

**The Parliament of the Commonwealth of Australia**

**Senate Legal and Constitutional  
Legislation Committee**

**Report on Government Amendments to the**

**Proceeds of Crime Bill 2002**

**and the**

**Proceeds of Crime (Consequential Amendments and  
Transitional Provisions) Bill 2002**

**June 2002**

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# **Chapter 1**

## **Referral of the Inquiry**

1.1 On 14 February 2002, the Senate referred the provisions of the Proceeds of Crime Bill 2002 (the bill) and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (the cognate bill) to the Committee. The Committee presented its report on these bills to the Senate on 26 April 2002.

1.2 On 26 June 2002, the Senate referred to the Committee the Government's proposed amendments to these bills, for inquiry and report by 1 July 2002.

1.3 The Government amendments seek to clarify the operation of the bills and take into account the comments and recommendations made by this Committee in its earlier report.

### **Conduct of the inquiry**

1.4 The Committee notified relevant stakeholders of the referral of the inquiry on 26 June 2002. The Committee received 1 submission which is listed at Appendix 1.

1.5 On 27 June 2002, the Committee held a public hearing in Canberra. A list of witnesses who appeared at this hearing is at Appendix 2. Given the extremely short time frame in which the Committee had to consider these amendments, the Committee would like to again place its gratitude on the record to those agencies and witnesses who facilitated the inquiry.

### **Note on references**

1.6 References in this report to submissions are to individual submissions as received by the Committee.

1.7 References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.



# Chapter 2

## The Amendments

2.1 As mentioned in Chapter 1, the Government amendments seek to clarify the operation of the bills and take into account the earlier report of this Committee. The Committee found that there was unanimous support for the proposed amendments from relevant organisations.

2.2 The Committee notes that the National Crime Authority did not appear as a witness in this inquiry but provided the Committee with a submission which stated that ‘the National Crime Authority has been fully consulted in relation to the government amendments and fully supports them’.<sup>1</sup>

2.3 The Committee draws attention to a number of key amendments and these are outlined below.

### Key Amendments

#### *Use of telephone intercept material in civil forfeiture cases*

2.4 At the time of the Committee’s earlier report, there was a divergence of views in relation to the use of telephone intercept material in civil forfeiture cases between law enforcement agencies and the Commonwealth Director of Public Prosecutions (DPP) on the one hand, and the Attorney-General’s Department (the Department) on the other.

2.5 The cognate bill as initially introduced has the effect of restricting the use of telephone intercept material gained by law enforcement agencies to conviction-based proceedings. It would not be possible to use such material in civil forfeiture cases. In its earlier report, the Committee noted that the law enforcement agencies and the DPP were all opposed to this restriction and a number suggested that its impact was so serious as to undermine the effectiveness of the legislation.<sup>2</sup> This was reaffirmed by the Commissioner of the Australian Federal Police (AFP) during consideration of Budget Estimates 2002-2003:

In terms of law enforcement policy, I can assure the Committee that I, as the head of the Australian Federal Police, Mr Damian Bugg, as the head of the Director of Public Prosecutions, and Mr Gary Crooke, as the Chairman of the National Crime Authority, are all of the one view – that is, unless the telephone intercept material can be used in the proceeds of crime legislation, it is almost pointless proceeding with the new legislation.<sup>3</sup>

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1 *Submission 1*, National Crime Authority, p. 1

2 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, pp. 38-39

3 Senate Legal and Constitutional Legislation Committee, *Hansard*, Friday, 31 May 2002, p. 475

2.6 In giving evidence at the earlier inquiry, the Department stated that the Attorney-General was ‘taking advice’ on the matter and the Committee was advised by the Attorney-General in a letter dated 5 April 2002 that “the matters raised by the law enforcement agencies in their submissions will be considered in the context of the ongoing review of the *Telecommunications (Interception) Act 1979*”. Given the status of the legislation, the Committee was not satisfied that adequate attention had been given to this issue and requested that the terms of reference and timeframe for finalisation of the “ongoing review” of the Telecommunications (Interception) Act be provided.<sup>4</sup>

2.7 On 23 May 2002, in response to the Committee’s request, the Committee was advised by the Attorney-General that:

The operation of the TI Act is carefully monitored on an ongoing basis. This informal ongoing review is carried out by the Information and Security Law Division of the Attorney-General’s Department, in conjunction with extensive consultation with stakeholders. As a result of the review process, the TI Act has been amended three times in the past five years (1997, 1999 and 2000) to take into account emerging issues of law and policy.<sup>5</sup>

2.8 This issue has now been resolved and the Government is proposing to enable intercept material to be used in restraining order proceedings for **both** conviction and civil-based proceedings.<sup>6</sup> Resolution of this issue included an assurance from the AFP that the new provisions do not create any new classes of offences, nor can a telecommunications interception warrant be used for the sole purpose of pursuing a civil forfeiture investigation.<sup>7</sup>

### ***Definition of ‘financial institution’***

2.9 The Government amendments propose to amend the definition of ‘financial institution’ to include Totalisator Agency Boards (TABs) and casinos. At the time of its report in April, the Committee noted that the Government was proposing to have the definition extended to TABs and casinos.<sup>8</sup> The Government advised that such an extension would be the subject of a Regulation Impact Statement (RIS).

2.10 The Attorney-General’s Department wrote to relevant stakeholders and advertised the RIS on Saturday, 13 April 2002. The RIS is included in the Supplementary Explanatory Memorandum for both bills and recommends that ‘the definition in the POC Bill and the POC (Consequential) Bill be amended to include TABs and casinos’. The RIS concluded that:

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4 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, p. 39

5 See correspondence from the Attorney-General, 23 May 2002

6 Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Supplementary Explanatory Memorandum*, Item 19, p. 17

7 *Transcript of evidence*, Australian Federal Police, pp. 8-9

8 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, footnote 47 (Chapter 2)

On balance, amending the definition of financial institution to include casinos and TABs would considerably enhance the ability of law enforcement agencies to identify those engaged in money laundering and other criminal activity, and would not have a significant impact on the business of running a TAB or casino.<sup>9</sup>

2.11 The Opposition's Additional Comments to the Committee's Report also questioned why other gambling places such as registered clubs were not considered for inclusion in the definition of 'financial institution'.<sup>10</sup> The RIS noted that TABCORP and the Australian Casino Association took the view that the amendments should not be limited in scope to TABs and casinos, but should include other gambling operators or organisations.<sup>11</sup> The RIS states that "the position of other operators is being considered in the context of a review of the FTR Act and will require separate consultation".<sup>12</sup>

2.12 In this regard, the Commissioner of the AFP stated that whilst registered clubs were places for gambling, the AFP was not aware of sufficient intelligence to suggest that licenced clubs should be included within the definition but that this would be a matter to consult with licenced clubs:

...we would need to see clear evidence that [money laundering] was occurring so that we could make a case.

It is perhaps something that we need to monitor and to consult with the licensed clubs about.<sup>13</sup>

2.13 Similarly, the AFP indicated that as a 'financial institution' TABs and casinos differ from registered clubs because they maintain and operate accounts, registered clubs do not.<sup>14</sup>

### ***Money laundering 'possession' offence***

2.14 Clauses 400.3 to 400.8 of the cognate bill create various offences of laundering money or other property that is the proceeds of crime in various situations which fall within certain Commonwealth legislative powers – the export or import of goods, by means of posts and telegraphs or in the course of banking. That is, the proceeds do not have to derive from an offence which comes within those Commonwealth legislative powers.

2.15 The Explanatory Memorandum states that clause 400.9, dealing with the possession of money or property reasonably suspected of being proceeds of crime, mirrors the more serious money laundering offences in clauses 400.3 – 400.8. In fact, this is not the case as evidence to the previous inquiry pointed out.<sup>15</sup> Clause 400.9 currently provides that the

9 Proceeds of Crime Bill 2002, *Supplementary Explanatory Memorandum*, p. 8

10 See, Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, p. 45

11 Proceeds of Crime Bill 2002, *Supplementary Explanatory Memorandum*, p. 8

12 Proceeds of Crime Bill 2002, *Supplementary Explanatory Memorandum*, p. 8

13 *Transcript of evidence*, Australian Federal Police, p. 10

14 *Transcript of evidence*, Australian Federal Police, p. 10

15 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, p. 40, para 3.68

possession of the proceeds of a State crime (ie. a crime against a State law) is an offence if the crime was committed in the export or import of goods, by means of posts and telegraphs or in the course of banking.

2.16 The Government amendments will change clause 400.9 so that the possession of the proceeds of a State crime (but not necessarily the State crime itself) is an offence if it is in the export or import of goods, by means of posts and telegraphs or in the course of banking.<sup>16</sup>

### ***Timeframe for application to revoke restraining order***

2.17 The Opposition's Additional Comments to the Committee's Report considered that 28 days was far too limited a period of time for an application for revocation of a restraining order to be made.<sup>17</sup> Opposition Members on the Committee recommended that the provision be amended to allow a court to consider an extension under certain circumstances.

2.18 This recommendation has been adopted in the Government amendments but in order to ensure that proceedings continue in a timely manner, the length of the extension which the court can grant has been limited to 3 months.<sup>18</sup>

### ***Procedural family law amendments***

2.19 The Government is proposing a number of amendments to the *Family Law Act 1975* in the cognate bill. These amendments are new provisions and address a number of procedural matters relating to property settlement or spousal maintenance proceedings where the property of the parties to the marriage or either one of them is covered by either a proceeds of crime order or an application for forfeiture order.<sup>19</sup>

2.20 In effect, this amendment gives primacy to the proceeds of crime legislation in the context of concurrent family law proceedings.<sup>20</sup> The DPP will also be able to intervene in such proceedings and will be treated as a party with the benefits and liabilities that that entails, including costs orders.<sup>21</sup>

2.21 The DPP noted that these amendments were arrived at in consultation with the Family Court and the Federal Magistrates Service.<sup>22</sup>

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16 Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Supplementary Explanatory Memorandum*, p. 11

17 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, p. 47

18 Proceeds of Crime Bill 2002, *Supplementary Explanatory Memorandum*, p. 12

19 Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002, *Supplementary Explanatory Memorandum*, pp. 12-16

20 *Transcript of evidence*, Commonwealth Director of Public Prosecutions, p. 2

21 *Transcript of evidence*, Commonwealth Director of Public Prosecutions, p. 2

22 *Transcript of evidence*, Commonwealth Director of Public Prosecutions, p. 2

## ***Other issues not covered by the amendments***

### **Legal assistance**

2.22 Under the provisions of the bill, people facing restraint or forfeiture of their assets are able to seek legal assistance by applying for legal aid. Where the restrained property is subsequently found not to have been illegally acquired and is returned to the owner, the Attorney-General's Department earlier advised:

...those assets would be taken into consideration in determining the amount of any final contribution that person may be required to make towards the cost of the legal assistance provided. Depending on the outcome of the means test assessment, a contribution covering the full cost of the grant may be imposed.<sup>23</sup>

2.23 In its earlier report, the Committee considered it unreasonable that a person found to have acquired property lawfully and not through criminal activity should be required to bear the costs of proving their innocence.<sup>24</sup>

2.24 The Department indicated that the apparent unreasonableness is, and has been, overcome by the power of the court to require the Commonwealth, through the DPP, to give an undertaking for costs in connection with the restraining order and the power of the court to order the Commonwealth to pay costs. Costs are not limited to party/party costs. The Committee understands the situation to be that the Commonwealth can be ordered to reimburse a person to whom restrained property is returned for any sums which he or she is required to pay to a legal aid commission.

### **Formal review of the legislation**

2.25 The Department advised the Committee that the bill will provide a formal review of the operation of the legislation after 3 years.<sup>25</sup> The Committee understands that the review will include such matters as the operation of the removal of derivative use immunity, operation of the DPP guidelines and the guidelines in relation to legal assistance.

### **Possible future issues**

2.26 In evidence, the Australian Federal Police Association (AFPA) tabled a document which stated that the AFPA 'strongly supports all of the proposed amendments',<sup>26</sup> particularly the amendment to allow the use of telephone intercept material in civil forfeiture cases. However, the AFPA identified a number of issues it had raised during the earlier inquiry but which had not been addressed in the Government's amendments. These issues include:

- Unexplained wealth declarations;

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23 *Submission 14B*, Commonwealth Attorney-General's Department, p. 1

24 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002*, April 2002, p. 35

25 *Transcript of evidence*, Attorney-General's Department, p. 14

26 *Tabled Document*, Australian Federal Police Association, p. 1

- The maximum penalty for offences under s.400.9 of the cognate bill; and
- The use of the Confiscated Assets Account.

2.27 The Committee notes that these issues are not within the scope of this inquiry but suggests that these may be issues to consider within the formal review of the legislation.

## **Conclusion**

2.28 The Committee notes the lengthy process involved in this legislation but congratulates all participants for their contribution to the refinement of the bills as introduced. The Committee considers that the Government amendments constitute a marked improvement on the original bills and is satisfied that the Committee's earlier concerns have been addressed.

2.29 The Committee also notes the significant consultation process that has been undertaken in relation to many aspects of the bills and has involved relevant industry bodies, stakeholders, law enforcement agencies, the Family Court and Federal Magistrates Service, the Department and the DPP.

### **Recommendation**

**The Committee recommends that the proposed Government amendments to the Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 be agreed to.**

**Senator Marise Payne**  
**Chair**

# **APPENDIX 1**

## **ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS**

1. National Crime Authority



## **APPENDIX 2**

### **WITNESSES WHO APPEARED BEFORE THE COMMITTEE**

#### **Public Hearing, Thursday 27 June 2002 (Canberra)**

Federal Agent Andrew Colvin, Team Leader, Financial Investigations Team, Australian Federal Police

Ms Annie Davis, Director, Legislation Program, Australian Federal Police

Mr Grahame Delaney, Principal Adviser, Commercial Prosecutions and Policy, Commonwealth Director of Public Prosecutions

Mr Geoff Gray, Senior Assistant Director, Commonwealth Director of Public Prosecutions

Ms Tamsyn Harvey, Senior Legal Officer, Criminal Justice Division, Attorney-General's Department

Mr Jonathan Hunt-Sharman, National President, Australian Federal Police Association

Mrs Margaret Jackson, Special Adviser, Criminal Justice Division, Attorney-General's Department

Commissioner Mick Keelty, Commissioner, Australian Federal Police

Mr Ian Knight, Principal Legal Adviser, Legislation Program, Australian Federal Police

Mr Geoffrey McDonald, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

Ms Catherine Smith, Acting Assistant Secretary, Security Law and Justice Branch, Attorney-General's Department

