

Chapter 1

Introduction and background

1.1 On 26 November 2015 the Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister on Counter-Terrorism, introduced the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (the bill) into the House of Representatives.¹ The bill was passed by the House of Representatives on 3 December 2015.²

1.2 On 3 December 2015, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the bill to the Senate Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 3 February 2016.³

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 8 January 2016. The inquiry was also made public on the committee's website (www.aph.gov.au/senate/legalcon).

1.4 The committee received 12 submissions to the inquiry. The list of submissions received by the committee is at Appendix 1.

Purpose of the bill

1.5 According to its Explanatory Memorandum (EM), the bill contains 'a range of measures to improve and clarify Commonwealth criminal justice arrangements'.⁴ These measures are implemented through proposed amendments to the *Proceeds of Crime Act 2002* (PoC Act), the *Criminal Code Act 1995* (Criminal Code), the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *AusCheck Act 2007* (AusCheck Act).

1.6 The bill proposes five discrete sets of amendments, all relating to criminal justice and national security matters, but not directly related to each other. The amendments are intended to:

- clarify the operation of the non-conviction based civil scheme for the forfeiture of assets suspected of being the proceeds of crime;
- create new offences of false dealing with accounting documents;
- amend provisions relating to serious drug offences in the Criminal Code to ensure that they capture all relevant substances and processes;

1 House of Representatives, *Votes and Proceedings*, No. 162, 26 November 2015, p. 1749.

2 House of Representatives, *Votes and Proceedings*, No. 166, 3 December 2015, p. 1805.

3 *Journals of the Senate*, No.134, 3 December 2015, pp 3624, 3626.

4 Explanatory Memorandum, p. 2.

- enable a wider range of agencies and officials to access and share information obtained by AUSTRAC under the AML/CTF Act, and further clarify the circumstances under which information can be shared; and
- extend the circumstances under which AusCheck can share background checking information it gathers with other Commonwealth, state and territory agencies performing law enforcement and national security functions.

1.7 Commending the bill to the House of Representatives, Minister Keenan said that:

This bill will enhance the ability of Commonwealth agencies to investigate and prosecute criminal offences, and seeks to ensure that the Commonwealth can effectively target and confiscate proceeds of crime. It will better address law enforcement issues and national security risks through improved information sharing, and it will improve the efficiency and effectiveness of various laws relating to the administration of criminal justice.⁵

Key provisions of the bill

1.8 The key substantive provisions of the bill are contained in its five schedules.

Schedule 1: proceeds of crime

Disclosure of information

1.9 Under the PoC Act, a person may be compelled by a court or a proceeds of crime examiner to provide a sworn statement or certain information to specified persons. Section 266A of the PoC Act provides that such information may then be disclosed onward to certain other authorities, and sets out the authorities to whom and the purposes for which such disclosures may be made.

1.10 Subsection 266A(2) presently provides that the listed disclosures may be made if the person disclosing information for a purpose specified in the subsection 'believes on reasonable grounds that the disclosure will serve that purpose'. The proposed amendment to that subsection would add the requirement that a court has not made an order prohibiting the disclosure of the information to the authority for that purpose.

Asset forfeiture scheme—interaction with related criminal proceedings

1.11 The PoC Act establishes a non-conviction based civil scheme for the restraint and subsequent forfeiture of assets which may be the proceeds of crime. Under the scheme, the Commissioner of the Australian Federal Police (AFP) or the Commonwealth Director of Public Prosecutions (CDPP) may apply to a court to restrain property reasonably suspected of being the proceeds of crime, without requiring any person to be charged. The restrained property may later be forfeited, if

5 The Hon Michael Keenan MP, Minister for Justice and Minister Assisting the Prime Minister on Counter-Terrorism, Second Reading Speech, *House of Representatives Hansard*, 26 November 2015, p. 5.

the court is satisfied on the balance of probabilities that the property is the proceeds of crime.⁶

1.12 The non-conviction based forfeiture scheme operates alongside provisions for forfeiture upon criminal conviction. Section 319 of the PoC Act provides that the fact that related criminal proceedings have been instituted is not grounds for staying non-conviction based forfeiture proceedings. Following a 2015 High Court decision in which the Court held that civil forfeiture proceedings must be stayed until criminal charges against the respondent had been determined,⁷ the bill seeks to amend section 319 to provide more specific direction on the relationship between civil proceedings under the Act, and related criminal proceedings.

1.13 Item 4 of Schedule 1 proposes to replace the existing Section 319 with a new multi-part section setting out more detailed criteria for the stay of non-criminal forfeiture proceedings under the PoC Act (PoC Act proceedings).

1.14 Subsection 319(1) provides that a court may stay PoC Act proceedings 'if the court considers that it is in the interests of justice to do so'.

1.15 Subsection 319(2) states that the court may not stay PoC Act proceedings on any or all of the grounds that:

- a) (any) criminal proceedings have been, are proposed to be or may be instituted or commenced against the person subject to the PoC Act proceedings;
- b) (any) criminal proceedings have been, are proposed to be or may be instituted or commenced against another person in respect of matters relating to the subject matter of the PoC Act proceedings;
- c) a person may need to give or call evidence in the PoC Act proceedings and that evidence is or may be relevant to a criminal matter; or
- d) PoC Act proceedings in relation to someone else have been, are to be or may be stayed.

1.16 The EM states that the grounds set out in subsection 319(2) are 'designed to prevent a respondent from claiming merely a generalised "risk" of prejudice to support a stay of proceedings', which would 'have flow-on effects on the availability of evidence, would impede the operation of the non-conviction based scheme and would frustrate the objects of the PoC Act'.⁸

1.17 Subsections 319(3) and (4) provide that paragraphs 319(2)(a) and (2)(b) apply even if the circumstances or subject matter of the civil and criminal proceedings in question are the same or very similar; and subsection 319(5) provides that paragraph 319(2)(d) applies even if the result is a multiplicity of PoC Act proceedings.

6 Explanatory Memorandum, p. 2.

7 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.

8 Explanatory Memorandum, p. 28.

1.18 Subsection 319(6) provides that in considering whether a stay of PoC Act proceedings is in the interests of justice, the court must have regard to the following matters:

- a) that both the criminal and civil proceedings in question should proceed as expeditiously as possible;
- b) the cost and inconvenience to the Commonwealth of retaining property to which the PoC Act proceedings relate, and being unable to expeditiously realise the proceeds;
- c) the risk of any prejudice to the PoC Act proceedings if they were stayed;
- d) whether any prejudice that might occur if the civil proceedings were not stayed may be addressed by the court by means other than a stay of the proceedings; and
- e) any other order the court could make to address any potential prejudice to a person which may arise from continuing with the PoC Act proceedings.

1.19 The EM states that the list of matters in subsection 319(6) 'is not a closed list, and does not prevent the court from considering other issues in its determination of the interests of justice'.⁹

1.20 A note is inserted after new subsection 319(6) to give examples of orders the court could make to address any potential prejudice resulting from not staying PoC Act proceedings. These include appropriate orders for the non-disclosure of evidence, or hearing the proceedings in closed court under new section 319A proposed in the bill, which provides that a court may order PoC Act proceedings to be heard in whole or part in closed court, if the court considers that necessary to prevent interference with the administration of criminal justice.

Restraint and forfeiture: order of proceedings

1.21 An amendment is also proposed in relation to the order of proceedings where the restraint and subsequent forfeiture of assets is in question. Section 315A presently provides that a court may hear and determine two or more applications under the PoC Act at the same time. New subsection 315A(2) qualifies this, by providing that if a proceeds of crime authority applies for a forfeiture order in relation to particular property (which will have been 'restrained' by authorities under the Act pending the forfeiture application), and a person has applied to exclude an interest in that property from the restraining order, the court may only hear the application for the forfeiture order after the application for exclusion from restraint has been determined.

Schedule 2: false accounting

1.22 Schedule 2 of the bill seeks to amend the Criminal Code to create two new offences of false dealing with accounting documents. The EM states that these are

9 Explanatory Memorandum, p. 29.

intended to implement Article 8 of the OECD Anti-Bribery Convention,¹⁰ which requires parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official. While there are existing provisions at Commonwealth, state and territory level which relate to false accounting, a 2012 OECD review of Australia's implementation of the Convention found that Australia had not fully implemented the accounting obligations required under Article 8 of the Convention.¹¹

1.23 Schedule 2 would insert a new Part 10.9 at the end of Chapter 10 of the Criminal Code, containing a new Division 490: 'False dealing with accounting documents'. Within that Division, two new offences would be created.

1.24 Section 490.1 would make it an offence to make, alter, destroy or conceal an accounting document,¹² or to fail to make or alter an accounting document a person is required by law to make or alter, with the intention that such conduct would facilitate, conceal or disguise the giving or receiving (by any person) of a benefit that is not legitimately due, or a loss not legitimately incurred.

1.25 The penalty for an individual committing the offence would be imprisonment for up to ten years, a fine of up to 10,000 penalty units (\$1.8 million), or both. For a corporation, the offence is punishable by a fine of up to 100,000 penalty units (\$18 million), an amount three times the value of the illegitimate benefit obtained by the company from the offence, or ten per cent of the company's turnover for the 12 months before the offence was committed, whichever is greater.

1.26 Section 490.2 would make the same conduct an offence where the person is reckless (rather than intentional) about whether the conduct would facilitate, conceal or disguise an illegitimate benefit or loss. The penalties for commission of a section 490.2 offence would be half the value of the penalties under section 490.1.

1.27 With regard to both offences, section 490.5 provides that it is not necessary to prove that a benefit was actually given or received, or a loss incurred; or that the defendant intended that a particular person receive a benefit or incur a loss. The (general) intention or recklessness itself is sufficient to prove the offence.

1.28 Subsection 490.1(2) sets out the circumstances in which the offences would apply, as determined by the constitutional powers of the Commonwealth, such as in relation to constitutional corporations, territories, the Commonwealth public service, Australian currency or matters occurring outside Australia. Under section 490.7, the new provisions would not exclude or limit the operation of any other Commonwealth, state or territory laws.

10 Organisation for Economic Cooperation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, [1999] ATS 21, entry into force for Australia and generally 17 December 1999.

11 Explanatory Memorandum, pp 31-32.

12 Item 2 of Schedule 1 inserts a definition of 'accounting document' into the Dictionary of the Criminal Code.

1.29 In cases where the conduct occurs wholly overseas and the alleged offender is not an Australian citizen, resident or corporation, section 490.6 requires that proceedings can only commence with the written consent of the Attorney-General. Subsection 490.6(2) provides that an alleged offender may be arrested, charged and detained pending such consent from the Attorney-General, to ensure that a person can not evade justice by fleeing Australia while the determination is made.

Schedule 3: serious drugs

Drug analogues

1.30 Part 9.1 of the Criminal Code establishes serious drug offences, applying to substances determined by regulation to be 'controlled' and 'border controlled' drugs, plants or precursors. Controlled and border controlled drugs are described by their chemical structure.

1.31 The offences relating to such drugs also apply to substances that are structurally similar to a controlled or border controlled drug, called 'drug analogues'.¹³ The bill seeks to amend the chemical descriptors of drug analogues in section 301.9, to clarify the provisions and account for some of the most common methods of synthesising drug analogues.¹⁴

1.32 New subsection 301.9(3), further seeks to remedy an unintended ambiguity in existing subsection 301.9(2), which states that a drug analogue 'does not include a substance that is itself a listed controlled drug or a listed border controlled drug'. The new subsection 301.9(3) would clarify that while a substance cannot be a drug analogue of a controlled drug if it is already listed as a controlled drug, and similarly cannot be a drug analogue of a border controlled drug if it is already listed as a border controlled drug, a substance can be a drug analogue of a controlled drug if it is listed as a border controlled drug, and vice versa.

1.33 Finally, new subsection 301.9(4) provides that the words 'addition' and 'replacement' used in section 301.9 have their ordinary meanings. The EM advises that this is necessary because both terms have a scientific meaning which is different to their ordinary meaning, and which is not intended here.¹⁵

Manufacture

1.34 Part 9.1 of the Criminal Code includes offences relating to the manufacture of controlled drugs. The bill proposes to amend the definition of 'manufacture' in section 305.1 to specify that it includes any process (other than the cultivation of a plant) by which a substance is produced, extracted, refined, transformed into a different substance, or converted from one form to another. This amendment responds to a 2013 case in which the Victorian Court of Appeal interpreted the definition of

13 Explanatory Memorandum, p. 13.

14 Explanatory Memorandum, p. 42.

15 Explanatory Memorandum, p. 43.

'manufacture' to require that the process produce a new substance, not merely convert a substance from one form into another.¹⁶

Schedule 4: anti-money laundering and countering the financing of terrorism (secrecy and access of AUSTRAC information)

1.35 The AML/CTF Act establishes the Australian Transaction Reports and Analysis Centre (AUSTRAC), a Commonwealth entity which retains, compiles, analyses and disseminates information to specified government persons and agencies in support of counter-terrorism and anti-money laundering activities.¹⁷ Part 11 of the AML/CTF Act governs the secrecy and disclosure of AUSTRAC information, providing for access to it by 'designated agencies'.

1.36 Item 1 of Schedule 4 seeks to amend the definition of 'designated agency' in section 5 of the Act to add the Independent Commissioner Against Corruption of South Australia (ICAC SA), enabling it to access AUSTRAC information. A consequential amendment to subsection 22(1) designates relevant staff of ICAC SA as 'officials' of the agency for the purposes of the Act.

1.37 Section 132 of the AML/CTF Act provides for the AFP or Australian Crime Commission (ACC) to disclose AUSTRAC information to foreign law enforcement agencies in certain circumstances. A proposed amendment to the definition of 'foreign law enforcement agency' in Section 5, presently defined as 'a government body that has responsibility for law enforcement in a foreign country or a part of a foreign country', would expand it to add multi-country organisations the European Police Office (Europol) and the International Criminal Police Organization (Interpol), and to allow other international bodies to be added in future by regulation.

1.38 Section 49 of the AML/CTF Act enables certain designated persons to compel further written information and documents from agencies who report to AUSTRAC (such as banks and other financial service providers¹⁸), to assist with relevant investigations arising from their reporting. Section 122 governs the secrecy of information obtained under section 49, providing that it must not be disclosed to anyone else, other than in accordance with exceptions set out in subsection 122(3).¹⁹ Item 4 of Schedule 4 proposes to add to these exceptions, by way of a new subparagraph 122(3)(c), allowing disclosure 'for the purposes of, or in connection with, the performance of the duties of' the AFP Commissioner, the Chief Executive Officer of the ACC, the Comptroller-General of Customs, the Integrity Commissioner or an investigating officer. The EM provides the example that such further disclosure may be required in an application for a warrant.²⁰

16 *Beqiri v R* (2013) 37 VR 219, cited in the Explanatory Memorandum, p. 14.

17 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, Part 16.

18 Section 6 of the AML/CTF Act lists providers of designated services.

19 It is noted that this prohibition does not apply to the AUSTRAC CEO.

20 Explanatory Memorandum, p. 45.

1.39 Item 5 of Schedule 4 provides that the new disclosure provisions, once commenced, would apply to information obtained both before and after the commencement of the bill.

Schedule 5: disclosure and use of AusCheck scheme personal information

1.40 AusCheck is a branch within the Attorney-General's Department (AGD) that provides national security background checking services for persons who require an Aviation Security Identification Card or a Maritime Security Identification Card, and for the National Health Security check regime. These accreditations enable persons to have access to secure areas of Australia's airports or seaports, or to security-sensitive biological agents. To conduct the background checks, AusCheck obtains personal information on applicants' identity, criminal history, security assessment and citizenship or residency status, from agencies such as the Australian Security Intelligence Organisation (ASIO), CrimTrac and the Department of Immigration and Border Protection (DIBP).²¹

1.41 Schedule 5 of the bill seeks to amend the AusCheck Act to extend AusCheck's ability to share the personal information it obtains with other agencies.

1.42 Subsection 4(1) of the Act presently defines 'Commonwealth authority' as 'a body corporate established for a public purpose by or under a law of the Commonwealth'. The bill proposes to replace this definition with 'a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth'. The EM states that expanding the definition in this way aims to allow AusCheck to share information with non-corporate Commonwealth agencies and entities, such as specific areas within government departments.²²

1.43 Section 14 of the AusCheck Act governs the retention and subsequent use of information gathered by AusCheck. Subparagraph 14(2)(b) sets out the purposes for which the information may be used or disclosed. These include for carrying out a subsequent background check on the same individual, responding to an incident that poses a threat to national security, and, at 14(2)(b)(iii), for:

the collection, correlation, analysis or dissemination of criminal intelligence or security intelligence by the Commonwealth, or by a Commonwealth authority that has functions relating to law enforcement or national security, for purposes relating to law enforcement or national security.

1.44 The bill proposes to repeal subparagraph 14(2)(b)(iii) and replace it with two new provisions, allowing disclosure for the following purposes:

- (iii) the performance of functions relating to law enforcement or national security by the Commonwealth or a Commonwealth authority;
- (iiia) the performance of functions relating to law enforcement or national security by a State or Territory or a State or Territory authority.

21 Explanatory Memorandum, p. 5.

22 Explanatory Memorandum, p. 46.

1.45 The bill would insert into subsection 4(1) a new definition of 'State or Territory authority' as 'a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory'.

1.46 The EM states that these amendments would enable AusCheck to disclose personal information to 'a Commonwealth authority which is not traditionally considered to be a law enforcement agency but may require access to the information to respond to national security or crime threats', as well as to state and territory agencies, which were not previously included in the Act.²³ The EM advises that 'appropriate safeguards' exist within the Act in relation to the use and disclosure of information, which would apply to the broader range of agencies with whom information may be shared under the amended provisions.²⁴

1.47 Item 5 of Schedule 5 provides that the amendments would apply to the use or disclosure of information collected both before and after the commencement of the bill.

Consideration by Scrutiny of Bills Committee

1.48 On 2 December 2015 the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) tabled its comments on the bill.²⁵

1.49 The Scrutiny of Bills Committee raised two issues upon which it sought further advice from the minister:

- the provision in Schedule 4 which would allow for additional international bodies to be prescribed by regulation in future for the purposes of sharing information. The committee stated that 'the implications for individual privacy of sharing AUSTRAC information are significant', and therefore such provision 'should be included in primary legislation unless a comprehensive and compelling justification is provided'.²⁶ The committee requested that the minister provide more detailed justification for the use of regulation rather than future primary legislation in this instance; and
- with regard to Schedule 5, the strength of safeguards to protect the disclosure of AusCheck personal information, given the expansion of such disclosures which would be allowed by the bill and the implications for persons' privacy. While recognising that AusCheck policies established practical safeguards, the committee regarded it as 'a matter of concern that the existence of safeguards...is not required by law', and sought the minister's advice as to whether consideration had been given to enshrining practices and policy in

23 Explanatory Memorandum, p. 48.

24 Explanatory Memorandum, pp 6-7, 48.

25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.14 of 2015*, 2 December 2015, pp 3-6. Tabled per *Journals of the Senate*, No.133, 2 December 2015, p. 3594.

26 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.14 of 2015*, 2 December 2015, p. 5.

law to provide assurance that the safeguards were 'robust and permanent', or to at least impose a legislative requirement that safeguards be in place.²⁷

1.50 Addressing one additional matter, the Scrutiny of Bills Committee noted that the ratio between imprisonment and penalty units for the new false accounting offences in Schedule 2 was inconsistent with other provisions in the Criminal Code, but that that approach had been justified in detail in the EM. The committee therefore did not seek further advice from the minister, inviting the Senate to consider the appropriateness of the provisions.²⁸

27 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.14 of 2015*, 2 December 2015, pp 5-6.

28 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No.14 of 2015*, 2 December 2015, p. 4.