CHAPTER 2

CRIMINAL ASSET CONFISCATION

Related inquiries and reviews

2.1 Schedules 1 and 2 of the Bill would amend the 2002 POC Act by introducing unexplained wealth provisions and by making various other changes to the federal criminal asset confiscation regime. This section outlines some previous inquiries and reviews which are relevant to these asset confiscation provisions of the Bill.

Australian Law Reform Commission review of the Proceeds of Crime Act 1987

2.2 The 2002 POC Act was enacted following an inquiry by the Australian Law Reform Commission (ALRC) into the *Proceeds of Crime Act 1987* (the 1987 POC Act).[1] The 1987 POC Act provides for the forfeiture of property derived from or used in connection with the commission of indictable offences. ALRC found that a significant limitation of the 1987 POC Act was that it does not allow for the confiscation of property, the acquisition of which could only be explained as the profits of continuing or serial criminal conduct, where there is insufficient evidence to prove the commission of a criminal offence beyond a reasonable doubt. Further, ALRC noted that under the 1987 POC Act it is necessary to prove a link between a particular offence and property to be confiscated. This means that, even where the offence is demonstrably part of a course of continuing or serial unlawful conduct, recovery is limited to property able to be linked to the commission of that particular offence.[2]

2.3 ALRC recommended that:

> 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.[3]

2.4 The 2002 POC Act implemented this recommendation by providing for confiscations based upon independent civil action as well as confiscations linked to a criminal prosecution. The Commonwealth Director of Public Prosecutions (DPP) explained that under the 2002 POC Act:

> Conviction based action depends upon a person being convicted by a court of a Commonwealth indictable offence, which in turn involves proof of all elements of the offence beyond reasonable doubt. Civil action may be taken whether or not a person has been charged with or convicted of an offence, and involves proof of the offence to a lower standard, "the balance

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1 ALRC, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, ALRC 87, 1999 at: http://www.austlii.edu.au/au/other/alrc/publications/reports/87/ (accessed 22 July 2009).

2 ALRC, p. 81.

3 ALRC, recommendation 9, p. 84.

of probabilities". Civil action is available in relation to a narrower range of cases.[4]

2.5 Some recovery of criminal assets continues to occur under the 1987 POC Act where the confiscation action was begun prior to the commencement of the 2002 POC Act on 1 January 2003. For example, in 2007-08, $5.19 million was recovered under the 1987 POC Act compared to $19.56 million under the 2002 POC Act.[5]

Sherman review of the Proceeds of Crime Act 2002

2.6 In 2006, Mr Tom Sherman AO conducted the independent review of the 2002 POC Act required by section 327 of that Act. The Sherman report found that the 2002 POC Act had been more effective than the 1987 POC Act but recommended several changes to the 2002 POC Act aimed at strengthening the federal regime for seizing the proceeds and instruments of crime.[6] Notably, Mr Sherman AO recommended that:

- the 2002 POC Act should contain a clear mandate for agencies to pass on information acquired under the Act to other agencies for purposes such as the investigation of offences and the protection of revenue;[7]
- the processing of legal aid claims under the Act should be made more flexible and efficient;[8]
- the limitation period for non-conviction based confiscation of the proceeds or instruments of crime be extended from six to twelve years from the date of the relevant offence;[9] and
- the 2002 POC Act provide for non-conviction based restraint and forfeiture of the instruments (as distinct from the proceeds) of non-terrorism offences.[10]

2.7 Mr Sherman AO considered submissions from the Australian Federal Police (AFP) and the Australian Federal Police Association that the Act should incorporate unexplained wealth provisions. Such provisions currently exist in Western Australia

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4 *Submission 5*, p. 2.

5 Commonwealth Director of Public Prosecutions, *Annual Report 2007-08*, at: http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2007-2008.pdf (accessed 22 July 2009) p. 92.

6 Mr Tom Sherman AO, *Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*, July 2006, at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth) (accessed 21 July 2009), p. 68.

7 Mr Tom Sherman AO, p. 29.

8 Mr Tom Sherman AO, pp 57-58.

9 Mr Tom Sherman AO, p. D4. At present, there is a six year limitation except in relation to terrorism offences. See for example subparagraphs 18(1)(d)(ii) and 47(1)(c)(ii) and paragraphs 19(1)(d) and 49(1)(d) of the 2002 POC Act.

10 Mr Tom Sherman AO, p. D4. Paragraphs 19(1)(d) and 49(1)(c) of the 2002 POC Act provide for non-conviction based restraint and forfeiture of instruments of terrorism offences but not the instruments of other offences. However, where there are associated criminal proceedings, the provisions dealing with restraint and forfeiture apply to the instruments of both terrorism and non-terrorism offences: subsections 17(2) and 48(2).

and the Northern Territory.[11] These provisions empower the Director of Public Prosecutions in those jurisdictions to apply to a court for an unexplained wealth declaration against a person. The court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the respondent's wealth is greater than the value of the respondent's lawfully acquired wealth. The respondent must pay any unexplained wealth to the state or territory. Under the provisions, it is presumed wealth was not lawfully acquired unless the respondent establishes to the contrary.[12]

2.8 Mr Sherman AO concluded that:

> Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? Moreover, the adoption of the recommendations made in this report will, I believe, make the Act far more effective in attacking the proceeds of crime.
>
> On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions but the matter should be kept under review.[13]

Parliamentary Joint Committee on the Australian Crime Commission inquiries

2.9 The Parliamentary Joint Committee on the Australian Crime Commission (the PJC) reported in September 2007 on its inquiry into the future impact of serious and organised crime on Australian society. The PJC made 22 recommendations including that:

- the recommendations of the Sherman report into the 2002 POC Act, where appropriate, be implemented without delay; and
- the Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime as a matter of priority.[14]

2.10 In August 2009, the PJC completed an inquiry into legislative arrangements to outlaw serious and organised crime groups. The PJC examined the unexplained wealth provisions of the Bill and recommended that those provisions be passed.[15]

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11 Sections 11-14 of the *Criminal Property Confiscation Act 2000 (WA)* and sections 67-72 of the *Criminal Property Forfeiture Act 2002 (NT)*.

12 Mr Tom Sherman AO, p. 37.

13 Mr Tom Sherman AO, p. 37.

14 PJC, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, at: http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/organised_crime/report/index.htm (accessed 20 July 2009), recommendations 5 and 8.

15 PJC, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, at: http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/report/report.pdf (accessed 17 August 2009), recommendation 3, pp 114-117.

Provisions in the Bill

2.11 In relation to the proposed changes to the Commonwealth criminal assets confiscation regime, the Explanatory Memorandum explains that:

> The overarching purpose behind these amendments is to improve the ability of law enforcement agencies to target upper-echelon organised crime figures that derive the greatest financial benefit from offences, but are seldom linked by evidence to the commission of an offence.[16]

2.12 The 2002 POC Act currently provides for:

(a) restraining orders which prevent dealings with property which is liable to forfeiture under the Act (sections 16 to 45);

(b) forfeiture orders which require the forfeiture of the proceeds or instruments of crime either where there are associated criminal proceedings or on the basis of independent civil proceedings (sections 46 to 114);

(c) pecuniary penalty orders which require payment to the Commonwealth of amounts based on benefits derived from crime (sections 115 to 150);

(d) literary proceeds orders which require payment to the Commonwealth of amounts which are benefits derived from the commercial exploitation of the notoriety a person achieves by committing a crime (sections 151 to 179); and

(e) coercive measures to assist in the investigation of proceeds of crime matters including:

  (i) orders allowing the examination of any person who has an interest in property which is the subject of a restraining order (sections 180 to 201);

  (ii) orders requiring the production of documents (sections 202 to 212);

  (iii) notices to financial institutions requiring the provision of information or documents (sections 213 to 218);

  (iv) orders requiring a financial institution to monitor and provide information relating to transactions through an account (sections 219 to 224); and

  (v) search warrants, and searches of aircraft, vehicles or vessels without warrants in emergency situations (sections 225 to 266).[17]

Unexplained wealth provisions

2.13 Schedule 1 of the Bill would introduce new provisions to provide for the seizure of wealth a person cannot demonstrate was lawfully acquired.[18] Under these

16 Explanatory Memorandum, p. 2.

17 Mr Tom Sherman AO, pp 7-8.

18 Explanatory Memorandum, pp 2 and 5.

provisions, once a court is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds his or her lawfully acquired wealth, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences. If a person cannot demonstrate this, the court must order the person to pay to the Commonwealth the difference between the person's total wealth and the person's legitimate wealth (the unexplained wealth amount).[19]

2.14 For the purpose of these provisions, an 'authorised officer' is an authorised member of the AFP, the Australian Crime Commission (ACC), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Customs and Border Protection Service (Customs) or the Australian Securities and Investment Commission (ASIC).[20]

Restraining orders

2.15 Item 5 of Schedule 1 would insert a new section 20A into the 2002 POC Act allowing the DPP to apply for restraining orders in relation to a person's property where there are reasonable grounds to suspect that:

- a person's total wealth exceeds his or her lawfully acquired wealth; and
- the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect; or the whole or any part of the person's wealth was derived from such an offence.[21]

2.16 The purpose of restraining orders is to ensure that property is preserved and cannot be dealt with to defeat an unexplained wealth order.[22] However, the court may refuse to make a restraining order if it is not in the public interest to do so.[23]

2.17 Proposed subsection 20A(2)[24] provides that a restraining order may cover all of the property of the person suspected of having unexplained wealth amounts (the suspect), or specified parts of that person's property. In addition, the order can extend to property of another person if that property is suspected of being under the effective control of the suspect.[25]

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19 Explanatory Memorandum, p. 5.

20 Definition of 'authorised officer' in section 338 of the 2002 POC Act.

21 Explanatory Memorandum, p. 7.

22 Explanatory Memorandum, p. 6.

23 Proposed subsection 20A(4).

24 References to proposed provisions in this chapter refer to proposed provisions of the 2002 POC Act.

25 Explanatory Memorandum, p. 7. For example, where a person transfers property into the name of a relative but retains effective control of the property. Section 337 of the 2002 POC Act defines 'effective control'.

2.18 Proposed section 29A would allow a person to apply for property to be excluded from a restraining order on the basis that it is not the property of the suspect and is not under the suspect's effective control.[26]

Preliminary unexplained wealth order

2.19 Proposed section 179M would empower the DPP to apply for an unexplained wealth order.[27] Where the DPP does so, proposed subsection 179B(1) will require a court with proceeds jurisdiction[28] to make a preliminary unexplained wealth order if the court is satisfied that there are reasonable grounds to suspect that the person's total wealth exceeds the value of the person's lawfully acquired wealth and the affidavit requirements set out in proposed subsection 179B(2) are met.

2.20 The Explanatory Memorandum notes that proposed section 179B is intended to act as a gate keeping provision:

> Before a court with proceeds jurisdiction embarks on the hearing of an unexplained wealth order, it has an opportunity to assess whether an authorised officer has demonstrated reasonable grounds to suspect that the total value of the person's wealth exceeds the value of the person's wealth that was lawfully acquired. If the court does not consider that the authorised officer has reasonable grounds to hold that suspicion, it can refuse to make the preliminary unexplained wealth order and the application for an unexplained wealth order does not proceed any further.[29]

2.21 A preliminary unexplained wealth order will require a person to appear before the court in relation to an unexplained wealth order.[30]

2.22 Under proposed section 179N, the DPP may apply for an unexplained wealth order without initially providing notice to the person to whom the order would relate.[31] Once a preliminary unexplained wealth order is made, the DPP will have to provide written notice of the order to the person, as well as a copy of the application for the unexplained wealth order and any affidavit supporting the application.[32] However, the DPP will be able to delay providing a copy of the affidavit where the court considers it would be appropriate to order such a delay (for example where providing the affidavit would prejudice the investigation of an offence).[33]

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26 Explanatory Memorandum, p. 8.

27 Explanatory Memorandum, p. 14.

28 The courts that have proceeds jurisdiction for a preliminary unexplained wealth order or an unexplained wealth order are those of any state or territory with jurisdiction to deal with criminal matters on indictment. See proposed subsection 335(7); Explanatory Memorandum, pp 11 and 19-20.

29 Explanatory Memorandum, p. 10.

30 Proposed subsection 179B(1); Explanatory Memorandum, p. 10.

31 Explanatory Memorandum, p. 14.

32 Explanatory Memorandum, p. 14.

33 Proposed subsections 179N(4) and (5).

2.23 Proposed section 179C will allow a person who is subject to a preliminary unexplained wealth order to apply to the court to revoke the order. The application must be made within 28 days of the person being notified of the preliminary order or, where the person seeks an extension of time within the 28 days, within the time the court allows, up to a maximum of 3 months.[34] The court may revoke the order if it is satisfied that there were no grounds on which to make the order at the time the order was made.[35]

Unexplained wealth order

2.24 Where the court has made a preliminary unexplained wealth order in relation to a person, proposed subsection 179E(1) will require the court to make an unexplained wealth order if the person has failed to satisfy the court that his or her total wealth was *not* derived from:

- an offence against a law of the Commonwealth;
- a foreign indictable offence; or
- a State offence that has a federal aspect.[36]

2.25 A person bears the legal burden of proving, on the balance of probabilities, that his or her wealth is not derived from one or more of the specified offences.[37]

2.26 An unexplained wealth order will require the person to pay to the Commonwealth an amount equal to the difference between his or her total wealth and the value of the property that was *not* derived from the specified offences.[38]

Unexplained wealth amounts

2.27 Proposed section 179G provides that a person's wealth is property owned, effectively controlled, consumed or disposed of by the person at any time. The Explanatory Memorandum sets out the rationale for this approach:

> It is necessary to include property owned, effectively controlled, consumed or disposed of by the person at any time so that the person accounts for the entirety of his or her wealth over time and not just property he or she currently owns or controls. If a person's wealth were limited to a particular period of time, a person could escape accounting for large amounts of unexplained wealth derived from a potential lifetime of crime. Similarly, if wealth did not include property disposed of, a person could funnel

34 Proposed subsection 179C(2).

35 Proposed subsection 179C(6).

36 Explanatory Memorandum, p. 11. Item 37 of Schedule 1 inserts a definition of 'State offence that has a federal aspect' into section 338 of the 2002 POC Act providing that the phrase has the same meaning as in section 3AA of the *Crimes Act 1914*. Essentially, this encompasses offences which could have been validly enacted by the Commonwealth Parliament.

37 Proposed subsection 179E(3); Explanatory Memorandum, p. 12.

38 Proposed subsection 179E(2).

significant amounts of proceeds of crime through extravagant gifts or personal consumption.[39]

2.28 Proposed section 179H provides that property will still be treated as a person's property if it is vested in an insolvency trustee. This will prevent people avoiding accounting for unexplained wealth by declaring themselves bankrupt.[40]

2.29 Proposed section 336A will define 'lawfully acquired' property or wealth to require both that the property or wealth was lawfully acquired, and that any consideration given for the property or wealth was lawfully acquired. The Explanatory Memorandum states that this will ensure a person retains his or her lawfully acquired consideration but does not retain unlawfully acquired consideration or capital gains made on property that was not lawfully acquired.[41] The Explanatory Memorandum gives as an example: a person who purchases a house for $100,000 with $50,000 of lawfully acquired wealth and $50,000 of unlawfully acquired wealth, and whose house appreciates so that it is worth $200,000, will only be entitled to the initial lawfully acquired $50,000.[42]

2.30 However, it is not clear how the definition has this effect given that under proposed subsection 179E(2) the 'unexplained wealth amount' is calculated by deducting from a person's 'total wealth' amounts not derived from specified offences and thus does not seem to be linked the definition of 'lawfully acquired' property and wealth.

2.31 The dependant of a person whose property is the subject of an unexplained wealth order may seek a court order requiring the Commonwealth to pay an amount to the dependant to relieve any hardship that would be caused by an unexplained wealth order.[43] If the dependant is over 18 years of age, the court must be satisfied that he or she had no knowledge of the criminal conduct that forms the basis of the unexplained wealth order.[44]

Other amendments to the Proceeds of Crime Act 2002

2.32 Schedule 2 of the Bill would amend the 2002 POC Act:

(a) to introduce freezing orders to ensure assets are not dispersed;

(b) to remove the six year time limitation on orders for non-conviction based restraint and forfeiture of proceeds of crime;

(c) to provide for non-conviction based restraint and forfeiture of instruments of serious crime;

(d) to enhance information sharing under the 2002 POC Act; and

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39 Explanatory Memorandum, p. 12.

40 Explanatory Memorandum, p. 13.

41 Explanatory Memorandum, p. 20.

42 Explanatory Memorandum, p. 20.

43 Proposed section 179L.

44 Explanatory Memorandum, p. 14.

(e) to reimburse legal aid commission legal costs from the Confiscated Assets Account.[45]

2.33 The Explanatory Memorandum notes that some of these changes:

> ...respond to recommendations made in the Sherman report, including the amendments removing the six year time limit on non-conviction-based asset recovery, providing for the restraint and forfeiture of instruments of serious offences without conviction and enhancing information sharing under the Act. ...Recommendations of the Sherman Report that are not dealt with in this Bill are being considered for possible amendments in future legislation.[46]

Freezing orders

2.34 Part 1 of Schedule 2 of the Bill would amend the 2002 POC Act by introducing freezing orders. Under these provisions, an authorised officer of the AFP, ACLEI, ACC or Customs would be able to apply to a magistrate seeking the temporary restraint of liquid assets held in accounts with financial institutions.[47] The magistrate would be required to grant the order if satisfied that:

- there are reasonable grounds to suspect that the balance of an account is wholly or partly proceeds, or an instrument of an offence; and
- there is a risk the balance of the account will be reduced and this reduction would frustrate forfeiture proceedings.[48]

2.35 While the 2002 POC Act already allows the DPP to seek restraining orders in relation to property, the Explanatory Memorandum explains that:

> Law enforcement agencies have identified that the time between identifying criminal funds in an account and obtaining a restraining order can result in criminal funds being moved. Even where restraining orders are obtained ex parte, significant documentation and a court hearing are required, which can provide more than enough time for funds in an account to be transferred.[49]

2.36 A freezing order will only continue in force for a maximum of three working days.[50] However, a magistrate may make an order extending a freezing order if an application for a restraining order, relating to the account subject to the freezing order, has been made but not yet determined by a court. The extension may be for a specified number of working days, or until the court decides the application for the restraining order.[51]

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45 Explanatory Memorandum, p. 23.

46 Explanatory Memorandum, p. 23.

47 Proposed paragraph 15B(1)(a) and the definition of 'authorised officer' in section 338 of the 2002 POC Act.

48 Proposed section 15B; Explanatory Memorandum, pp 27 and 28.

49 Explanatory Memorandum, p. 27.

50 Proposed subsection 15N(3); Explanatory Memorandum, pp 27 and 31.

51 Proposed section 15P; Explanatory Memorandum, p. 31.

2.37 Proposed sections 15D and 15E would permit freezing orders to be applied for and granted by telephone, fax or other electronic means in urgent cases, or where the delay that would occur if the application was made in person would frustrate the effectiveness of the order.[52]

2.38 Where an account is subject to a freezing order, a person in whose name the account is held can apply to a magistrate to have the order varied to allow a withdrawal to meet the reasonable living expenses of the person or their dependants, the reasonable business expenses of the person or a specified debt incurred in good faith by the person.[53]

Removal of six year time limit

2.39 At present under the 2002 POC Act, non-conviction based asset recovery is generally limited to confiscation of the proceeds of crimes committed in the six years prior to recovery action commencing.[54] In particular, the provisions relating to:

- non-conviction based restraining orders (sections 18 and 19);
- non-conviction based forfeiture orders (sections 47 and 49); and
- pecuniary penalty orders (section 116),

are all limited by a requirement that the relevant criminal offence was committed within the six years preceding the application for a restraining order (unless the offence was a terrorism offence).[55]

2.40 The Explanatory Memorandum argues that:

> As criminals routinely attempt to conceal offences, and crimes such as fraud and money laundering may occur over extended periods, the time limit can pose significant obstacles for non-conviction-based recovery.[56]

2.41 The Sherman report recommended that the six year period be extended to 12 years provided that all of the conduct occurred within the 12 year period.[57] Mr Sherman AO noted that:

> In one sense, whatever period is specified, there will always be difficulties. However, in the case of more serious offences (which is the provenance of the Act) six years seems too short. Professional criminals engage in crime over long periods of time, many have life careers. Extending the 6 year limitation to 12 years seems reasonable. However, with the extended period

52 Explanatory Memorandum, pp 28-29.

53 Proposed section 15Q; Explanatory Memorandum, pp 27 and 31-32.

54 Explanatory Memorandum, p. 33. This time limit does not apply to conviction based forfeitures, literary proceeds orders or the forfeiture of the proceeds or instruments of terrorism offences.

55 Pecuniary penalty orders may not be preceded by a restraining order in which case paragraph 116(2)(a) of the 2002 POC Act provides that the offence must have occurred within six years preceding the application for the pecuniary penalty order.

56 Explanatory Memorandum, p. 33.

57 Mr Tom Sherman AO, p. D4.

> the case for covering part of the relevant conduct occurring before the 12 year period is weakened. There have to be some limits on what is essentially a civil liability.[58]

2.42 However, the provisions in Part 2 of Schedule 2 of the Bill would remove the time limit altogether.[59]

Restraint and forfeiture of instruments of serious crime

2.43 Currently, the 2002 POC Act provides for non-conviction based restraint and forfeiture of instruments of terrorism offences but not the instruments of other offences.[60] However, where there are associated criminal proceedings, the provisions dealing with restraint and forfeiture apply to the instruments of all indictable offences.[61] The Sherman report recommended that the instruments of indictable offences should be subject to non-conviction based restraint and forfeiture orders.[62]

2.44 The amendments in Part 3 of Schedule 2 would enable the restraint and forfeiture of instruments of offences without conviction but the amendments are limited to the instruments of 'serious offences'.[63] A serious offence is defined under the 2002 POC Act as an indictable offence punishable by at least 3 years imprisonment and involving certain other elements such as:

- unlawful conduct relating to narcotics or serious drug offences;
- unlawful conduct intended to cause a benefit or loss of at least $10,000;
- money laundering;
- terrorism; or
- certain people smuggling offences.[64]

2.45 The Explanatory Memorandum states that:

> The effect of these changes will mean that the DPP could apply to a court with proceeds jurisdiction to confiscate the premises of a person used as a laboratory to make narcotics, because the premises would be treated as an instrument of a serious offence.[65]

2.46 Under the proposed amendments, courts will have a discretion not to make a non-conviction based forfeiture order in relation to property that is an instrument of a

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58 Mr Tom Sherman AO, p. D3.

59 Explanatory Memorandum, p. 33.

60 Subparagraphs 18(2)(d)(ii), 19(1)(d)(ii) and 49(1)(c)(iv), paragraph 19(2)(b) and subsection 47(1) of the 2002 POC Act.

61 Paragraphs 17(2)(d) and 48(2)(d) of the 2002 POC Act; Explanatory Memorandum, p. 38.

62 Mr Tom Sherman AO, p. D4; Explanatory Memorandum, p. 39.

63 Explanatory Memorandum, p. 38.

64 Explanatory Memorandum, p. 38; section 338 of the 2002 POC Act.

65 Explanatory Memorandum, p. 38.

serious offence (other than a terrorism offence) if it is not in the public interest to make the order.[66]

Information sharing

2.47 The 2002 POC Act does not expressly limit the use and sharing of information obtained under the Act.[67] However, the New South Wales Supreme Court in *Director of Public Prosecutions v Hatfield* ruled that information obtained in an examination under Part 3-1 of the 2002 POC Act could only be used for the purpose of proceedings under the Act and could not be used or disclosed for any other purpose.[68] This decision was based upon the principle that:

> A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose.[69]

2.48 While the decision in *Hatfield* related to information obtained using the examination powers under the 2002 POC Act, the same principle is likely to apply to material obtained using the other information-gathering powers under the Act.

2.49 The DPP noted that the decision in *Hatfield*:

> ...has placed an organisational burden on law enforcement agencies, requiring them to endeavour to "quarantine" information obtained from examinations, and has also inhibited law enforcement generally by preventing the free flow of relevant information and intelligence. [70]

2.50 The Sherman report recommended that the 2002 POC Act should be amended so that it provided a clear mandate for information acquired in any way under the Act, relating to any serious offence, to be passed:

- to any agency that has a lawful function to investigate that offence;
- to the Insolvency and Trustee Service Australia (ITSA) to assist in the discharge of its functions under the Act; and
- to the ATO for the protection of public revenue.[71]

2.51 The Explanatory Memorandum states that:

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66 Proposed subsections 47(4) and 49(4); Explanatory Memorandum, pp 39 and 40.

67 There are some exceptions to this. For example, section 198 provides that material provided by a person in an examination is generally not admissible in civil or criminal proceedings against the person.

68 [2006] NSWSC 195; Explanatory Memorandum, p. 41.

69 Brennan J in *Johns v Australian Securities Commission,* (1993) 178 CLR 408 at 424 cited in *DPP v Hatfield* at para 24.

70 *Submission 5*, p. 5.

71 Mr Tom Sherman AO, p. 29; Explanatory Memorandum, p. 41.

> It was never the intention of the [2002 POC] Act that information obtained in an examination could only be used for the purposes of confiscation proceedings under the Act and could not be shared for any other reason. It is desirable that, if during the course of an examination hearing, information about planned serious criminal activity is uncovered, such information is able to be passed on to relevant law enforcement agencies.[72]

2.52 The proposed amendments in Part 4 of Schedule 2 would ensure that information obtained under the 2002 POC Act can be disclosed when that information will assist in the prevention, investigation or prosecution of criminal conduct.[73] In particular, proposed section 266A will permit the disclosure of information to:

- an authority with functions under the 2002 POC Act where the disclosure would facilitate the authority's performance of its functions under the Act;
- an authority of the Commonwealth, a state, territory or foreign country that has a function of investigating or prosecuting crimes where the disclosure would assist in the prevention, investigation or prosecution of a crime against the law of the relevant jurisdiction; and
- the ATO where the disclosure would assist the ATO to protect public revenue.[74]

Reimbursement of legal aid commission costs

2.53 Part 5 of Schedule 2 would simplify arrangements for legal aid commissions to recover costs incurred by people who have assets restrained under the 2002 POC Act. The amendments would provide for legal aid costs to be paid directly from the Confiscated Assets Account, instead of from restrained assets.[75] These amendments respond to a recommendation of the Sherman report.[76]

Key issues

2.54 The key issues raised in evidence to the committee regarding amendments to the 2002 POC Act concerned the provisions related to:

- unexplained wealth;
- freezing orders;
- removal of the six year limitation period on non-conviction based forfeitures;
- non-conviction based forfeiture of the instruments of serious offences; and
- information sharing.

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72 Explanatory Memorandum, p. 41.

73 Explanatory Memorandum, p. 41.

74 Explanatory Memorandum, pp 42-43.

75 Explanatory Memorandum, p. 43.

76 Mr Tom Sherman AO, p. 58.

Unexplained wealth provisions

2.55 Mr Mark Burgess of the Police Federation of Australia noted that the unexplained wealth provisions have three objectives:

> ...firstly, to deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from that activity; secondly, to prevent crime by diminishing the capacity of offenders to finance any future criminal activity that they might engage in; and, thirdly, to remedy the unjust enrichment of criminals who profit at society's expense.[77]

2.56 The committee received some evidence endorsing the unexplained wealth provisions in the Bill. For example, Professor Roderic Broadhurst submitted that:

> Tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in [organised crime] is usually indirect in terms of actual commission. Indeed unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery that often facilitate serious crime.[78]

2.57 Similarly, an officer from the AFP told the committee:

> The AFP sought these provisions as an additional method to investigate and confiscate the proceeds of crime generated by organised crime networks. In essence, they will enable us to investigate better those individuals who distance themselves from the commission of criminal activity but are actively involved in its planning and benefit from it.[79]

2.58 Amongst those opposed to the unexplained wealth amendments, views ranged from those who considered that the provisions are too broad to those that argued the amendments do not go far enough.

Concerns that the provisions infringe civil liberties

2.59 The Law Council of Australia (the Law Council) opposed the introduction of unexplained wealth provisions arguing that the provisions undermine the presumption of innocence by reversing the onus of proof and thus requiring the respondent to demonstrate that his or her wealth was lawfully acquired.[80] The Law Council submitted that:

> By reversing the onus of proof the proposed unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property.[81]

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77 *Committee Hansard*, 28 August 2009, p. 25.

78 *Submission 12*, p. 1. See also Mr John Lawler, ACC, *Committee Hansard*, 28 August 2009, p. 46.

79 *Committee Hansard*, 28 August 2009, p. 47. See also p. 54.

80 *Submission 6*, pp 4 and 15.

81 *Submission 6*, p. 17. See also Civil Liberties Australia, *Submission 4*, supplementary submission, pp 4-5; New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 1.

2.60 In addition, Mr Tim Game SC of the Law Council told the committee:

> The central problem that we would see with the unexplained wealth orders is that to get to a forfeiture in unexplained wealth you do not need any evidence in relation to any offence. To get an unexplained wealth restraining order you do, but to get a forfeiture order you do not...[82]

2.61 Mr Game SC expressed particular concern at the impact of combining the reverse onus with the absence of a requirement to present evidence that shows there are reasonable grounds to suspect a person has committed an offence, or that his or her wealth is derived from an offence, in order to obtain a forfeiture order. He argued that the combination of these factors means that:

> ...you have put the person in a position where the suspicion in relation to the wealth is the sole thing that has triggered their forfeiture. That is the thing that we think goes too far.[83]

2.62 Finally, the Law Council submitted the powers available under the unexplained wealth provisions would be open to misuse and arbitrary application:

> [S]uch provisions could be used as a method of harassing suspects who have been uncooperative with police or whom police have been unable to arrest due to lack of evidence. Police may also be motivated to bring unexplained wealth applications in order to gather evidence as testimony given by a respondent as to how his or her property was obtained may be relevant to another line of enquiry.[84]

Concerns that the provisions will be ineffective

2.63 By contrast, the Office of Public Prosecutions Victoria submitted that the unexplained wealth provisions may not adequately strengthen the proceeds of crime regime. The Office argued that, in part, this was because, in order to meet the threshold requirement for obtaining a restraining order, the DPP would require much more detailed information regarding the respondent's financial affairs than was likely to be available in the absence of powers to compel the respondent to provide financial records.[85]

2.64 In a similar vein, the Australian Federal Police Association and the Police Federation of Australia (the Police Associations) argued that the unexplained wealth provisions in the Bill are too restrictive and 'would not enable the AFP to combat even simple money laundering techniques'.[86]

2.65 The Police Associations expressed particular concern about the link to offences in the unexplained wealth provisions. For example, in order to obtain a

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82 *Committee Hansard*, 28 August 2009, p. 2.

83 *Committee Hansard*, 28 August 2009, pp 5-6.

84 *Submission 6*, p. 18. See also New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 1; Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, p. 23.

85 *Submission 10*, p. 1.

86 *Submission 3*, p. 4.

restraining order under proposed section 20A there must be reasonable grounds to suspect that:

(a) the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect; or

(b) the whole or any part of the person's wealth was derived from such an offence.

2.66 The Police Associations argued that, if there were reasonable grounds to suspect such offences were the source of the property, then property restraint could be pursued using the existing mechanisms in the 2002 POC Act and thus unexplained wealth provisions would not be required.[87]

2.67 The Police Associations acknowledged the constitutional limitations affecting the drafting of the Bill but urged a further evaluation of whether the external affairs power would support broader provisions and, if not, whether such provisions should be based on a referral of powers to the Commonwealth by the states.[88] The Police Associations advocated that these broader provisions should be modelled on the *Criminal Property Forfeiture Act 2002 (NT)* noting that around $6 million has been forfeited under that Act.[89] Mr Burgess summarised why the Police Associations considered the unexplained wealth provisions in jurisdictions such as the Northern Territory and Western Australia to be preferable to the provisions in the Bill:

> The key aspect ...is that in their provisions, Western Australia and the Northern Territory in particular, there does not need to be a link to an initial criminal offence to actually start the procedure whereas in this legislation there will need to be a link to an initial criminal offence. Some of the examples that have been provided to us from interstate are that there are people who are holding assets on behalf of these people who have gained substantial assets who it would be almost impossible to link to the criminal offence. The unexplained wealth provisions in Western Australia and in particular the Northern Territory have allowed the state to get the assets from those particular people.[90]

2.68 The Police Associations also made several specific recommendations for changes to the unexplained wealth provisions of the Bill. For example, they argued that, in addition to the DPP, the Commissioner of the AFP should be authorised to apply for a restraining order under the unexplained wealth provisions.[91] Federal Agent Whitehead explained the rationale for this recommendation:

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87 *Submission 3*, p. 4. See also Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, p. 26.

88 *Submission 3*, p. 3; Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, pp 35 and 36-37; *Answers to questions on notice*, 11 September 2009, pp 3-5.

89 *Committee Hansard*, 28 August 2009, pp 25 and 27.

90 *Committee Hansard*, 28 August 2009, p. 27.

91 *Submission 3*, p. 7; Federal Agent John Whitehead, *Committee Hansard*, 28 August 2009, pp 37-38.

> One of the issues we have from a law enforcement perspective is that the resources of the DPP are sometimes stretched. It is sometimes less timely to have matters considered. They have to go to the director or the deputy director for consideration as to the liability for costs that the DPP considers. So ...there are additional impediments to the effective operation of the legislation. One of the recommendations ...was to transfer that power to the AFP commissioner ...to improve the efficiency with which the act can operate.[92]

Threshold for commencing unexplained wealth proceedings

2.69 The Office of the Privacy Commissioner did not oppose the unexplained wealth provisions. However, the Office recommended that consideration be given to authorised officers having to demonstrate to the court that they have 'reasonable grounds to believe' (rather than 'reasonable grounds to suspect'), that a person's wealth exceeds his or her lawfully acquired wealth, before a preliminary unexplained wealth order may be made.[93] Mr Timothy Pilgrim, Deputy Privacy Commissioner submitted that:

> ...given the wide reach of the powers and the nature of such orders, the office believes that, before a court issues them, authorised officers ...should be able to demonstrate a higher level of knowledge than just having reasonable grounds to suspect that a person's total wealth exceeds the estimated value of lawfully acquired wealth. The office suggests that authorised officers could instead be required to demonstrate reasonable grounds to believe that this is the case. ...The office believes that [this] could assist in making sure that individuals who have not actually committed any offence nor gained personally from any illegal activity are not inadvertently caught up through this mechanism.[94]

2.70 Civil Liberties Australia made similar comments in relation to the use of 'reasonable grounds to suspect' as the threshold for obtaining a restraining order and noted that:

> ...if enacted in its current form, the amendments would allow the restraint of property on the most flimsy and superficial briefs of evidence. The burden selected strikes an inappropriate balance between the law enforcement interests of the state on the one hand, and the interests of the individual on the other.[95]

Burden of proof

2.71 In addition, Civil Liberties Australia proposed that the Bill be amended so that the DPP has an overarching burden to satisfy the relevant court, on the balance of probabilities, that the wealth was obtained through illicit means. Under this approach a

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92 *Committee Hansard*, 28 August 2009, p. 37.

93 *Submission 9*, p. 5. See also Civil Liberties Australia, *Submission 4*, supplementary submission, pp 1 and 3-4; Mr Tim Game SC, Law Council, *Committee Hansard*, 28 August 2009, p. 6.

94 *Committee Hansard*, 28 August 2009, p. 8. See also *Submission 9*, p. 2; Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, pp 18 and 21.

95 *Submission 4*, supplementary submission, p. 4.

respondent would only bear an evidential, as opposed to a legal, burden of showing that wealth was lawfully acquired. However, if the respondent failed or refused to adduce any evidence, then it would be open to the court to draw the inference that the assets were unlawfully obtained.[96] Mr Bill Rowlings of Civil Liberties Australia noted that:

> We support the principle that people should not gain from crime, but how you get there is the problem. ...We do not support people having to explain their wealth; we would prefer it the other way. [97]

2.72 Further, Mr Lance Williamson of Civil Liberties Australia argued that respondents may have difficulty producing evidence demonstrating the source of their wealth even where their assets were obtained legitimately:

> I would suggest most people do not have receipts and documentation going back more than a couple of years on most of their business. I cannot produce receipts, for example, for cars I would have bought five years ago or 10 years ago.[98]

2.73 The DPP made a proposal which may assist a respondent seeking to discharge the burden of proving that his or her wealth is not derived from criminal activity. Specifically, the DPP argued that that the evidence given by a person at the hearing of an application for an unexplained wealth order should not be admissible in criminal or civil proceedings against the person except:

- in criminal proceedings for giving false and misleading information; or
- in proceedings under the 2002 POC Act or related proceedings.[99]

2.74 The 2002 POC Act already contains a similar provision in respect of evidence given at an examination.[100] The DPP noted that:

> Without such a provision, a person might well refuse to give any evidence at the unexplained wealth order hearing on the basis that their evidence may incriminate them.[101]

Definitions of wealth and unexplained wealth

2.75 The Police Associations submitted that the definition of 'unexplained wealth amount' in proposed subsection 179E(2) is too prescriptive in that it is focused on the source of funds applied to particular items of property. The Police Associations proposed that a less prescriptive approach be adopted that would allow, for example, unexplained wealth to be calculated by adding the total increase in a person's net assets to his or her expenses over a specified time period and then subtracting from

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96 *Submission 4*, supplementary submission, p. 5.

97 *Committee Hansard*, 28 August 2009, p. 18.

98 *Committee Hansard*, 28 August 2009, p. 22.

99 *Answers to questions on notice*, 1 September 2009, p. 4.

100 Section 198 of the 2002 POC Act.

101 *Answers to questions on notice*, 1 September 2009, p. 4.

this total the funds or income legitimately available to a person during the same period of time.[102]

2.76 The DPP expressed related concerns that the definition of 'wealth' in proposed subsection 179G(1) is overly prescriptive. Under that provision, 'wealth' is defined as property owned or under the effective control of the person at any time as well as property the person has consumed or disposed of at any time. The DPP argued that:

> This definition is exclusive and does not include items such as expenses met by a person or services used by a person. The provision would also seem to encompass double counting of property that has been sold and replaced by other property.
>
> Proposed subsection 179G(1) could be amended to an inclusive definition of wealth which would allow for flexibility in assessing a person's wealth and the inclusion of expenses and services.[103]

Government response

2.77 In relation to the arguments of the Police Associations that a restraining order under proposed section 20A of the unexplained wealth provisions should not require reasonable grounds to suspect that specified offences were the source of the property, the Attorney-General's Department explained that the link to specified offences is required to ensure the constitutionality of the provisions:

> The paragraphs that relate to the person being suspected of committing an offence or part of their wealth being derived from an offence were included in order to provide a connection to a Commonwealth constitutional head of power.[104]

2.78 The officer from the Attorney-General's Department further advised that, while the department had considered whether broader unexplained wealth provisions could be supported by relying on the external affairs power in conjunction with international conventions relating to organised crime, corruption and money laundering, these conventions would not support a comprehensive unexplained wealth regime.[105]

2.79 Contrary to the view that the unexplained wealth provisions would be ineffective, the ACC provided the committee with an outline of specific cases where those provisions would have supported ACC operations. One case involved $100 million in remittances overseas where it was suspected that the remittance service was being used to launder funds derived from organised crime. In this case, legitimate and

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102 *Submission 3*, pp 11-15. See also the concerns raised by the DPP in relation to the formula for calculating unexplained wealth: *Answers to questions on notice*, 1 September 2009, p. 2.

103 *Answers to questions on notice*, 1 September 2009, p. 2.

104 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 64. See also Explanatory Memorandum, p. 5; Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 57.

105 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, pp 64 and 65.

illegitimate funds were mingled and it was not clear what percentage of the funds were proceeds of crime.[106]

2.80 Similarly, the AFP noted that the provisions would enable the AFP to reconsider a range of investigations where the AFP had been unable to take action against people in the higher levels of criminal networks because they remain at arms-length from criminal activity.[107] The AFP also outlined the following specific example of a case in which the provisions could have been utilised:

> ...there were a series of significant illegal drug importation investigations in which an Australian based member of a syndicate was identified through criminal intelligence. Insufficient evidence could be obtained to prosecute the individual or connect him to the criminal activity. During and subsequent to the investigation, the AFP identified that the individual had accumulated significant assets and wealth with no detectable legal means to account for them. An unjust enrichment provision in that sense would be effective in allowing us to continue to target that person in relation to their unexplained wealth.[108]

2.81 In his second reading speech, the Attorney-General noted that:

> Organised crime affects many areas of social and economic activity, inflicting substantial harm on the community, business and government.
>
> It has been estimated to cost the Australian economy at least $15 billion each year.[109]

2.82 The committee questioned officers from the Attorney-General's Department and the ACC about the basis for this figure but did not receive any information that would corroborate this estimate other than advice that the figure is based on United Nations Office on Drugs and Crime projections.[110]

2.83 On the specific proposal from the Police Associations that the AFP Commissioner should be authorised to apply for a restraining order under the unexplained wealth provisions, an officer from the DPP noted:

> One of the things about looking at making these applications is that it is important that there is some process in place whereby there are people, probably outside the direct investigation, who have some oversight in terms of making the application. If the commissioner were given that power, I would expect that he or she would put in place some sorts of processes to ensure that the cases were properly considered before court action was

106 ACC, *Examples where ACC operations would have been enhanced through new powers*, tabled at public hearing, 28 August 2009.

107 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 49.

108 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 56.

109 The Hon Robert McClelland MP, *House Hansard*, 24 June 2009, p. 6964. See also Mr John Lawler, ACC, *Committee Hansard*, 28 August 2009, p. 46.

110 *Committee Hansard*, 28 August 2009, pp 58 and 65.

> commenced. Whether that would then allow it to happen any quicker than it happens now I do not know.[111]

2.84 The Attorney-General's Department rejected the view that the threshold for obtaining preliminary unexplained wealth orders should be 'reasonable grounds for belief' rather than 'reasonable grounds to suspect' that a person's wealth exceeds lawfully acquired wealth:

> ...there is quite a lot of information that has to be provided to a court by an agency, including the authorised officer having to indicate the property which they know or reasonably suspect to have been lawfully acquired, all the property they know or reasonably suspect to be owned by the person, as well as reasonable grounds to show why they think total wealth exceeds the person's wealth. It is a fairly comprehensive list of criteria that have to be satisfied and it is our view that 'reasonable grounds to suspect' is quite an appropriate threshold.[112]

2.85 The Attorney-General's Department also responded to concerns that the definition of 'wealth' in proposed section 179G may allow for double counting of property:

> A broad definition of wealth is required so that a person accounts for the entirety of his or her wealth over time and not just property he or she currently owns or controls.
>
> The Commonwealth's unexplained wealth provisions are modelled on the Western Australian and the Northern Territory unexplained wealth provisions... which operate in exactly the same way. That is, a broad definition of what constitutes a person's wealth coupled with a common sense approach that the proceeds of property disposed of cannot be counted in addition to further property purchased with those proceeds. There has not been any suggestion that the WA or NT provisions "double count" property in practice.[113]

2.86 Both the AFP and the ACC responded to concerns that the unexplained wealth provisions may be used in relation to minor offenders. An officer from the AFP explained:

> [O]ur resources are set to target the highest echelon of criminals across Australia that operate internationally and cross-jurisdictionally. It is those people who are able to distance themselves from the smaller crimes who build networks and sit on top of large criminal organisations. They are the ones who have been able to distance themselves in the past from the predicate offences, which has led to them amassing proceeds of crime and wealth within their organisations. So the AFP see little value in targeting at the bottom level...[114]

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111 *Committee Hansard*, 28 August 2009, p. 44.

112 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 67.

113 *Answers to questions on notice*, 7 September 2009, p. 1.

114 *Committee Hansard*, 28 August 2009, pp 50-51. See also Federal Agent John Whitehead, Police Associations, *Committee Hansard*, 28 August 2009, pp 27-28.

2.87 Under section 21 of the 2002 POC Act, the DPP may provide an undertaking with respect to the damages and costs of the respondent, and the court may refuse a restraining order if the DPP does not do so. An officer from the DPP explained that this also helps to ensure that the powers under the Act are exercised responsibly:

> To some extent, ...the courts feel some comfort in the fact that an undertaking as to damages is given so that if it turns out that we have all got it wrong at the end of the day the person can be compensated. As you would imagine, that is a fairly big consideration for us because in some of these cases, given their size and complexity, the potential fallout from that would be quite significant. Apart from any other reason to ensure that the cases are properly assessed in terms of the evidentiary material, we always have that as a reminder to us to exercise our powers responsibly.[115]

2.88 Finally, in response to questioning by the committee, the Attorney-General's Department argued that it would not be appropriate for the court have a discretion with respect to the making of an unexplained wealth order:

> ..for all the other types of orders under the Proceeds of Crime Act, it is mandatory, once the court has reached satisfaction of a number of criteria, which is also the case here, that the court has to make an order. And then there are a suite of provisions that allow specific exceptions and for property to be taken out of orders—for instance, if there is any hardship to dependants. The way it is constructed is that the court has a discretion in the sense that it has to consider and come to its own satisfaction in relation to the criteria, but once the court believes they have been satisfied, for unexplained wealth orders as well as for conviction based orders and non-conviction based orders under the current act, it must make an order.[116]

Drafting issue

2.89 The requirements for an affidavit in support of a preliminary unexplained wealth order are set out under proposed subsection 179B(2). This provision requires the authorised officer state:

- that the officer suspects a person's wealth exceeds his or her lawfully acquired wealth;
- the property the officer suspects is owned or under the effective control of the person; and
- the property the officer suspects was lawfully acquired.

2.90 The authorised officer is also required to state the grounds on which he or she holds suspicions in relation to the last two matters. However the authorised officer is not required to state the grounds on which he or she holds the suspicion that a person's

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115 *Committee Hansard*, 28 August 2009, p. 42. Federal Agent John Whitehead, Police Associations, *Committee Hansard*, 28 August 2009, p. 29.

116 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 67. See also proposed section 179L of the 2002 POC Act in relation to the power of the court to order an amount be paid to dependants of a person subject to an unexplained wealth order to relieve hardship.

wealth exceeds his or her lawfully acquired wealth. The Attorney-General's Department explained that there is no requirement for the affidavit to set out the grounds for this suspicion because under proposed subsection 179B(1) the court must be satisfied that there are reasonable grounds for such a suspicion so inevitably there will be evidence given to the court on that point. Despite this, the department and the DPP agreed that there would be no difficulty in clarifying the provision by including a requirement for the grounds for this suspicion to be set out in the affidavit.[117]

Freezing orders

2.91 The Law Council opposed the freezing order provisions arguing that the provisions have 'great potential to undermine the presumption of innocence and infringe individual rights.'[118] In particular, the Law Council expressed concern that freezing orders could be made without the affected party being heard and without the magistrate having any discretion to refuse to make the order once the requirements of proposed section 15B have been met.[119] The Law Council also queried the necessity of the proposed freezing order regime in light of the existing power of the DPP to apply for a restraining order without giving notice to the owner of the property.[120]

2.92 On the other hand, the Police Associations argued that the freezing order provisions do not go far enough and proposed that the AFP Commissioner should issue freezing orders rather than applications being made to a magistrate.[121] The Police Associations noted that:

> There is little incentive for investigators to apply to a Magistrate to hear an application for a freezing notice in the proposed form as it would often be easier to schedule an application with a written affidavit before a judge - and in doing so apply for a restraining order (subject of course to the involvement of the CDPP).[122]

2.93 However, the AFP appeared to support the requirement for freezing orders to be issued by a magistrate.[123]

2.94 An officer from the DPP suggested that, for practical reasons, it may be appropriate for freezing orders to be obtained by investigators rather than the DPP seeking such orders:

> At the moment you can get restraining orders and you go to either the Supreme Court or the district and county court, depending on which jurisdiction you are in. There is a little bit of time involved, but we can get those orders reasonably quickly. The freezing order is an intermediate step,

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117 Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard,* 28 August 2009, p. 63; Mr John Thornton, DPP, *Committee Hansard,* 28 August 2009, p. 39.

118 *Submission 6,* p. 23.

119 *Submission 6,* p. 23.

120 *Submission 6,* pp 23-24. See subsection 26(4) of the 2002 POC Act.

121 *Submission 3,* p. 18. See proposed section 15B.

122 *Submission 3,* p. 18.

123 Assistant Commissioner Mandy Newton, *Committee Hansard,* 28 August 2009, p. 57.

> if you like, where you have bank accounts which are obviously very liquid and quickly moved. If you have those sorts of assets there is probably a need to move even more quickly and so you have this provision, which only lasts for a short period while you get the restraining order. I would imagine that one of the key elements is the ability to move quickly, and in those circumstances and given the limited time that they will apply for there are probably reasons why you would have the investigator do that rather than come to us.[124]

Removal of the six year time limit

2.95 The Law Council opposed the removal of the six year limitation period arguing that some time limit was necessary to protect against unlimited interference with individual rights.[125] The Law Council argued that the risk of unjustified intrusion into the property rights of individuals is particularly acute given the mandatory nature of the civil confiscation regime and noted that these amendments would mean that:

> [P]rovided the DPP could demonstrate reasonable grounds to suspect that the person engaged in criminal activity some thirty years ago, his or her property could be forfeited regardless of whether he or she was ever convicted, or even prosecuted for, the suspected criminal conduct.[126]

2.96 However, the DPP noted that:

> ...experience under the existing provisions has been that in some cases – particularly complex fraud cases which take time to discover and then investigate – the 6-year time limit effectively means that the option of civil confiscation action is not available.[127]

Restraint and forfeiture of instruments of serious crime

2.97 In relation to the amendments to allow for the restraint and forfeiture of the instruments of serious offences in non-conviction based proceedings, the DPP commented that:

> ...experience under the existing provisions, particularly in cases involving suspected money-laundering, was that it was often difficult to ascertain whether property ought properly to be regarded as "proceeds" or an "instrument" of the relevant offending, and the unavailability of civil restraint and forfeiture of "instruments" of offences was therefore problematic.[128]

2.98 However, Civil Liberties Australia and the Law Council both opposed these amendments.[129] Civil Liberties Australia gave the following example of how the new provisions may operate:

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124 *Committee Hansard*, 28 August 2009, pp 43-44.

125 Mr Tim Game SC, *Committee Hansard*, 28 August 2009, p. 2.

126 *Submission 6*, p. 26.

127 *Submission 5*, p. 4.

128 *Submission 5*, p. 5.

129 *Submission 4*, supplementary submission, pp 8-9; *Submission 6*, pp 27-28.

> A person is gainfully employed, and purchases a house for $400,000 through legitimate means. The house is their place of residence. In one bedroom, they artificially cultivate $30,000 worth of cannabis. Under the Act, not only can any proceeds from the sale of the cannabis be seized, but the entire house may also be forfeited if the DPP so applies.[130]

2.99 Civil Liberties Australia argued that the provisions would allow authorities to have 'a second bite at the cherry' and seize a person's lawfully acquired property on the basis that he or she has committed an offence, even where the person has been acquitted of that offence, and would thus violate the rule against double jeopardy:

> Given that the confiscation of such property is punitive in nature, the imposition of a confiscation order in such circumstances would amount to a second and further attempt to impose a punishment after a person has already been acquitted. Such proceedings can easily lend themselves to an abuse of power on the part of authorities and would create a mechanism for the overzealous pursuit of individuals by law enforcement agencies.[131]

Information sharing

2.100 Proposed section 266A would specifically authorise the disclosure of information obtained under the 2002 POC Act for certain purposes. The Office of the Privacy Commissioner recommended that:

- the disclosure of information acquired under the Act should be limited to disclosure for the purpose of investigation or prevention of *serious* offences; and
- disclosure of information overseas, for the purposes of a criminal investigation, should not be made unless the offence under investigation would be considered a serious offence if it had occurred in Australia.[132]

2.101 With respect to disclosures to foreign law enforcement agencies, the Office noted that allowing personal information flows to foreign countries for the purposes of enforcing foreign laws poses particular privacy risks.[133] Mr Timothy Pilgrim, Deputy Privacy Commissioner, explained:

> In allowing the disclosure of personal information to foreign countries for the purpose of enforcing foreign laws certain privacy risks arise. In particular, there is a risk that the information requested may relate to conduct that is illegal in one country but lawful in Australia. This could create an inconsistency in the application of Australian privacy regulations by allowing personal information to be disclosed overseas when it would not be permitted to be disclosed in Australia.[134]

2.102 The Attorney-General's Department noted that the disclosure of information under proposed section 266A had not been limited to disclosure of information about

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130 *Submission 4*, supplementary submission, p. 8.

131 *Submission 4*, supplementary submission, p. 9.

132 *Submission 9*, pp 2 and 6. See also Law Council, *Submission 6*, p. 31.

133 *Submission 9*, p. 6.

134 *Committee Hansard*, 28 August 2009, p. 9.

serious offences because the definition of 'serious offence' in section 338 of the 2002 POC Act requires both that the offence be an indictable offence punishable by imprisonment for three or more years, and that the offence involve specific types of unlawful conduct.[135] The department argued that:

> Disclosure of information about offences that do not meet the definition of "serious offence" under [the 2002 POC Act] may still be very relevant to combating crime and, when combined with similar pieces of information, could lead to the detection of serious offences.[136]

2.103 In response to questions from the committee, the Attorney-General's Department confirmed that the proposed provisions would permit disclosures of information even where a court declines to make a confiscation order under the 2002 POC Act:

> These provisions apply to all information that is gathered under the information gathering powers in the Proceeds of Crime Act. It was always understood that information could be passed under the act until a recent Supreme Court of New South Wales case. Following that the Sherman review recommended that we needed to clarify that information could be provided. It has never been the case that we have seen a need to restrict the provision of information to situations where a final order has been made by the court.[137]

135 *Answers to questions on notice*, 7 September 2009, p. 3.

136 *Answers to questions on notice*, 7 September 2009, p. 3.

137 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 63.