The Senate

Legal and Constitutional Affairs Legislation Committee

Unexplained Wealth Legislation Amendment Bill 2018 [Provisions]

August 2018

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Recommendations

Recommendation 1

2.65 The committee recommends that the bill be passed.

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

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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.

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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*.

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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,

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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.

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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;

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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.

Chapter 2

Key issues

2.1 This chapter outlines the key issues raised in submissions received by this inquiry, which include:

- general issues concerning unexplained wealth laws;
- retrospectivity;
- exemption from disallowance;
- privilege against self-incrimination;
- legal professional privilege;
- significant matters in delegated legislation;
- immunity from liability; and
- privacy concerns.

2.2 This chapter also sets out the committee's views and recommendations.

A national scheme for unexplained wealth

Constitutional basis for a national scheme

2.3 As outlined in chapter 1 of this report, the Unexplained Wealth Legislation Amendment Bill 2018 (the bill), seeks to establish a national scheme to target unexplained wealth. Due to constitutional limitations, this will require one or more States to refer their power to the Commonwealth. The Department of Home Affairs (the department), noted that to preserve the constitutional basis, amendments cannot be made to Schedules 1, 2 and 4 of the bill, as these Schedules are being referred in their present form, by the New South Wales Parliament.[1] The department explained that after this bill has been enacted, it is possible for amendments to be made pursuant to the reference power at proposed section 14C, provided these amendments are unanimously agreed to by the relevant parties.[2]

Implementing a national unexplained wealth scheme

2.4 Submitters expressed mixed views in relation to the establishment of a national scheme for unexplained wealth. The Police Federation of Australia noted its support for the bill and outlined that it has been advocating for 'harmonised' unexplained wealth legislation since 2007 and that 'crime bosses were exploiting differences in criminal laws in Australia.'[3] The Police Federation of Australia argued for the need to tackle such changes urgently and implored 'all states to enact

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1 Department of Home Affairs, *Submission 6,* p. 8.

2 Department of Home Affairs, *Submission 6,* p. 8.

3 Police Federation of Australia, *Submission 4,* pp. 1 and 2.

legislation, consistent with the Bill to ensure a truly national unexplained wealth regime is implemented.'[4]

2.5 In contrast, Civil Liberties Australia noted that it did not support the bill because unexplained wealth laws have been used beyond their original intent.[5] They explained that the laws were originally justified on the basis that they would only be used 'to combat serious and organised crime where the criminals were using such sophisticated business models that it would be extremely difficult to secure convictions against senior-level bosses.'[6] However, Civil Liberties Australia noted that a 2017 review of Tasmania's unexplained wealth laws found that its laws were not confined for use against 'senior organised crime figures', but applied to anyone whose wealth was unexplained, or who may have profited from crime.[7] They noted that the review found that Tasmania's unexplained wealth laws had been used to recover amounts as small as $3,000. Civil Liberties Australia urged the committee to investigate the application of unexplained wealth laws at federal and state levels.[8]

2.6 In response to the concerns raised by Civil Liberties Australia, the department explained that the bill, in part, responds to recommendations made following two separate reviews of unexplained wealth legislation and arrangements.[9] Furthermore, the department noted that the bill requires the minister to cause an independent review to be undertaken of the national unexplained wealth provisions, following the fourth anniversary of the commencement of this bill.[10]

2.7 In relation to concerns that the provisions of the bill would be used against petty criminals, the department noted that the bill contains a number of protections 'which ensure that unexplained wealth orders do not unfairly impact upon petty offenders.'[11] These safeguards include:

- The court may refuse to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth order if satisfied that there are not reasonable grounds to suspect that the person's total wealth exceeds by $100,000 or more the value of the person's wealth that was lawfully acquired (see ss 20A(4)(a), 179B(4) and 179E(6)(a) of the POC Act).
- The court may refuse to make an unexplained wealth restraining order or unexplained wealth order if satisfied that doing so is not in the public interest (ss 20A(4)(b) and 179E(6)(b) of the POC Act).

4 Police Federation of Australia, *Submission 4,* p. 2.

5 Civil Liberties Australia, *Submission 2,* pp. 1–3.

6 Civil Liberties Australia, *Submission 2,* pp. 1–2.

7 Civil Liberties Australia, *Submission 2,* p. 2.

8 Civil Liberties Australia, *Submission 2,* p. 3.

9 Department of Home Affairs, *Submission 6,* p. 9.

10 Department of Home Affairs, *Submission 6,* p. 9.

11 Department of Home Affairs, *Submission 6,* p. 9.

- The court may exclude property from the scope of some of these orders or revoke these orders in a range of situations, including (for some orders) where it is in the public interest or the interests of justice to do so (ss 24A, 29A, 42 and 179C).[12]

Retrospectivity

2.8 As noted in chapter 1 of this report, the bill proposes three provisions which would apply retrospectively.[13] Both the Law Council of Australia (Law Council) and the Senate Scrutiny of Bills Committee (Scrutiny Committee) raised concerns relating to the retrospective operation of these provisions, noting that retrospective provisions 'challenge a basic value of the rule of law.'[14]

2.9 The Law Council explained that the impact of retrospective laws may be particularly acute where a person who has not been charged with or convicted of an offence, could have their property rights interfered with.[15] The Scrutiny Committee and Civil Liberties Australia also noted that the POC Act applies without the need to prove 'on the usual criminal standard (that is, beyond reasonable doubt), that the person has committed an offence.'[16] Civil Liberties Australia elaborated on this point:

> Unexplained wealth laws are not conviction-based. They remove the need to prove a person has engaged in any criminal activity or indeed that any offence has even been committed. Unexplained wealth laws reverse the burden of proof by requiring a person to prove on the balance of probabilities that assets are not the proceeds of crime.[17]

2.10 However, the Explanatory Memorandum (EM) noted that these 'amendments do not have the effect of criminalising conduct which was otherwise lawful prior to the amendments.'[18] The EM outlined the rationale for the retrospective operation of these provisions:

> Retrospective operation is required to ensure that unexplained wealth action is 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, realised or became subject to the effective control of a person.
>
> Such a requirement would be unnecessarily onerous and would be contrary to the objects of the Act. Further, it would be almost impossible to show the

12 Department of Home Affairs, *Submission 6,* p. 9.

13 These provisions are clauses 7 and 8 of proposed Schedule 2 (which is inserted by item 6 of Schedule 1), as well as item 10 of Schedule 3.

14 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, pp. 6–8. See also Law Council of Australia, *Submission 5,* p. 2.

15 Law Council of Australia, *Submission 5,* p. 2.

16 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, pp. 7–8.

17 Civil Liberties Australia, *Submission 2,* p. 1.

18 Explanatory Memorandum, p. 31.

> point at which wealth or property was acquired or derived in cases where a person has accumulated significant amounts of wealth and property over decades and has no apparent source of legitimate income, especially in relation to property that is portable and not subject to registration requirements or where relevant financial records have been destroyed or lost over time.
>
> Previous amendments to unexplained wealth orders and restraining orders have been applied retrospectively to property or wealth acquired before the amendments commenced…
>
> It is also necessary to apply these amendments retrospectively to offences against a law of a *'participating State'* to ensure that the aims of the POC Act are not frustrated. It is necessary for these provisions to apply retrospectively as the criminal conduct of the person may continue over several years or may not be discovered immediately.[19]

2.11 The Scrutiny Committee concluded by reiterating its concern with provisions that apply retrospectively and noted that it 'leaves to the Senate as a whole the appropriateness of retrospectively applying amendments which widen the scope of the unexplained wealth regime.'[20]

Exemption from disallowance

2.12 Proposed section 14F outlines when a non-participating State is a cooperating State. Proposed subsection 14F(4) provides that the minister may, by legislative instrument, declare a State to ***not*** be a cooperating State. 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.*

2.13 The Scrutiny Committee expressed the view that 'exempting delegated legislation from disallowance is a serious matter' and where a bill seeks to exempt delegated legislation from the usual disallowance process, 'the committee would expect a sound justification to be provided in the [EM].'[21] Consequently, the Scrutiny Committee sought the minister's justification for exempting declarations made under new subsection 14F(4) from disallowance.

2.14 In its submission, the department explained that the exemption from disallowance at proposed subsection 14F(5) is justified by virtue of subsection 44(1) of the *Legislation Act 2003*, which specifies that the rules of disallowance at section 42 do not apply if the enabling legislation for the instrument:

> (a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and

19 Explanatory Memorandum, p. 31.

20 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 8.

21 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 6.

> (b) authorises the instrument to be made by the body or for the purposes of the body or scheme...[22]

2.15 The department noted that an instrument made under proposed subsection 14F(4) 'is intended to facilitate the operation of the National Cooperative Scheme on Unexplained Wealth…'[23] Further, the department submitted that this scheme would be made up of the Commonwealth and one or more States, and it would not be appropriate for the Commonwealth Parliament to be permitted to 'unilaterally disallow instruments that are part of a multilateral scheme.'[24]

2.16 The department explained that cooperating States benefit from the new equitable sharing arrangements at Schedule 5 of the bill and explained the importance of allowing the minister to declare by legislative instrument that a State is not a cooperating State:

> A State's ongoing participation in the Scheme as a *'cooperating State'* is intended to facilitate continued good faith negotiations with the Commonwealth and encourage the State to fully commit to the Scheme at a later date. The Minister's ability to remove this status by legislative instrument is vital in ensuring that a State cannot continue to indefinitely benefit from the equitable sharing arrangements where it has demonstrated it has no intention of re-engaging with the Scheme.
>
> If there is a risk that such an instrument would be disallowed, this would jeopardise the ongoing effectiveness of the Scheme.[25]

Privilege against self-incrimination

2.17 Item 6 of Schedule 4 proposes to introduce new Schedule 1 into the POC Act. Part 1 of new Schedule 1 deals with production orders and provides a magistrate may make a production order requiring a person to produce documents or make documents available for inspection by an authorised State/Territory officer. Proposed paragraph 5(1)(a) states that a person is not excused from producing a document or making a document available for inspection on the grounds that producing the document or making it available 'would tend to incriminate the person or expose the person to a penalty'. In effect, the proposed provision would override a person's privilege against self-incrimination.

2.18 The Law Council explained that the privilege against self-incrimination is 'a substantive right of long standing, applicable to criminal and civil penalties and forfeiture', which is 'deeply ingrained in the common law'.[26] The Law Council noted that privilege against self-incrimination is required by the *International Covenant on*

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22 Subsection 44(1), *Legislation Act 2003.*

23 Department of Home Affairs, *Submission 6,* p. 6.

24 Department of Home Affairs, *Submission 6,* p. 6.

25 Department of Home Affairs, *Submission 6,* p. 6.

26 Law Council of Australia, *Submission 5,* p. 2.

Civil and Political Rights as well as being protected under Australia's legislative framework.[27]

2.19 The EM notes the rationale for abrogating the privilege against self-incrimination:

> It is appropriate to override the privilege against self-incrimination and legal professional privilege under subclause 5(1) as criminals regularly seek to hide their ill-gotten gains behind a web of complex legal, contractual and business arrangements. As such, requiring the production and availability of relevant documents is necessary to enable law enforcement to effectively trace, restrain and confiscate unexplained wealth amounts. This provision therefore accords with the principles at Part 9.5.3 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide).
>
> …
>
> Further, it should be noted that similar provisions overriding the privilege against self-incrimination exist at section 206 of the POC Act.[28]

2.20 The department elaborated on the above points, noting that Part 9.5.3 of the Guide states that it may be appropriate to override the privilege against self-incrimination 'where it could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.'[29] The department explained that for some unexplained wealth matters relevant information can only be obtained from persons with some connection to criminal conduct, such as 'the individual that committed the original crime, a financial institution that dealt with property suspected of being proceeds of an offence or professional intermediaries responsible for laundering the property through legal structures.' The department argued that to allow these individuals to rely on the privilege against self-incrimination 'would frustrate the operation of production orders and, in many cases, would prevent law enforcement from gathering the information required to support the unexplained wealth action.'[30]

2.21 The department maintained that production orders as proposed by the bill have been designed to minimise the impact on a person's privilege against self-incrimination as production orders can only be made by a court and magistrates retain the discretion to not make a production order.[31] The department also noted that pursuant to subclause 1(3) of new Schedule 1, production orders have a narrow scope

27 Law Council of Australia, *Submission 5,* p. 2.

28 Explanatory Memorandum, p. 42.

29 Department of Home Affairs, *Submission 6,* p. 3. See also the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* Part 9.5.3, p. 95.

30 Department of Home Affairs, *Submission 6,* p. 4.

31 Department of Home Affairs, *Submission 6,* p. 4.

and therefore the risk of the privilege of self-incrimination being overridden is minimised.[32]

2.22 Finally, the department reiterated that the abrogation of the privilege against self-incrimination already exists for current production orders under paragraph 206(1)(a) of the POC Act.[33] Consequently, the department noted that the bill does not change the current Commonwealth arrangements concerning production orders, but rather extends the current arrangements to States and Territories that participate in the Scheme.[34]

Use and derivative use immunities

2.23 The Scrutiny Committee noted that where privilege against self-incrimination has been overridden, it will consider 'the extent to which the use of self-incriminating evidence is limited by use or derivative use immunity provisions.'[35] The Scrutiny Committee explained the difference between a 'use immunity' and a 'derivative use immunity':

> A use immunity generally provides that the information or documents produced in response to the statutory requirement (in this case, in response to a production order) will not be admissible in evidence against the person that produced it. A derivative use immunity generally provides that anything obtained as a direct or indirect consequence of the production of the information or documents will not be admissible in evidence against the person that produced it.[36]

2.24 Both the Law Council and Scrutiny Committee acknowledged that the bill contains a use immunity under subclause 5(2) of new Schedule 1, which states that the document is not admissible in evidence, in a case of a natural person, except in proceedings relating to the provision of false or misleading information or documents.[37]

2.25 However, the Law Council and Scrutiny Committee expressed concern that the bill does not contain a derivative use immunity. They outline that, pursuant to clause 18 of new Schedule 1, information obtained as a result of a production order

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32 Department of Home Affairs, *Submission 6,* p. 4. Pursuant to subclause 1(3) of new Schedule 1, a magistrate cannot make a production order unless they are reasonably satisfied that the documents are within the person's possession or control. In the case of a body corporate, the documents must either be in the possession or control of the body corporate, or the documents must be used or intended to be used in the carrying on of a business.

33 Department of Home Affairs, *Submission 6,* p. 4.

34 Department of Home Affairs, *Submission 6,* p. 4.

35 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 9.

36 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 9.

37 Law Council of Australia, *Submission 5,* p. 3; and Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 9.

may be disclosed under certain circumstances.[38] Moreover, proposed paragraph 18(5)(b) explicitly allows for the admissibility of information indirectly obtained through this clause, stating:

> …this clause does not affect the admissibility in evidence of any information, document or thing obtained as an indirect consequence of a disclosure under this clause.[39]

2.26 The Scrutiny Committee noted that the EM does not sufficiently address this matter and sought further advice from the minister in relation to the appropriateness of overriding the privilege against self-incrimination.[40] Analogous recommendations were also made by the Law Council:

- A fuller explanation be provided in the Explanatory Memorandum of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary; and
- Both a use and derivative use immunity should apply to civil and criminal proceedings.
- In relation to the issue of information sharing with state or territory agencies, no direct or derivative use should be made of the material by state or territory agencies in relation to criminal proceedings.[41]

2.27 However, the department argued that to apply a derivative use immunity to civil and criminal proceedings would not be appropriate.[42] The department explained that in the case of civil proceedings subclause 1(6) of new Schedule 1 outlines that a document may be subject to a production order, where the purpose is to determine whether to take civil action under State and Territory unexplained wealth legislation, or proceedings under the unexplained wealth legislation of the State or Territory.[43] Consequently, the department noted that to allow a derivative use immunity for civil proceedings would defeat the purpose of production orders as it is intended to operate under the bill.[44]

2.28 In the case of criminal proceedings, the department argued that a derivative use immunity would 'have the potential to severely undermine the existing ability of authorities to investigate and prosecute serious criminal conduct'[45] and provided the following example:

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38 Law Council of Australia, *Submission 5*, p. 3; and Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 9.

39 New Schedule 1, Part 3, paragraph 5(1)(b).

40 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 9.

41 Law Council of Australia, *Submission 5*, p. 3.

42 Department of Home Affairs, *Submission 6*, pp. 4-5.

43 Department of Home Affairs, *Submission 6*, p. 4.

44 Department of Home Affairs, *Submission 6*, p. 4.

45 Department of Home Affairs, *Submission 6*, p. 4.

> For example, if a derivative use immunity was included, where an investigator in a criminal matter could potentially have access to privileged material, the prosecution may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.[46]

2.29 Additionally, the department noted that the bill (as well as the current provisions within the POC Act), only allow for the derivative use and sharing of information contained within produced documents, with a specific authority and for a legitimate purpose, as set out in the table at subclause 18(2) of new Schedule 1.[47] Finally, the department outlined that production orders do not affect the courts inherent power to manage criminal and civil proceedings.[48]

Legal professional privilege

2.30 Similar to the abrogation of the privilege against self-incrimination, proposed paragraph 5(1)(c) of new Schedule 1 specifies that a person is not excused from producing a document or making a document available on the grounds that the production of the document or making it available would disclose information that is the subject of legal professional privilege.

2.31 As noted above, proposed subclause 5(2) of new Schedule 1 contains a use immunity, which would also apply to information that is the subject of legal professional privilege; however, a derivative use immunity is not contained in the bill. The EM contains no further justification apart from that outlined at paragraph 2.19 of this report.

2.32 Both the Law Council and Scrutiny Committee explained the importance of legal professional privilege being 'not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice.'[49] The Scrutiny Committee elaborated on its concern:

> The committee considers that abrogating legal professional privilege may unduly trespass on individual rights, as to do so may interfere with legitimate, confidential communications between individuals and their legal representatives. In this regard, the committee notes that while the explanatory memorandum provides a limited policy justification for abrogating legal professional privilege, it does not provide any information about how any interference with individual rights will be addressed (for example, it does not set out any safeguards).[50]

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46 Department of Home Affairs, *Submission 6,* p. 5.

47 Department of Home Affairs, *Submission 6,* p. 5.

48 Department of Home Affairs, *Submission 6,* p. 5.

49 Law Council of Australia, *Submission 5,* p. 4; and Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 10.

50 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 10.

2.33 In light of these concerns, the Scrutiny Committee sought further advice from the minister as to the appropriateness of overriding legal professional privilege.[51]

2.34 In its submission, the department explained why it was necessary to override legal professional privilege:

> Serious and organised crime groups frequently set up elaborate financial and legal structures to conceal or disguise their wealth. Lawyers can become unwittingly caught up in this process if they provide advice to a client on matters such as setting up a trust structure, incorporating a business or selling property.
>
> However, in other circumstances, lawyers may become professional facilitators. The use of legal practitioners to launder illicit funds is an internationally established money laundering method, and law enforcement have reported that it can be difficult in many cases to distinguish legitimate legal advice from advice given to intentionally frustrate the operation of future investigations.
>
> As production orders can be issued prior to restraint action or during a covert investigation, if legal professional privilege was not removed tension could also arise between a lawyer's professional obligations to their client and the fact that they could not take instructions to clarify or waive legal professional privilege from their client due to the non-disclosure requirements under clause 16 of proposed Schedule 1. The abrogation of legal professional privilege prevents this tension from arising.[52]

2.35 Similar to the abrogation of privilege against self-incrimination, the department reiterated that production orders must be made by a court and a magistrate retains the discretion to not issue a production order. Further, the department noted that the POC Act already permits the abrogation of legal professional privilege for production orders and that the bill merely extends this aspect to States and Territories participating in the scheme.[53]

Significant matters in delegated legislation

2.36 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.[54] Subclause 12(3) of new Schedule 1 lists the officials of a participating State who may give a notice to a financial institution. However, proposed paragraph 12(3)(d) does not provide a similar list for self-governing Territories and instead specifies that this will be 'prescribed by the regulations in the Territory.'

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51 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 11.

52 Department of Home Affairs, *Submission 6*, p. 5.

53 Department of Home Affairs, *Submission 6*, pp. 5–6.

54 Clause 12, new Schedule 1 (which is inserted by item 6 of Schedule 4)..

2.37 As noted by the Scrutiny Committee, proposed paragraph 12(3)(d) appears to allow for significant matters to be prescribed in the regulations:

> The bill would therefore appear to permit the regulations to confer coercive evidence-gathering powers on a potentially broad range of persons. The bill does not set a limit on the categories of persons on whom powers may be conferred.
>
> The committee's consistent view is that significant matters, such as the persons empowered to exercise coercive evidence-gathering powers, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.[55]

2.38 Apart from noting that similar provisions apply in relation to Commonwealth notices to financial institutions, the EM does not set out a rationale for this provision.[56] As such, the Scrutiny Committee sought the following information from the minister:

> The committee requests the minister's detailed justification for allowing regulations to prescribe classes of persons authorised to issue notices to financial institutions under clause 12 of proposed Schedule 1.
>
> The committee also seeks the minister's advice as to the appropriateness of amending the bill to specify the category of persons who may be empowered under the regulations to issue notices under clause 12 of proposed Schedule 1.[57]

2.39 The Law Council noted that it shared the concerns raised by the Scrutiny Committee and similarly recommended that the bill set out 'the criteria or class of persons for the definition of who may exercise coercive evidence-gathering powers in self-governing Territories…'[58]

2.40 In its submission, the department provided some context in relation to the development of this provision. The department explained that paragraph 12(3)(d) of new Schedule 1 'arose out of negotiations with the States and Territories and was created to ensure that the Scheme was sufficiently flexible to allow appropriate officials in the Territories to issue notices to financial institutions in unexplained wealth cases.'[59] The department noted that the Australian Capital Territory currently does not have an unexplained wealth scheme and therefore it was not possible to accurately define potential future officials who would be vested with the power to issue notices to financial institutions.[60]

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55 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 11.

56 Explanatory Memorandum, p. 45.

57 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 12.

58 Law Council of Australia, *Submission 5,* p. 4.

59 Department of Home Affairs, *Submission 6,* p. 6.

60 Department of Home Affairs, *Submission 6,* p. 6.

2.41 The department additionally noted that this regulation-making power will be subject to the rules of disallowance under section 42 of the *Legislation Act 2003*, and will be subject to oversight by the Parliamentary Joint Committee on Law Enforcement.

Immunity from liability

2.42 As noted in chapter 1 of this report, clause 14 of new Schedule 1 provides that financial institutions as well as officers, employees and agents of financial institutions, are protected from any action, suit or proceedings in relation to any action taken by the institution or person under a notice under clause 12 or in the mistaken belief that action was required under the notice. The EM outlines the intent of this provision:

> Subclause 14(1) ensures that financial institutions and related persons are not exposed to situations where they may be criminally liable for failing to comply with a notice under clause 17, but would nevertheless expose themselves to liability (for releasing private information etc.) by complying with this notice.[61]

2.43 The Scrutiny Committee explained the effect of this provision and the reason for its concern:

> This removes any common law right to bring an action to enforce legal rights. The committee notes that this applies even if the relevant action was not taken in good faith.
>
> The committee expects that if a bill seeks to provide immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no such justification, merely restating the operation and effect of the relevant provisions.[62]

2.44 In light of the concerns raised, the Scrutiny Committee sought further advice from the minister as to why immunity from civil and criminal liability is considered appropriate, 'particularly without any requirement that the action be taken in good faith…'[63]

2.45 The department explained that:

> Subclause 14(1) replicates existing subsection 215(1) of the POC Act, which was introduced at the recommendation of the Australian Law Reform Commission. The Commission found that financial institutions and their employees could expose themselves to civil and criminal liability for the mere act of providing financial information or documents to an authorised officer, even where they were compelled to do so.

61 Explanatory Memorandum, p. 46.

62 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 12.

63 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018*, 27 June 2018, p. 12.

> On this basis, the Commission recommended that financial institutions and their employees should be protected from any action, suit or proceedings in relation to its or their response to a notice.[64]

2.46 The department also explained that the immunity from liability would only operate narrowly—that is, in relation to action taken under a particular notice. Therefore, the immunity from liability 'will not protect an employee from civil or criminal liability if they deliberately engage in conduct that clearly falls outside of the parameters of the notice.'[65]

Privacy

2.47 As explained in chapter 1 of this report, the bill proposes to expand certain definitions within the *Telecommunication (Interception and Access) Act 1979* (TIA Act) 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.[66] The EM notes that the proposed provision might be used, for example, 'where the wealth vastly exceeds the person's known lawful income but the underlying predicate offending is not known.'[67]

2.48 The Scrutiny Committee explained its concerns with these provisions:

> Thus, it would appear that such information could be used to investigate a person's wealth despite there being no specific information as to any criminal offending. This impacts on a person's right to privacy and raises scrutiny concerns as to whether allowing such information to be used or disclosed for such purposes unduly trespasses on personal rights and liberties.[68]

2.49 The statement of compatibility within the EM noted that the limits on the right to privacy are 'reasonable, necessary and proportionate to achieving the legitimate objective of ensuring that law enforcement authorities are in a position to effectively combat serious and organised crime…'[69] Additionally, the EM noted that the TIA Act already allows for the communication of lawfully intercepted information or interception warrant information relevant to certain orders. The amendments in the bill, it explained, 'merely extend the existing disclosure laws to ensure that they also cover information relevant to unexplained wealth provisions.'[70]

2.50 However, the Scrutiny Committee raised concerns that 'the type of information that can be intercepted can include highly personal information.'[71] The

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64 Department of Home Affairs, *Submission 6,* p. 7.

65 Department of Home Affairs, *Submission 6,* p. 7.

66 Proposed paragraphs 5B(1)(bd) and 6L(1)(b) of Schedule 6.

67 Explanatory Memorandum, pp. 55–56.

68 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 13.

69 Explanatory Memorandum, p. 12.

70 Explanatory Memorandum, p. 12.

71 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 13.

Scrutiny Committee also suggested, that '[a]llowing the disclosure of such information to investigate a person's wealth, without the need to provide any link to a particular offence, raises scrutiny concerns as to whether these measures risk unduly trespassing on a person's right to privacy.'[72]

2.51 In addition to sharing the concerns of the Scrutiny Committee, the Law Council also noted that the information provided pursuant to a notice under proposed section 12 'may include a substantial amount of personal and financial information.'[73] As such, the Law Council recommended that the views of the Privacy Commissioner be obtained to ensure that the measures in the bill were necessary and proportionate.[74]

2.52 In response to the Law Council's concerns, the department explained that the TIA Act already contains a range of protections to safeguard a person's privacy and noted that lawfully intercepted information can only be used in limited circumstances.[75] Similarly, the bill only permits the disclosure of information to specific authorities and for a specified purpose as set out in the table at subclause 18(2) of new Schedule 1.[76] Finally, the department noted that the use of these powers will be reported to the minister annually and is subject to scrutiny by the Parliamentary Joint Committee on Law Enforcement.[77]

Committee view

2.53 In its submission, the department, noted that '[s]erious and organised crime groups are increasingly operating in a more coordinated and organised manner and are frequently controlling activities that span national and international borders.'[78] Given the challenges posed by the increasingly sophisticated, coordinated and cross-jurisdictional operations of serious and organised crime groups, the committee considers it necessary and timely that the Commonwealth seek to establish a national scheme to target unexplained wealth.

2.54 It is important to note that the bill is a result of consultations between Commonwealth, State and Territory governments. Also, due to constitutional limitations, one or more States must refer their power to the Commonwealth. This will be achieved through a text referral of Schedules 1, 2 and 4 from the New South Wales Parliament, and therefore these Schedules cannot be amended. The committee, however, notes that there is scope for amendments to be made after the bill has been enacted in its present form, but that this can only occur if the parties to the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth, unanimously agree to the amendments. Consequently, any amendments by

72 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018,* 27 June 2018, p. 13.

73 Law Council of Australia, *Submission 5,* p. 5.

74 Law Council of Australia, *Submission 5,* p. 5.

75 Department of Home Affairs, *Submission 6,* p. 8.

76 Department of Home Affairs, *Submission 6,* p. 8.

77 Department of Home Affairs, *Submission 6,* p. 8.

78 Department of Home Affairs, *Submission 6,* p. 9.

the Commonwealth Parliament to these schedules would place the national scheme on unexplained wealth in jeopardy.

2.55 The committee acknowledges that the concerns raised during this inquiry are in relation to retrospectivity, privilege against self-incrimination, legal professional privilege, the exemption from disallowance, immunity from liability, significant matters being in delegated legislation and privacy. The committee notes that most of the provisions that relate to these concerns are contained within Schedules 1, 2 and 4 of the bill, which must be enacted in its present form.

2.56 The committee has given careful consideration to the issues raised by submitters, but has ultimately arrived at the view that the provisions in the bill are justified. Each of these concerns is discussed below.

Retrospectivity

2.57 In relation to the concerns relating to retrospectivity, the committee notes that the bill does not criminalise conduct that was otherwise lawful prior to the amendments. The committee is also persuaded by the evidence provided by the department, that it would be almost impossible for law enforcement to prove the precise point in time when property or wealth was acquired. The committee also notes that the POC Act contains a similar provision and therefore the bill merely extends current provisions of the POC Act to participating States and self-governing Territories. The committee is therefore of the view that the retrospective application of the bill is justified.

Privilege against self-incrimination and legal professional privilege

2.58 The committee acknowledges the concerns relating to the abrogation of legal professional privilege and privilege against self-incrimination. The committee agrees that these privileges are fundamental to the administration of justice. However, the committee is also of the view that in limited circumstances, and with sound justification, these privileges can be appropriately overridden.

2.59 The committee notes the advice provided by the department, to the affect that production orders have a narrow scope and therefore the risk of the privileges being overridden is minimised. Also, the committee accepts the view put by the department that to allow criminals to rely on these privileges would frustrate the operation of production orders and would, in some instances, prevent law enforcement from gathering information required to support the unexplained wealth action. The committee also notes that the abrogation of the privilege against self-incrimination and legal professional privilege already exists for current production orders under the POC Act and therefore the bill merely extends these arrangements to participating States and self-governing Territories. Accordingly, the committee considers that, under these circumstances, it is appropriate that these privileges are overridden.

Exemption from disallowance

2.60 Regarding the minister's declaration under proposed subsection 14F(4) being exempt from disallowance, the committee notes the advice from the department—that subsection 44(1) of the *Legislation Act 2003* specifically allow for the rules of disallowance at section 42 to not apply under certain circumstances. The committee is

of the view that these circumstances are met as the declaration under proposed subsection 14F(4) is intended to facilitate the operation of an intergovernmental scheme, namely, the National Cooperative Scheme on Unexplained Wealth.

Significant matters in delegated legislation

2.61 In relation to allowing the regulation to specify, in the case of self-governing Territories, the kind of person who may issue notices to financial institutions, the committee is mindful that the scheme needs to maintain a degree of flexibility, particularly in light of the Australian Capital Territory currently not having an unexplained wealth scheme. The committee further notes that the regulation will be subject to the rules of disallowance and that the operation of new Schedule 1 (which includes notices to financial institutions), will be subject to oversight by the Parliamentary Joint Committee on Law Enforcement.

Immunity from liability

2.62 Regarding the concerns relating to financial institutions and its officers, employees and agents being immune from liability, the committee notes that the immunity would only operate narrowly. Furthermore, the immunity was introduced into the POC Act at the recommendation of the Australian Law Reform Commission and the bill merely extends this immunity to apply to action taken in respect of notices to financial institutions issued by participating States and self-governing Territories. Consequently, the committee is of the view that the amendment as proposed by the bill is justified and appropriate.

Privacy concerns

2.63 In relation to the privacy concerns, the committee considers that the bill appropriately limits the circumstances when disclosure of information to specific authorities for a specified purpose, is permitted. Furthermore, the committee is reassured that the use of powers under the TIA Act will be reported to the minister annually and is subject to scrutiny by the Parliamentary Joint Committee on Law Enforcement.

2.64 The committee supports the establishment of a national scheme to target unexplained wealth and considers that the bill achieves the right balance between protecting the rights of individuals and providing law enforcement with sufficient tools to deprive serious and organised crime groups of their wealth.

Recommendation 1

2.65 The committee recommends that the bill be passed.

Senator the Hon. Ian Macdonald

Chair

Appendix 1

Public submissions

1 Adelaide Magistrates Court
2 Civil Liberties Australia
3 Legal Services Commission of South Australia
4 Police Federation of Australia
5 Law Council of Australia
6 Department of Home Affairs
7 Mr Edward Greaves