

Chapter 1

Introduction

1.1 On 16 November 2017 the Senate referred the provisions of the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee).¹

1.2 In recommending the referral of the bill for inquiry, the Selection of Bills committee stated that:

[g]iven the complexity and technical nature of the amendments contained in the Bill, and its capacity to impact on individuals' rights and liberties, it would be appropriate to refer the Bill to inquiry for careful consideration.²

Purpose of the Bill

1.3 The bill would allow authorities to restrain and confiscate property where illicit funds are used to make payments on that property. The Minister for Justice, the Hon. Michael Keenan MP, explained that the bill addresses a gap in existing law:

These amendments are necessary as recent developments in case law have indicated that a person's interest in property is fixed at the moment of initial acquisition, and that any subsequent payments on the property are irrelevant to determining if the property is lawfully acquired or derived from crime.³

1.4 The Explanatory Memorandum (EM) refers to two recent cases which held that the source of funds used to repay a mortgage or to satisfy the costs of restoration or repairs to an asset could not be considered when determining whether the asset was 'lawfully acquired' or 'proceeds' of crime and therefore was not subject to forfeiture.⁴

1.5 The minister argued that '[t]his is a loophole that could allow organised crime groups to use a web of financial arrangements and asset protection structures to avoid forfeiture of property.' He further argued that '[t]he existence of this loophole is contrary to the central purpose of the act, which is to undermine the profitability of criminal enterprise.'⁵

1 *Journals of the Senate (Proof)*, No. 71, 16 November 2017, p. 2249.

2 Selection of Bills Committee, *Report No. 13 of 2017*, 16 November 2017, Appendix 6.

3 The Hon. Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 18 October 2017, p. 11031.

4 Explanatory Memorandum, Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (Explanatory Memorandum), p. 2; See also *Commissioner of the Australian Federal Police v Huang* [2016] WASC 5; and *Commissioner of the Australian Federal Police v Hart & Ors* [2016] QCA 215.

5 The Hon. Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 18 October 2017, p. 11031.

Key Provisions

1.6 The bill would amend the *Proceeds of Crime Act 2002* (the Act) in the following ways:

- align the Commonwealth unexplained wealth regime with other types of orders in the Act to ensure that it covers situations in which wealth is 'derived or realised, directly or indirectly' from certain offences;
- clarify that property becomes '*proceeds*' or an '*instrument*' of an offence under the Act when '*proceeds*' or an '*instrument*' are used to improve the property or discharge an encumbrance security or liability incurred in relation to the property, and
- clarify that property or wealth will only be '*lawfully acquired*' in situations where the property or wealth is not '*proceeds*' or an '*instrument*' of an offence.⁶

1.7 The EM states that the bill would have no financial impact.

Unexplained wealth orders

1.8 Currently, subsection 179E(1) of the Act requires a court to make an order requiring a person to pay an amount (the person's unexplained wealth amount), to the Commonwealth, if the court is not satisfied that the whole or any part of the person's wealth was not derived from one or more relevant offences.

1.9 The bill proposes to extend the circumstances in which an 'unexplained wealth order' is made by expanding the reference to wealth derived from a relevant offence to cover wealth 'derived or realised, directly or indirectly' from a relevant offence.⁷ The EM notes that '[t]he Act already contains safeguards and protections that ensure the measures are no more onerous than necessary to achieve their objectives' and lists a number of these safeguards and procedures.⁸

The meaning of 'proceeds' and an 'instrument'

1.10 The bill would expand the circumstances in which property becomes 'proceeds' or an 'instrument' of an offence, including where proceeds or an instrument of an offence are used to:

- service a mortgage or other loan in relation to the property;⁹
- renovate the property or 'adapt structures to facilitate further criminal offending (e.g. to store drugs or launder money)';¹⁰

6 Explanatory Memorandum, p. 2.

7 Proposed paragraphs 179E(1)(b) and 2(b) and subsection 179E(3) of the bill.

8 Explanatory Memorandum, p. 7.

9 Proposed paragraphs 330(1)(c) and (2)(c) of the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (the bill); Explanatory Memorandum, p. 11.

10 Proposed paragraphs 330(1)(d) and (2)(d) of the bill; Explanatory Memorandum, p. 11.

- improve the property (where 'improve' is interpreted broadly, including where the improvement does not increase the property's value).¹¹

1.11 The amended meanings of 'proceeds' and an 'instrument' also allow illicit funds to be traced through multiple transactions.¹² The EM explains this by example:

For example, where a car is bought with the 'proceeds' of a fraud offence against the Commonwealth, the car will be derived from the commission of an offence and will qualify as 'proceeds' under subsection 329(1). If the car is later sold, the money gained from the sale of the car will continue to be 'proceeds' under paragraph 330(1)(a) or (b). If the money is subsequently put towards a mortgage repayment on real property, this real property will then constitute 'proceeds' of the original Commonwealth offence under paragraph 330(1)(c).¹³

The meaning of 'lawfully acquired'

1.12 The bill would repeal and replace one of the criteria that must be met in order for property or wealth to be 'lawfully acquired'. The proposed criterion clarifies that property or wealth is lawfully acquired only if '...the property or wealth is not proceeds or an instrument of an offence.'¹⁴

1.13 This would allow a court, when considering whether property was lawfully acquired, to draw on the amended meanings of 'proceeds' and an 'instrument'.¹⁵ As the EM states:

These amendments ensure that court[s] can consider the origins of a person's property or wealth, and that the proceeds and instrument of crime will not be seen to be 'lawfully acquired' merely because the act of acquiring the property or the circumstances in which the property was acquired was in itself lawful.¹⁶

1.14 The EM notes that existing subsection 330(4) provides protection for '[i]nnocent third parties who unwittingly purchase for sufficient consideration property that is the proceeds or instrument of an offence'.¹⁷

Retrospective application of the bill

1.15 Some aspects of the bill would apply retrospectively.¹⁸ The EM states that this is necessary to ensure that orders made under the Act:

11 Proposed paragraphs 330(1)(e) and (2)(e) of the bill; Explanatory Memorandum, p. 11.

12 Proposed subsections 330(1) and 330(2) of the bill.

13 Explanatory Memorandum, pp. 11–12.

14 Proposed paragraph 336A(c) of the bill.

15 Explanatory Memorandum, p. 12.

16 Explanatory Memorandum, p. 13.

17 Explanatory Memorandum, p. 13.

18 Item 14 of Schedule 1 of the bill; Explanatory Memorandum, pp. 14–15.

...are not frustrated by requiring law enforcement agencies to obtain evidence of, and prove, the precise point in time at which certain property or wealth was derived, acquired, or became tainted...

Such a requirement would be unnecessarily onerous and would be contrary to the objects of the Act, as it will be practically impossible to satisfy in complex cases of fraud or money laundering.¹⁹

1.16 The EM further states that if the amendments do not apply retrospectively then a court may rely on existing case law, which '...could lead to the anomalous outcome that different definitions of "proceeds", "instruments" and "lawfully acquired" could be applied to different pieces of property within the same proceeding.'²⁰

1.17 The EM highlights precedent for retrospective amendments in this policy area and also emphasises that '[t]hese amendments do not have the effect of criminalising conduct which was otherwise lawful prior to the amendments.'²¹

Consideration by other committees

1.18 The bill was considered by the Scrutiny of Bills Committee (scrutiny committee) and the Parliamentary Joint Committee on Human Rights (PJCHR).²²

Scrutiny of Bills Committee

1.19 The scrutiny committee drew particular attention to the retrospective application of the bill. It noted that the EM provides a justification for retrospectivity, including that retrospectivity is necessary to achieve the objective of the bill. However, the scrutiny committee also noted its 'long standing scrutiny concern about provisions that have the effect of applying retrospectively'.²³ Moreover, the scrutiny committee noted that it has previously raised concerns that the Act '...appears to trespass on the rights of persons who have neither been charged with, nor convicted of, any wrong-doing.'²⁴

1.20 The committee concluded that it '...leaves to the Senate as a whole the appropriateness of retrospectively applying amendments which widen the scope of the property that can be restrained, frozen or forfeited.'²⁵

19 Explanatory Memorandum, pp. 14–15.

20 Explanatory Memorandum, p. 15.

21 Explanatory Memorandum, p. 15.

22 Scrutiny of Bills Committee (scrutiny committee), *Scrutiny Digest 13 of 2017*, 15 November 2017, pp. 46–48; Parliamentary Joint Committee on Human Rights (PJCHR), *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017.

23 Scrutiny committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 47.

24 Scrutiny committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 47.

25 Scrutiny committee, *Scrutiny Digest 13 of 2017*, 15 November 2017, p. 48.

Parliamentary Joint Committee on Human Rights

Concerns raised regarding the Act

1.21 The PJCHR noted that it had previously raised concerns relating to the Act and whether it was compatible with articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) concerning the right to a fair trial and the right to a fair hearing.²⁶ The PJCHR explained the concerns previously raised:

For example, a forfeiture order may be made against property where (relevantly) a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences. The fact a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make such a forfeiture order. Further, a finding need not be based on a finding that a particular person committed any offence. A finding that a court is satisfied that the property is 'proceeds' of an indictable offence or an 'instrument' of one or more serious offences appears to entail 'blameworthiness' or 'culpability' which the committee has previously considered would suggest that the provisions may be criminal in character, and therefore may engage criminal process rights which must be complied with in order for the measures to be compatible with fair trial and fair hearing rights.²⁷

1.22 The PJCHR noted that it had previously recommended that the Minister for Justice undertake a detailed assessment of the Act to determine its compatibility with the right to a fair trial and fair hearing. However, the minister stated that he did not consider it necessary to conduct an assessment of the Act as 'legislation enacted prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment, and the government continually reviews the [Act] as it is amended.'²⁸

1.23 The PJCHR recommended that the minister undertake a detailed assessment of the Act and its compatibility with articles 14 and 15 of the ICCPR.²⁹

Right to a fair trial and hearing

1.24 The PJCHR explained that broadening the circumstances in which a person's assets can be forfeited may raise similar human rights concerns:

In particular, applying a broader basis on which a person's assets may be frozen, restrained or forfeited to include property subject to a mortgage in which mortgage payments have been serviced by illicit funds, without a finding of criminal guilt beyond reasonable doubt, may limit the right to be

26 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 35.

27 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, pp. 35–36.

28 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 36.

29 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 38.

presumed innocent and the prohibition against double punishment should the [Act] provision be criminal in nature.³⁰

1.25 The PJCHR noted that aspects of the bill operate retrospectively and while a penalty or sanction is classified domestically as civil, it may be considered criminal for the purposes of international human rights law.³¹ The PJCHR goes on to explain that if the forfeiture orders are assessed as a criminal charge, this does not prevent such measures being taken, but rather, 'requires that the measures are demonstrated to be consistent with the criminal process rights under articles 14 and 15 of the ICCPR.'³²

1.26 The PJCHR raised similar concerns in relation to the amendments to the unexplained wealth regime—that it may not be compatible with the right to a fair trial and fair hearing as well as the right to be presumed innocent until proven guilty.³³

1.27 The PJCHR sought further information from the minister in relation to whether the freezing, restraint or forfeiture powers, as well as the proposed amendments to the unexplained wealth regime in the bill, may be characterised as 'criminal' for the purposes of international human rights law, and whether these provisions are compatible with articles 14 and 15 of the ICCPR, including where applicable, any justification for the limitations of these rights.³⁴

Right to privacy

1.28 The PJCHR noted that the proposed amendments 'may engage and limit the right not to be subject to arbitrary or unlawful interference with a person's home, as the amendments affect orders that can be used to restrain and forfeit real property.'³⁵

1.29 While the PJCHR acknowledged that the bill appeared to have a legitimate objective, it questioned the proportionality of the measure.³⁶ The PJCHR noted that there did not appear to be a safeguard in place to allow the court to revoke a forfeiture order where a person has been acquitted of an offence or where their conviction has been subsequently quashed.³⁷ The PJCHR sought further advice from the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure.³⁸

30 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 36.

31 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, pp. 36–37.

32 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 36.

33 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, pp. 40–41.

34 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 38 and pp. 41–42.

35 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 38.

36 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 39.

37 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 39.

38 PJCHR, *Human Rights Scrutiny Report 12 of 2017*, 28 November 2017, p. 40.

Conduct of the inquiry

1.30 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 21 December 2017.³⁹ The committee also wrote directly to some organisations inviting them to make submissions. The committee received six submissions, which are listed at appendix 1 of this report. The committee did not hold any public hearings for this inquiry.

Structure of this report

1.31 This report consists of two chapters:

- This chapter provides a brief overview of the bill as well as the administrative details of the inquiry.
- Chapter two discusses the key issues raised in submissions to the inquiry, and provides the committee's view and recommendations.

Acknowledgements

1.32 The committee thanks all organisations and individuals that made submissions to this inquiry.

39 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs.

