Additional Comments by Liberal Senators

1.1 Organised crime imposes major costs on the Australian community both in financial and human terms. Liberal Senators therefore strongly support the aim of the Bill to strengthen the legislative mechanisms available to tackle organised crime. We also endorse the recommendations in the majority report, apart from recommendation 12 which relates to proposed changes to the TIA Act. In addition to our concerns about recommendation 12, Liberal Senators have a number of further comments and recommendations for amendments to the Bill.

Amendments to the Proceeds of Crime Act 2002

Constitutionality of the unexplained wealth provisions

1.2 At the public hearing for this inquiry, Liberal Senators questioned officers of the Attorney-General's Department in relation to the constitutional validity of the unexplained wealth provisions in the Bill. The answers provided to the committee at the hearing were less than satisfactory and ultimately these questions were taken on notice.

1.3 Given the recent decision of the High Court in relation to the constitutional invalidity of the legislation establishing the Australian Military Court, it would seem prudent for Senate committees to independently scrutinise the reasoning of government departments with respect to the constitutional validity of provisions in bills.[1] In particular, Liberal Senators note that the concerns of the Senate Standing Committee on Foreign Affairs, Defence and Trade about the constitutionality of the Australian Military Court were disregarded, with most unsatisfactory results.[2]

1.4 The Government has obtained legal advice on the constitutionality of the unexplained wealth provisions but was unwilling to provide that advice to the committee. It is difficult to see how the disclosure of legal advice provided to the Government in these circumstances is contrary to the public interest. It would assist committees in performing their role to scrutinise proposed legislation and it may well help the Government to avoid the embarrassment of having legislative provisions struck down with potentiality more dramatic consequences than would have arisen from amending the original bill. Moreover, the failure to disclose the legal advice leaves perhaps unwarranted suspicions that the advice was not unequivocal.

1.5 The Government's failure to disclose this legal advice robs Liberal Senators of an opportunity to be reassured that the proposed unexplained wealth amendments are constitutional. We therefore recommend that, unless the Senate is provided with early advice that persuasively confirms the constitutionality of the provisions, a more

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1 *Lane v Morrison* [2009] HCA 29.

2 *Report on the inquiry into the provisions of the Defence Legislation Amendment Bill 2006*, October 2006, at: http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/def_leg_bill_06/report/report.pdf (accessed 9 September 2009), pp 5-6.

cautious approach would be to base such provisions upon a referral of powers by the states to the Commonwealth.

Additional recommendation 1

1.6 Liberal Senators recommend that, unless the Senate is provided with early legal advice which persuasively confirms the constitutionality of the proposed unexplained wealth provisions of the *Proceeds of Crime Act 2002*, those provisions should be based upon a referral of powers from the states.

1.7 Liberal Senators also consider that additional amendments to the 2002 POC Act should be considered in relation to:

- the grounds on which preliminary unexplained wealth orders are granted;
- the power to apply for restraining orders under the unexplained wealth provisions;
- the grounds on which an unexplained wealth order is granted; and
- the disclosure of information gathered under the Act.

Preliminary unexplained wealth orders

1.8 While Liberal Senators support the unexplained wealth provisions in the Bill, it is critical to minimise the possibility of innocent parties being captured by those provisions. This could be readily achieved by providing that before issuing a preliminary unexplained wealth order a court should be satisfied that there are reasonable grounds to *believe*, not merely reasonable grounds to *suspect*, that a person's wealth exceeds his or her lawfully acquired wealth. The Office of the Privacy Commissioner suggested such an amendment to the committee and noted that requiring this higher level of knowledge:

> ...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.[3]

1.9 The test of 'reasonable grounds to believe' is not uncommon under federal legislation and exists in provisions in both the Crimes Act and the Criminal Code. For example, the Deputy Privacy Commissioner explained how the two tests are used in current provisions in the Criminal Code:

> ...'reasonable grounds to believe' requires a higher level of knowledge than, say, 'reasonable grounds to suspect'. This distinction has been applied in some other legislation. An example I can give is the *Criminal Code Act 1995*, where both levels of knowledge are required in different circumstances. So, for example, within the Criminal Code Act, ...at section [105.43(2)(b)]—and that concerns taking fingerprints, recordings or samples of handwriting or photograph use—it is required that the police officer... believes on reasonable grounds that there is enough evidence or information to support those actions. Whereas in section 105.24, where it is

3 Mr Timothy Pilgrim, *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.

> referring to the conduct of ordinary searches, it only requires the police officer to suspect on reasonable grounds.[4]

1.10 The test of reasonable grounds to believe is also applied under existing section 244 of the 2002 POC Act in relation to whether a thing may be moved to another place for processing or examination in order to establish whether it may be seized under a search warrant.[5]

1.11 The Law Council supported the strengthening of the test applicable to preliminary unexplained wealth orders to 'reasonable grounds to believe' at the public hearing.[6] While Civil Liberties Australia was critical of the use of the test of 'reasonable grounds to suspect' even at the earlier stage of obtaining a restraining order under the unexplained wealth provisions and argued that:

> 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.[7]

1.12 Liberal Senators accept that the test of 'reasonable grounds to suspect' is appropriate in the context of restraining assets under proposed section 20A. Indeed this is the test applicable to other restraining orders under existing sections 18 to 20 of the 2002 POC Act. However, to apply the same test to a preliminary unexplained wealth order is quite a different matter given the serious consequences of such orders: namely that an individual will be required to prove the provenance of his or her property or face forfeiture of that property. As a result, Liberal Senators recommend that the higher threshold of 'reasonable grounds to believe' ought to be met before a preliminary unexplained wealth order is made.

Additional recommendation 2

1.13 Liberal Senators recommend that before making a preliminary unexplained wealth order under proposed section 179B of the *Proceeds of Crime Act 2002* a court must be satisfied that there are reasonable grounds to *believe* that a person's wealth exceeds his or her lawfully acquired wealth.

Power for AFP to apply for a restraining order

1.14 Liberal Senators are also concerned that criminals should not be able to evade the unexplained wealth provisions by dispersing assets before they can be restrained. Liberal Senators therefore support the Commissioner of the AFP being empowered to apply for a restraining order under proposed section 20A of the 2002 POC Act. In circumstances where assets may be dispersed quickly to defeat unexplained wealth proceedings, it would seem reasonable for the Commissioner of the AFP as well as the DPP to be able to seek restraint of those assets.

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4 Mr Timothy Pilgrim, *Committee Hansard,* 28 August 2009, p. 13.

5 Attorney-General's Department, *Answers to Question on Notice*, 7 September 2009, p. 7.

6 Mr Tim Game SC, *Committee Hansard,* 28 August 2009, p. 7.

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

Additional recommendation 3

1.15 Liberal Senators recommend proposed section 20A and related provisions of the *Proceeds of Crime Act 2002* be amended to empower the Commissioner of the AFP to apply for a restraining order under the unexplained wealth provisions.

Granting unexplained wealth orders

1.16 Under proposed paragraph 20A(1)(g) of the 2002 POC Act, a court must be satisfied that there are reasonable grounds to suspect that a person has committed specified offences or that a person's wealth was derived from such offences before issuing a restraining order. This requirement is not replicated in the provisions dealing with preliminary unexplained wealth orders and unexplained wealth orders. In response to questions from the committee, the Attorney-General's Department explained the reason for this anomaly was that proposed paragraph 20A(1)(g) provides the nexus to constitutional heads of power by linking the provision to offences which are within Commonwealth power. Such a connection is not required in relation to preliminary unexplained wealth orders under proposed section 179B. In relation to unexplained wealth orders under proposed section 179E, the constitutional nexus is achieved through the definition of 'unexplained wealth amount' as the difference between total wealth and wealth that was not derived from offences within Commonwealth power.[8] An officer from the department explained:

> It was appropriate [in proposed section 179E] for us to connect it to Commonwealth power to describe unexplained wealth by reference to offences that were within Commonwealth power. But it was not appropriate to include that second ground that is in [proposed paragraph 20A(1)](g), which relates to the person's commission of an offence, in part because that would move it away from being an unexplained wealth order and, in addition, if the person also had to demonstrate that they had not committed an offence to the satisfaction of the court that would be quite an inappropriate provision to include in the making of an unexplained wealth order.[9]

1.17 While this reasoning may be sound in relation to the constitutional bases for the provisions, it leaves the rather unsatisfactory outcome that at the final stage of making a forfeiture order in relation to unexplained wealth there is no specific requirement for a court to be satisfied that there are reasonable grounds for believing that a person's wealth is illicit. Liberal Senators accept that it would be inappropriate for the onus to be on the respondent to demonstrate that he or she had not committed one of the specified offences as well as having to account for the source of his or her assets. Nevertheless, the court should remain satisfied that there are reasonable grounds to believe a person has committed offences or derived wealth from offences when making an unexplained wealth order. Consideration should be given to

8 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 62.

9 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 62.

amending proposed section 179E of the *Proceeds of Crime Act 2002* to achieve this result.

Disclosure of information

1.18 The Bill would create extensive powers to share information obtained under the 2002 POC Act for a broad range of purposes. Liberal Senators support recommendations 4 and 5 of the majority report which limit the provisions allowing the disclosure of information to law enforcement and prosecuting agencies to disclosures for the purpose of preventing, investigating or prosecuting indictable offences punishable by imprisonment for three or more years. However, these recommendations do not go far enough.

1.19 As drafted, the provisions in the Bill would permit the disclosure of information obtained in relation to individuals even where a court refused to make a forfeiture order or other penalty order in relation to the person. This means that information can be exchanged between agencies even in cases where a court was not satisfied on the balance of probabilities that a person was involved in any criminal activity or was the recipient of illicit funds. Liberal Senators believe that disclosures should be limited to cases where such adverse findings have been made in relation to the respondent or where forfeiture has been ordered as a result of a criminal conviction.

Additional recommendation 4

1.20 Liberal Senators recommend that disclosures of information acquired under the *Proceeds of Crime Act 2002* should be limited to cases where a forfeiture order, pecuniary penalty order or literary proceeds order has been made by the court.

1.21 A further issue is that the table in proposed subsection 266A(2) of the 2002 POC Act would allow the exchange of information for the ill-defined purpose of 'assisting in the prevention of a crime'. It is difficult to imagine what disclosure of information to law enforcement agencies could not be justified on the basis that it may serve the purpose of assisting the prevention of crime. Liberal Senators observe that the drafting of item 2, column 2, in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* would be improved by omitting the word 'prevention'.

1.22 Similarly, Liberal Senators do not support the capacity to share information obtained under the 2002 POC Act for the purpose of the ATO investigating tax matters. The coercive information gathering powers granted under the Act are directed at disrupting organised crime. They should not be available for subsidiary purposes such as protecting public revenue. Liberal Senators consider that item 3 in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* should be deleted.

1.23 Where a person provides information or documents in compliance with the information gathering powers under the 2002 POC Act, proposed subsection 266A(3) would prevent the use of answers and documents provided by the person in evidence in criminal or civil proceedings against the person (apart from certain specified proceedings). As drafted, proposed subsection 266A(3) does not prevent the subsidiary use of this material against third parties. This provision could result in

considerable injustice to the family members or business associates of a person required to provide information under the Act. In essence, it may circumvent an individual's right to silence by compelling the production of information related to his or her affairs from his or her family or associates. To avoid this outcome, consideration should be given to inserting the words 'or against any other person' in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* after the phrase 'against the person who gave the answer or produced the document'.

Telecommunications interception

1.24 Finally, the Bill would expand the scope of offences which may be investigated utilising telecommunications interception warrants to include offences associated with a criminal organisation which are linked to prescribed offences. Prescribed offences, in general terms, are offences punishable by imprisonment for a term of at least three years. Recommendation 12 of the majority report would include first time offences of association under section 26 of the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* within the definition of 'prescribed offence' in section 5 of the TIA Act. This offence has a maximum penalty of only two years imprisonment. The change proposed by the majority report would ultimately allow telecommunications interception warrants to be obtained in relation to the investigation of this offence.

1.25 Any amendments to the TIA Act must be applicable to both the existing state legislation targeting criminal organisations in New South Wales and South Australia as well as able to accommodate any future legislation passed by other states and territories. It is not practical, nor is it good policy, to tailor provisions to any particular state regime. It is therefore inappropriate and unacceptable to broaden the definition of 'prescribed offence' to include a specific offence which the New South Wales Parliament did not consider warranted a sentence of more than two years imprisonment.

Senator Guy Barnett **Senator Mary Jo Fisher**

Deputy Chair