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# Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

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# Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

**Date introduced:** 25 June 2009

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** All provisions with the exception of Schedule 2, Part 5 (relating to legal aid costs under the *Proceeds of Crime Act 2002 (Cth)*) are to commence either on the day on which the Act receives Royal Assent, or the following day Schedule 2, Part 5 is to commence 3 months and one day after the Act receives Royal Assent.

**Links:** The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

## Purpose

The Bill makes significant amendments to the following Commonwealth Acts: *Crimes Act 1914*, *Criminal Code Act 1995*, *Customs Act 1901*, *Family Law Act 1975*, *Proceeds of Crime Act 2002*, *Telecommunications (Interception and Access) Act 1979*. The amendments are targeted at organised criminal activity and include unexplained wealth provisions and enhanced police powers relating to controlled operations, assumed identities and witness identity protection. This Bill also introduces liability for persons who jointly commit offences. Finally, the Bill will also allow for increased access to telecommunications interception for criminal organisation offences.

## Outline of Bills Digest

This Bill is lengthy and complex and due to time constraints, it is not possible for the Bills Digest to cover all the detail presented in the Bill. The Digest has covered the most controversial and pertinent points of the Bill. Furthermore, the recent tabling of the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups[1] and the pending

1. Commonwealth of Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Canberra, August 2009, http://www.aph.gov.au/senate/committee/acc_ctte/laoscg/index.htm viewed 3 September 2009.

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Senate Legal and Constitutional Affairs Committee's Inquiry into the provisions of the Bill make it unnecessary to duplicate extensive background material and commentary.

## Background

### Proceeds of Crime amendments

#### Unexplained wealth

*"Unexplained wealth" provisions allow a court to issue a declaration unless the subject of the declaration can establish, on the balance of probabilities, that his or her wealth was lawfully acquired. Following an assessment of the quantum of unexplained wealth, the subject of a declaration must pay the amount to the jurisdiction.*[2]

Historically, the predecessor to the current proceeds of crime legislation, the *Proceeds of Crime Act 1987* was enacted prior to the international community acknowledging the significance and importance of unexplained wealth provisions. In 1997, the Interpol General Assembly passed a resolution which

> recognised that unexplained wealth is a legitimate subject of inquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country's domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect of unexplained wealth.[3]

There was not an explicit reason for not drafting unexplained wealth provisions in the Proceeds of Crime Bill 2002. Possibly the Government took the approach that without unexplained wealth provisions, the Bill was already ambitious in its coverage and the Government could consider unexplained wealth provisions at a later date if necessary. Primarily, that Bill sought to implement recommendations in the Australian Law Reform Commission's review of the *Proceeds of Crime Act 1987*, entitled 'Confiscation that Counts'.[4] That review did not discuss unexplained wealth provisions.

The compulsory statutory review of the *Proceeds of Crime Act 2002* was completed in 2006 (the Sherman Review) and Tom Sherman AO considered that:

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2. Attorney-General's Department, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups: additional questions*, Canberra, 23 December 2008 http://www.aph.gov.au/SENATE/committee/acc_ctte/laoscg/qon/qon_AGD.pdf p.2.

3. Interpol, *Money Laundering: Investigations and police cooperation,* Resolution No AGN/66/RES/17**,** New Delhi, 15-21 October 1997. This resolution is available here, viewed 4 September 2009.

4. Australian Law Reform Commission, *Confiscation That Counts: A review of the Proceeds of Crime Act 1987*, Report No 87, March 1999, http://www.austlii.edu.au/au/other/alrc/publications/reports/87/ viewed 4 September 2009.

> … to introduce these [unexplained wealth] provisions would represent a significant step beyond the national and international consensus in this area. …
>
> While this [Interpol General Assembly] resolution is an important expression of consensus in the international police community it falls short of the wider consequence I believe is necessary to support the introduction of unexplained wealth provisions.
>
> Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? Moreover, the adoption of the recommendations made in this report will, I believe, make the Act far more effective in attacking the proceeds of crime.
>
> On balance, I believe it would be inappropriate at this stage to recommend the introduction of these provisions but the matter should be kept under review.[5]

In the context of improving the effectiveness of proceeds of crime legislation, Mr Sherman considered that unexplained wealth provisions were not necessarily a helpful tool to add to the legislative framework. However, police and prosecutors are in favour of having unexplained wealth provisions to address the difficulties in obtaining sufficient real evidence to proceed with other confiscation action:

> Leaders of criminal enterprises are rarely close to the predicate criminal activities. Underlings can be paid to take those risks. Unexplained wealth provisions enable law enforcement to confiscate the illicit profits that are a number of steps removed but under the indirect control of organised crime leaders. The AFP has examples where criminal intelligence has identified individuals who have accumulated significant assets and wealth with no detectable legal means to account for it.[6]

Unexplained wealth provisions arguably undermine the presumption of innocence and rights such as the right to silence and the right to privacy. This Bills Digest will look at the criticisms of the proposed provisions under "Key Issues" below.

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5. Sherman, T. *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth),* July 2006, pp. 36-37, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF/$file/5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF viewed 28 August 2009.

6. Australian Federal Police Association, *Submission to the Federal Crime Justice Forum*, 29 September 2008, p.30, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~AFPA+Submission+to+the+Federal+Crime+Justice+Forum.pdf/$file/AFPA+Submission+to+the+Federal+Crime+Justice+Forum.pdf viewed 6 September 2009.

### Freezing orders

*'Freezing orders' will enable the temporary restraint of liquid assets held in accounts with financial institutions. The application process for freezing orders will be simpler than for restraining orders and an expedited application process will be available in circumstances where the time taken to obtain a formal restraining order increases the risk that suspected proceeds or instruments of crime will be transferred to frustrate confiscation proceedings.*[7]

The Sherman Review did not make a recommendation in favour or against the introduction of interim restraining or freezing orders. Mr Sherman noted in the report that the Australian Federal Police (AFP) and the Australian Federal Police Association (AFPA) submitted that the Act should contain provision for interim restraining or freezing orders[8] but went on to say that his recommendations concerning provision for other *ex parte* applications for the exercise of other coercive powers will, if implemented, go a considerable distance towards providing quick action that will not put a suspect on alert.[9]

Nonetheless, the Government stated that a senior level working group of Commonwealth agencies reviewed the Sherman Report and identified additional proposals to improve the operation of the Act, including the introduction of freezing orders. The Explanatory Memorandum notes that these proposals were based on their experience and research since the time of the Sherman Report.[10] The time between the tabling of the Sherman Report and the formation of the working group was 8 months.

The provisions in the Bill relating to the introduction of freezing orders are problematic from a rights perspective and submissions on the provisions of the Bill to the Senate Legal and Constitutional Affairs Committee have expressed strong concerns about the justification for their introduction. In particular, 'the Law Council queries the necessity of the proposed freezing order regime in light of the already expansive powers to make restraining orders'.[11] This will be discussed further under "Key Issues".

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7. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.26.

8. T. Sherman, Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth), Canberra, July 2006, p.38.

9. Sherman, *Report,* see Recommendations 7 and 22(d).

10. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.23.

11. Law Council of Australia, Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.24 http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 2 September 2009.

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### Time limitations

Presently the Act has a six year time limitation period for *non-conviction-based* asset recovery. This means that confiscation is precluded if the relevant offences are not detected and a restraining application made within six years. The Sherman Report recommended that the time limitation period be extended to twelve years, which is the time period allowed under analogous confiscation legislation in the United Kingdom.[12] Mr Sherman noted that 'there have to be some limits on what is essentially a civil liability'.[13] However, the Government has considered it appropriate to remove the time limit altogether. Again, the Law Council has criticised the proposal to remove the time limit and is 'not convinced that the Department or the CDPP [Commonwealth Director of Public Prosecutions] has outlined sufficient grounds to justify a complete removal of any time limitation on the non-conviction based confiscation scheme'.[14] This proposal has otherwise not received much attention to date.

### Restraint and forfeiture of *instruments* of serious crime

Section 329 of the Act defines instrument as either the property is used in, or in connection with, the commission of an offence; or the property is intended to be used in, or in connection with, the commission of an offence; whether the property is situated within or outside Australia. This could include computers, vehicles, communications technology. The Explanatory Memorandum notes

> that the Act permits the proceeds of a wide variety of offences to be confiscated on a civil standard of proof but instruments of indictable offences (other than terrorism offences) may only be confiscated where a person is convicted of the offence.[15]

The Sherman Report recommended that instruments of indictable offences should be subject to non-conviction based restraining and forfeiture orders under the Act.[16] Mr Sherman stated that 'there seems no reason in principle why instruments should not be subject to restraining orders to the same extent as proceeds'.[17] However, the Law Council commented that:

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12. Sherman, *Report*, D3.
13. Sherman, *Report*, D4.
14. Law Council of Australia, *Submission*, p.26. For the CDPP's justification of the proposal (for 12 years, not removing the time limit altogether), see Sherman, *Report*, D2-3.
15. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.37.
16. Sherman, *Report,* D4.
17. Sherman, *Report*, D4.

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> the expansion of this regime demands to be justified by sound evidence of necessity. The fact that the non-conviction based confiscation regime has proven to be an effective mechanism to remove the proceeds of unlawful activity does not of itself justify further expansion of this regime to permit the civil confiscation of instruments of illegal activity.

The amendments will enable the restraint and forefeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction. This will bring the Commonwealth legislation into line with legislation in South Australia, Western Australia and Victoria that permits non-conviction based confiscation of property used (or intended to be used) in, or in connection with, an offence.[18] Against this background, the safeguards that the Government proposes for non-conviction based restraining orders for instruments of indictable offences will be discussed under the "Key Issues" in this Digest.

#### Information sharing under the Act following the *Hatfield* decision

As summarised in the Explanatory Memorandum, in *DPP (Cth) v Hatfield* [2006] NSWSC 195, the court held that information obtained in an examination under Part 3-1 of the Act could only be used for the purpose of proceedings under the Act, and could not be used or disclosed for any other purpose.[19] This decision did not go to appeal. The Sherman Report commented that:

> the *Hatfield Case* provides no guidance on what constitutes permitted disclosure other than to say that use of information is permissible in court proceedings designed to further the actual obtaining of property liable to confiscation.
>
> The *Hatfield Case* has introduced considerable uncertainty to the use and dissemination of information obtained under the Act. Despite the fact that, unlike other Commonwealth Acts which contain compulsive powers, the Act contains no general prohibition on the use of information under the Act except for the purposes of the Act.[20]

The Sherman Report then made a seemingly common-sense recommendation that information relating to any serious offence can be passed to any agency having a lawful function to investigate that offence. However, as the Law Council has noted, specific safeguards should be in place to protect against undue intrusion into the individual rights

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18. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.37.
19. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.40.
20. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.40.

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of those persons in respect to whom information is gathered and shared.[21] The Explanatory Memorandum notes that it was never the intention of the Act that information obtained in an examination could only be used for the purposes of confiscation proceedings under the Act and could not be shared for any other reason. Indeed, at the time of the introduction of the Proceeds of Crime Bill 2002, the Director of Public Prosecutions' Guidelines to Prosecutions under the *Proceeds of Crime Act 2002* were presented to the Parliament. These Guidelines clearly state at paragraph 5.6 that:

> If the material [revealed in an examination] shows that serious criminal conduct has occurred which is not the subject of a current investigation the material can be provided to an appropriate agency for investigation with a view to possible prosecution.[22]

The *Hatfield* decision was thus contrary to Parliament's original intention of the information sharing provisions. The proposed provisions on disclosure of information put it beyond doubt that information obtained under the regime can be disclosed when that information will assist in the prevention, investigation or prosecution of criminal conduct. Interestingly, the proposed disclosure provisions are even more wide-reaching than the Guidelines and include allowing the Australian Taxation Office to receive information for the purpose of protecting public revenue. This will be discussed further under "Key Issues".

### Legal Aid Commission costs to be paid out of the Confiscated Assets Account

Section 292 presently allows for the Official Trustee to pay a legal aid commission the legal costs relating to proceedings under the Act. This is to be paid out of the property covered by a restraining order. The Sherman Report noted that over 2003-2005, 38 applications were funded by legal aid, totalling almost $200 000.[23] The Sherman Report considered concerns from the New South Wales Legal Aid Commission that the existing arrangements are not facilitating the reimbursement of their costs. In particular, legal aid commissions are not being promptly reimbursed for money they outlay in representations in these matters which significantly affects their ability to fund other legal aid priorities.[24] The Sherman Review recommended that all 'claims for legal expenses which have been certified as fair, reasonable and duly expended by legal aid commissions on proceedings under the Act should be paid directly out of the CAA [Confiscated Assets Account]'.[25]

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21. Law Council of Australia, *Submission,* p.30.

22. *DPP (Cth) v Hatfield* [2006] NSWSC 195, at 8 http://www.austlii.edu.au/au/cases/nsw/NSWSC/2006/195.html viewed 12 September 2009.

23. Sherman, *Report,* p.54. Note that although the Act was enacted in 2002, the commencement date was 1 January 2003.

24. Sherman, *Report,* p.56.

25. Sherman, *Report*, p.57.

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According to Mr Sherman, the CAA would be able to manage these costs because the income of the CAA (and the overall value of recoveries) is much greater than the cost of legal aid. The estimated balance of the CAA for the period 2008-09 is approximately $9.5 million.[26]

Based on six years of operation of the Act, the Sherman Review and submissions from stakeholders suggest that there is no real concern that the proposed amendments to allow legal aid repayments out of the CAA will impact on the main purpose of that account, namely to fund crime prevention, law enforcement, drug treatment and diversionary measures relating to the illicit use of drugs[27]. The proposed changes are not controversial. The Sherman Review went on to recommend that for accountability purposes, these expenses should be itemised in the Insolvency and Trustee Service of Australia's annual report however the Bill does not make amendments to require this.

## Enhancement of police powers

Schedule 3 of the Bill implements model provisions relating to controlled operations, assumed identities and witness protection. The Explanatory Memorandum offers an exceptionally thorough summary and explanation of the offences. These provisions are generally not controversial and the variances from the model laws are only necessary because of their unique application in the Commonwealth environment.

This section of the Bills Digest notes the comments and concerns raised by the Commonwealth Ombudsman, the Law Council of Australia and Civil Liberties Australia in their respective submissions to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Bill However, due to time constraints, it is not possible to provide a provision-by-provision analysis of this Schedule.

### Controlled operations

*A controlled operation is a law enforcement operation in which a person is authorised to engage in unlawful conduct in order to obtain evidence of a serious criminal offence. In a controlled operation, instead of seeking to terminate immediately a criminal scheme, law enforcement officers allow the scheme to unfold under controlled conditions. During the process of allowing the scheme to unfold… [an authorised person] … may themselves need to commit offences.*[28]

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26. Australian Government, *Budget Paper No. 4 – Special Accounts*, May 2009, http://www.budget.gov.au/2009-10/content/bp4/html/bp4_special_accounts_03_ag.htm viewed 15 September 2009.

27. As prescribed under section 298 of the Act.

28. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.45.

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The Standing Committee of Attorneys-General (SCAG) agreed to a resolution for a comprehensive national response to combat organised crime.[29] In that agreement, the SCAG agreed to enhance police powers by implementing model laws for controlled operations, assumed identities and witness identity protection. The model laws for these police powers were first endorsed for implementation in 2004, following the publication of a report entitled *Cross-border Investigative Powers for Law Enforcement*. This report was the result of the 2002 Leaders Summit on Multi-jurisdictional Crime by the joint Working Group of the Standing Committee of Attorneys-General and the then Australasian Police Ministers Council. By enacting the model laws, the Commonwealth will assist in the harmonisation of laws that will enhance:

> the ability of law enforcement agencies to investigate multi-jurisdictional criminal activity. This type of crime is becoming increasingly common due to advances in information and communication technology, and the increasing sophistication of organised criminal groups, particularly those involved in terrorism or trans-national crime, including drug-trafficking.[30]

Stakeholder groups are generally supportive of the evidence, concept and need for these provisions. There is some equivocation of support by the Law Council of Australia and Civil Liberties Australia who both suggest amendments to enhance the regime.[31]

Civil Liberties Australia are supportive of the provisions but recommend that the Bill be amended to also include a specific provision (based on US and Canadian experience) to the effect that a person is not to be held criminally responsible for an offence where a police officer has induced the commission of the crime (intentionally or otherwise) and the defendants had a lack of predisposition to engage in the criminal conduct other than that instilled by the police officer's conduct.[32]

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29. McClelland, R, *Media Release*, 'National Response to Combat Organised Crime', April 2009 http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_16April2009-NationalresponsetocombatOrganisedCrime viewed 3 September 2009.

30. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.45.

31. Law Council of Australia, *Submission,* pp. 36-42.

32. Civil Liberties Australia, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009,* p.12. http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 7 September 2009.

The Commonwealth Ombudsman has stated that 'the proposed legislation provides a clearer and more robust exposition of the Ombudsman in relation to his oversight role'.[33] Further, 'these changes are strongly supported'.[34] The Commonwealth Ombudsman did raise a concern about reporting mechanisms, discussed under "Key Issues" further in this Digest.

### Assumed Identities and Witness Identity Protection

*An assumed identity is a false identity that is used for the purpose of investigating, or gathering intelligence on, criminal activity, or conducting other intelligence or security activities. Assumed identities provide vital protection for undercover operatives engaged in infiltrating organised crime groups or collecting information relevant to national security.*[35]

*Undercover operatives may need to give evidence in criminal and civil proceedings. In some cases, it will be necessary to protect the true identity of the operative to ensure their safety (or the safety of his or her family). A witness who appears in person to give evidence, who can be cross-examined, whose demeanour can be assessed by the court but whose true name and address are withheld is significantly different from a truly anonymous witness who does not appear and who the defendant cannot place.* [36]

The Law Council opposes the introduction of proposed Part 1ACA into the *Crimes Act 1914* which introduces a new process for determining when and how the true identity of a witness in court proceedings may be concealed:

> The Law Council is concerned about the removal of procedural safeguards designed to protect the individual rights of the accused. In the context of assumed identities and witness protection, this has taken the form of removing any oversight or discretionary role for the court and replacing this with an internal authorisation procedure, whereby

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33. Commonwealth Ombudsman, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, p.2. http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 9 September 2009.

34. Commonwealth Ombudsman, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, p.2. http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 9 September 2009.

35. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.47.

36. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.48.

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> law enforcement and intelligence agencies are invested with almost exclusive control over the protection of covert operatives and their identities.[37]

Only the Law Council of Australia has raised concerns about these provisions and these will not be explored further. The Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Bill provides considerable detail on its opposition to the provisions.[38]

### Joint commission offence

*Joint commission applies when two or more people agree to commit an offence together, and an offence is committed under that agreement. The effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group.*[39]

Given that joint commission is a provision that extended criminal responsibility for offence, it is being inserted into Part 2.4, alongside other provisions that extend criminal responsibility to persons who were not wholly responsible for committing an offence.[40]

The SCAG Resolution for a national response to combat organise crime noted that the Commonwealth will 'consider the introduction of a package of legislative reforms to combat organised crime included measure to … address the joint commission of criminal offences'.[41] Joint commission is not an entirely new concept. It builds on the common law principle of joint criminal enterprise which is 'a venture undertaken by more than one person acting in concert in pursuit of a common criminal enterprise.[42]

The second reading speech summarises the need and background to the offence provisions:

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37. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.45.
38. Law Council of Australia, Submission, pp. 45-49.
39. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.132.
40. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.132.
41. Standing Committee of Attorneys-General, *Communique*, 17 April 2009 http://www.jaiccols.net/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_17April2009-Communique-StandingCommitteeofAttorneys-General viewed 28 August 2009.
42. *McAuliffe v R* (1995) 183 CLR 108; 130 ALR 26. Presently under common law, A person involved in a joint enterprise may be liable for the crime committed as a principal or an accessory depending upon the role played: *Johns v R* (1980) 143 CLR 108 ; 28 ALR 155.

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> In terms of the undertaking of offences by way of a joint commission of offence with others, the Bill introduces a new joint commission provision which is targeted at offenders who commit crimes in organised groups, and hence the relevance to serious and organised crime.
>
> This provision builds upon the common law principle of 'joint criminal enterprise'. If a group of two or more offenders agree to commit an offence together, the effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group.
>
> Joint commission targets members of organised groups who divide criminal activity between them.[43]

The Law Council of Australia and the Australian Federal Police Association are strongly opposed to the introduction of these provisions. Their arguments will be raised further under "Key Issues".

### Telecommunications interception for criminal organisation offences

The proposed amendments in Schedule 4 Part 2 of the Bill extend the definition of "serious offence" under the *Telecommunications (Interception and Access) Act 1979* to include conduct that would target associating with, contributing to, aiding and conspiring with a criminal organisation or a member of that organisation for the purpose of supporting the commission of prescribed offences.[44]

In the second reading speech on the Bill, the Attorney-General said that

> … in order to fight organised crime we must be able to target those who support the activities of criminal groups. The Bill will make telecommunications interception available for the investigation of offences relating to an individual's involvement in serious and organised crime in those states that have that legislation in place currently and those that in turn subsequently introduce such legislation on a similar basis or to a similar effect.[45]

These provisions have attracted some criticism by the Law Council and the Office of the Privacy Commissioner but are otherwise supported by law enforcement authorities. A short discussion of the Law Council's concerns is under "Key Issues" below.

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43. McClelland, R, *Second reading speech*, p. 12.

44. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.142.

45. Currently South Australia New South Wales are the only jurisdictions to have enacted relevant legislation. Queensland intends to pass legislation before Christmas: http://www.abc.net.au/news/stories/2009/09/03/2676126.htm viewed 13 September 2009.

## Basis of policy commitment

The Explanatory Memorandum states that the Bill implements a set of resolutions by the Standing Committee of Attorneys-General (SCAG) for a comprehensive national response to combat organised crime.[46] In that agreement, the SCAG agreed to enhance police powers by implementing model laws for controlled operations, assumed identities and witness identity protection. The model laws for these police powers were first endorsed for implementation in 2004, following the publication of a report entitled *Cross-border Investigative Powers for Law Enforcement*. This report was the result of the 2002 Leaders Summit on Multi-jurisdictional Crime by the joint Working Group of the Standing Committee of Attorneys-General and the then Australasian Police Ministers Council.

## Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 17 September 2009. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/legcon_ctte/organised_crime/info.htm. At the time of publication of this Digest, 13 submissions have been made to that Committee and some of the main points raised in those submissions are indicated below.

In March 2008, the Parliamentary Joint Committee on the Australian Crime Commission commenced an inquiry into legislative arrangements to outlaw serious and organised crime groups pursuant to paragraph 55(1)(b) of the *Australian Crime Commission Act 2002.* This Committee presented its report in August 2009 and contains an excellent contextual background to some of the issues that this Bill seeks to address, including a useful overview of unexplained wealth provisions in various jurisdictions.[47] Further, the Committee also noted its support of the Bill.[48]

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46. McClelland, R, *Media Release*, 'National Response to Combat Organised Crime', April 2009 http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_16April2009-NationalresponsetocombatOrganisedCrime viewed 3 September 2009.

47. Parliamentary Joint Committee into the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/index.htm viewed 28 August 2009. See pp. 101-118 for a discussion on unexplained wealth.

48. Parliamentary Joint Committee on the Australia Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p. 117 http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/index.htm viewed 28 August 2009.

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### Position of significant interest groups

The Law Council of Australia have submitted reservations to some aspects of the Bill, mostly on the grounds that the provisions are not well-supported by the accompanying explanatory material and/or are questionably oppressive to an individual's rights. The Australian Federal Police Association has made a detailed submission on the unexplained wealth provisions. Other submissions of significance include the Commonwealth Ombudsman, the Office of the Privacy Commissioner and Civil Liberties Australia.

## Financial implications

The Explanatory Memorandum states that the amendments in this Bill have no financial impact on Government revenue.

However, there are no indications as to how much revenue is anticipated from the proposed unexplained wealth provisions, the investigation of which is likely to be resource intensive for law enforcement authorities from time to time. The proposed new freezing orders also have the potential to be resource intensive and may require a reconsideration of budget allocation to the relevant law enforcement authorities.

On 10 September 2009, at the resumption of debate on the Bill, the Speaker of the House reported a message from the Governor-General recommending appropriation.[49]

Further, there is no discussion in the Explanatory Memorandum as to how the Confiscated Assets Account (CAA) will continue to function with delays that might be incurred by the provisions in Part 5 of Schedule 2 requiring the Official Trustee to pay legal aid commissions from the CAA. The Commonwealth will recover the amount from the person who received the legal aid but this might be take considerable time. While the evidence suggests that the new provisions will not put the CAA into deficit, it is not clear whether it will have an impact on the provision and administration of funds to law enforcement programs under section 298 of the Act.

49. Order of Business, 10 September 2009. In accordance with section 56 of the Constitution and Standing Order 180(a) appropriations must be recommended by a message from the Governor-General. However, unlike the situation with appropriation and supply bills, the message recommending the appropriation is announced after the second reading (Standing Order 147). The Chair announces the receipt of the message. The terms of the message state that the Governor-General recommends to the House that an appropriation be made for the purposes of the bill. http://www.aph.gov.au/house/PUBS/gtp/pdf/chapter12.pdf viewed 10 September 2009.

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## Key issues

### Unexplained Wealth

**The provisions in the Bill dealing with unexplained wealth orders are outlined in this Digest at pages 23-29 and further background is set out at pages 4-5 above.**

A number of jurisdictions, including the UK, Italy, Western Australia and the Northern Territory, have already adopted legislation which reverses the onus of proof, enabling authorities to restrain assets that appear to be additional to an individual's legitimate income and requiring that individual to demonstrate that those assets were obtained legally.[50]

South Australia has recently introduced the *Serious and Organised Crime (Unexplained Wealth) Bill 2009* which adopts the Northern Territory model. The South Australian Police have said that the 'effectiveness of the proposed unexplained wealth declarations rests on the Crown being relieved of the need to prove the defendant is, or has been, involved in criminal activity or that a particular asset is linked to a particular crime'.[51]

However, there are strong arguments against the introduction of unexplained wealth provisions. The effectiveness of the provisions at deterring crime and the anticipated revenue that may be raised is questionable. In the context of the debate about heavy-handedness with laws relating to organised crime, the federal shadow Attorney-General George Brandis SC is reported as saying that 'governments that wish to expand the reach of ever-invasive laws have a strong burden of persuasion to show why the existing laws need more extension.'[52] The proposed unexplained wealth provisions are an example of this expanding reach.

#### Law Council of Australia

According to the Law Council of Australia, the provisions undermine the presumption of innocence, the right to silence and reverse the onus of proof. The provisions have the

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50. Parliamentary Joint Committee on the Australia Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p.102.

51. South Australian Police, *Submission into the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009,* p.1 http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 9 September 2009.

52. Eyers, J. 'Panicking politicians on the road to police state', *Australian Financial Review*, 5 September 2009, p.26 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FQ6LU6%22 viewed 12 September 2009.

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potential for arbitrary application. The Law Council argue that unexplained wealth provisions in Western Australia and the Northern Territory have not proven to be an effective prosecutorial tool. The provisions are unnecessary in light of other confiscation mechanisms.[53]

### Australian Federal Police Association and Police Federation of Australia

The Australian Federal Police Association and the Police Federation of Australia have been lobbying for unexplained wealth provisions for a number of years. However, the AFPA and PFA are critical of the proposed provisions, stating that the Government has not introduced unexplained wealth legislation as it is defined, or exists, in other Australian and international jurisdictions. The provisions should enable the AFP to investigate whether a person, company, trust has wealth in excess of its known lawful income and impose an unexplained wealth declaration accordingly without the need to link it to an offence. Furthermore, the current provisions do not enable the AFP to proactively investigate and recover assets involved in the 'layering' and 'integration' of money laundering.[54]

In its submission to the Senate Committee's Inquiry into the Bill, the AFPA and PFA have provided detailed alternative or possible amendments to the unexplained wealth provisions. The submission also raises the issue of constitutionality,[55] however it is the view of the author that the provisions are likely to be within constitutional power and their validity will not be called into question.

### Office of the Privacy Commissioner

The Office of the Privacy Commissioner (OPC) has also raised issues about the unexplained wealth provisions. Consideration could be given to the authorised officers having to demonstrate to the court that they have 'reasonable grounds to believe' rather than 'reasonable grounds to suspect'. Requiring a higher level of knowledge would lessen the possibility that personal information is collected from individuals who have not committed any offences.[56]

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53. Law Council of Australia, *Submission*, pp. 15-22.

54. Australian Federal Police Association, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, pp. 1-2 http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 7 September 2009.

55. Australian Federal Police Association, *Submission*, p.3.

56. Office of the Privacy Commissioner, *Submission to the Inquiry into the Crimes Legislation (Serious and Organised Crime) Bill 2009,* p.2 http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 11 September 2009.

### Civil Liberties Australia

Civil Liberties Australia has raised the same concern as the OPC about the evidentiary burden, saying that '…the bill in its current form sets the evidentiary threshold for commencing unexplained wealth proceedings too low, relying on 'reasonable suspicion' as opposed to 'reasonable belief'.[57]

Amendments to the Act 'derogate unjustifiably from established procedural rights such as the presumption of innocence, the right against self-incrimination and the rule against double jeopardy'.[58] These criticisms should not be taken lightly and the Parliament needs to be cognisant that:

> One of the big problems we have is that once the public are desensitised to issues on civil liberties and rule of law and basic civil liberties safeguards, they become insensitive to other legislation, commonwealth or state, which is brought in to attack other perceived problems.[59]

### Parliamentary Joint Committee on the Australian Crime Commission

In the committee's view, expressed in the Inquiry into the legislative arrangements to outlaw serious and organised crime groups, the unexplained wealth provisions in the Commonwealth's Bill are a reasoned and measured approach to the problem of organised crime.[60] However, the committee did note that the

> unexplained wealth provisions in WA have had limited use, with only 13 declarations made between its commencement in 2000 and June 2008. This supports the evidence that the committee heard from the Queensland Crime and Misconduct Commission that 'the jury is still out… on unexplained wealth'.[61]

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57. Civil Liberties Australia, *Submission*, p.1.
58. Civil Liberties Australia, *Submission*, p.1.
59. Eyers, J. 'Panicking politicians on the road to police state', *Australian Financial Review*, 5 September 2009, p.26 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FQ6LU6%22 viewed 12 September 2009.
60. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p.117.
61. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p.133.

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The committee nonetheless went on to recommend that the unexplained wealth provisions of this Bill be passed.[62] The committee also urged the Commonwealth to 'continue to consult with the States and Territories about the adoption of uniform unexplained wealth laws'.[63]

## Amendments relating to proceeds of crime

The Bill, in Schedule 2 Part 4, inserts new disclosure of information provisions into the Proceeds of Crime Act.[64] The OPC recommended that the 'purposes for disclosure of information acquired in any way under the *Proceeds of Crime Act 2002* should be limited to the investigation and prevention of serious offences'.[65]

Further, OPC noted that disclosure of personal information overseas for the purposes of criminal investigations should relate to offences that would be considered serious if they were committed in Australia.[66] It is in fact questionable why the provisions have gone so far when there are other mechanisms in place to deal with the exchange of information with foreign countries. For example, section 13 of the *Mutual Assistance in Criminal Matters Act 1987* (taking of evidence and production of documents at the request of a foreign country) would seem to cover the conduct anticipated by **proposed subsection 266A(2)**. This subsection outlines when disclosure is permitted and includes assisting in the prevention, investigation or prosecution of a crime against a foreign country's law.

## Controlled operations, assumed identities, witness identity protection

These provisions contained in Schedule 3 of the Bill are implementing model provisions that have been agreed to by all jurisdictions. However, there has been some criticism of the provisions, in particular those relating to controlled operations. The Law Council of Australia has made the following suggested amendments to Schedule 3 of the Bill:

- a requirement that an authorisation for a controlled operation specify the nature of the criminal activities covered by the authorisation, the identity of each participant in the

62. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p.117.
63. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p.118.
64. **Proposed section 266A** will be inserted at the end of Chapter 3 in the *Proceeds of Crime Act 2002*.
65. Office of the Privacy Commissioner, *Submission,* p.2.
66. Office of the Privacy Commissioner, *Submission*, p.2.

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controlled operation and the nature of the controlled conduct in which an authorised participant may engage

- a maximum duration for controlled operations
- enhanced reporting requirements, and
- a continued role for Administrative Appeal Tribunal members in approving extensions of controlled operations for more than three months.

Other stakeholders are generally supportive or silent on the implementation of the model provisions.

In relation to reporting requirements, the Commonwealth Ombudsman did seek to note that 'it has come to our attention that there is generally a lack of easily accessible records to verify the outcomes of operations and particularly the handling and possession of narcotic goods during the operation.'[67] It is noteworthy that the model legislation did provide for a principal law enforcement officer's report to be prepared and retained at the conclusions of a controlled operation but this has not been adopted in this Bill.

### Joint commission offence

The Bill proposes a significant amendment to the *Criminal Code Act 1995* that has largely gone unnoticed, perhaps because it is overshadowed by debate about the unexplained wealth provisions. **Proposed new section 11.2** of the Code will put the common law principle of joint criminal enterprise into the legislative framework. The principle of joint criminal enterprise (or common purpose):

> applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design […]. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime.[68]

The Law Council of Australia does not support the enactment of a joint commission offence for a number of reasons. Explicitly, LCA is of the view that there has not been sufficient consultation on the significant changes and there are uncertainties surrounding the concepts and the reasons for the introduction of a joint commission offence.[69] This is a significant point because, while slightly different to doctrines of common purpose and complicity, joint commission is intertwined with 'one of the most conceptually confusing

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67. Commonwealth Ombudsman, *Submission*, p.3.
68. McAuliffe v R (1995) 183 CLR 108 at 113.
69. Law Council of Australia, *Submission,* pp. 53-55.

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areas of criminal law theory.'[70] Furthermore, rights such as the right to silence and freedom of assembly are potentially abrogated with the introduction of this offence.

South Australian Police submitted that:

> With the current legislative reform occurring across the country which allows organised crime groups to be 'declared', there may be consideration to provide higher penalties for offenders who commit Commonwealth offences whilst a member of a declared organisation in a state.[71]

The key elements of the offence require the prosecution to establish that one or more parties to an agreement engaged in a particular course of conduct. The second reading speech notes that:

> joint commission targets members of organised groups who divide criminal activity between them. If, for example, three offenders agree to import heroin into Australia and two of the offenders each bring in 750 grams of heroin, all three offenders can be charged with importing a commercial quantity.[72]

While the provisions are attempting to put into statute what already exists at common law, greater consideration and debate on these provisions should occur.

### *Telecommunications (Interception and Access) Act 1979*

The Law Council of Australia opposes the introduction of the proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) which would expand the intrusive Commonwealth telecommunication interception regime to cover a range of new offences of a substantially different character to those currently covered by the definition of 'serious offence'.[73]These amendments are, according to the Law Council of Australia, 'wide ranging and intrusive to personal privacy'.[74]

The view of the OPC on these provisions is that any proposal broadening the telecommunications interception powers should consider consistent privacy protections.

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70. Freckleton, I and Selby, H. (eds), *Appealing to the Future: Michael Kirby and his Legacy*, Sydney, 2009, p.302.

71. South Australian Police, *Submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, p.2 http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/submissions.htm viewed 11 September 2009.

72. McClelland, R. *Second Reading Speech*, p.12.

73. Law Council of Australia, *Submission*, p.63.

74. Law Council of Australia, *Submission*, p.57.

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Further, robust reporting requirements are necessary to ensure transparency and allow for the ongoing monitoring of the operation of the provisions.

Despite criticism of the provisions by the Law Council of Australia and the Office of the Privacy Commissioner, these provisions have also seemingly gone unnoticed with the focus on more controversial aspects of the Bill.

## Main provisions

### Schedule 1— Unexplained Wealth—Amendments to the *Proceeds of Crime Act 2002*

**Items 1-4** are consequential amendments to the **new Part 2-6** of the Act. That Part will fit under Chapter 2 of the Act which deals with methods of confiscation. **Item 1** inserts **proposed paragraph (5)(ba)**, stating that it is a principal object of the Act to deprive a person of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences.

**Item 5** will insert a **new section 20A** to allow for restraining orders to be made over unexplained wealth. This provision sits underneath section 20 that deals with restraining orders derived from literary proceeds.[75] **New section 20A** *requires*[76] an appropriate court to order that property not be disposed of or otherwise dealt with by any person (**paragraph 20A(1)(a)**) or that the property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order (**paragraph 20A(1)(b)**) if the following circumstances exist:

- The DPP applies for the order; and (**proposed paragraph 20A(1)(c)**)
- There are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired; and (**proposed paragraph 20A(1)(d)**)
- Any affidavit requirements in subsection (3) for the application have been met; and (**proposed paragraph 20A(1)(e)**)
- The court is satisfied that the authorised officer who made the affidavit holds the suspicion, or suspicions stated in the affidavit on reasonable grounds; and (**proposed paragraph 20A(1)(f)**)
- There are reasonable grounds to suspect either or both of the following (**proposed paragraph 20A(1)(g)**):

75. For a case analysis of the literary proceeds orders provisions in the *Proceeds of Crime Act 2002 (Cth)*, see Biddington, M. 'Selling your story - literary proceeds orders under the Commonwealth Proceeds of Crime Act 2002', 2008, http://www.aph.gov.au/library/pubs/rp/2007-08/08rp27.pdf viewed 20 August 2009.

76. Subject to new subsection 20A(4).

(i) That the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect[77];

(ii) That the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

**Proposed subsection 20A(2)** requires the court to specify the property that must not be disposed of or otherwise dealt with, to the extent that the court is satisfied that there are reasonable grounds to suspect that the property is any one or more of the following:

(a) All or specified property of the suspect;

(b) All or specified bankruptcy property of the suspect;

(c) All property of the suspect other than specified property;

(d) All bankruptcy property of the suspect other than specified bankruptcy property;

(e) Specified property of another person (whether or not that person's identity is known) that is subject to the effective control of the suspect).

**Proposed subsection 20A(3)** outlines the requirements of an affidavit by the authorised officer. The affidavit must state:

(a) That the authorised officer suspects that the total wealth of the suspects exceeds the value of the suspect's wealth that was lawfully acquired;[78] and

(b) If the application is to restrain property of a person other than the suspect but not to restrain bankruptcy property of the suspect – that the authorised officer suspects that the property is subject to the effective control of the suspect[79];

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77. Note that this paragraph covers *any* Commonwealth offence. Restraining orders relating to literary proceeds orders have a narrower application in that they only apply to an indictable offence (offence punishable by imprisonment for a period exceeding 12 months: section 4G of the *Crimes Act 1914*), or a foreign indictable offence (see s337A of the *Proceeds of Crime Act 2002* for the complete definition). Similarly, the requirement that the offence be a State offence with a federal aspect is broad enough to capture both summary and indictable offences.

78. Note that the terms lawfully acquired, suspect, total wealth and wealth are new terms defined in the Bill (see **Items 32, 38, 29 and 42**).

79. Note that the terms bankruptcy property and effective control are terms specifically defined in the Act (see section 337).

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(c) That the authorised officer suspects either or both of the following:

(i) that the suspect has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect;

(ii) that the whole or any part of the suspect's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

**Proposed subsection (20A)(4)** allows the court to refuse to make a restraining order if is contrary to the public interest to do so. No guidance is given as to what matters the court may or must take into account when considering this issue. Further, a court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.

**Proposed subsection (20A)(5)** requires the court to make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with. The Explanatory Memorandum justifies this provision on the grounds that it is necessary for a restraining order to be in force before a court may make an examination order to investigate potential proceeds of crime.[80]

The court may also specify that a restraining order is to cover property that the suspect may acquire in the future. If the court does not specify this, future property is not covered by the order (**proposed subsection 20A(6)**).

If a person has applied under section 30 or 31 of the Act for an order to exclude property from a restraining order or if the court is otherwise satisfied that the property is another person's property that is not subject to the suspect's effective control, then the court can exclude that person's property from the restraining order under **proposed section 29A.**

**Item 10** of the Bill will insert a note at the end of subsection 39(1) of the Act (relating to ancillary orders). The note will state that the court may also order the Official Trustee to pay the Commonwealth an amount equal to the relevant unexplained wealth amount out of property covered by the restraining order (under section 20A).

**Item 11** will insert a new subsection to section 45 of the Act. Section 45 deals with the type of restraining orders that currently exist under the Act. **Proposed subsection 45(7)** puts it beyond doubt that the section does not apply to a section 20A restraining order.

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80. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.6.

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**Proposed section 45A** will be inserted to address the cessation of unexplained wealth restraining orders.[81]

**Item 12** will insert **new section 45A** and that section will outline the grounds when a restraining order made under section 20A will cease to have force. Under **proposed subsection 45A(1)**, a restraining order will cease to be in force within 28 days after the order was made if no application for a subsection 179E(1) unexplained wealth order has been made in relation to the suspect to whom the restraining order relates. Under **proposed subsection 45A(2)**, if a court refuses to make an unexplained wealth order and all appeal avenues are closed, the restraining order will cease to be in force. In the case that an application for a unexplained wealth order is made within 28 days of the restraining order and is granted by the court (and is complied with or an appeal has been upheld on the matter), **proposed subsection 45A(3)** notes that the restraining order will cease to have force.

**Item 13** inserts a **new Part 2-6** in the *Proceeds of Crime Act 2002*. This Part provides for the making of unexplained wealth orders.

**Division 1** contains provisions on the making of unexplained wealth orders. It is proposed that there be two types of orders under this Division; a *preliminary unexplained wealth order* and an *unexplained wealth order*.

**Proposed subsection 179B(1)** allows a court to make a preliminary unexplained wealth order requiring a person to appear before the court. The court will then decide whether to make an unexplained wealth order if the DPP has applied for such an order and the court is satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired. If the court is so satisfied, any affidavit requirements (as set out in subsection (2)) must also be met. **Proposed subsection 179B(2)** requires that an application for an unexplained wealth order be supported by an affidavit of an authorised officer stating the person's details and that the authorised officer suspects that the persons total wealth exceeds the value of the person's wealth that was lawfully acquired. The affidavit must also state the property that the authorised officer knows or reasonably suspects was lawfully acquired, is owned or is under the effective control of the person (**proposed subparagraph 179B(2)(c)**).

A person may apply to revoke a preliminary unexplained wealth order under **proposed section 179C**. The application must be made within 28 days after the person is first notified of the preliminary unexplained wealth order. There is some discretion on the part of the court to allow a longer period to apply to the court but that period must not exceed 3 months (**proposed subparagraph 179C(2)(b)**). The preliminary unexplained wealth order remains in force until the court revokes the order. If a preliminary unexplained wealth

81. Note there is an error under **Item 11** in the Explanatory Memorandum, at p.8. It states that cessation of section 20A restraining order will be governed by section 45A at item 10. The correct item is **Item 12**.

order is revoked, the DPP must give written notice of the revocation to the applicant for the revocation under **proposed section 179D**.

An unexplained wealth order requiring a person to pay an amount to the Commonwealth must be made (in accordance with **proposed section 179E**) if the court has made a preliminary unexplained wealth order and the court is *not* satisfied that the total wealth of the person was *not* derived from a Commonwealth offence, a foreign indictable offence or a State offence that has a federal aspect.[82] If a court has made either a preliminary unexplained wealth order or an unexplained wealth order, the court may also make ancillary orders at the same time or at a later time (**proposed section 179F**).

**Division 2** outlines the calculations required to determine unexplained wealth amounts.

**Proposed section 179G** outlines how an unexplained wealth amount is to be determined. The wealth of a person, for the purposes of this Part is:

- Property owned by the person at any time;
- Property that has been under the effective control of the person at any time;
- Property that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time; including property owned, effectively controlled, disposed of or consumed before the commencement of this Part (**proposed subsection 179G(1)**).

The sum of the all of the values of this property is the 'total wealth' of a person (**proposed subsection 179G(2)**).

The value of the property (if disposed, consumed or otherwise not available) is the greater of:

- The value of the property at the time it was acquired; and the value of the property immediately before it was disposed of, consumed or become unavailable (**proposed subsection 179G(3)**) .

Property is still taken to be the person's property if it vests in the trustee of the estate of a bankrupt, the trustee of a composition or scheme arrangement, the trustee of a personal insolvency agreement or the trustee of a deceased person's estate (**proposed section 179H**). The Explanatory Memorandum notes that this section is necessary to prevent a person avoid an unexplained wealth order by declaring themselves bankrupt.[83]

If there are other forfeiture orders, pecuniary penalty orders, or literary proceeds orders in place, the court must deduct an amount equal to the amount in those orders when determining an unexplained wealth amount; (**proposed section 179J**). Additionally, the

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82. Note that the burden is on the respondent to that his or her total wealth was not derived from any such offence; **proposed subsection 179E(3)**.

83. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.12.

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court may increase the unexplained wealth amount if an appeal is allowed to those orders listed under 179J (**proposed section 179K**).

The court making an unexplained wealth order may make additional orders directing the Commonwealth to pay a specified amount to a dependant of the person (**proposed section 179L**). The court must be satisfied that the order would cause hardship to the dependant and that the specified amount would relieve that hardship. Further, **proposed subparagraph 179L(1)(c)** also requires the court to be satisfied that a dependant over the age of 18 years had no knowledge of the person's conduct that is the subject of the unexplained wealth order. The specified amount must not exceed the unexplained wealth amount (**proposed subsection 179L(2)**).

**Division 3** outlines how an unexplained wealth order is obtained.

The DPP may apply for an unexplained wealth order and **proposed section 179N** sets out the notice requirements if the DPP has made an application for an unexplained wealth order. The DPP cannot apply for an unexplained wealth order against a person if there is a pre-existing application for such an order and that has been finally determined (**proposed subsection 179P(1)**). However, the court can give leave for such an application if it is satisfied that new wealth or evidence has been identified subsequent to the first application or it is in the interests of justice to do so (**proposed subsection179P(2)**).

**Division 4** relates to the enforcement of unexplained wealth orders.

**Proposed section 179R** makes it clear that an amount under an unexplained wealth order is a civil debt due to the Commonwealth. It can be enforced as if it were made in civil proceedings instituted by the Commonwealth. It is taken to be a judgment debt. If an order is made after the person's death, the order is still enforceable and has the effect as if the person had died on the day after the order was made.

Determining whether or not property is subject to a person's *effective control*[84] is addressed in **proposed section 179S**. This section outlines that the court must be satisfied that there were reasonable grounds to suspect that the person

- had committed a Commonwealth offence, a foreign indictable offence or a State offence that has a federal aspect, or
- the whole or any part of the person's wealth was derived from a Commonwealth offence, a foreign indictable offence or a State offence that has a federal aspect (**proposed subsection 179S(3)**).

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84. Section 337 defines 'effective control' under the Act. Property may be subject to the effective control of a person whether or not the person has a legal or equitable estate or interest in the property; or a right, power or privilege in connection with the property.

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A restraining order may then be made in respect of the property. The DPP must notify the person who is subject to the unexplained wealth order and any person who may have an interest in the property (**proposed subsection 179S(4)**).

If a court makes an unexplained wealth order of an amount which the court does not have the jurisdiction to recover, the registrar of the court must issue a certificate as detailed in the regulations (**proposed subsection 179T(1)**). That certificate can then be registered in a court that does have the jurisdiction and is enforceable as a final judgement of the court.

**Item 14** makes an insertion into existing subsection 202(5) of the Act which relates to the definition of a property tracking document. Any document relevant to identifying, locating or quantifying the property of a person (to whom there is a reasonable suspicion that the person's wealth is in excess of their lawfully acquired wealth) or that is necessary for the property transfer is to be defined as a property tracking document (**proposed subparagraphs 202(5)(ea)** and **202(5)(eb)**.

**Item 16** will insert **proposed section 282A** which will allow a court to direct the Official Trustee to pay an amount out of property that is subject to a restraining order under section 20A. The section outlines three circumstances when the court can make such a direction.

**Items 17-28** make necessary minor amendments to existing sections in the Act to facilitate the operation of unexplained wealth orders.

**Item 29** inserts a new subsection to section 335 to confirm that courts that have proceeds jurisdiction for either a preliminary unexplained wealth order or an unexplained wealth order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

**Item 32** will insert a definition of 'lawfully acquired' into the Act. Notably, the funds or other considerations used to acquire the property or wealth must themselves have been lawfully acquired.

**Items 34, 35 and 37-40** insert new definitions relating to unexplained wealth orders in to section 338, which is the *Dictionary.*

**Part 2** makes necessary consequential amendments to other existing Acts, namely the *Bankruptcy Act 1996* and the *Crimes Act 1914.* The amendments flow from the new provisions dealing with unexplained wealth orders.

### Schedule 2—Other amendments relating to proceeds of crime

**Part 1** introduces freezing orders over account of financial institutions that are intended to be an interim measure in circumstances where obtaining a restraining order would take a longer period of time and any delay would risk the movement of the assets.

**Item 3** of the Schedule will insert a **new Part 2-1** to the Act.

**Item 8** specifies that the Part will apply in relation to an account if there are reasonable grounds to suspect that the balance of the account is proceeds of an indictable offence, a

foreign indictable offence or an indictable offence of Commonwealth concern. The balance of the account may also be suspected of being wholly or partly an instrument of a serious offence.

**Proposed section 15B** provides that a magistrate must order that a financial institution not allow a withdrawal from an account with the institution if an authorised officer applies for a freezing order and there are reasonable grounds to suspect that the balance of the account is proceeds of

- an indictable offence
- a foreign indictable offence
- an indictable offence of Commonwealth concern, or
- is wholly or partly an instrument of a serious offence (**proposed subparagraph 15B(1)(b)**).

The magistrate needs to be satisfied that unless an order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument (**proposed subparagraph 15B(1)(c)**).

**Proposed subsection 15B(3)** notes that the reasonable grounds referred to in paragraph (1)(b) and the satisfaction referred to in paragraph (1)(c) need not be based on a finding as to the commission of a particular offence.

**Proposed section 15C** outlines the requirements for an affidavit from an authorised officer who seeks a freezing order. **Proposed section 15D** allows the authorised officer to apply by telephone, fax or other electronic means in an urgent case or in the case that making the application in person would frustrate the order's effectiveness. If an order is made by telephone (or similar means), **proposed section 15E** requires the magistrate to inform the applicant of the terms of the order, including the day and time at which it was signed. The applicant must then complete a form of freezing order and state the magistrate's details and order on the form. This must be done by the second working day after the magistrate makes the order.

If a signed form of freezing order is not produced in evidence, the court must assume that the order was not duly made unless the contrary is proved (**proposed section 15F**).

**Proposed sections 15G** and **15H** are offence provisions with penalties of imprisonment for 2 years or 120 penalty units[85], or both.[86] **Proposed section 15G** makes it an offence for a person to make a false or misleading statement, or omit any matter or thing, in connection with an application for a freezing order. The omission must result in the

85. A penalty unit is $110: Section 4AA of the *Crimes Act 1914*.

86. The Explanatory Memorandum notes that these offences match existing offences in the Act designed to support the operation of search warrants: Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.28.

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statement being misleading. The fault element for this offence is intention. **Proposed section 15H** outlines 4 offences relating to orders made under section 15E (freezing orders by telephone or similar).

If a person states a name of a magistrate in a freezing order form and the name is not the name of the magistrate who made the order, they have committed an offence under **proposed subsection 15H(1)**. A person will also commit an offence (under **proposed subsection 15H(2)**) if they state a matter in a freezing order and that matter departs in a material way from the order made by the magistrate. **Proposed subsection 15H(3)** makes it an offence to serve a freezing order that has not been approved by a magistrate or that departs materially from the terms authorised by the magistrate. A person will also commit an offence if, after serving a freezing order on a financial institution, they give the magistrate a varied form of that which was provided to the financial institution.

**Division 3** deals with giving effect to freezing orders. **Proposed section 15J** requires the applicant for the freezing order to give a copy of the order to the relevant financial institution and to each person in whose name the account is held. **Proposed section 15K** provides that the existence of a freezing order does not prevent the financial institution from processing withdrawals or payments mandated by family law or other court orders. A financial institution will commit an offence under **proposed section 15L** if it allows a withdrawal from an account (which is subject to a freezing order) where the withdrawal contravenes the terms of the order. This offence is punishable by 5 years imprisonment or a fine of 300 penalty units or both. A financial institution, or an agent of a financial institution, is protected from legal proceedings for any action taken in complying with the order or in the mistaken belief that action was required under a freezer order (**proposed section 15M**). This is a good faith provision.

**Division 4** specifies the duration of a freezing order.

**Proposed section 15N** outlines that a freezing order will come into force when a copy of the order is given to the institution. It will remain in force until the end of the period specified in the order, or (if before the end of that period), a court makes a decision on an application for a restraining order to cover the account. The freezing order must not specify a period of more than 3 working days. **Proposed section 15P** allows a magistrate to extend a freezing order if the authorised officer applies for an extension and the magistrate is satisfied that an application has been made to a court for a restraining order.

**Division 5** allows a magistrate to vary the scope of a freezing order.

If the magistrate considers it necessary, a freezing order may be varied to allow withdrawals for the reasonable living expenses of the person or the person's dependants. **Proposed section 15Q** also allows a variation to the freezing order to permit reasonable business expenses of the person or a specified debt incurred by the person.

**Item 7** inserts a new term, 'working day', into the *Dictionary* (section 338).

**Part 2** repeals provisions relating to the 6-year time limit that applies to restraining order and forfeiture orders under sections 18, 19 and 47, 49 respectively. Repealing the provisions will mean there is no time limit to apply for an order for non-conviction based

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asset recovery. **Items 11-30** makes amendments to various provisions of the Act to achieve this.

**Items 30** and **31** insert a revised **section 149** and clarify the application of new section 149. **Proposed section 149** will allow the court to make an order confirming a pecuniary penalty order without reference to offences within a six-year time period.

**Part 4** contains provisions to facilitate the disclosure of information under the Act.

**Item 67** inserts **proposed section 266A** specifying that if a person is exercising his or her power or performing a function under the Act, that the person may disclose the information to an authority described under subsection (2). A table is inserted at **proposed subsection 266A(2)** indicating the authority and corresponding purpose for which disclosure may be made. If the Authority has one or more functions under the Act, the purpose for disclosure must be to facilitate that authority's performance of its functions. If the Authority is that of the Commonwealth, State, Territory or foreign country (that has a function of investigating or prosecuting crimes against a law of the Commonwealth, State Territory of that country), then the purpose for disclosure is to assist in the prevention, investigation or prosecution of a crime against that law. Further, disclosure may be made to the Australian Taxation Office for the purpose of protecting public revenue.

Some safeguards are provided by way of limitations on use of the information disclosed in **proposed subsection 266A(3).** Any existing immunity in relation to the information will still apply in court proceedings and under the rules of evidence.

### Schedule 4, Part 1—Joint Commission

Part 1 of Schedule 4 makes amendments to Part 2.4 of the *Criminal Code Act 1995* in order to insert new provisions that extend criminal liability to persons who jointly commit an offence.

**Item 1** inserts a reference to **'**section 11.2A (joint commission) section 11.3 (commission by proxy)' into subsection 11.1(7) of the Criminal Code. This is a consequential and minor technical amendment.

**Item 2** substitutes 'principal offender' with 'other person' in subsection 11.2(5) in order to provide consistent use of terminology in that provision . This implements former Justice Kirby's view that there were 'serious anomalies, disparities, inconsistencies and lack of symmetry that have been introduced into the area of secondary liability for acts done by others'.[87]

**Item 3** removes the words 'aiding, abetting, counselling or procuring the commission of that offence' from subsection 11.2(6). The substituted text will be 'for the purposes of determining whether a person is guilty of that offence because of the operation of

87. Freckleton, I and Selby, H. (eds), *Appealing to the Future: Michael Kirby and his Legacy*, Sydney, 2009, p.305.

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subsection (1)'. The purpose of the amendment is to ensure that the provision does not mistakenly suggest that section 11.2 is an offence.

**Item 4** is the main amendment in this Part. It inserts the new offence of joint commission. **Proposed section 11.2A** provides that a person commits an offence if:

- a person and at least one other person enter into an agreement to commit an offence, and either
  - an offence is committed in accordance with that agreement, or
  - an offence is committed in the course of carrying out the agreement.

A person that is convicted of a joint offence is liable to receive the penalty prescribed for that offence.

There are a number of requirements set out in **proposed subsection 11.2A(2)** that must be met for joint commission to apply. The conduct must be the same as what was agreed, the conduct of one or more of the parties must make up a physical element of the offence, the result of the conduct must arise from the conduct engaged in and where an element of the joint offence consists of a circumstance, the conduct engaged in occurs in that circumstance. Note that 11.2A(3) is an alternative to 11.2A(2).

The Explanatory Memorandum notes that the drafting of the offence provisions is consistent with the common law formulation of joint criminal enterprise found in *McAuliffe v The Queen* [1995] HCA 37, confirmed in *Clayton v R* [2006] HCA 58.[88] This includes the definition of 'agreement' which is intended to include express agreements and implied agreements. The inclusion of 'implied agreement' is noteworthy because it can broaden the conduct that can be captured under joint commission and brings a level of subjectivity that is particularly burdensome for the defence to disprove. Again, as raised under "Key Issues", these provisions are worthy of more considered debate.

### Schedule 4, Part 2—Amendments to the *Telecommunications (Interception and Access) Act 1979*

The amendments in Part 2 of Schedule 4 of the Bill are intended to capture organised crime association and facilitation offences. The provisions will make telecommunications interception available for the investigation of offences relating to an individual's involvement in serious and organised crime.

**Item 14** of Schedule 4 inserts a definition of to 'associate' into the Telecommunications (Interception and Access) Act.

To 'associate' with a criminal organisation or a member of such an organisation, includes:

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88. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.134.

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(a) be in the company of the organisation or member; and

(b) communicate with the organisation or member by any means (including by post, fax, telephone, or by email or other electronic means).

**Item 15** will insert a definition of 'criminal organisation' into the Act. The term'criminal organisation' means an organisation that is

(a) a declared organisation within the meaning of

(i) the *Crimes (Criminal Organisations Control) Act 2009* of New South Wales; or

(ii) the *Serious and Organised Crime (Control) Act 2008* of South Australia; or

(b) an organisation of a kind specified by or under, or described or mentioned in, a prescribed provision of a law of a State or Territory.

**Item 16** will insert a definition of member of a criminal organisation. Then, at the end of section 5D of the Act, **item 17** will amend the definition of 'serious offence' to insert offences relating to an individual's involvement in serious and organised crime. As summarised by the Explanatory Memorandum, the conduct targeted includes:

- associating with a criminal organisation, or a member of a criminal organisation;
- contributing to the activities of a criminal organisation;
- aiding, abetting, counselling or procuring the commission of a prescribed offence for a criminal organisation;
- being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of a prescribed offence for a criminal organisation; or
- conspiring to commit a prescribed offence for a criminal organisation.[89]

## Concluding comments

This Bill appears to be the first tranche of a number of changes to the Commonwealth criminal law framework and is ambitious, controversial and significant to the future of Commonwealth criminal law. The enhancement of police powers (controlled operations, witness identity, assumed identities) is unlikely to receive much attention in debate. However, the unexplained wealth provisions and the joint commission offence demand

89. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p.143.

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carefully considered debate and Parliamentarians are urged to have regard to the Senate Committee's report on the Bill, which is due on 17 September. While it is important to be tough on serious and organised crime, any legislation introduced to combat this issue must be carefully considered so as to both protect the public and deter criminal activity.

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