59 Amendments to the *Telecommunications (Interception) Act 1979* through the cognate Bill will have the effect of restricting the use of information gained by law enforcement agencies through telephone interception to conviction-based proceedings. It will not be possible to use such information in civil forfeiture cases. This is despite the fact that telephone intercept material and listening device material is currently admissible in civil forfeiture cases under the *Customs Act 1901* and the *Australian Federal Police Act 1979.*

3.60 The law enforcement agencies and the DPP are all opposed to this amendment. A number suggested that the impact of the proposed amendment was so serious as to undermine the effectiveness of the legislation.

> As the POCB stands, the "Mr Biggs" of Organized Crime who normally remain one step removed from the crime, who are usually only identified through the use of telephone intercept material, will not be touched by this legislation. They can sit

> back confident that their multimillion dollar mansions and vulgar wealth will be safe as they laugh at Australian law enforcement efforts.[39]
>
> It is submitted that if TI information cannot be used in civil forfeiture proceedings relating to serious offences the proposed Proceeds of Crime Act 2002 will fail to achieve its objectives.[40]

3.61 Whilst the Committee received no contrary advice from legal and civil liberties groups, it is particularly concerned at the disparity of views between the Attorney-General's Department and law enforcement agencies on this matter. Evidence from the Attorney-General's Department did not provide insight as to the reasons for this disparity but suggested that the concerns of the law enforcement agencies were receiving attention.

> I am aware that there are conflicting views about the interpretation of the Telecommunications (Interception) Act and its current application in relation to civil forfeiture proceedings. That is a matter on which the Attorney-General is currently taking advice, and he will consider the matter in light of that advice. [41]

3.62 This was supplemented by the Attorney-General in a letter dated 5 April 2002 in which the Attorney-General stated that "the matters raised by the law enforcement agencies in their submissions will be considered in the context of the ongoing review of the *Telecommunications (Interception) Act 1979*". However, the Committee is unaware of any review of the Telecommunications (Interception) Act and neither advice assisted in clarifying this issue for the Committee.

3.63 The Committee is of the view that unresolved, this issue detracts from consideration of the legislation on this issue. Of the examples of cases supplied by the AFP that might have proceeded had the legislation been available, a number of those cases specifically stated that the AFP would need to rely upon the use of telephone intercept material.[42] The Committee is of the view that these are the sorts of issues that remain unresolved as to how agencies intend to, or will be able to address such cases without the use of telecommunication interception powers in relation to civil forfeiture.

3.64 The Committee is not satisfied that adequate attention has been given to this issue given the status of the legislation. In order to ensure active consideration of the *Telecommunications (Interception) Act 1979* (specifically the issue in relation to the use of telephone intercept material in cases of civil forfeiture), the Committee requests that the terms of reference and timeframe for finalisation of the "ongoing review" of the Telecommunications Act be provided to the Committee.

Money laundering

3.65 One issue on which the Committee received some evidence from law enforcement agencies was changes relating to money laundering offences.

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39 *Submission 7A*, Australian Federal Police Association, p. 5

40 *Submission 6A*, National Crime Authority, p. 2

41 *Transcript of evidence, 27 March 2002,* Commonwealth Attorney-General's Department, p. 31

42 *Submission 8B*, Australian Federal Police, pp. 3-7

3.66 The cognate Bill repeals the existing money laundering offences in the *Proceeds of Crime Act 1987* and replaces them with new offences in the Criminal Code (in clauses 400.3 – 400.9).[43] Clause 400.9 is concerned with the lesser offence of possession of property reasonably suspected of being the proceeds of crime. In this respect it differs from the offences in 400.3 to 400.8, which require proof of intention, recklessness or negligence. Because of the lower threshold of proof required for clause 400.9 it is likely to be more often used than the other money laundering offences. For this reason law enforcement agencies submitted that the penalties for 400.9 should be increased from a maximum of two to a maximum of five years imprisonment.

> The AFP supports this move [to new money laundering offences] but believes that the initiative to include the proceeds of state and territory offences should be replicated in the lesser money laundering offence where it can only be shown that there is a reasonable suspicion that the funds were the proceeds of crime. The AFP believes that the effectiveness of this provision would be strengthened if the penalty were to be increased from the current two years imprisonment or 50 penalty points to five years and 300 penalty points. This would enable courts to turn their consideration to the criminality and full circumstances of some of these matters.[44]

3.67 The Attorney–General's Department disagreed, considering that since it was easier to bring charges under clause 400.9 than under other money laundering clauses it was appropriate that it should attract a lower penalty.

> The situation with 400.9 is that it does have proof of fault requirements which are much easier to establish than the other offences. …However, certainly the policy of this legislation is that sections 400.3 to 400.8 provide a more than adequate range of offences to cover money laundering – everything from intentional conduct right through to negligence. There could not be more options in terms of fault than what we have there. So it would be inconsistent with the whole scheme of it to increase the penalties for 400.9 or to expand the scope of that offence.[45]

3.68 Law enforcement agencies also wanted the scope of clause 400.9 to be expanded to include all State indictable offences involving the matters listed in clause 400(3)(c). These currently apply to clauses 400.3-400.8 but not to clause 400.9 (although the Explanatory Memorandum is misleading because it suggests that the scope of clause 400.9 is wider than is in fact the case). The Australian Federal Police would like the legislation to reflect the position set out in the Explanatory Memorandum. The Commonwealth Director of Public Prosecutions would like an even broader interpretation. The Commonwealth Attorney-General's Department advised[46] that, if the Committee wished to adopt either of these positions it would need to recommend a change in the legislation. Of the two positions, the Department favoured the more limited scope advocated by the Australian Federal Police.

3.69 No other individuals or groups commented on the money laundering provisions of the legislation.

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43 These changes are described in greater detail in the previous chapter.

44 *Transcript of evidence, 27 March 2002*, Australian Federal Police, p. 2002

45 *Transcript of evidence, 27March 2002,* Commonwealth Attorney–General's Department, p. 32

46 *Submission 14B,* Commonwealth Attorney-General's Department, p.3

Racketeer influenced and corrupt organisations (RICO)

3.70 The Australian Federal Police Association favoured the introduction of modified racketeer influenced and corrupt organisations (RICO) legislation into Australia [47]on the grounds that it would be more effective than current or proposed legislation in dealing with organised crime. Where a pattern of racketeering could be established, whether involving Commonwealth, State or both types of offences, harsh penalties would apply.

3.71 The Australian Federal Police (AFP) disagreed,[48] pointing out that RICO was developed for the United States situation and would not suit Australian conditions. In the view of the AFP, the legislation under consideration in the two bills before the Committee represented a better tool for dealing with organised crime than did the RICO approach, a view with which the Committee concurred.

Conclusion

3.72 Two main points of view have emerged in evidence to the Committee. The first acknowledges the strong provisions of the Bill but considers these are necessary to combat the growth in organised crime and the sophistication of its operations. This was the majority view. It was shared by all the law enforcement agencies and can be summed up by the following comments from the Commonwealth Director Of Public Prosecutions:

> In the DPP's view the current Bill draws an appropriate balance between the need to give effective powers to law enforcement agencies and the need to protect the rights of innocent parties.[49]

3.73 Evidence provided to the Committee from these groups on the principal and cognate bills argued that some of the proposed changes, and especially those relating to telecommunications intercepting, did not go far enough and that, if not amended, they would place at risk the benefits which would flow through to law enforcement agencies from the 2001 Bill.

3.74 A different viewpoint was provided by a small number of legal, civil liberties and related groups. They considered that the changes in the 2001 Bill and the principal Bill were too heavily weighted in favour of law enforcement agencies, to the detriment of the traditional rights and liberties of citizens.

> The Association is of the view that the Bill distorts unfairly in favour of the Commonwealth, the delicate balance between the rights of the citizen and the rights of Government inherent in Proceeds of Crime legislation….the DPP submission to the Committee states that 'there are some strong provisions in the Bill,' indeed there are, and many of them are far too strong.[50]

3.75 The Committee is persuaded by the arguments of those supporting the introduction of a Commonwealth civil forfeiture regime, particularly in light of the demonstrated inadequacy of the *Proceeds of Crime Act 1987* and the introduction of state and international

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47 *Submission 7*, Australian Federal Police Association, p. 3

48 *Transcript of evidence, 27 March 2002,* Australian Federal Police, p. 16

49 *Submission 4*, Director of Public Prosecutions, p. 3

50 *Submission 15*, New South Wales Bar Association, p. 9

civil based legislation. While it acknowledges the concerns raised by other witnesses, the Committee notes that they were not widely canvassed in submissions and evidence. The Committee concludes that it is timely that the Commonwealth move to a civil forfeiture regime. Accordingly:

Recommendation 2

The Committee **recommends** that the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 be passed, subject to advice on the status of the review of the *Telecommunications (Interception) Act 1979* and adequate attention being given to the Committee's recommendation on legal assistance.

Senator Marise Payne

Chair

ADDITIONAL COMMENTS BY MEMBERS OF THE AUSTRALIAN LABOR PARTY

1.1 Opposition senators on the Committee broadly support the majority report. However, we also have concerns in relation to a number of issues surrounding the Bill's deviation from some of the recommendations of the Australian Law Reform Commission (ALRC) in its report "Confiscation that Counts. A Review of the *Proceeds of Crime Act 1987*" and a number of specific clauses in the Bill.

1.2 Issues of concern include the following:

- The provision of legal assistance under the Bill;
- The definition of financial institution;
- Clause 47 relating to forfeiture orders;
- Clause 42 relating to applications to revoke a restraining order;
- Literary proceeds orders;
- The definition of 'commercial exploitation';
- The context of the Bill in terms of the definition of 'terrorism' within the Criminal Code;
- The impact on the Telecommunications (Interception) Act 1979;
- The lack of formal review of the arrangements for both conviction based and civil based regimes; and
- Arrangements between the Director of Public Prosecutions (DPP) and the Australian Taxation Office (ATO).

Legal Assistance

1.3 Opposition senators are particularly concerned with the operation of legal assistance through Legal Aid Commissions (LACs) under the Bill. Whilst we understand the changes that were made in relation to legal assistance from the 2001 Bill, Opposition senators find the new arrangements uncertain and lacking in detailed information. We are of the view that this has resulted in members of the Committee and other interested parties being unable to fully consider the matter. For example, the NSW Bar Association stated:[1]

> As I read the bill, the Legal Aid Commission in some way is going to fund the defence of any criminal charge that may be laid against a person and the defence of proceedings brought under the Proceeds of Crime Bill, if it becomes enacted, and the commission will be reimbursed either from property that is the subject of a restraining order or from the confiscated assets account … Quite how that funding arrangement operates in practice is obviously going to be a matter of concern to members of the association, as well as to their clients.

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1 *Transcript of evidence*, 27 March 2002, p. 19

1.4 Opposition senators concur with this statement. Members of the Committee have not been able to fully consider the provisions in relation to legal assistance without the benefit of the guidelines that are to be agreed upon between LACs and the Commonwealth. Opposition members consider this to be a major shortfall on the part of the Government's legislation.

1.5 We are concerned that the Government has not put enough thought into the legal aid aspects of the scheme. Firstly, the Government has not clarified whether legal aid will be capped for particular cases. Secondly, it is not clear whether the guidelines for legal aid in Proceeds of Crime matters will be the same as other Commonwealth civil law guidelines. Thirdly, it is not clear whether the discretion allowed to legal aid commissions will be restrained so as to ensure that persons subject to restraining orders do not 'forum shop' among different Legal Aid Commissions.[2]

1.6 Opposition senators therefore, support the Bill, subject to the inclusion in the guidelines of measures to deal with the concerns raised above.

Monitoring mechanism

1.7 In its Report, the ALRC discussed the absence of any monitoring mechanism in the Proceeds of Crime (POC) Act for the determination of fees and the nature and length of proceedings.[3] It was the ALRC's view that "if the legislation makes provision for funding of the defence of a person (whose property has been restrained) in such a way that the quantum of that expenditure impacts directly on the net amount of property ultimately available for forfeiture under the POC Act, the legislation should likewise ensure the appropriate monitoring of the expenditure of such funding".[4]

1.8 Evidence from the Attorney-General's Department stated that the use of LACs to provide legal assistance is viewed as an appropriate monitoring mechanism"[5] and any excessive use of funds would be deterred because LACs are publicly accountable bodies.[6]

1.9 Opposition senators are not satisfied that the use of LACs is a sufficient monitoring mechanism. As discussed in evidence, the Attorney-General's Department stated that there is nothing in the Act that would preclude LACs from accessing restrained assets or the Confiscated Assets Account.[7] The Attorney-General's Department stated that it would be a system that operated in accordance with some guidelines and indications,[8] however, as mentioned above, the Committee has not had the benefit of scrutinising these guidelines.

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2 *Transcript of evidence*, Attorney-General's Department, 27 March 2002, p. 34

3 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, pp. 232-233

4 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 233

5 *Submission 14A*, Commonwealth Attorney-General's Department, p. 2

6 *Submission 14C*, Commonwealth Attorney-General's Department, p. 2. See also, paragraphs 3.45-3.49 above

7 *Transcript of evidence*, Attorney-General's Department, 27 March 2002, pp. 33-34

8 *Transcript of evidence*, Attorney-General's Department, 27 March 2002, p. 34

1.10 Opposition senators are of the view that an independent body should undertake monitoring, for example, the Office of the Auditor-General. The system offered by the Attorney-General's Department is considered inadequate as a monitoring mechanism.

Deviation from ALRC

1.11 The ALRC also recommended that any proposed alternative to the current s. 43 scheme that deals with the provisions for 'reasonable expenses' in defending a criminal charge, should meet a number of requirements. Whilst many of the requirements outlined by the ALRC were included in the Bill, the following were not:[9]

> 5. The adequacy of the defence should be determined by reference to the kind of defence that an ordinary self funded person could be expected to provide as an adequate defence of the matters in issue.
>
> 7. In the interests of justice (including compliance with the principles of *Dietrich*, where applicable) the defendant should be entitled to seek review by the court of the adequacy of the provision made by such authority for the defence of the issues for trial.

1.12 These appear to be particularly useful concepts and the Department should have strong grounds for omitting them from the Bill. Opposition senators are particularly concerned that the Attorney-General's Department did not offer any explanation for excluding these requirements from the Bill.[10]

Definition of financial institution

1.13 Opposition senators understand the definition of 'financial institution' in the *Proceeds of Crime Bill 2002* is more limited than that defined in the *Financial Transaction Reports Act 1988*. However, we are aware the Government has proposed to include casinos and TABs in this definition and is now consulting to gauge the regulatory impact of such a proposal on the gaming industry and the community.

1.14 Opposition senators are concerned at the reasons for now attempting to include casinos and TABs in the definition under the Bill. In a letter dated 5 April 2002, the Minister for Justice and Customs, the Hon. Senator Ellison explained to the Committee that the new measures in the Bill such as monitoring orders and the serving of notices, "have exposed a limitation in the current definition of 'financial institution'. The Minister stated that "the Government is concerned that this might open up the possibility that money laundering through accounts held with these organisations may continue unchecked even when other assets of a suspect are under investigation".

1.15 Under this rationale, Opposition senators question why other gambling places such as registered clubs have not been considered. We are of the view that amending the definition of 'financial institution' in the Bill in such a way must only be considered after the most thorough consultation.

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9 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 234

10 *Submission 14A*, Commonwealth Attorney-General's Department, p. 3

1.16 Opposition senators also note the comments of the NSW Bar Association in relation to the resources allocated to financial investigation by agencies and the argument that if enough resources were devoted to financial investigation, a civil forfeiture regime may not be necessary. [11] However, we are of the view that the introduction of this legislation should be seen as a replacement for these types of financial investigatory agencies or relied on where good investigatory work would suffice.

Clause 47 – Forfeiture orders

1.17 Clause 47 of the Bill provides for the making of forfeiture orders in relation to property that has been the subject of a restraining order under s. 18 of the Bill for a period of at least 6 months. Sub-clause 47(1)(c) allows a court to make an order that property specified in the order is forfeited to the Commonwealth if there are 'reasonable grounds to suspect' that a person engaged in conduct constituting one or more serious offences, and for those offences that were not terrorism offences, were committed within the last 6 years.

1.18 Opposition senators share the concern of the NSW Bar Association that to forfeit property on the basis of mere suspicion, although said to be on reasonable grounds, is a far lower threshold for forfeiture:[12]

> We can all have suspicions, and sometimes there can be a series of events which might be thought to reasonably generate a suspicion. But to provide that the ultimate penalty of forfeiture should apply based on a suspicion, in our submission, really provides far too low a threshold for forfeiture – when you acknowledge that forfeiture of property is a substantial penalty.[13]

1.19 The NSW Bar Association also outlined that many aspects of the Bill are based on the NSW Criminal Assets Recovery Act. However, in relation to forfeiture orders, the NSW legislation does not provide that forfeiture can be ordered based merely on the suspicion that a person has committed a serious criminal activity.[14] The NSW legislation requires proof that it is 'more probable that not' that the person engaged in such activity which is a much more stringent test than that provided for in the Bill.[15]

1.20 The Explanatory Memorandum to the Bill explains that to make a civil forfeiture order, the court must find to the civil standard ('on the balance of probabilities') that the person engaged in conduct constituting a serious offence in the last six years.[16] Opposition senators are concerned that this standard is not adequately reflected in the Bill.

1.21 We understand that clause 317 of the Bill effectively overrides all other clauses by providing that all questions of fact which are to be decided by a court pursuant to an

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11 *Transcript of evidence*, NSW Bar Association, 27 March 2002, p. 18

12 *Submission 15*, New South Wales Bar Association, p. 7. See also, paragraph 3.29 above

13 *Transcript of evidence*, New South Wales Bar Association, 27 March 2002, p. 21

14 *Submission 15*, New South Wales Bar Association, p. 7

15 *Submission 15*, New South Wales Bar Association, p. 7

16 Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 22

application under the Bill are to be decided to the civil standard.[17] However, we are of the view that in order to prevent any confusion in relation to clause 47, it would seem obvious to consider the wording of the NSW legislation.

Recommendation 1

Opposition senators **recommend** that in order to clarify this provision, clause 47 of the Bill should be amended to use the words of the NSW Criminal Assets Recovery Act in its equivalent provision. The clause would read as follows:

47(1)(c) it is more probable than not that:

(i) a person engaged in conduct constituting one or more serious offences; and

(ii) for each suspected offence that is not a terrorism offence – the offence was committed within the 6 years preceding the application, or since the application was made.

Clause 42 – Applications to revoke a restraining order

1.22 Opposition members are concerned about the ability of defendants to dispute the continuance of a restraining order within the limited time frame of 28 days as provided for by Clause 42 of the Bill, with no option for an extension. The NSW Bar Association highlighted the practical reality of this provision:[18]

> Where the person concerned is charged with a Commonwealth offence, often bail will be initially refused, and they will be occupied with finding legal representation and dealing with the practical difficulties associated with their changed circumstances. It is likely that shortly after being charged, they will be served with the restraining order. To expect in those circumstances that they, or their lawyers, are likely to consider the making of an application under clause 42, within 28 days, is unrealistic.

1.23 Opposition senators agree with the NSW Bar Association that the 28 day period provided for in clause 42 of the Bill is far too limited a period of time for such an application to be made.

Recommendation 2

Opposition senators **recommend** that clause 42 of the Bill be amended to allow a court to consider an extension under certain circumstances. The wording of such an amendment may be as follows:

42 (1) A person who was not notified of the application for a restraining order may, within 28 days after being notified of the order, apply to the court to revoke the order, unless granted an extension by the court on grounds being shown.

17 Proceeds of Crime Bill 2002, *Explanatory Memorandum*, p. 104. See also, *Transcript of evidence*, Australian Federal Police, 27 March 2002, p. 26; and *Transcript of evidence*, Attorney-General's Department, 27 March 2002, pp. 32-33

18 *Submission 15*, New South Wales Bar Association, p. 5

Literary proceeds orders

1.24 In relation to literary proceeds orders, we would like to draw attention to an anomaly between the Bill and the recommendation of the ALRC. Regarding s. 154 of the Bill that deals with matters to be taken into account in deciding whether to make literary proceeds orders, the ALRC suggested that 'the court should have regard to',[19] however, the Bill uses the wording 'the court may take into account'. In explaining this difference, evidence supplied by the Attorney-General's Department was vague and confusing:[20]

> ALRC Recommendation 72 in part says that the court 'should have regard' to a number of factors in determining whether a literary proceeds order should be made and the quantum of any such order. That Recommendation follows the ALRC's view that the Commonwealth legislation should follow the existing Victorian literary proceeds legislation, which provides the court with a discretion as to what should be treated as literary proceeds. The Victorian legislation provides that 'the court may have regard' to a number of specified matters along with any other matters it thinks fit. The Commonwealth Bill reflects the Victorian legislation.

1.25 The Attorney-General's Department subsequently clarified this information for the Committee outlining that whilst the ALRC recommended that 'the court should have regard to', discussion earlier in the ALRC Report clearly indicates an intention to follow the Victorian legislation which uses the words 'may take into account':[21]

> The Commission favours an approach, therefore, along the lines of the Victorian legislation which provides the court with a discretion as to what should be treated as profits having regard to the criteria of public interest, social and educational value, and the nature and purpose of the publication, production or entertainment, including its use for research, educational or rehabilitation purposes.

1.26 We are grateful for this clarification, however, we are not satisfied that the current wording which is based on the Victorian legislation is adequate:

Recommendation 3

Opposition senators **recommend** that in order to provide certainty, s. 154 of the Bill should be amended by removing the word 'may' and inserting the word 'should' as initially recommended by the ALRC.

1.27 In future similar circumstances, it would be helpful for the Attorney-General's Department to provide such clarification in the Explanatory Memorandum.

'Commercial exploitation'

1.28 In relation to proposed ss. 153(2) under literary proceeds orders, we note with concern the open-ended nature of 'commercial exploitation'. Evidence from the Attorney-

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19 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, Recommendation 72, pp. 279-280

20 *Submission 14B*, Commonwealth Attorney-General's Department, pp. 4-5

21 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 279

General's Department shows the Bill does not limit what is meant by 'commercial exploitation' as this "enables the Bill to cover new technologies and human ingenuity".[22]

1.29 Opposition senators are particularly concerned about the practice of legislating for behaviour or acts that do not currently exist and suggest that 'commercial exploitation' be limited to those acts outlined in ss. 153(2).

'Terrorism'

1.30 Opposition senators point out that the *Proceeds of Crime Bill 2002* is under consideration against a background of several other Bills dealing with 'terrorism'.

1.31 We note that within the *Proceeds of Crime Bill 2002*, ss. 18 1(d)(ii) contains a reference to a 'terrorism' offence which is to be defined under the Criminal Code Part 5-3. This expression is defined in the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]* which is the subject of a separate inquiry by this Committee. The definition, we understand, will be inserted in the Criminal Code and hence will apply to the *Proceeds of Crime Bill 2002*.

1.32 Opposition senators are of the view that the Committee has been unable to give full consideration to this aspect of the Bill. There may be matters that arise out of the Committee's report on the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]* and related bills that require further consideration.

1.33 When Opposition senators have fully considered this issue in the context of the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, we will be able to finalise our position for the purposes of this Bill. In the mean time, we foreshadow possible further additional comments.

Telecommunications interception

1.34 As noted in the Chair's Report, Opposition senators are also particularly concerned at the disparity of views between the Attorney-General's Department and law enforcement agencies in relation to the use of telecommunications interception material in cases of civil forfeiture. It is very unclear as to what impact the impact will be in the *Telecommunications (Interception) Act 1979*.

1.35 In this regard, we support the comments of the Attorney-General and the advice provided to the Committee in his letter dated 5 April 2002 (that the matters raised by the law enforcement agencies in their submissions will be considered in the context of the ongoing review of the *Telecommunications (Interception) Act 1979*).[23]

Other recommendations of the Australian Law Reform Commission

1.36 Opposition senators are concerned that a number of other recommendations of the ALRC were not adopted in the development of this Bill. For example, the ALRC

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22 *Submission 14A*, Commonwealth Attorney-General's Department, p. 5

23 See paragraph 3.62 above

recommended that "a review should be conducted of the investigatory, operational, liaison and accountability arrangements necessary to ensure optimal operation of the existing conviction based scheme and the proposed non-conviction based regime".[24] The Attorney-General's Department stated that this did not occur.[25]

1.37 Opposition senators on the Committee draw attention to this recommendation in light of the number of amendments that have been made since the 2001 Bill was introduced and the length of time it has taken for both the *Proceeds of Crime Bill 2002* and the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002* to reach the Parliament.

1.38 Opposition senators are of the view that many elements of the Bills reflect this lack of review and suggest that these issues may have been resolved had the Attorney-General's Department and relevant agencies established a Committee to consider these issues, as recommended by the ALRC. In addition, we note the still outstanding issue in relation to telecommunications interception and the recent proposal by the Government in relation to the definition of 'financial institution'. We are also concerned that the guidelines in relation to the operation of legal assistance and examinations by the Director of Public Prosecutions have not been finalised and therefore open to scrutiny by the Committee.

1.39 Given the many new aspects to the Bill, particularly in relation to the removal of derivative use immunity, the recommendation of the ALRC is particularly relevant. We also suggest that the example of the *National Crime Authority Amendment Act 2001* be followed. Namely that the Minister is to conduct a review of the operation of the Act and report to Parliament.[26]

Recommendation 4

Opposition senators **recommend** that the Bill be amended to insert a provision for formal review of the operation of the legislation within 3 years from commencement of the Bill. This provision should make particular reference to the operation of the provisions relating to the removal of derivative use immunity and the guidelines relating to legal assistance and examinations by the Director of Public Prosecutions.

1.40 Similarly, recommendation 21 of the ALRC Report stated that "the various arrangements between the ATO and the DPP and law enforcement agencies should periodically be reviewed to eliminate the risk that taxation recovery of proceeds is too readily resorted to as the sole means of recovery in cases where greater or additional recovery might be available by use of POC Act provisions".[27]

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24 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, Recommendation 93, p. 367

25 *Submission 14A*, Commonwealth Attorney-General's Department, p. 7

26 *National Crime Authority Amendment Act 2001*, s. 4. This provision was recommended by the Parliamentary Joint Standing Committee on the National Crime Authority in its Report on the *National Crime Authority Legislation Amendment Bill 2000*, see p. vii

27 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, p. 114

1.41 Evidence supplied by the Attorney-General's Department stated that a memorandum of understanding (MOU) had been entered into between the ATO and the DPP on 7 February 1997, but that this was not subject to formal review.[28] Whilst the Attorney-General's Department also stated that the arrangements between the DPP and the ATO are discussed at regular criminal asset liaison meetings,[29] Opposition senators are concerned that these arrangements have not been formally reviewed since 1997.

1.42 The Attorney-General's Department stated that it is envisaged that the MOU will be reviewed once the legislation is enacted. We understand this rationale given the many changes that will be made to the legislation with the enactment of the Bill, however, it is desirable that periodic review be undertaken.

Senator Jim McKiernan
Deputy Chair

Senator Barney Cooney
Member

Senator Joe Ludwig
Participating Member

28 *Submission 14A*, Commonwealth Attorney-General's Department, p. 1

29 *Submission 14A*, Commonwealth Attorney-General's Department, p. 1

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Australian Civil Liberties Union
2. Australian Law Reform Commission
3. Western Australia Police Service

3A. Western Australia Police Service

4. Commonwealth Director of Public Prosecutions

4A. Commonwealth Director of Public Prosecutions

4B. Commonwealth Director of Public Prosecutions

5. Victoria Police
6. National Crime Authority

6A. National Crime Authority

7. Australia Federal Police Association

7A. Australian Federal Police Association

7B. Australian Federal Police Association

8. Australian Federal Police

8A. Australian Federal Police

8B. Australian Federal Police

9. NSW Commission for Children and Young People
10. The Law Society of Western Australia
11. Mr Ralph McFadyen
12. Australian Privacy Charter Council
13. Office of the Federal Privacy Commissioner
14. Commonwealth Attorney-General's Department

14A. Commonwealth Attorney-General's Department

14B. Commonwealth Attorney-General's Department

14C. Commonwealth Attorney-General's Department

15. NSW Bar Association

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Thursday, 31 January 2002 (Canberra)

Mr Damian Bugg, Director of Public Prosecutions, Commonwealth Director of Public Prosecutions

Mr Grahame Delaney, Principal Adviser, Commercial Prosecutions and Policy Branch, Commonwealth Director of Public Prosecutions

Mr Geoffrey Gray, Assistant Director, Criminal Assets and International Branch, Commonwealth Director of Public Prosecutions

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

Ms Tamsyn Jane Harvey, Senior Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

Mrs Maggie Jackson, Special Adviser, Criminal Justice Division, Attorney-General's Department

Mr Andrew Alexander Colvin, Federal Agent, Team Leader, Financial Investigation Team, Australian Federal Police

Mr John Alexander Davies, Deputy Commissioner, Australian Federal Police

Ms Annie Davis, Director, Legislation Program, Australian Federal Police

Mr Ian Thomas Knight, Federal Agent, Principal Legal Adviser to the Legislation Program, Australian Federal Police

Mr Michael Petty, Team Leader, Financial Investigation Team, Australian Federal Police

Mr Marshall Philip Irwin, Acting Chairman, National Crime Authority

Mr David Anthony Lusty, Lawyer, National Crime Authority

Public Hearing, Wednesday 27 March 2002 (Sydney)

Mr Jonathon Kirkness, National President, Australian Federal Police Association

Mr Ferdinand Gere, Detective Superintendent, Organised Crime Division, Western Australian Police Service

Mr Mark Buscombe, Barrister Member of Criminal Law Committee, New South Wales Bar Association

Mr Andrew Alexander Colvin, Team leader, Financial Investigations Team, Australian Federal Police

Ms Annie Davis, Director, Legislation Program, Australian Federal Police

Mr John Adrian Lawler, Federal Agent, General Manager, Eastern Operations, Australian Federal Police

Mr Michael Charles Petty, Federal Agent, Team Leader, Financial Investigations Team, Australian Federal Police

Mr Geoffrey Angus McDonald, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

Mrs Maggie Jackson, Special Adviser, Criminal Justice, Attorney-General's Department