

Chapter 1

Introduction and background

1.1 On 28 June 2018, the Senate referred the provisions of the Unexplained Wealth Legislation Amendment Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 6 August 2018.¹

1.2 The Senate Committee for the Selection of Bills noted that the bill would affect state and territory governments, law enforcement agencies across Australia, as well as people's rights and liberties.² In referring the bill for inquiry, the Selection of Bills Committee recommended that the relevant groups affected by the bill be provided an opportunity to raise concerns with the proposed scheme.³

Background

1.3 The Explanatory Memorandum (EM) notes that Commonwealth unexplained wealth laws were introduced in 2010 through amendments to the *Proceeds of Crime Act 2002* (POC Act). The POC Act 'provides a comprehensive scheme to trace, investigate, restrain and confiscate proceeds generated from Commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law.'⁴

1.4 The POC Act provides for three types of orders which can be sought in relation to unexplained wealth:

- unexplained wealth restraining orders, which are interim orders that restrict a person's ability to dispose of property (section 20A);
- preliminary unexplained wealth orders, which require a person to attend court to establish whether or not their wealth was derived from lawful sources (section 179B); and
- unexplained wealth orders, which are final orders that make payable to the Commonwealth an amount which, in the court's opinion, constitutes the difference between their total wealth and their wealth that has been lawfully acquired (section 179E).⁵

1.5 The EM explains that in 2014 the *Independent Report of the Panel on Unexplained Wealth* found that arrangements for dealing with unexplained wealth laws were not working effectively across multiple jurisdictions due to constitutional

1 *Journals of the Senate*, No. 105, 28 June 2018, pp. 3357–3359.

2 Senate Committee for the Selection of Bills, *Report No. 7 of 2018*, 28 June 2018, Appendix 6.

3 Senate Committee for the Selection of Bills, *Report No. 7 of 2018*, 28 June 2018, Appendix 6.

4 Explanatory Memorandum, Unexplained Wealth Legislation Amendment Bill 2018 (Explanatory Memorandum), p. 6.

5 Explanatory Memorandum, pp. 6–7.

limits.⁶ To address this issue, the report recommended a referral of powers from the States to the Commonwealth 'to enable the unexplained wealth provisions in the POC Act to be broadened to also apply where a link to a suspected State or Territory offence could be established.'⁷ A Working Group on Unexplained Wealth, made up of officials from Commonwealth, States and Territories, was established. The EM notes that the bill will 'give effect to the national scheme as negotiated by the Working Group.'⁸

Purpose of the bill

1.6 The bill was introduced in the House of Representatives on 20 June 2018 by the Hon. Peter Dutton MP, Minister for Home Affairs.⁹ Minister Dutton explained the purpose of the bill:

Unexplained wealth laws provide a valuable tool for law enforcement to confiscate the assets of these criminals where they cannot demonstrate that this wealth has been lawfully obtained.

However the scale and complexity of this criminal threat has necessitated an enhanced focus on cooperative, cross-jurisdictional responses by Australian governments.

The Unexplained Wealth Legislation Amendment Bill 2018 will provide a national approach to target unexplained wealth. It will enable all participating jurisdictions to work together to effectively deprive these criminals of their wealth, irrespective of the jurisdictions in which they operate.¹⁰

1.7 Minister Dutton noted that '[t]he scheme will not replace existing unexplained wealth schemes around the country'.¹¹

Overview of the Schedules of the bill

1.8 The bill is made up of eight Schedules which seek to establish a national scheme to target unexplained wealth.

- Schedule 1 – outlines the constitutional basis for the measures, defines key terms, and includes provisions to ensure the confiscation regimes of the Territories and participating States continue to operate concurrently with the national scheme.

6 Explanatory Memorandum, p. 7.

7 Explanatory Memorandum, p.7.

8 Explanatory Memorandum, p. 7.

9 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 7.

10 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 8.

11 The Hon. Peter Dutton, Minister for Home Affairs, *Proof House of Representatives Hansard*, 20 June 2018, p. 8.

- Schedule 2 – allows unexplained wealth restraining orders and unexplained wealth orders under the POC Act to be made in respect of relevant offences of participating States.
- Schedule 3 – allows unexplained wealth restraining orders and unexplained wealth orders under the POC Act to be made in respect of all Territory offences.
- Schedule 4 – provides State and Territory law enforcement agencies access to production orders and notices to financial institutions, for the purpose of unexplained wealth investigations and litigation under State and Territory unexplained wealth legislation.
- Schedule 5 – introduces an equitable sharing arrangement so that the proceeds from an action under the POC Act will be appropriately allocated to each participating jurisdiction that contributed to that action.
- Schedule 6 – amends the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to allow law enforcement agencies of the Commonwealth, participating States, and the Territories to use, communicate and record lawfully intercepted information in relation to unexplained wealth investigations and proceedings.
- Schedule 7 – provides for the review of the key operative provisions in the scheme as soon as practicable after the fourth anniversary of the commencement of the *Unexplained Wealth Legislation Amendment Act 2018*.
- Schedule 8 – makes amendments to the *Proceeds of Crime Regulations 2002* to clarify that the definition of 'unexplained wealth legislation' in section 338 of the POC Act extends to particular provisions of the *Criminal Assets Recovery Act 1990* (NSW) and the *Criminal Property Forfeiture Act* (NT).¹²

1.9 More detail on each schedule is provided below.

Schedule 1, Constitutional basis

Referral of powers to the Commonwealth

1.10 To enable the scheme to operate nationally, 'participating States' must refer their power to the Commonwealth. New section 14C sets out how a State becomes a participating State and allows for a State to join the scheme both prior to, as well as after, the bill being enacted. The EM notes that States will need to either enact Schedules 1, 2 and 4 of the bill, or adopt the most recent amendment to Schedules 1, 2 and 4, as well as refer the amendment reference at subsection 14C(4) of the bill.¹³ The EM notes that the amendment reference allows the POC Act to 'be amended from time to time by the Commonwealth Parliament and continue to apply in relation to State offences covered by the referral.'¹⁴

¹² Explanatory Memorandum, pp. 2–5.

¹³ Subsections 14C(1), (2), (3) and (4) of the bill, and Explanatory Memorandum, p. 2.

¹⁴ Explanatory Memorandum, p. 2.

1.11 The Scheme will also operate in the Territories. However, the bill and EM explains that there is no requirement for the Territories to refer their powers to the Commonwealth as the application of the measures will be based on the Territories power under section 122 of the Constitution.¹⁵

Concurrent operation of State and Territory confiscation regimes

1.12 Proposed sections 14A and 14L of the bill expressly provide for the continued operation of the confiscation laws of a State and Territory 'to the extent that the law is capable of operating concurrently with this Act.'

1.13 New sections 14G and 14K also allow for States and Territories to rollback any future amendments to relevant provisions of the POC Act so that these amendments will not apply in their jurisdiction. The EM explains the rationale for the rollback provisions is 'to incentivise participation in the national scheme and ensure the continued operation of a suite of nationally cohesive, effective and cooperative laws to target unexplained wealth.'¹⁶

Cooperating States

1.14 A non-participating State will be considered a 'cooperating State' pursuant to new section 14F of the bill. The EM explains the effect of being a cooperating State:

Under the national scheme, '*cooperating States*' remain members of the [Cooperating Jurisdiction Committee] which decides on the distribution of '*sharable proceeds*' amongst contributing jurisdictions. '*Non-participating states*' (including '*cooperating States*'), however, will not have access to the information gathering or information sharing measures at Schedules 4 and 6 of the Bill or to the benefits granted under the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth (the '*NCSUW agreement*'). '*Cooperating States*' will, however, retain the benefits relating to equitable sharing.¹⁷

1.15 A State will cease to be a cooperating State if the Minister declares, by way of a legislative instrument, that the State is not a cooperating State.¹⁸ Pursuant to proposed subsection 14F(5) of the bill this legislative instrument is not subject to disallowance as outlined in section 42 of the *Legislation Act 2003*.

Termination of referral and the Unexplained Wealth Legislation Amendment Act

1.16 Item 6 of Schedule 1 of the bill proposes to introduce a new Schedule (Schedule 2) into the POC Act. New Schedule 2 sets out the transitional, application and saving provisions underpinning the national scheme and is divided into two Parts. Part 1 provides for the termination of a State's referral or adoption while Part 2 deals with the *Unexplained Wealth Legislation Amendment Act 2018*.

15 Proposed subsection 14B(11) of Schedule 1 of the bill, and Explanatory Memorandum, p. 2.

16 Explanatory Memorandum, p. 3.

17 Explanatory Memorandum, p. 22.

18 New subsections 14F(3) and (4) of the bill.

New Part 1 of Schedule 2, termination of State reference or adoption

1.17 New Part 1 of Schedule 2 outlines the effect of the termination on things that occurred prior to the termination. The EM explains the effect of clause 1 of new Schedule 2:

Clause 1 ensures any proceedings that have been commenced based upon the referral or adoption prior to it being terminated can be seen through to their conclusion and that all actions necessary to support those proceedings can be undertaken. For example, if a restraining order was made under section 20A based on a '*relevant offence*' prior to termination and the relevant State's referral or adoption was then terminated, clause 1 of Schedule 2 would operate to ensure that the matter could be seen through to conclusion...¹⁹

1.18 Similarly, Clause 4 of new Schedule 2 allows for proceedings, which were commenced based upon an offence against a law of a participating State that later ceases to be a relevant offence, to be concluded.

1.19 Clause 2 outlines that a participating State that has terminated its reference or adoption can continue to access the equitable sharing arrangements where an unexplained wealth order relates to a '*relevant offence*' of that State. The EM notes:

This ensures that States will still have access to the favourable equitable sharing arrangements under Division 2 Part 4-3 of the POC Act for Commonwealth unexplained wealth matters that previously relied on the State's referral or adoption of power and have reached forfeiture stage after termination.²⁰

New Part 2 of Schedule 2, Unexplained Wealth Legislation Amendment Act 2018

1.20 Clause 6 of new Schedule 2 defines '*amending Act*' to mean the *Unexplained Wealth Legislation Amendment Act 2018*. Clause 7 outlines that the amendments made by new Schedule 2 of the amending Act will:

...apply to an application made after commencement for an order in relation to an offence against a law of a participating State, whether or not:

- (a) the offence is committed, or is suspected of having been committed, before or after commencement; or
- (b) the application relates to property or wealth that is acquired before or after commencement; or
- (c) the application relates to property or wealth that is derived or realised, directly or indirectly, before or after commencement; or
- (d) the application relates to property or wealth that becomes subject to the effective control of a person before or after commencement.

19 Explanatory Memorandum, p. 28.

20 Explanatory Memorandum, p. 29.

1.21 In effect, Clause 7 provides that applications made for an order in relation to an offence against a law of a participating State would apply retrospectively.

1.22 Similarly, Clause 8 provides for the retrospective application of amendments made by Schedule 4 to the amending Act, in relation to production orders for a document and in relation to notices to financial institutions for information or a document, after its commencement.

Schedules 2 and 3, extending Commonwealth unexplained wealth orders to State and Territory offences

1.23 Schedule 2 of the bill proposes to amend relevant sections of the POC Act to allow participating States to use unexplained wealth restraining orders and unexplained wealth orders to 'relevant offences' against the laws of a participating State.²¹ Item 8 of Schedule 2 defines 'relevant offence of a participating State' to mean 'an offence of a kind that is specified by the referral Act or adoption Act of the State.'

1.24 Similarly, Schedule 3 of the bill proposes to amend relevant sections of the POC Act to apply to all offences against the laws of 'self-governing Territories',²² where self-governing Territories is defined under current section 338 of the POC Act to include the Australian Capital Territory and the Northern Territory.

1.25 The effect of schedules 2 and 3 are that they would:

- allow unexplained wealth restraining orders to be obtained where there are reasonable grounds to suspect that a person has committed a relevant offence of a participating State or any offence against the law of a self-governing Territory (Schedule 2, item 1 and Schedule 3, item 1);
- allow unexplained wealth restraining orders to be obtained where there are reasonable grounds to suspect that the whole or part of a person's wealth was derived from a relevant offence of a participating State or any offence against the law of a self-governing Territory (Schedule 2, item 2 and Schedule 3, item 2);
- expand the affidavit requirements that must be met to support an application for an unexplained wealth restraining order (Schedule 2, items 3 and 4; and Schedule 3, items 3 and 4);
- allow unexplained wealth orders to be obtained in situations where a court is not satisfied that the whole or part of the person's wealth was not derived from a relevant offence of a participating State or any offence against the law of a self-governing Territory (Schedule 2, item 5 and Schedule 3, item 5);
- allow the court to also take into consideration the value of property that was derived from a State offence and a Territory offence (in addition to the value of property derived from Commonwealth offences), when determining the unexplained wealth amount (Schedule 2, item 6 and Schedule 3, item 6); and

21 See Schedule 2, items 1–7.

22 See Schedule 3, items 1–8.

- extend the person's appeal rights to allow a person to appeal against an unexplained wealth order as if the person had been convicted of a relevant offence of a participating State or a Territory offence (Schedule 2, item 7 and Schedule 3, item 8).

1.26 Similar to clause 7 of new Schedule 2 (refer to paragraphs 1.20 and 1.21 of this report), clause 10 of Schedule 3 provides that applications made for an order in relation to an offence against a law of a self-governing Territory, would apply retrospectively.

Schedule 4, information gathering under the national cooperative scheme

1.27 Item 6 of Schedule 4 of the bill proposes to introduce new Schedule 1 to the POC Act, which concerns information gathering by participating States and self-governing Territories. New Schedule 1 is divided into the following three Parts:

- Part 1—Production orders;
- Part 2—Notices to financial institutions; and
- Part 3—Disclosure of information.

Part 1 of new Schedule 1, Production orders

1.28 Part 1 of new Schedule 1 relates to production orders and provides that a magistrate may make an order (a production order) requiring a person to produce documents or make documents available for inspection by an 'authorised State/Territory officer'.²³ Part 1 sets out the following matters relating to production orders:

- the contents of production orders (clause 2);
- the powers of authorised State/Territory officers to inspect, take extracts from, or make copies of, documents the subject of a production order (clause 3);
- the retention of produced documents (clause 4); and
- the varying of production orders (clause 6).

1.29 New Part 1 also introduces offences relating to production orders, including:

- for making false statements in an application for a production order, which is punishable by a maximum of 12 months imprisonment or 60 penalty units, or both (clause 8);
- for disclosing the existence or nature of a production order where the order specifies that information about the order must not be disclosed, which is punishable by a maximum of two years imprisonment or 120 penalty units, or both (clause 9);
- for failing to comply with production orders, which is punishable by a maximum of six months imprisonment, or 30 penalty units, or both (clause 10); and

23 Clause 1 of new Schedule 1.

- destroying, defacing, or interfering with documents subject to production orders, which is punishable by a maximum of six months imprisonment, or 30 penalty units, or both (clause 11).

1.30 Pursuant to clause 5 of new Schedule 1, a person is not excused from producing a document or making a document available under a production order on the grounds that it:

- (a) would tend to incriminate the person or expose the person to a penalty; or
- (b) would breach an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document; or
- (c) would disclose information that is the subject of legal professional privilege.²⁴

Part 2 of new Schedule 1, notices to financial institutions

1.31 Part 2 of new Schedule 1 provides for the issuing of a notice to a financial institution requiring that institution to provide certain information to an authorised State/Territory officer for the purpose of determining whether to take any action under the unexplained wealth legislation of the State or Territory.²⁵

1.32 Clause 13 sets out the particulars that must be contained in notices to financial institutions.

1.33 Pursuant to clause 14, financial institutions and officers, employees and agents of financial institutions are protected from any action, suit or proceedings in relation to their response to, or the mistaken belief that action was required under, a notice under clause 12 of new Schedule 1.

1.34 Similar to Part 1 of new Schedule 1, Part 2 contains new offences relating to notices to financial institutions, including:

- for making false statements in notices, which is punishable by a maximum of 12 months imprisonment or 60 penalty units, or both (clause 15);
- for disclosing the existence or nature of notices where the notice specifies that information about the notice must not be disclosed, which is punishable by a maximum of two years imprisonment or 120 penalty units, or both (clause 16); and
- for failing to comply with notices, which is punishable by a maximum of six months imprisonment, or 30 penalty units, or both (clause 17).

Part 3 of new Schedule 1, disclosure of information

1.35 Part 3 of new Schedule 1 provides for the disclosure of information obtained from production orders and notices to financial institutions, to specified authorities,

²⁴ Subclause 5 of new Schedule 1 (which is inserted by item 6 of Schedule 4).

²⁵ Clause 12, new Schedule 1.

for certain purposes.²⁶ Information can only be disclosed in accordance with the table set out in subclause 18(2) of new Schedule 1 if the person believes on reasonable grounds that the disclosure will serve the purpose as outlined in the table, and where the court has not made an order prohibiting the disclosure.²⁷

1.36 The document, and information contained in the document, is not admissible in evidence in a criminal proceeding against a person who produced or made available a document under a production order.²⁸ However, any information, document or thing that has been obtained as an indirect consequence of a disclosure under clause 18, may be admissible in evidence.²⁹

1.37 Clause 19 outlines that new Schedule 1 is subject to the oversight by the Parliamentary Joint Committee on Law Enforcement, who may require an authority of a participating State or self-governing Territory to appear before the committee to give evidence. Additionally, reporting requirements relating to the operation of new Schedule 1 is contained in clause 20.

Schedule 5, sharing proceeds under the national cooperative scheme

1.38 Schedule 5 of the bill outlines how the 'sharable' proceeds are to be distributed among domestic and foreign entities. New section 297A sets out the circumstances when the national cooperative scheme on unexplained wealth would operate.

1.39 Proposed section 297C sets out the process undertaken to equitably share the proceeds with a State or self-governing Territory, which includes:

- calculating the net amount of proceeds to be shared (new subsection 297C(2));
- the establishment of a subcommittee of the Cooperating Jurisdiction Committee to be made up of the Commonwealth and each State and Territory that made a contribution to the recovery of assets (new subsections 297C(3) and (4));
- consideration of whether a specified proportion of the net amount be payable to a non-participating State (that is not a cooperating State), that contributed to the recovery of assets, and where the subcommittee makes a unanimous decision that it would be appropriate to make such a payment (new subsection 297C(5));
- the remaining amount of proceeds to be shared equally between the subcommittee members (new subsection 297C(6));

26 Refer also to the table a subclause 18(2), new Schedule 1.

27 Subclause 18(2), new Schedule 1.

28 Subclause 18(3), new Schedule 1.

29 Paragraph 18(5)(b), new Schedule 1.

- the relevant minister of the forfeiting jurisdiction to decide if a foreign jurisdiction contributed to the action, and the amount of proceeds that will be allocated to the foreign jurisdiction (new section 297B); and
- once the distribution of funds are determined, these funds are to be paid, by the minister, to the relevant State or Territory, within the 'payment period' as defined in the National Cooperative Scheme on Unexplained Wealth, or if it is not defined in this agreement, as defined in regulations (new subsection 297C(11)).

Schedule 6, sharing information under the national cooperative scheme

1.40 Schedule 6 of the bill proposes to expand particular terms within the TIA Act to allow for the sharing of information between law enforcement agencies of the Commonwealth, participating States and Territories.

1.41 Currently the TIA Act contains a general prohibition on using, disclosing, recording, and giving in evidence lawfully intercepted information. Current section 5B of the TIA Act lists 'exempt proceedings' for the purposes of the TIA Act, where paragraph 5B(1)(b) of the TIA Act requires that lawfully intercepted information can only be used in unexplained wealth proceedings where these proceedings are *linked* to a prescribed offence. Item 2 of Schedule 6 proposes to expand the definition of 'exempt proceedings', to allow the Commonwealth, a participating State and Territories to disclose and use information without the need to show a link to a prescribed offence.

1.42 Similarly, the definitions of 'permitted purpose' and 'relevant proceedings' in the TIA Act are also expanded to allow for the AFP and police forces of the Territories and participating States to use, communicate and record lawfully intercepted information for all unexplained wealth proceedings and 'not just those linked to a prescribed offence'.³⁰

Schedule 7, review of the national cooperative scheme

1.43 Schedule 7 provides for the independent review of the national scheme as soon as practicable after the fourth anniversary of the commencement of the *Unexplained Wealth Legislation Amendment Act 2018*.³¹ Prior to the review commencing, new subsection 327A(3) requires that the appropriate ministers of participating States, cooperating States, and self-governing Territories, are consulted about the terms of the review and the appointment of the persons who are to undertake the review. The appropriate ministers must also be consulted for the purposes of undertaking the review and must be provided with a written report of the review.³² Proposed subsection 327A(5) requires a copy of the report to be tabled in each Houses of Parliament within 15 sitting days of the relevant House.

30 Item 3 of Schedule 6, new subparagraphs 6L(1)(b)(ba) and (bb); and item 6 of Schedule 6, new subsection 6L(3).

31 Schedule 7, proposed subsections 327A(1) and (2).

32 Proposed subsection 327A(4).

Schedule 8, amendments to *Proceeds of Crime Regulations 2002*

1.44 Schedule 8 of the bill makes amendments to the *Proceeds of Crime Regulations 2002* to clarify that the definition of 'unexplained wealth legislation' in section 338 of the Act extends to particular provisions of the *Criminal Assets Recovery Act 1990* (NSW) and the *Criminal Property Forfeiture Act* (NT).³³ The EM explains the reason for the proposed amendment:

New regulation 13A ensures that New South Wales and the Northern Territory can access the information gathering measures at Schedule 4 of the Bill (relating to production orders and notices to financial institutions) and the information sharing measures at Schedule 6 of the Bill (involving the sharing of TIA Act information), which apply in relation to the 'unexplained wealth legislation' of 'participating States' and 'self-governing Territories'.³⁴

Financial implications

1.45 The EM states that the bill 'will have no financial input'.³⁵

Compatibility with human rights

1.46 The EM notes that the bill engages with a number of human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.³⁶ It states that to 'the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Bill'.³⁷

1.47 The Parliamentary Joint Committee on Human Rights deferred its consideration of this bill.³⁸

Senate Scrutiny of Bills Committee

1.48 The Senate Standing Committee for the Scrutiny of Bills raised a number of concerns, including:

- the exemption from disallowance;
- the retrospective application of certain provisions of the bill;
- the abrogation of privilege against self-incrimination;
- the abrogation of legal professional privilege;
- significant matters in delegated legislation;

33 Explanatory Memorandum, pp. 2–5.

34 Explanatory Memorandum, p. 59.

35 Explanatory Memorandum, p. 5.

36 Explanatory Memorandum, pp. 6–14.

37 Explanatory Memorandum, p. 14.

38 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report 6 of 2018*, p. 133.

- immunity from liability; and
- privacy concerns.³⁹

1.49 These concerns will be discussed in the following chapter.

Conduct of the inquiry

1.50 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 13 July 2018. The committee also wrote directly to a number of individuals and organisations inviting them to make a submission. The committee received seven submissions, which are available in full on the committee's website. A list of all submissions is available at appendix 1 of this report.

Structure of this report

1.51 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry; and
- Chapter 2 discusses the evidence received by the committee, and sets out the committee's views and recommendation on the bill.

Acknowledgements

1.52 The committee thanks all organisations that made submissions to this inquiry.

39 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, pp. 5–14.