

CHAPTER 5

PROCEEDS OF CRIME

Background

5.1 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). The Sherman report recommended several changes to the POC Act aimed at strengthening the federal regime for seizing the proceeds and instruments of crime.¹ Some of the proposed amendments in Schedule 1 of the Bill arise out of recommendations of the Sherman report, whilst other amendments would implement proposals made by law enforcement agencies.²

5.2 The committee's report on the provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 provides an overview of the existing provisions of the POC Act as well as other reviews and inquiries that are relevant to the Act.³

Provisions in the Bill

5.3 Schedule 1 of the Bill would make amendments to the POC Act relating to:

- (a) the exclusion of property from restraining or forfeiture orders, and compensation for legitimately obtained interests in property;
- (b) pecuniary penalty orders;
- (c) examination orders;
- (d) other information gathering powers;
- (e) ancillary orders; and
- (f) various definitions in the Act.⁴

Exclusion or recovery of property and compensation

5.4 In certain circumstances, the POC Act provides for:

- the exclusion of property from restraining orders (section 29);
- the exclusion of property from forfeiture (sections 73 and 94);
- the recovery of forfeited property or its equivalent value (section 102); and

1 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_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002\(Cth\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002(Cth)) (accessed 29 September 2009).

2 Explanatory Memorandum, p. 6.

3 *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, pp 3-6. See also DPP, *Submission 8*, pp 1-3.

4 Explanatory Memorandum, pp 6-7.

- compensation for the proportion of forfeited property that was legitimately obtained (section 77).

Exclusion or recovery of property

5.5 The provisions in Part 1 of Schedule 1 would correct various anomalies in the provisions relating to the exclusion of property from restraining or forfeiture orders and the recovery of forfeited property.⁵ Perhaps the most serious anomaly relates to the test that applies to the exclusion of property from a forfeiture order. The Explanatory Memorandum explains that:

Currently, paragraph 73(1)(d) specifies the test which allows a third party to apply for exclusion of property from a forfeiture order under sections 47 and 49. Paragraph 73(1)(c) specifies the test that applies to a suspect. At present, the provisions are more onerous for a third party than for a suspect, as a third party must show that they were not involved in the commission of any of the offences to which the application relates. The same requirement does not apply to a suspect.⁶

5.6 The amendments would ensure that the tests for exclusion of property from forfeiture orders are not harder for third parties to satisfy than for suspects by providing, essentially, that property will be excluded where it is not the proceeds of unlawful activity or an instrument of a relevant offence.⁷ The amendments would also ensure that:

- third parties with an interest in property have access to the same mechanisms to exclude property from forfeiture as suspects;⁸ and
- the test for recovery of forfeited property under section 102 is consistent with the test for exclusion of property from automatic forfeiture under section 94.⁹

5.7 The POC Act currently refers to the Commonwealth Director of Public Prosecutions (DPP) being given an opportunity to conduct an ‘examination of the applicant’ prior to a court hearing an application to exclude property from a restraining or forfeiture order.¹⁰ However, there are cases where the DPP may need to examine not only the applicant but also a third party (for example where the applicant is holding property on behalf of that third party). The Bill would therefore amend these provisions to read ‘examinations in relation to the application’.¹¹ Similar

5 Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the POC Act.

6 Explanatory Memorandum, p. 12.

7 Item 22 of Schedule 1, Explanatory Memorandum, p. 12.

8 Items 51, 52 and 54 of Schedule 1, Explanatory Memorandum, pp 19-20.

9 Items 58, 60 and 62 of Schedule 1, Explanatory Memorandum, pp 22-23.

10 Subsection 32(b) and section 76.

11 Items 18 and 28 of Schedule 1; Explanatory Memorandum, pp 11 and 14; Mr Tom Sherman AO, recommendation D6, p. D8. Item 56 of Schedule 1 makes a similar amendment to section 94 which does not currently provide that an application under that section, to exclude property from forfeiture, must not be heard until the DPP has had a reasonable opportunity to conduct an examination.

amendments would ensure that the DPP has an opportunity to conduct examinations of all relevant parties before it is required to provide notice of the grounds on which it proposes to contest an application to exclude property from a restraining or forfeiture order.¹²

Compensation for legitimately obtained property

5.8 Schedule 1 of the Bill would also amend the provisions of the POC Act dealing with compensation for legitimately obtained interests in property to address some anomalies and inconsistencies. For example, section 77 currently provides that compensation is available if, when the property first became proceeds of an offence, a proportion of the property was not acquired using the proceeds of any offence. The Explanatory Memorandum notes that:

This limits a court's consideration to a particular moment in time, which could frustrate the purpose of the Act. For example, if a \$500,000 house was purchased with a deposit of \$50,000 derived from crime and a legitimate loan of \$450,000, only 10% of the value was obtained with illegitimate funds when the property first became the proceeds of crime. If mortgage payments are subsequently made entirely with proceeds of crime, a court might be prevented from considering the later use of illegitimate funds because they are not relevant to when the house first became proceeds. This could result in compensation being paid where it should not be paid.¹³

5.9 The Bill would amend subsection 77(1) to provide that before making a compensation order, a court must be satisfied that the portion of the applicant's interest that is to be compensated was not derived or realised, directly or indirectly, from the commission of any offence, and is not an instrument of any offence.¹⁴ Subsection 77(1) does not currently exclude compensation for legitimately obtained property on the basis that the property is an instrument of an offence.¹⁵ The Attorney-General's Department advised that this change is necessary to ensure that it is not possible for a person to receive compensation for property that has been validly forfeited.¹⁶

5.10 Another inconsistency in the provisions dealing with compensation for legitimately obtained interests in property is that compensation is available if property has been forfeited to the Commonwealth under a forfeiture order but not if it has been

12 Items 17, 27 and 55 of Schedule 1; Explanatory Memorandum, pp 10-11, 13 and 20; Mr Tom Sherman AO, recommendation D5, p. D7. See also Items 33, 34 and 63 of Schedule 1 which would provide that the DPP need not give notice of the reasons it proposes to contest a compensation, recovery or buy back order, and a court must not hear an application for a compensation, recovery or buy back order, until the DPP has had a reasonable opportunity to conduct examinations in relation to the application: Explanatory Memorandum, pp 16 and 24.

13 Explanatory Memorandum, p. 14.

14 Item 30 of Schedule 1; Explanatory Memorandum, p. 14.

15 Proposed section 94A would also exclude compensation if the applicant's interest in the property is the instrument of any offence.

16 *Answers to questions on notice*, 9 November 2009, p. 17.

automatically forfeited under section 92 of the POC Act. Item 57 of Schedule 1 would insert a new section 94A in the POC Act to ensure that where property that was automatically forfeited was acquired with both the proceeds of an offence and legitimately obtained funds, the owner of the forfeited property is compensated for the legitimately obtained proportion of the property.¹⁷

Pecuniary penalty orders

5.11 Sections 115 to 150 of the POC Act relate to pecuniary penalty orders which are orders that require payment to the Commonwealth of amounts based on benefits derived from crime.

5.12 Part 2 of Schedule 1 would clarify the provisions governing the calculation of pecuniary penalty orders. At present, these provisions direct the court to consider a person's property that is covered by a restraining order, but make no reference to property of another person that is under the person's effective control. The Explanatory Memorandum notes that this omission can result in a court not taking into consideration the full range of criminal benefits a person has gained. The amendments would address this by inserting references to property 'suspected of being subject to the effective control of the person' in subparagraph 121(4)(a)(i) and paragraph 124(1)(c).¹⁸

5.13 The Bill would also empower a court to hear an application for a pecuniary penalty order, outside of the time limits set by section 134 if it is in the interests of justice to do so.¹⁹ The Explanatory Memorandum argues that this provision is necessary in circumstances where the DPP seeks the forfeiture of property in the mistaken belief that the entire property was obtained with the proceeds of crime and therefore does not also seek a pecuniary penalty order in relation to the person's criminal activities.²⁰ The Explanatory Memorandum provides the following example:

...assume a person defrauds the Commonwealth of \$1 million, and owns a house worth \$1 million. Following an investigation, it appears that the house was purchased using the proceeds of the fraud, so the house is restrained and then forfeited. Subsequently, another person demonstrates that they contributed \$250,000 in legitimate funds to purchase the house, and is therefore entitled to be compensated for this amount. The person who committed the offence has therefore only forfeited 75% of the value of the offence. If the [DPP] was aware of this at the time of restraint, a pecuniary penalty order would have been issued for the \$250,000. However, if the [DPP] became aware after forfeiture, it is prevented by section 134 from obtaining a pecuniary penalty order.²¹

5.14 The Bill would amend the POC Act to allow a court to vary a pecuniary penalty order where the order was made on the basis of a number of convictions and

17 Explanatory Memorandum, p. 21.

18 Items 68 and 72 of Schedule 1; Explanatory Memorandum, pp 25 and 26.

19 Item 78 of Schedule 1; Explanatory Memorandum, pp 27-28.

20 Explanatory Memorandum, p. 28.

21 Explanatory Memorandum, p. 28.

one conviction was subsequently quashed.²² The Explanatory Memorandum notes that at present, under section 146 of the POC Act, there is provision for the DPP to seek confirmation of the pecuniary penalty order, relating to a person's conviction of a serious offence, by proving to the civil standard that the quashed offence occurred. However, if this cannot be proved then the entire pecuniary penalty order is discharged even if it relates to several other offences which have not been quashed.²³

5.15 Furthermore, if the pecuniary penalty order relates only to indictable offences there is no provision for the DPP to seek confirmation of the order and the order will lapse even if it relates to several other indictable offences which have not been quashed. The amendments would provide that if a conviction is quashed, a pecuniary penalty order is discharged unless the DPP applies to the court within 14 days to have the order confirmed or varied and insert proposed section 149A to set out the procedure for varying a pecuniary penalty order.²⁴

Examination orders

5.16 Sections 180 to 201 of the POC Act permit courts to make orders allowing the examination of any person who has an interest in property which is the subject of a restraining order. The Bill would permit courts to make an examination order, in certain circumstances, where a restraining order is not in place.²⁵ In particular, the Bill would permit examination orders where:

- an application is made to have property excluded from forfeiture (proposed section 180A);
- an application is made for compensation for the proportion of property that was legitimately obtained, after the property has been forfeited (proposed section 180B);
- an application is made to recover an interest in forfeited property (proposed section 180C);
- a confiscation order has been made but not satisfied (proposed section 180D);²⁶ or
- a restraining order is revoked under section 44, which allows a court to revoke a restraining order where a person provides satisfactory security or a satisfactory undertaking in lieu of the restraining order (proposed section 180E).²⁷

5.17 Proposed sections 180A to 180E would permit not only examination of persons who have or claim an interest in the relevant property (or in the case of

22 Items 82-87 and 91-93 of Schedule 1; Explanatory Memorandum, pp 29 and 30; Mr Tom Sherman AO, recommendation D21, p. D27.

23 Explanatory Memorandum, p. 29.

24 Explanatory Memorandum, pp 29 and 30.

25 Explanatory Memorandum, p. 32. See also DPP, *Submission 8*, p. 3.

26 'Confiscation order' is defined in section 338 of the POC Act and means a forfeiture order, a pecuniary penalty order or a literary proceeds order.

27 Item 103 of Schedule 1; Explanatory Memorandum, pp 32-35. See also Mr Tom Sherman AO, recommendation D22(b), pp D29-D31.

proposed section 180D the person against whom the confiscation order was made) but also spouses or de facto partners of those persons. In addition, the Explanatory Memorandum notes that these provisions would allow the examination of lawyers, accountants, bankers and other advisers of the person and his or her spouse or de facto partner.²⁸

5.18 Part 3 of Schedule 1 of the Bill would also:

- confirm that the DPP may apply for an examination order *ex parte*;²⁹
- insert a definition of ‘affairs’ to clarify the range of questions which may be asked at an examination;³⁰
- introduce a new offence of providing false or misleading answers or documents in connection with an examination;³¹ and
- increase penalties for existing offences relating to examinations.³²

Other information gathering powers

5.19 In addition to the power to conduct examinations, the POC Act provides for various other information gathering powers including:

- production orders which are orders made by a magistrate requiring the production of property tracking documents (sections 202 to 212);
- notices to financial institutions requiring the provision of information or documents relating to accounts and transactions (sections 213 to 218); and
- monitoring orders which are orders made by a judge requiring a financial institution to monitor and provide information relating to transactions through an account (sections 219 to 224).

5.20 Part 4 of Schedule 1 of the Bill would amend the provisions relating to production orders by:

- broadening the definition of ‘property tracking document’ in subsection 202(5) to allow production orders to be used in relation to property where the identity of the person who committed the relevant offences is unknown;³³

28 Explanatory Memorandum, pp 33-35; *Answers to questions on notice*, 9 November 2009, pp 18-19.

29 Item 109 of Schedule 1; Explanatory Memorandum, pp 36-37. See also Mr Tom Sherman AO, recommendation D22(d), pp D30-D31.

30 Items 118 of Schedule 1; Explanatory Memorandum, p. 39. Under sections 180 and 181 and proposed sections 180A to 180E, examination orders permit questioning ‘about the affairs’ of the person being examined.

31 Items 116 of Schedule 1; Explanatory Memorandum, p. 38. See also Mr Tom Sherman AO, recommendation D25, p. D33.

32 Items 114 and 115 of Schedule 1; Explanatory Memorandum, pp 37-38. See also Mr Tom Sherman AO, recommendation D24, p. D32.

33 See for example Item 120 of Schedule 1; Explanatory Memorandum, pp 39-40; Mr Tom Sherman AO, recommendation D26(a), pp D33-35.

- requiring production orders to specify the form and manner in which documents are to be produced to allow for the electronic receipt of documents;³⁴ and
- clarifying the power of a magistrate to order that documents be produced within a shorter period than the usual minimum of 14 days from the order including setting a minimum period of at least three days from the order in these urgent cases.³⁵

5.21 In relation to the power to issue notices to financial institutions, the Bill would make three significant changes. Firstly, the list of authorised officers who may issue such notices would be expanded to include the Commissioner of Taxation, the Chief Executive Officer of the Australian Customs and Border Protection Service (Customs) and the Chairperson of ASIC.³⁶ Secondly, where an authorised officer considers it appropriate, he or she would be able to specify a period for providing the documents or information of less than the current minimum of 14 days though the period would have to be at least three days from the giving of the notice.³⁷ Thirdly, authorised officers would have the power to obtain information about stored value cards and transactions made using those cards.³⁸

5.22 The power of a judge to issue a monitoring order would also be expanded to enable orders to be made that require financial institutions to provide information about transactions made using a stored value card issued by the financial institution.³⁹

5.23 Finally, the existing definition of ‘account’ in section 338 of the POC Act would be expanded to include credit card accounts, loan accounts and closed accounts.⁴⁰ The effect of this change would be to broaden information gathering powers under the POC Act, particularly, the powers to issue notices to financial institutions and to obtain monitoring orders.⁴¹

Ancillary orders

5.24 Section 39 of the POC Act allows a court to make ancillary orders where a restraining order has been made. Amongst other things, such orders can require the owner of property to give a sworn statement about his or her property, or to take actions necessary to bring the restrained property within the jurisdiction. Part 5 of Schedule 1 of the Bill would clarify the way in which orders ancillary to restraining orders are to be made and operate.⁴² For example, the Bill would:

34 Item 125 of Schedule 1; Explanatory Memorandum, p. 40; Mr Tom Sherman AO, recommendation D26(b), pp D33-35.

35 Item 126 of Schedule 1; Explanatory Memorandum, p. 41.

36 Item 133 of Schedule 1; Explanatory Memorandum, pp. 42.

37 Items 136 and 137 of Schedule 1; Explanatory Memorandum, p. 43.

38 Item 132 of Schedule 1; Explanatory Memorandum, p. 42. Item 148 of Schedule 1 would insert a definition of ‘stored value card’ in section 338 of the POC Act.

39 Item 141 of Schedule 1; Explanatory Memorandum, p. 44.

40 Item 147 of Schedule 1; Explanatory Memorandum, p. 45.

41 Explanatory Memorandum, p. 45.

42 Explanatory Memorandum, p. 7.

- empower the court to make orders directing a person whom the court reasonably suspects has information relevant to identifying, locating or quantifying the property (such as a mortgage broker or a real estate agent) to give a sworn statement in relation to the property;⁴³
- expand the power to make orders requiring the owner of restrained property to do anything necessary to bring the property within the jurisdiction so that it also applies to persons who have effective control of the property;⁴⁴
- allow ancillary orders to be made *ex parte*;⁴⁵
- clarify that the privilege against self-incrimination does not apply in relation to providing a sworn statement about particulars of, or dealings with, property.⁴⁶

5.25 The Explanatory Memorandum notes that the abrogation of the privilege against self-incrimination is in response to a New South Wales Supreme Court decision which held that the privilege was impliedly removed by paragraph 39(1)(d).⁴⁷ The provision is therefore designed to clarify the existing position, but it would also provide a direct use immunity so that the sworn statement cannot be used in civil or criminal proceedings against the person except in specified circumstances.⁴⁸

Changes to definitions in the POC Act

5.26 Part 7 of Schedule 1 would amend several of the definitions used in the POC Act. The Bill would expand the definition of ‘serious offence’ in section 338 of the POC Act so that it would cover two or more related fraud offences which, in aggregate, cause a benefit or loss of more than \$10,000.⁴⁹ The Explanatory Memorandum notes that the existing definition of ‘serious offence’, as it relates to fraud-type offences, refers to an indictable offence that causes a benefit or loss of at least \$10,000 and is punishable by three or more years imprisonment. This definition does not capture a person committing a series of related frauds which, in aggregate, cause a benefit or loss of more than \$10,000.⁵⁰

43 Item 152 of Schedule 1; Explanatory Memorandum, p. 46.

44 Item 153 of Schedule 1; Explanatory Memorandum, p. 47; Mr Tom Sherman AO, recommendation D7(c), pp D10 and D12.

45 Item 154 of Schedule 1; Explanatory Memorandum, p. 47; Mr Tom Sherman AO, recommendation D7(d), pp D11-12. Item 154 would also insert a new section 39B which will enable a person to apply for an ancillary order to be revoked where the order was made *ex parte*.

46 Item 156 of Schedule 1; Explanatory Memorandum, pp 48-49; Mr Tom Sherman AO, recommendation D7, pp D10 and D12.

47 *DPP v Xu* [2005] NSWSC 191 at para 36; Explanatory Memorandum, p. 48.

48 Explanatory Memorandum, pp 7 and 48.

49 Item 179 of Schedule 1; Explanatory Memorandum, p. 55; Mr Tom Sherman AO, recommendation D36, pp D48-D49.

50 Explanatory Memorandum, p. 55. See also DPP, *Submission 8*, p. 4.

5.27 The Bill would also expand the definition of ‘unlawful activity’ in section 338 to include state and territory summary offences.⁵¹ The Explanatory Memorandum notes that:

Currently, the definition of “unlawful activity” applies to any offences against Commonwealth law or the laws of a foreign country, but applies only to indictable offences under State and Territory law (excluding State/Territory summary offences). This limit did not exist in the *Proceeds of Crime Act 1987* and the Sherman Report recommended the definition be amended to encompass these offences...⁵²

5.28 The term ‘unlawful activity’ is used in several provisions of the POC Act. One significant example is that property can only be excluded from a restraining order or from forfeiture where it is not the proceeds of unlawful activity.⁵³

5.29 Finally, the Bill would clarify the definitions of ‘evidential material’, ‘foreign indictable offence’ and ‘tainted property’ set out in sections 337A and 338. These amendments would allow search warrants to be issued under section 225 of the Act in relation to property that is proceeds of a foreign indictable offence.⁵⁴

Issues raised in submissions

5.30 Many of the proposed amendments to the POC Act are technical in nature but some submissions expressed support for the amendments or raised concerns about particular amendments. For example, the Police Associations strongly supported the proposed amendments.⁵⁵ While the AFP expressed specific support for the amendments that would:

- allow search warrants to be obtained under section 225 in relation to property that is proceeds of a foreign indictable offence;
- expand the definition of ‘account’; and
- extend the information gathering powers under the POC Act to stored value cards.⁵⁶

5.31 The DPP also supported the POC Act amendments overall but made one suggestion in relation to the amendments in Part 1 of Schedule 1. The DPP suggested that the requirement to pay compensation and the power to make post forfeiture recovery orders should be conditional on the recipient not having any other outstanding liabilities under the POC Act.⁵⁷

51 Item 182 of Schedule 1; Mr Tom Sherman AO, recommendations D38, pp D49-D50.

52 Explanatory Memorandum, p. 56.

53 See for example sections 29, 73 and 94.

54 Items 172, 173, 177 and 180 of Schedule 1; Explanatory Memorandum, pp 53-56; Mr Tom Sherman AO, recommendations D33, D37 and D39, pp D45-D46 and D49-D50.

55 *Submission 3*, p. 3.

56 *Submission 10*, pp 2-4. See also Mr Roman Quaedvlieg, Acting Deputy Commissioner, *Committee Hansard*, 29 October 2009, p. 3.

57 *Submission 8*, p. 3. See also *Answers to questions on notice*, 9 November 2009, p. 18.

5.32 Liberty Victoria raised several issues about the proposed amendments to the POC Act. For example, Liberty Victoria queried the rationale for extending the power to issue notices to financial institutions, requiring the provision of information or documents, to the Australian Taxation Office (ATO), Customs and ASIC and noted that this represents a significant increase in access to personal information without a warrant.⁵⁸

5.33 Sections 211 and 218 of the POC Act create offences where a person fails to comply with a production order or a notice to produce. Liberty Victoria argued that the Bill should amend these sections to provide a general defence where a person has made all reasonable efforts to comply with the production order or the notice to produce.⁵⁹

5.34 The NSW Attorney-General expressed concern about the potential breadth of the amendment to expand the definition of ‘unlawful activity’ to include state and territory summary offences. The Attorney-General noted that there are ‘a broad range of summary offences, many of which involve a very low degree of criminality.’⁶⁰

5.35 Finally, Professor Broadhurst and Ms Ayling noted that proceeds of crime laws are becoming more complex and suggested that:

...there may be the need to provide further specialisation within the judiciary, indeed the task may be best handled by a specialist court.⁶¹

58 *Submission 11*, p. 2.

59 *Submission 11*, p. 2. Item 127 of Schedule 1 would introduce a more limited defence in relation to the offence under section 211. This defence would apply where a person fails to comply with a production order only because he or she did not produce the documents within the time specified in the order: Explanatory Memorandum, p. 41.

60 *Submission 13*, p. 1. See also Liberty Victoria, *Submission 11*, p. 2.

61 *Submission 6*, p. 2.