Australian Government
Department of Home Affairs

Joint-agency submission to the Inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020

Senate Legal and Constitutional Affairs Legislation Committee

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Crimes Legislation Amendment (Economic Disruption) Bill 2020

Introduction

The Department of Home Affairs thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission on the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the Bill). This joint-agency submission has been developed by Home Affairs in close consultation with the Australian Federal Police, Australian Criminal Intelligence Commission, Australian Financial Security Authority, Attorney-General's Department, Australian Transaction Reports and Analysis Centre, Australian Security Intelligence Organisation and Commonwealth Director of Public Prosecutions.

Transnational, serious and organised crime (TSOC) groups are systematically affecting the health, wealth and safety of Australian citizens through abhorrent conduct such as illicit drug trafficking, mass fraud and child exploitation. The Australian Institute of Criminology estimates that these groups cost Australia up to AUD47.4 billion per year but, when indirect social and economic impacts are considered, the true cost is immeasurable.

The profit motive lies at the heart of TSOC. Criminal groups are no longer confined to a particular crime-type or association, but have instead evolved into sophisticated multinational businesses, constantly shifting their operations to create, maintain and disguise illicit financial flows. Money laundering remains a fundamental enabler of almost all TSOC activity, enabling profits from crime to be realised, concealed and reinvested in further criminal activity, or used to fund lavish lifestyles. The availability and complexity of this enabler has increased with the growth of global money laundering syndicates, which use an array of products and channels to transfer money around the world in a manner that is incredibly difficult to trace.

The Bill seeks to attack TSOC groups by targeting the illicit wealth that sustains them. It ensures that money laundering offences are adapted to combat the behaviour of modern money laundering networks, enhances asset confiscation laws and strengthens undercover operations. In doing so, the Bill gives law enforcement vital tools to cut off the flow of illicit finds that enables the devastating harm caused by TSOC.

Schedule 1 – Money Laundering

Money laundering networks are becoming increasingly complex and more difficult for law enforcement agencies to disrupt. These networks are currently exploiting vulnerabilities in Commonwealth money laundering offences, avoiding serious criminal liability by dealing with property at an arms-length, remaining wilfully blind to its criminal origins and concealing these origins behind complex financial, legal and administrative arrangements.

Schedule 1 to the Bill will address these vulnerabilities, ensuring that Commonwealth money laundering offences can be effectively used to target and dismantle the networks that conceal and sustain illicit financial flows.

Wilful blindness

The more serious offences at sections 400.3-400.8 of the Criminal Code require the prosecution to prove that the defendant believed, or was reckless or negligent as to whether the property (including money) they dealt with was proceeds of a class of indictable offence (see *Lin v R* [2015] NSWCCA 204). This could be satisfied, for example, where a person believed that property was derived from a drug importation offence.

Money laundering networks have adapted to practice strict information compartmentalisation, keeping their participants wilfully blind as to the criminal origins of property. While these individuals may be aware of a risk that the property they are dealing with was derived from crime, they will rarely have the information required to identify the class of offence it came from.

To combat this, Schedule 1 creates new 'proceeds of general crime offence provisions' which instead require the defendant to believe, or be reckless or negligent as to whether, property was proceeds of crime generally. This could be implied from the defendant's awareness of suspicious circumstances surrounding the property, including the circumstances at pages 14-15 of the Explanatory Memorandum to the Bill.

To ensure that these offences do not apply to trivial conduct, they will only apply where:

- the defendant intentionally engaged in one or more instances of conduct in relation to money or other property; and
- one instance of the defendant's conduct, or two or more instances taken together relate to the money or other property collectively valued at $100,000 or more; and
- the person believed, was reckless or was negligent as to whether the money or other property was proceeds of general crime in each instance; and
- each instance of the defendant's conduct concealed or disguised one or more particular aspects of the money or other property; and
- the defendant was reckless as to this result occurring in each instance.

Tracing property to its illicit origins

The more serious offences at sections 400.3-400.8 of the Criminal Code require the prosecution to prove that the property (including money) that the defendant dealt with was actually proceeds of a class of indictable offence (see *Lin v R* [2015] NSWCCA 204). This element could be satisfied, for example, where property was actually derived from illicit firearms trafficking.

Money laundering networks, however, often make tracing efforts impossible by obscuring the actual criminal origins of property through complex arrangements, strict information compartmentalisation, encrypted communication services and other methodologies. The global nature of money laundering networks allows them to move illicit property away from the jurisdiction in which the predicate offending occurred, further frustrating attempts to identify a class of predicate offence.

Schedule 1 to the Bill contains three reforms that address this issue.

First, new 'proceeds of general crime offence provisions' will only require the prosecution to prove that property was proceeds of crime generally, rather than requiring a link to be made to a class of offence. Property will be proceeds of general crime where evidence of the circumstances in which the property was handled are such as to give rise to the irresistible inference that it is wholly or partly derived or realised, directly or indirectly, from crime generally. This should ensure that the manner in which property is dealt with in Australia carries greater weight in prosecutions, reducing the need to trace property to a specific class of predicate offence (often in a foreign jurisdiction) to make out serious money laundering offences.

Second, item 76 changes the elements required to prove that a person attempted to commit a serious money laundering offence. Where authorities cannot prove that property was actually proceeds of crime, they may choose to pursue a prosecution for attempting to commit a money laundering offence. This may be successful even if the property was not actually proceeds of crime. Under subsection 11.1(3) of the Criminal Code, however, the prosecution must also prove that the defendant knew or believed the property was the proceeds of crime, even though it would only need to be established that they were reckless of negligent about that fact if they were prosecuted for the completed offence. This is often impossible for law enforcement to prove, as money laundering networks ensure participants remain wilfully blind to predicate offending, preventing them from knowing or believing that property came from crime.

The proposed amendments at item 76 will provide that, in proving that a person attempted to commit an offence that would ordinarily require a person to be negligent or reckless as to whether property was proceeds of crime, the prosecution will only need to prove that a person was reckless as to this fact. This will ensure that a mechanism that is already understood and used by prosecutors can be used to address this issue. This also replicates laws applying to serious drug offences at section 300.6 of the Criminal Code.

Third, Part 2 of Schedule 1 will ensure that property provided by a participant in a controlled operation will be deemed to be actually proceeds of crime under money laundering offences (a person will still need to believe this, or be reckless or negligent to this fact). This acknowledges that property provided in these controlled operations is not actually proceeds of crime, but is represented to be so by participants. This essentially ensures that item 125 of the Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019 applies to the new 'proceeds of general crime offences'.

Arm's length dealings

Commonwealth money laundering offences only apply to individuals who 'deal with' property (including money). The definition of 'deals with money or other property' under section 400.2 of the Criminal Code includes receiving, possessing, concealing, disposing, importing, exporting or engaging in banking transactions. These offences can be avoided by the controllers who typically lead money laundering networks, as these controllers rarely deal with property directly, and instead issue directions to subordinates to locate, move, collect or otherwise deal with property on their behalf.

Item 6 of Schedule 1 addresses this issue by specifying that a person will be taken to have dealt with property under relevant offences where they intentionally engage in conduct that causes another person to deal with money or other property and are reckless as to whether their conduct would cause this result. This could include texting the location of money to a cash handler knowing of a substantial risk that this would lead to the cash handler dealing with the property in a particular fashion.

The new 'proceeds of general crime offence provisions' will use the term 'engaging in conduct in relation to property' rather than 'dealing with' property, ensuring that these offences extend to arm's length dealings.

Offences for high value money laundering

Money laundering activity has increased significantly since Commonwealth money laundering offences were added to the Criminal Code in 2002. The most serious offences currently on the statute book relate to laundering property valued at $1,000,000 or more, and do not adequately reflect the seriousness of modern large-scale money laundering.

To address this issue, Schedule 1 adds new tiers of offences to target the high-value money laundering cases, creating an additional tier for all offence types for laundering property worth $10,000,000 or more. The maximum penalty for the most serious offences in this tier is life imprisonment and/or a fine of 2000 penalty units. Schedule 1 also introduces a new offence of dealing with money or other property valued at $1,000,000 or more where it is reasonable to suspect that the money or other property was 'proceeds of indictable crime', filling a gap in existing offence provisions in section 400.9 of the Criminal Code.

Mistake of fact as to value

Section 400.10 of the Criminal Code provides that, where a person has a mistaken but reasonable belief as to the value of property they deal with, they may rely on the partial defence in this section to ensure they are prosecuted on the basis of the believed value of the property, not its actual value. In *Singh v the Queen* [2016] VSCA 163, the court found that a person could rely on this partial exemption where they had a mistaken but reasonable belief as to the value of property (including money) at or before the time they dealt with this property, even if they discovered its true value while dealing with it.

Item 72 clarifies that, if a dealing or conduct in relation to property continues for a period, a person's mistaken belief as to the value of the property must be maintained for that period to rely on the partial defence.

For example, if before a person possessed a suitcase of money they had a mistaken but reasonable belief that it was valued at $100,000, they must maintain this belief for the duration of their possession of the money to rely on the exemption. If the person opens the suitcase while it is in their possession and discovers that it actually contains $1,000,000, they cannot rely on the partial exemption under section 400.10 and can be found liable for dealing with, or engaging in conduct in relation to, money valued at $1,000,000 or more.

Case study – Wilful blindness

Facts: A third party operated a service that allowed customers to transfer large amounts of Australian dollars offshore, concealing the origins of the cash and the parties to the transaction. The defendant was an associate that took possession of Australian currency from the third party in order to arrange for its placement into the financial system. The defendant engaged in this conduct for financial reward in an unknown amount. The defendant had a telephone conversation with the third party, where he asked for $1 million in cash to be delivered in a handover. The defendant was later arrested after just over $1 million dollars was placed in his car by the third party. The defendant was found in possession of four mobile phones, some of which were subscribed in false names.

Outcome: Prosecutors did not pursue serious money laundering offences under sections 400.3-400.8, as they did not have sufficient evidence that could prove beyond reasonable doubt that the defendant knew, believed, was reckless or was negligent, that the money was proceeds of crime derived from an identifiable class of offending. Instead, prosecutors pursued a less serious charge under section 400.9 of dealing with property where there are reasonable grounds to suspect it is proceeds of crime, which was punishable by a maximum sentence of 3 years imprisonment. The defendant was ultimately sentenced to 15 months imprisonment (to be released after 9 months).

Outcome under proposed reforms: The defendant could be liable under a new 'proceeds of general crime offence' as, while he was not aware that the money was proceeds of a specific class of offence, he may have believed it was proceeds of crime generally. This offence is punishable by up to 25 years imprisonment under proposed subsection 400.3(1A). The defendant may also be liable under new offences of having 'reasonable grounds to suspect' that the property was proceeds, with each count being punishable by up to four years imprisonment under proposed subsection 400.9(1AB).

Case study – Tracing high-value property and arm's length dealings

Facts: The defendant received a text message from their relative, providing the time and details of a third party's car. Based on these details, the defendant routinely met with a third party in their car in the Chinatown area, where they exchanged large sums of cash. In this instance, the defendant collected $35 million from the third party and placed it into a Super Forex account. The defendant's relative then provided instructions to the defendant in relation to what should occur with the deposited money.

Outcome: Prosecutors did not pursue serious money laundering offences under sections 400.3-400.8, as they did not have sufficient evidence that could prove beyond reasonable doubt that the money was in fact proceeds of a specific class of indictable crime. Instead, prosecutors pursued two less serious charges under section 400.9 of dealing with property where there are reasonable grounds to suspect it is proceeds of crime, with the maximum sentence for each charge being 3 years and 2 years imprisonment respectively. The defendant was sentenced to total effective sentence of 4 years and 9 months imprisonment with a non-parole period of 2 years and 7 months imprisonment. The defendant's relative was not charged.

Outcome under proposed reforms: The defendant could be liable for attempting one of the new 'proceeds of general crime offences'. Under an attempt charge, the prosecution would not need to prove that the property was actually proceeds of crime provided that the defendant believed that, or was reckless as to whether, the property was proceeds of crime generally. As the defendant in this case likely believed that the money was generally proceeds of crime, he would face a maximum sentence of life imprisonment under proposed subsection 400.2B(2). The defendant may have also been liable under new offences of having 'reasonable grounds to suspect' that the property was proceeds, with each count being punishable by up to five years imprisonment under proposed subsection 400.9(1AB).

The defendant's relative may also have been prosecuted under these offences as they intentionally sent the defendant instructions on how to deal with the money, which caused the defendant to deal with the money pursuant to these instructions and the relative was reckless as to whether this would occur.

Schedule 2 – Investigation of Commonwealth Offences

Schedule 2 amends the Crimes Act to clarify that the obligations imposed on investigating officials under Part IC do not apply to undercover operatives, including the requirement under section 23F to caution a person who is under arrest or a protected suspect before starting to question the person. This also includes those obligations listed in Division 2, where investigating officials are engaged in their capacity as undercover operatives. The powers of detention provided to (and the requirements imposed upon) investigating officials under Division 2 relate to the arrest and detention of persons. The powers and requirements under Division 2 would necessarily, only be exercised by, and applied to, officers acting overtly.

The purpose of Schedule 2 is to ensure that any evidence gained by undercover operatives is not considered to have been obtained unlawfully, by reason of the fact that an undercover officer did not comply with the Part IC procedures. Requiring compliance with those obligations would directly undermine any undercover activity undertaken by law enforcement officers. The court would retain its discretion to consider whether or not to admit any evidence obtained in this way, on fairness or other grounds.

The amendments made by Schedule 2 also bring the definition of the term 'investigating official' under the Crimes Act into line with the *Evidence Act 1995*, and ensures consistency between the two Acts.

Schedule 3 – Buy backs

The *Proceeds of Crime Act 2002* (the POC Act) currently allows individuals to apply to buy back an interest in property after it is forfeited to the Commonwealth. If a buy back order is not obtained, a person will generally need to compete with other buyers at a public auction to reacquire the property.

In recent years, suspects have sought to buy back property with funds of unknown, potentially illicit, origin and have made buy back applications after forfeiture, unnecessarily delaying proceedings and frustrating law enforcement efforts. It currently remains open to a court to issue a buy back order in these circumstances, and the Australian Federal Police does not have sufficient information-gathering powers to determine the likely origins of funds used to buy back the property.

Schedule 3 ensures that only those with 'clean hands' can apply to buy back their interest in property, providing that a court can only make a buy back order when the applicant was not involved in, and did not have knowledge of, the offending that resulted in the restraint or forfeiture of the property. In addition, the court must be satisfied that the applicant can pay for the property, service any loan used to acquire the property and meet their eligible living expenses and debts using funds not derived from unlawful activity.

Schedule 3 also requires buy back applications to be made before forfeiture unless an applicant is given leave by the court. This will ensure that buy back orders are made and heard in a timely fashion and prevent individuals from unnecessarily delaying proceeds cases, while still ensuring courts can hear buy back applications made after forfeiture in appropriate cases.

Schedule 3 will also ensure that an examination order or production order can be made to obtain information and documents relevant to a buy back application, allowing evidence relevant to ascertaining whether an application is genuine or seeking to buy back property with illicit funds to be collected and laid before the court. Enforcement of examination notices is also strengthened by enabling enhanced restraint and confiscation action to be taken where a person commits an offence of failing to abide by examination notice requirements under existing section 195, 196 or 197A of the POC Act.

Case example – Suspect delaying proceedings and buying back property with unexplained wealth

Facts: The suspect attempted to import and possess a marketable quantity of heroin and had his family home confiscated under court order. The suspect and his wife then applied to buy back the property at the end of extensive forfeiture proceedings, further delaying resolution of the matter. As the applicants had been in receipt of Government benefits for approximately 20 years, the source of the funds to pay for the buy back and their ability to service any mortgage became the central issue in the proceedings. The suspect also produced evidence that they had been approved for an interest only loan, with an unusually high rate of payable interest.

Outcome: The applications were ultimately discontinued, but the proceedings were unnecessarily delayed by the last-minute applications at significant expense to the Commonwealth. If these applications had proceeded, it would have been open to the court to grant a buy back order, despite the fact that the applicants could not satisfactorily explain the source of the funds used to repay the loan.

Outcome under proposed reforms: The suspect would have been unable to apply for a buyback order. While the suspect's wife would have been permitted to apply following confiscation, she would be required to seek the leave of the court to do so and could only obtain an order if she could prove that she could service the loan with legitimately obtained funds and did not know of the suspect's offending. The AFP could also apply for an examination order and/or production order to ascertain the source of any funds used for the buy back and the wife's knowledge of the suspect's offending.

Schedule 4 – Benefit

Schedule 4 clarifies that the definition of the term 'benefit' under the POC Act includes the avoidance, deferral or reduction of a debt, loss or liability, by making this explicit in the POC Act. This ensures that the value of a benefit obtained through tax avoidance, or by avoiding the payment of duties or levies, can be confiscated through pecuniary penalty or literary proceeds orders (see Parts 2-4 and 2-5 of the POC Act).

Schedule 4 will reinforce the broad application of the POC Act in ensuring that criminals are not able to benefit in any way from their offending. For example, this would include where a person has incorrectly declared the import of goods (such as tobacco or alcohol) in order to pay lesser excise or import duty, which would allow them to gain a commercial advantage. Similarly, it would cover where a person provides false information to the Australian Taxation Office in order to reduce their tax liability.

The United Kingdom has made similar amendments to their asset confiscation laws (subsection 76(5) of the *Proceeds of Crime Act 2002* (UK)).

Schedule 5 – Jurisdiction of Courts

It is vital that the POC Act allows for confiscation of overseas property, as criminals frequently amass criminal wealth across multiple countries, or seek to move their assets offshore to avoid confiscation action. Existing section 53 of the POC Act, has produced unnecessary confusion as to whether the Act can be used to take action against property located overseas. Uncertainties can also arise where property is located in a foreign country whose laws regarding ownership differ from that of domestic jurisdictions.

Schedule 5 amends the POC Act to reinforce its existing operation, clarifying that all courts with proceeds jurisdiction are able to make orders under the Act in respect of property located overseas. These amendments are intended to better reflect, and not interfere with, the existing procedures by which restraint and confiscation action are taken against property located overseas under the POC Act, the *Mutual Assistance in Criminal Matters Act 1987* and the law of the foreign country in which the property is located.

Schedule 6 – Information

The coercive information-gathering powers in the POC Act directly support the central purposes of this Act by ensuring that law enforcement has the necessary tools to uncover wealth derived from serious and organised crime. Schedule 6 will enhance the enforcement of these powers and increase the utility of the information obtained using them.

Enforcing information-gathering powers

Law enforcement's efforts to restrain and confiscate criminal assets are currently being frustrated by individuals who refuse to comply with information-gathering powers under the POC Act. While non-compliance currently attracts a criminal penalty, these penalties are relatively low. In addition, the POC Act does not explicitly state that information gathered under these powers can be used to investigate and prosecute non-compliance offences. Information gained in the course of exercising these powers is often vital in proving non-compliance. For example, a record of a person verbally refusing to answer a question during a POC Act examination may be the only evidence available to prove that this person committed an offence of refusing or failing to answer a question under section 197A. There has been no recorded instance of a conviction being secured under the non-compliance offences in the POC Act since they came into force.

Schedule 6 ensures that existing criminal offences function as an effective deterrent by raising the maximum penalty for non-compliance offences under existing sections 195, 196, 197A, 211 and 218 of the POC Act. Schedule 6 also ensures that these offences can be effectively enforced by clarifying that information or documents gained under POC Act powers: can be disclosed to authorities that are responsible for investigating and prosecuting non-compliance offences, can be used to investigate non-compliance offences and may be admissible in criminal proceedings relating to non-compliance offences.

Even where criminal penalties can be enforced, they may not sufficiently incentivise compliance where the subject of that power is willing to incur a criminal penalty through non-compliance to maximise their chances of retaining their illicitly derived property. To address this behaviour, this Schedule provides that non-compliance offences under existing sections 195, 196 or 197A that relate to an examination notice will be 'serious offences' for the purposes of the POC Act in certain circumstances, allowing authorities to take enhanced restraint and confiscation action where non-compliance occurs.

Enhancing the utility of information gained

Existing limitations and legislative ambiguity has significantly reduced the usefulness of information and documents gained through information-gathering powers under the POC Act, and has been a barrier to agencies working effectively together in cross- agency matters.

The Official Trustee's information-gathering powers, for example, often uncover evidence that may be of relevance to law enforcement, including evidence of ownership of illicitly obtained property. The Official Trustee, however, is currently restricted in their ability to disclose this information to law enforcement, as derivative use protections prevent this information being used in criminal investigations and there are no provisions explicitly governing permitted disclosure. In addition, law enforcement often comes across evidence of breaches of professional standards in the course of exercising their information-gathering powers (for example, by lawyers), but are not explicitly permitted to pass this information on to professional standards bodies.

Schedule 6 addresses this by clarifying and expanding relevant provisions governing disclosure and use. In particular, Schedule 6 allows the Official Trustee to disclose information and documents gained through its powers to the same authorities, for the same purposes, as the responsible authority so as to maximise cooperation between investigative and prosecutorial agencies. Schedule 6 also allows information to be disclosed to professional standards boards, allowing these boards to take action where a breach of professional standards is discovered. The amendments also clarify and expand existing laws to ensure that material can be disclosed to particular authorities for purposes relating to mutual assistance, extradition and

enabling or assisting the International Criminal Court and the International War Crimes Tribunal in exercising their functions.

Schedule 6 also explicitly enshrines current permissible use and disclosure of information and documents gained through coercive powers into the POC Act, by clarifying that section 266A is not intended to limit the use of material for the purpose for which it was obtained, for incidental or connected purposes, or for various other purposes once the material is already disclosed.

Schedule 7 – Official Trustee

The Official Trustee is responsible for preserving the value of property seized under POC Act and administering the Confiscated Assets Account into which proceeds from the sale of confiscated assets are credited. The Official Trustee has specific powers to assist it in discharging these obligations, including information-gathering powers, the power to destroy or dispose of seized property and to recover costs from the sale proceeds of confiscated property or the Confiscated Assets Account at the conclusion of a matter.

Schedule 7 enhances these powers by:

- ensuring that the Official Trustee can use its powers to gather information and deal with property in relation to property that is forfeited or subject to a confiscation direction, lifting existing prohibitions that prevent the Official Trustee disposing of property by consent or under court order during appeal periods
- allowing a person to give evidence or provide information records to the Official Trustee remotely, rather than in person
- allowing the Official Trustee to meet its cost-recovery obligations by recovering its remuneration, expenses and costs directly from the Confiscated Assets Account, and
- transferring responsibility for purely administrative tasks, such as the transfer of property to an applicant, from the Minister for Home Affairs to the Official Trustee.

The Bill also improves the administration of the Confiscated Assets Account and expands the categories of money to be credited into the Account by providing:

- the Minister with alternative avenues to fund State and Territory law enforcement, crime prevention and drug treatment and diversion measures from the Account, and
- that payments under proposed Commonwealth deferred prosecution agreements or foreign deferred prosecution agreements that represent proceeds or instruments of alleged unlawful activity must be credited to the Account.

Case example – Costly management of confiscated aircraft during appeal periods

Facts: Property valued at approximately $4.9 million was forfeited to the Commonwealth in 2006. This property included large numbers of aircraft, the leases over hangers where the aircraft was stored and proceeds from the sale of real estate. The Official Trustee was tasked with preserving the value of this property during the appeal period, which stretched over 12 years to 2018, when confiscation of the majority of the property was validated by the High Court, with other property being required to be returned to its owners.

Outcome: Under the current law, the Official Trustee is prevented from selling depreciating assets, or assets that are costly to maintain, that are confiscated to the Commonwealth during appeal periods, despite being empowered to do so in relation to restrained property. As a result the Official Trustee was required to manage the aircraft at great cost over a period of 12 years, with costs relating to maintenance and storage alone exceeding $1,450,000. This led to lower amounts being credited to the Confiscated Assets Account.

Outcome under proposed reforms: The proposed reforms would have permitted the Official Trustee to sell the aircraft during the appeal period, with the proceeds of this sale being held to pay the party who

was ultimately successful on appeal. This could be done by consent or under a court order, saving the Commonwealth more than $1,450,000 in management costs.