



Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009

Monica Biddington, Diane Spooner and Sharon Scully
Law and Bills Digest Section

Contents

Executive Summary	3
Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009	5
Purpose	5
Background	7
Basis of policy commitment	7
Committee consideration	7
Financial implications	9
Main provisions	9
Schedule 1 – Proceeds of Crime	9
Part 1 – Exclusion, recovery and compensation	9
Part 2 – Pecuniary Penalty Orders	13
Part 3 – Examinations	15
Part 4 – Notices	17
Part 5 – Ancillary Orders	18
Part 6 – Evidence	19
Part 7 – Definitions	19
Part 8 – Technical amendments relating to orders	19
Part 9 – Confiscated Assets Account	20

Schedule 2 – Search warrants	20
Part 1 – Seized things	20
Part 2 – Use of equipment under warrant	21
Schedule 3 – Witness protection	22
Part 1 – Amendments	23
Schedule 4 – Criminal organisation and association offences	24
Schedule 5 – Money laundering.	30
Part 1 – Amendments to the <i>Criminal Code Act 1995</i>	31
Part 2 – Amendments to the <i>Anti-Money Laundering and Counter Terrorism Financing Act 2006</i>	35
Schedule 6 – Unfitness to plead.	38
Schedule 7 – Amendments relating to the Australian Crime Commission	39
Schedule 8 – Penalties for bribery	42
Schedule 9 – Drug importation	43
Schedule 10 – Amendments consequential on enactment of joint commission offence	44
Concluding comments.	45

Executive Summary

- This Bills Digest brings attention to the key aspects of the Bill and provides technical detail on the provisions. Due to the length of the Bill, it is not possible in this Bills Digest to provide detailed analysis of every issue.
- The Standing Committee of Attorneys-General (SCAG) agreed to measures to support a national response to combat serious and organised crime at its meetings in April and August 2009. This Bill implements those measures and builds on legislative measures introduced in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.
- The Bill focuses on changes to procedures by addressing many concerns of law enforcement authorities that are necessary to correct anomalies and uncertainties in aspects of criminal law.
- The Bill implements recommendations from a number of reviews:
 1. *Independent Review of the Operation of the Proceeds of Crime Act 2002*¹ ('Sherman Report')
 2. *Review of the National Witness Protection Program*, December 2003
 3. Report of the *Review of the Australian Crime Commission Act 2002*²
 4. *Inquiry into the Australian Crime Commission Act Amendment Act 2007*³
- The Bill has been supported by the Senate Legal and Constitutional Affairs Legislation Committee with some recommendations for amendments and Additional Comments from Liberal Senators.
- Summary of key amendments:
 1. New criminal association offence (see pages 24-30)
 2. Extend geographical jurisdiction of money laundering offence (see pages 30-35)

-
1. T Sherman, *Report of the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, viewed 23 November 2009, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002\(Cth\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationoftheProceedsofCrimeAct2002(Cth))
 2. Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act, 2002*, 2005, viewed 23 November 2009, http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/2004-07/acc_act02/report/index.htm
 3. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, 2008, viewed 23 November 2009, http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/index.htm

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

3. Strengthening powers of Australian Crime Commission to deal with uncooperative witnesses (see pages 30-35)
4. Clarifying the Commonwealth Director of Public Prosecutions' role and the court's role in proceeds of crime investigations (see pages 39-43)
5. Outlining the purposes for which seized material may be shared between law enforcement officers (see pages 20-23)
6. Allowing seized electronic equipment to be operated at any location for the purpose of determining whether the information on the equipment is evidential material (see page 21).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009

Date introduced: 16 September 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement:

Schedule 1, items 1 to 213 (which are all amendments to the *Proceeds of Crime Act 2002*) commence on the later of: (a) the day after this Act receives the Royal Assent; and (b) immediately after the commencement of Part 1 of Schedule 2 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009*. The remaining items in Schedule 1 (**items 214-221**) commence either at the day after Royal Assent or after the commencement of specified Parts to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009*. The provisions do not commence if that Act does not commence.

Schedules, 2, 3, 4, 5 (Part 2), 7, 8 and 9 commence on the day after Royal Assent.

Schedules 6, items 1 and 2 commence on the later of the day after Royal Assent and immediately after the commencement of subsection 369(4) of the *Criminal Procedure Act 2009* of Victoria. Further, **Schedule 6, item 3** commences immediately after the commencement of the same Victorian Act.

Schedules 10 and 11 commence on the later of the day after Royal Assent and immediately after the commencement of Part 1 of Schedule 4 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2009*.

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 lengthy Bill will serve a number of purposes. Overall, the Bill is facilitating the operation of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 which makes some significant changes to laws relating to proceeds of crime, cross-border investigations and the introduction of a new joint commission offence. This Bill will also introduce new offences for criminal association and committing crimes for a criminal organisation. The Explanatory Memorandum states that:

the Bill implements legislative aspects of the national response to organised crime that were not implemented by the first Bill, and includes additional measures to

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

strengthen existing laws to more effectively prevent, investigate and prosecute organised crime activity.⁴

Schedule 1 will amend the *Proceeds of Crime Act 2002* to strengthen the Commonwealth criminal assets confiscation regime. Many of the provisions in this Schedule are intended to address inefficiencies and anomalies that have been revealed during six years of operation of the Act.

Schedule 2 will make reforms to the search warrant provisions in the *Crimes Act 1914* to allow certain seized material to be shared between law enforcement agencies. The amendments will also facilitate more effective and efficient access and searching of electronic equipment.

Schedule 3 will amend the *Witness Protection Act 1994*, implementing recommendations made in the *Review of the National Witness Protection Program* of December 2003. The amendments will broaden the protection, security and assistance that will be available.

Schedule 4 will insert new offences targeting persons involved in serious and organised crime into the *Criminal Code Act 1995*.

Schedule 5 will make amendments to address problems encountered by law enforcement authorities when investigating and prosecuting the money laundering offences in Division 400 of the Criminal Code. The amendments will extend the geographical jurisdiction of the offences and remove limitations on the scope of the offences to enable them to apply to the full extent of the Commonwealth's constitutional power in this area.

Schedule 6 will make an amendment relating to fitness to plead to allow defendants in Victoria to appeal a finding that they are unfit to plead. The Government considers this an urgent amendment.

Schedule 7 will amend the *Australian Crime Commission Act 2002* to give the Australian Crime Commission (ACC) greater powers to deal with uncooperative witness. The amendments will require the ACC to be regularly reviewed (every five years) by an independent person or body.

Schedule 8 will change the penalties in the Criminal Code for the offences of bribing a foreign official and bribery of a Commonwealth public official.

Schedule 9 will make amendments that will have the effect of broadening the range of criminal activity relating to drug importation.

4. Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) (No.2) Bill 2009 (hereafter referred to as the Explanatory Memorandum), p. 1.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The purpose of Schedules 10 and 11 is to make minor and consequential amendments. These will ensure that references to the extensions of criminal responsibility provisions in part 2.4 of the Criminal Code are correct and that references to repealed provisions of the *Crimes Act 1914* are removed.

Background

Basis of policy commitment

The Bill is building on reforms proposed in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009. That Bill was introduced in June 2009 and the Bills Digest can be found at <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd031.htm>. Both Bills are in response to the Standing Committee of Attorneys-General agreement to support a national response to combat serious and organised crime.⁵

The second reading speech for this Bill states that the Bill ‘builds on earlier reforms and further strengthens the laws necessary to combat organised crime’.⁶

In addition, the Bill implements a recommendation from the Independent Review of the *Australian Crime Commission Act 2002*, conducted by Mr Mark Trowell QC in 2007.

The second reading speech concludes that the Bill represents:

another significant step as part of a coordinated national effort to more effectively prevent, investigate and prosecute organised crime activities, and to improve laws that target the proceeds of organised crime groups.⁷

Committee consideration

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and the Committee reported on 16 November 2009. Details of the inquiry, including the link to the Committee’s report, are at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/organised_crime_two/index.htm

-
5. R McClelland, ‘National Response to Combat Organised Crime’, *Media Release*, April 2009, viewed 19 November 2009
http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_SecondQuarter_16April2009-NationalresponsetocombatOrganisedCrime
 6. R McClelland, ‘Second reading speech: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009’, House of Representatives, *Debates*, 16 September 2009, p. 9704.
 7. *ibid.*, p. 9707.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The Committee made the following recommendations:

1. Proposed section 390.3 of the Criminal Code be amended by limiting its application to circumstance where the accused intended that the association would facilitate the criminal conduct or proposed criminal conduct.
2. The defence in proposed subsection 390.3(6) of the Criminal Code be amended by:
 - replacing the existing defences for legal practitioners with a more general defence that the association was only for the purpose of providing legal advice or representation and
 - adding a general defence where the association was reasonable in the circumstances.
3. Proposed paragraph 390.4(1)(b) of the Criminal Code be amended to provide that ‘the person intended the provision of the support or resources would aid the organisation to engage in conduct constituting an offence against any law.’
4. That the maximum penalty for an offence under proposed section 390.4 of the Criminal Code should be the maximum penalty for the offence the accused intended to support.
5. That subsections 3K(3A) and 3K(3B) of the Crimes Act should provide for equipment to be moved for examination for an initial period of no longer than seven days.
6. That subsection 3L(1) of the Crimes Act should require that, before operating electronic equipment at warrant premises to access data, an officer executing the warrant must have reasonable grounds to suspect that the data constitutes evidential material.⁸

Subject to these recommendations, the Committee broadly supported the passage of the Bill. Liberal Senators did make some additional comments about the Bill more generally:

It is not sufficient justification for a continual expansion in the powers available to law enforcement agencies and the reach of criminal offences to point simply to the difficulties allegedly faced in pursuing particular groups of offenders. The task of law enforcement officers and prosecutors may well be challenging, but to address this by diluting basic criminal justice principles, and oversimplifying the arrest, prosecution and imprisonment of people would jeopardies the most fundamental individual rights.

Liberal Senators consider that changes proposed by the Bill and the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 ought to be viewed as being at the outer limit of the powers the Parliament will countenance for law enforcement agencies. Furthermore, we intend to monitor closely through the Estimates process whether these powers are being exercised appropriately and

-
8. Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009*, Commonwealth of Australia, Canberra, November 2009, p. ix.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

whether practice bears out arguments that they are necessary to tackle organised crime.⁹

Financial implications

The Explanatory Memorandum states that the amendments in this Bill have no financial impact on Government revenue.¹⁰

Main provisions

Schedule 1 – Proceeds of Crime

All amendments made under this Schedule are to the *Proceeds of Crime Act 2002*. The amendments are extensive but are mostly procedural and technical. The amendments are strongly supported by the Commonwealth Director of Public Prosecutions (DPP) and the Australian Federal Police (AFP) and many are implementing recommendations from an independent review of the Act conducted in 2006. The amendments will clarify the operation of certain parts of the Act to improve the speed in which property can be dealt with. There are appropriate safeguards in the Bill, and in existing legislation, to ensure that any person whose property is wrongfully affected by any court action can be appropriately compensated.

Part 1 – Exclusion, recovery and compensation

Items 1-15 make changes to various terms in sections 29 and 29A of the Act.

Item 16 repeals existing subsection 31(1) and inserts **new subsections 31(1) and (1A)**. A person will be allowed under these subsections to apply for an exclusion order over property that they have an interest in that is subject to a restraining order. An application may be made to the court at any time after the restraining order is made.

Item 17 implements recommendation D5 of the Sherman Report, inserting a new sentence into subsection 31(6) which clarifies that the DPP does not need to give notice of the grounds on which it proposes to contest an application until it has had a reasonable opportunity to conduct examinations in relation to the restraining order.

Item 22 introduces **new paragraphs 73(1)(c) and (d)** in relation to excluding certain property from a forfeiture order. This item will ensure consistency in the test that applies to a person (suspect and third parties) for an exclusion order.

9. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 72.

10. Explanatory Memorandum, p. 4.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 23 and 24 remove the term ‘property’ from paragraphs 73(2)(a),(b),(c) and (d) and substitutes them for the term ‘interest’. Similarly, **item 25** amends subsection 74(1) to omit the reference to the ‘person’s property’ and replace it with ‘property in which the person claims an interest’.

Item 26 inserts new provisions on the timing of when a person can apply for an exclusion order following a forfeiture order. The provisions are necessary for consistency between the application provisions for exclusion of property from a restraining order (section 31) and exclusion of property from a forfeiture order. The Explanatory Memorandum states that

the aim of this amendment is to encourage people to make an application for property to be excluded prior to forfeiture of property. This will assist in the timely administration of the Act, as a court can consider an application to exclude property within the context of the forfeiture proceedings.¹¹

Item 27 is consequential to the amendments made to section 76 by **item 28**. **Item 28** implements recommendation D6 of the Sherman Report, allowing the DPP to examine any person that may have information relevant to an application for an exclusion order, prior to the application being heard by a court.

Items 29 and 30 repeal the existing heading and subsection 77(1) and substitute it with **new paragraphs 77(1)(a)-(e)**. The Subdivision containing the new subsection addresses compensation for the proportion of property not derived or realised from the commission of any offence. An example is provided in the Explanatory Memorandum where the deposit for a house is derived illegitimately while the bank loan is lawfully commenced. **New subsection 77(1)** will require a court to be satisfied that the portion of the applicant’s interest that is to be compensated was not derived or realised, directly or indirectly, from the commission of any offence and is not an instrument of any offence.¹²

Item 31 will insert new words into paragraph 77(2)(b) that clarify that the Commonwealth is not required to carry out the directions specified by the court under paragraph 77(2)(b) until the property vests absolutely in the Commonwealth.

Item 32 will repeal existing section 78 and substitute it with **new section 78** concerning applications for compensation orders. Under **new subsection 78(1)**, a person may apply to a court for a compensation order if an application for a forfeiture order has been made to the court, but the forfeiture order is yet to be made. **New subsection 78(2)** deals with compensation applications post forfeiture order. **New subsection 78(3)** prevents the applications if the person was notified of the application for the forfeiture order but did not make an application under subsection (1) before the forfeiture order was made; or

11. Explanatory Memorandum, p. 13.

12. *ibid.*, p. 14.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

appeared at the hearing of the forfeiture. The court may give the person leave to apply if there was a good reason, there is new relevant evidence or there are other special grounds for granting the leave (**new subsection 78(4)**). The Explanatory Memorandum states that the:

aim of these amendments is to encourage people to make an application for property to be compensated, prior to the forfeiture of property. This will assist in the timely administration of the Act, as a court can consider an application for compensation within the context of the forfeiture proceedings.¹³

Item 33 will allow the DPP not to give notice of the reasons that it proposes to contest an application for compensation until it has had a reasonable opportunity to conduct examinations in relation to the application. This is a consequential amendment (**item 103**).

New section 79A will state that an application for a compensation order must not be heard until the DPP has had a reasonable opportunity to conduct examinations in relation to the application (**item 34**).

Item 35 relates to the application of the amendments, which will be determined by reference to either the date of the application for a restraining order, or the date of application for a forfeiture order.

Item 40 inserts a **new subsection 92A(1)** which requires the DPP to take reasonable steps to give any person who has or claims [to have], or whom the DPP reasonably believes may have, an interest in the property a written notice. The terms of that notice are identified in the section. Further, **new subsection 92A(2)** says that the DPP need not give a notice to a person under subsection (1) if the person has made an application for an extension order in relation to the property; and an application under sections 30, 31, or 94 in relation to the property. The purpose of **new section 92A**, as noted in the Explanatory Memorandum, is to ensure that a person who may have an interest in property will be given notice of the automatic forfeiture and their associated rights in relation to that property.¹⁴ Currently there is no requirement that a defendant or any other person be notified of the potential for automatic forfeiture.

Item 41 makes a consequential amendment to paragraph 93(1)(a). The amendment is consequential on **item 66** which amends the definition of ‘conviction day’ in paragraph 333(1)(a). **Item 44** makes the same consequential amendment to subsection 93(1).

Items 42 and 43 implement recommendation D14 of the Sherman Report by making technical amendments to section 93 of the Act. The items amend section 93 to provide that a court may also extend the time period before property is forfeited if a person has applied for property to be excluded under sections 30, 31 and 94. As the provisions are currently

13. *ibid.*, p. 15.

14. *ibid.*, p. 17.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

drafted, the DPP is of the view that section 93 fails to recognise that an application for exclusion of property from automatic forfeiture may also be made under section 94 and sections 30 and 31.¹⁵ **Items 45, 46 and 47** make consequential amendments to these provisions.

Item 48 inserts a new notice provision for when an order extending the forfeiture date is made under section 93. **New paragraphs 93(4)(a) and (b)** outline what must be included in the contents of the notice.

Item 50 makes a minor amendment to subsection 94(1) to bring greater consistency to the provisions of the Act. This amendment aligns the requirement for a court to exclude property from forfeiture, with the requirement for the court to exclude property from a restraining order and a forfeiture order under section 29.

Item 51 repeals paragraphs 94(1)(a), (b) and (c) and inserts two new paragraphs. The amendment will correct an anomaly in existing section 94. The amendment will require a court to exclude property from forfeiture where it is satisfied that a person has an interest in property covered by a restraining order that the interest is not proceeds of lawful activity or an instrument of unlawful activity, and that the interest has been lawfully acquired. **Items 52 and 54** will make consequential amendments to **item 51**.

Item 53 makes a minor amendment to existing paragraph 94(1)(e) to bring more uniformity in the terminology used in the Act.

Item 55 makes an amendment that will clarify, in **subsection 94(5)**, that the DPP does not need to give notice of the grounds on which it proposes to contest an application until it has had a reasonable opportunity to conduct examinations in relation to the restraining order.

Item 56 will insert **new subsection 94(6)** which will provide that an application for an exclusion order ‘must not be heard until the DPP has had a reasonable opportunity to conduct examinations in relation to an application’. This amendment will ensure the DPP has an opportunity to explore whether the relevant property has any links to proceeds of crime, prior to a court considering whether to exclude that property from forfeiture.¹⁶

Item 57 inserts **new section 94A** which will allow compensation to be granted where property has been forfeited under section 92 of the Act. The court must be satisfied that the person has an interest in the property and that a proportion of the value of their interest was not derived or realised from the commission of any offence (and is not an instrument of any offence).

15. T Sherman, op. cit., D19.

16. Explanatory Memorandum, p. 20.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 58 is a consequential amendment to the repeal of subsections 102(2) and (3). **Item 59** makes a small amendment (omitting ‘may’ and inserting ‘must’ into existing subsection 102(1)) which has the consequence of aligning the court’s requirements to make certain orders (under sections 29, 73, 94).

Item 60 will align the test for recovery of property under section 102 with the test for exclusion of property under section 94. The Explanatory Memorandum says that:

The test for exclusion of property could be viewed as more difficult to prove than the test for recovery of property, as it contains an additional requirement that the court must be satisfied that the applicant’s interest in property was lawfully acquired.¹⁷

The item will correct the anomaly in **existing paragraph 102(b)** by requiring the court to be satisfied that the applicant had an interest in the forfeited property and that the interest was not the proceeds or instrument of unlawful activity.

Item 63 introduces amendments to the application provision under section 104 and seeks to align the provisions with similar provisions under sections 31, 74, 78 and 94A:

The aim of these amendments is to encourage people to make an application for exclusion of property prior to forfeiture of property, rather than waiting until after forfeiture.¹⁸

Proposed new section 104 will allow a person who claims an interest in property that has been forfeited to the Commonwealth under section 92 to apply to the court that made the restraining order (paragraph 92(1)(b)) for an order under section 102 or 103. However, restrictions are imposed on the person under **proposed paragraphs 104(2)(a) and (b)**.

Items 65 and 67 are application provisions that have retrospective application.¹⁹ Those items note that Part 2-3 and paragraph 333(1)(a) of the Act will apply ‘whether conduct constituting the offence concerned occurred or occurs *before*, on or after commencement.

Part 2 – Pecuniary Penalty Orders

The amendment to subparagraph 121(4)(a)(i) under **item 68** will ensure the court takes into consideration the full range of criminal benefits a person has gained. The item amends subparagraph 121(4)(a)(i) to insert a reference to property being subject to the effective control of a person (more than just property covered by a restraining order).

17. *ibid.*, p. 22.

18. *ibid.*, p. 23.

19. The Scrutiny of Bills Committee has sought the Attorney-General’s advice for reasons for the retrospective provisions in the Bill Alert Digest 13/09, pp. 22-23. From a practical perspective it is difficult to see how the proceeds of crime laws could operate retrospectively because they relate to a person’s property in possession at the time of the application.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Items 69 and 70 will amend paragraphs 122(1)(a) and 122(1)(b) by removing the references to a person's request or control.

The amendments will remove the requirement for the DPP to prove that the defendant impliedly requested or directed that money or a benefit went to a third party (including a company). The Explanatory Memorandum notes that this is contrary to the intention of the Act.²⁰

As noted in the Explanatory Memorandum, these items implement recommendation D17 of the Sherman report. The DPP's justification of the proposal suggests that the amendments would put it beyond doubt and potentially save considerable court time.

Item 71 corrects a drafting error by inserting the phrase 'and the other unlawful activity' into **existing paragraph 124(1)(c)**. Section 124 deals with the calculation of pecuniary penalty orders. Similarly, **item 72** amends existing **paragraph 124(5)(a)** to add a reference to property being subject to the effective control of a person. This will facilitate the court having regard to all the benefits a person has derived when calculating a pecuniary penalty order.

The intention of **items 73 and 74** is to ensure that 'the formula for calculating pecuniary penalty orders does not result in a person being required to account for criminal benefits twice'.²¹ The amendments will insert references to 'unlawful activity' in existing section 130 to correct a drafting error.

Items 75 and 76 will amend section 133 relating to the ability to vary a pecuniary penalty order, and implement recommendation D19 of the Sherman Report. That recommendation said that section 133 should be amended to ensure that the value of pecuniary penalty orders can be adjusted where exclusion, compensation or recovery orders are subsequently made.

Item 77 explicitly notes that Division 2 of Part 2-4 of the Act (Determining penalty amounts for pecuniary penalty orders), applies in relation to pecuniary penalty orders that are applied for on or after the commencement of this item, whether conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

Item 78 will remove the time limit for an application for a pecuniary penalty order, if it is in the interests of justice to do so.

Items 79 and 80 will amend subsections 136(2), (3) and (4) to implement recommendation D20 of the Sherman Report. The amendments will require the DPP to provide a defendant

20. Explanatory Memorandum, p. 25.

21. *ibid.*, p. 26.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

with any affidavit that will be relied upon in a pecuniary penalty order hearing, within a reasonable time before the court conducts a hearing.

Items 82, 83, 84, and 85 implement recommendation D21 of the Sherman Report by amending section 146 to allow a court to vary a pecuniary penalty order where the order was made on the basis of a number of convictions and one conviction was subsequently quashed. If a conviction is quashed, a pecuniary penalty is discharged unless the DPP applies to the court within 14 days to have the pecuniary order confirmed or varied (see **item 91** for variation).

Items 86 and 87 are consequential amendments arising from the introduction of **new section 149A (item 91)**.

Item 91 will insert **new section 149A**, enabling a court to vary a pecuniary penalty order. The court may vary a pecuniary penalty order by reducing the penalty amount if it is satisfied that it related to more than one offence, and one or more of those offences has not been quashed. The court may have regard to transcripts and evidence given in proceedings to assist in its decision.

The remaining items in this Part make necessary minor amendments to facilitate the preceding amendments.

Part 3 – Examinations

The provisions in Part 3 of the Bill implement some of the technical recommendations in the Sherman Report (namely 22, 24 and 25) and primarily facilitate the commencement of examination orders. The court will be able to make an examination order where a restraining order is not in place when:

- (a) An application is made to have property excluded from a forfeiture order
- (b) An application is made for compensation for the proportion of property that did not involve proceeds of an offence, after the property has been forfeited
- (c) An application is made to recover the interest in forfeited property that is neither the proceeds of unlawful activity nor an instrument of unlawful activity, and
- (d) A confiscation order has been made but not satisfied.

A thorough and unambiguous description of **new sections 180A-180E** can be found at pages 32-35 of the Explanatory Memorandum.

Items 104-108 make amendments to the Act relating to the application of **new sections 180A – 180E** and consequential amendments relating to the insertion of new terms in the Dictionary (section 338). **Item 109** will insert a **new subsection 182(2)** requiring the court to consider an application for an examination order without notice having been given to any person if the DPP requests the court to do so (an *ex parte* application). The

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Explanatory Memorandum notes that this item implements recommendation D22(d) of the Sherman Report which noted the need to examine persons as soon as possible after restraining orders are obtained in order to preserve property and progress confiscation proceedings.²² It is intended that this amendment will:

reduce court burden and assist authorised examiners to conduct examinations early to ensure that all relevant property is identified quickly, and, if appropriate, restrained early in an investigation.²³

Item 111 inserts new circumstances (into **paragraph 187(4)(a)**) when an examination must not relate to a person's affairs. If the person is no longer a person whose affairs can be subject to examination under the new section created by this part, the examination must not relate to a person's affairs. See further at **item 118**, definition of 'affairs.'

Item 114 increases the penalty for the offence of failing to attend an examination. The penalty will be increased to two years imprisonment and/or 120 penalty units.²⁴ This amendment is implementing recommendation D24 of the Sherman Report and is consistent with similar provisions in the *Australian Securities and Investments Commission Act 2001*.

Item 116 will insert a new offence of giving false or misleading answers or documents at an examination. A person commits the offence if they attend an examination and give an answer or produce a document and the answer or document is either false or misleading or omits a matter or thing, without which the answer or document is false or misleading. This new offence implements recommendation D25 of the Sherman Report. While there are similar and general provisions in the *Criminal Code 1995*, the Government considers that the *Proceeds of Crime Act 2002* should be consistent with the *Australian Security and Investments Commission Act 2001* to address the particular circumstance of an examination order.²⁵

Item 118 inserts a new definition of 'affairs' in the Dictionary (section 338). The Explanatory Memorandum explains that this item was necessary as a consequence of two judgements in New South Wales and Queensland that had different interpretation of the term. 'Affairs' is to be defined as including, but not limited to, the nature and location of the person's property and any of the person's activities that are or may be relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order under the Act.

22. Explanatory Memorandum, p. 36.

23. *ibid.*, p. 37.

24. A penalty unit is \$110: Subsection 4AA(1) of the *Crimes Act 1914*.

25. Explanatory Memorandum, p. 38.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Part 4 – Notices

Section 202 allows a magistrate to make a production order requiring a person to:

- (a) produce one or more *property-tracking documents to an *authorised officer; or
- (b) make one or more property-tracking documents available to an authorised officer for inspection.

The section also has a lengthy definition of ‘property-tracking document’ and **item 120** will insert a new paragraph into subsection 202(5) to ensure that a document relevant to identifying, locating or quantifying property suspected of being proceeds of an indictable offence, foreign indictable offence or indictable offence of Commonwealth concern, or an instrument of a serious offence, is included in the definition of ‘property-tracking document’. **Items 121-124** are consequential to this amendment.

Item 125 will allow for a document produced under a production order to be received electronically. This amendment is intended to facilitate efficient procedures, especially when dealing with large documents.

Item 127 will insert a defence to an offence under section 211 for failing to comply with a production order. If a person took all reasonable steps to comply with a production order but could not produce it within the specified time, this defence may be used.

Items 129-131 are consequential amendments relating to the new definition of ‘account’ which has been inserted by **item 147**.

Item 132 enables authorised officers to obtain information about stored value cards to assist in identifying proceeds of crime and ensuring funds are not dispersed.

Item 133 implements one of the major recommendations of the Sherman Report to allow the Commissioner of Taxation, the CEO of Customs and the Chairperson of ASIC as officers who may give a notice to a financial institution. This is to overcome delays and will *not* give those authorised officers the power to issue a notice.

Item 136 will require that the information be provided in less than 14 days if the authorised officer believes that is appropriate (having regard to matters in **new subsection 214(2)** at **item 137**). Those matters in item 137 include having regard to the urgency of the situation and having regard to any hardship that may be caused by the reduced time frame.

Item 139 will provide a defence to the offence under section 218 of failing to comply with a notice given under section 213. If a person is genuinely unable to provide the required information within the specific time, they will not be exposed to a penalty.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 141 will insert **new subsection 219(1)** to allow a judge to make a monitoring order that financial institutions provide certain information (including the use of a stored value card).

Items 142-145 are consequential amendments arising out of the introduction of the new term ‘stored value card’.

Items 147 and **148** insert new definitions in the Dictionary (section 338) of ‘account’ (modelled on the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*) and ‘stored value card’.

Part 5 – Ancillary Orders

Part 5 will make a number of amendments implementing recommendation D7 of the Sherman Review.

Ancillary orders are ‘orders which give the restraining order practical effect, or which help to achieve or promote the underlying purpose of the restraining order’.²⁶

Recommendation D7 of the Sherman Report considered that section 39 of the Act should be amended to provide for further ancillary orders, namely to:

- (a) Order a previous owner of the property to provide a sworn statement on dealing in the property; (note that **item 152** goes beyond this by applying it to any other person (excluding the previous owner) whom the court reasonably suspects to have information relevant to identifying, locating or quantifying the property);
- (b) Compel a suspect to provide a sworn statement regarding assets and liabilities;
- (c) Require the person in effective control of the property to do all that is necessary to bring the property within jurisdiction;
- (d) Allow ancillary orders to be made *ex parte*; and to make provision to qualify the privilege against self-incrimination but provide direct use immunity for any statement made.²⁷ This means that the evidence can not be used except in proceedings directly related to proceeds of crime applications or in proceedings for perjury.

The Explanatory Memorandum provides a thorough overview of the background and intention of these provisions.²⁸

26. T Sherman, op. cit., D9.

27. *ibid.*, D12.

28. Explanatory Memorandum, pp. 46-49.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Part 6 – Evidence

Items 159, 160, 162 and 163 will amend subsection 64(2), paragraph 64(2)(a), subsection 138(2) and paragraphs 138(2)(a) respectively to remove the references to conviction of an indictable offence (limiting the existing provisions) and permit the court to have regard to transcripts of *any proceedings for an offence that constitutes unlawful activity*.

Item 165 will insert a new provision, 318A, allowing examination statements to be admissible as evidence in proceedings under the Act. This will only apply in certain circumstances such as when the person is absent, unavailable or deceased.

Part 7 – Definitions

Part 7 makes amendments to the Act addressing consistency and accuracy in definitions that have come to light through 7 years of the operation of the Act. The amendments to the definitions are comprehensively explained in the Explanatory Memorandum.²⁹

The amendments do include a repeal of subsection 337A(3) (**item 174**) which stated that an offence against a law of a foreign country included an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America. Given the United States' Supreme Court decision in *Hamdan v Rumsfeld* (29 June 2006) finding the military commissions to be invalid, it is appropriate to remove this reference.

Part 8 – Technical amendments relating to orders

When a new trial has been ordered, **item 183** will allow a restraining order to remain in effect after a successful appeal against conviction.

The Explanatory Memorandum addresses unintended consequences in parts of the Act that deal with forfeiture orders.³⁰ **Items 188 and 189** make consequential amendments arising from the insertion of subsection 84(1) (**item 185**).

Item 195 will amend subsection 316(1) to require the court to seek the consent of all persons likely to be affected by an order when considering making orders by consent, not the people who have an 'interest' in the property. This item will omit from paragraph 316(1)(b) the words 'has an interest in the property that is the subject of the proceeding' and substituting 'would be affected by the order'. There is a minor referencing error in the Explanatory Memorandum to this item.³¹

29. *ibid.*, pp. 52–56.

30. *ibid.*, p. 57.

31. *ibid.*, p. 59.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 196 will correct an anomaly in the Act that was recommended by the Sherman Report (Recommendation D29).

Part 9 – Confiscated Assets Account

The amendments to the terminology used for the management of the Confiscated Assets Account will remove an administrative burden faced by the Insolvency and Trustee Service of Australia (ITSA). Prior to these amendments, there was a distinction between ‘distributable’ and ‘suspended’ funds in Part 4-3 of the Act. Supported by the Sherman Report, ITSA submitted that the process of determining suspended and distributable funds ‘is becoming less relevant’. The Sherman Report agreed and said that the distinction seemed ‘to serve no purpose that ordinary prudent accounting measures cannot serve.’³²

Schedule 2 – Search warrants

The amendments to the *Crimes Act 1914* will allow material seized under Part IAA to be used by, and shared between all law enforcement agencies. This will facilitate cross-border investigations.

Further, the amendments are intended to ensure that law enforcement agencies are able to effectively and efficiently access and search electronic equipment.³³

Part 1 – Seized things

Items 1 and 2 are consequential amendments to new sections (inserted by **items 9 and 10**).

Item 3 repeals subsection 3F(5) which is no longer necessary as a consequence of the insertion made by **item 9**. **Item 4** will repeal and replace paragraph 3L(1B)(b), and instead require data to be destroyed if the Commissioner of the AFP is satisfied that the data is not required, or not longer required for the investigation of an offence or complaint, for judicial or administrative review proceedings or for AFP conduct issues. **Items 5-8** will repeal subsections 3UF(4)-(7) and (9) and section 3UG respectively which will be replaced by **new sections 3ZQZA and 3ZQZB (item 9)**.

Item 9 inserts the new sections allowing for the use and sharing of seized things (**new section 3ZQU**) and for the seizure and use of seized electronic equipment (**new section 3ZQV and 3ZQW**). The Explanatory Memorandum outlines the background and detail to the provisions thoroughly and explains that the provisions ‘do not presuppose that these uses are not available currently, but puts the issue beyond doubt by providing a direct

32. *ibid.*, p. 60.

33. *ibid.*, p. 65.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

legislative basis for certain uses.³⁴ Refer to pages 67-80 for a comprehensive description of the provisions.

Part 2 – Use of equipment under warrant

Item 12 will repeal existing subparagraph 3K(2)(a)(ii) and substitute it with ‘the executing officer or constable assisting *suspects* on reasonable grounds that the thing contains or constitutes evidential material’[author emphasis]. The Explanatory Memorandum says that the reasoning for this is that ‘requiring an executing officer or constable assisting to determine that there are reasonable grounds to *believe* that the thing contains or constitutes evidential material is both conceptually and operationally problematic.’³⁵

Further:

The test of ‘reasonable grounds to believe’ is the same test that the executing officer or constable assisting must apply in determining whether to seize a thing that is not specified in the warrant under paragraph 3F(1)(d). If an executing officer or constable assisting genuinely holds ‘reasonable grounds to believe’ that the thing is evidential material, then it is questionable why they would elect to *move* the thing for further analysis under section 3K when they would already have grounds to seize the thing under section 3F.³⁶

A further insertion to section 3K is made by **item 13**. This item will insert **new paragraph 3K(3)(3AA)** that will allow an officer not to comply with paragraph 3K(3)(a) or (b) if he or she believes on reasonable grounds that to comply might endanger a person’s safety or prejudice and investigation or prosecution.

The Senate Committee recommended that subsection 3K(3A) and 3K(3B) of the Crimes Act should provide for equipment to be moved for examination for an initial period of no longer than seven days.³⁷ This will likely be an issue for consideration during debate in the Senate.

Item 16 will repeal the existing subsection 3L(1) and insert **new subsection 3L(1)** allowing the executing officer or a constable assisting to operate equipment held at the warrant premises to access data (including data not held at the premises).

34. *ibid.*, p. 71.

35. *ibid.*, p. 81.

36. *ibid.*, p. 82.

37. Senate Legal and Constitutional Affairs Legislation Committee, *op. cit.*, Recommendation 5.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 3 – Witness protection

Life in witness protection has been described by one state authority as “extremely stressful”. That’s an understatement. Yet every year in Australia dozens of people agree to risk their lives to testify in court in return for shedding their previous lives like old skins and making a new start. For most, it is the only option other than death or physical injury.³⁸

The National Witness Protection Program (NWPP) was established under the *Witness Protection Act 1994* (Cth) (the WP Act) following recommendations of the Joint Parliamentary Committee on the National Crime Authority in 1988. The WP Act created the NWPP and gave the Commissioner of the AFP responsibility for running the program.

In deciding whether to include a witness in the NWPP, the Commissioner must consider:

- (a) Whether the witness has a criminal record and whether that record indicates a risk to the public if the witness is included
- (b) Whether there are any viable alternative methods of protecting the witness
- (c) Any psychological or psychiatric examination which has been conducted to determine the witness’ suitability for inclusion.

In the financial year ending 30 June 2006, the NWPP managed 19 active witness protection operations, providing protection to 39 people. According to the AFP, the majority of people have been accepted into the program because of their involvement as witnesses in prosecutions relating to organised, large-scale importation of illegal drugs, or corruption matters. The movement of witnesses into or out of Australia ‘remains an active element of the NWPP’.³⁹ In the previous year’s Annual Report the following information was provided:

The NWPP provided protection and assistance to 51 people during the reporting period.

In addition, three people were assessed for inclusion in the NWPP during the period; two applications met the necessary criteria and one application did not. Five additional inquiries were received, however they did not progress to assessment.⁴⁰

The latest Annual Report (September 2006-07) does not provide any statistics in this part of the Report, ‘Performance and effectiveness of the NWPP’.

38. Hughes G, ‘Twilight life’, *Australian*, 8 March 2007, p. 12.

39. Australian Federal Police, *Witness Protection Annual Report 2005-06*, September 2006, p. 3.

40. Australian Federal Police, *Witness Protection Annual Report 2004-05*, September 2005, p. 5.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

As noted above, the WP Act allows for the inclusion of foreign nationals in the NWPP but whether criminals, murderers and terrorists have been allowed into Australia under the program is not divulged by the authorities.⁴¹ Each Annual Report on the NWPP states that:

Details of the actual movement of witnesses into or out of Australia or arrangements entered into between Australia and other Governments cannot be reported without the possibility of compromising either the safety of individuals concerned or the integrity of the NWPP.⁴²

The Attorney-General notes in his second reading speech that the amendments will increase protection of current and former participants and officers involved in the program,⁴³ and the Explanatory Memorandum outlines the key changes:

- (a) Clarifying the application of the Act to witnesses involved in State and Territory matters
- (b) Updating the concept of identity
- (c) Extending the availability of protection under the NWPP to former participants and related persons
- (d) Updating and extending the scope of non-disclosure offences.⁴⁴

Part 1 – Amendments

The most significant amendments to the WP Act are to add additional definitions to section 3 and to expand the existing offences.

Items 2, 3 and 7 insert definitions of current, former and original identity and **items 4 and 8** insert a definition for a former participant and participant respectively. A ‘participant’ is extended to include a ‘former participant’ unless otherwise stated. In relation to identity, currently the WP Act only distinguishes between a person’s ‘former identity’ and their ‘new identity’. The Explanatory Memorandum explains:

Such a distinction is based on the assumption that a person will only be provided with one identity under the NWPP, and that their former identity is equivalent to their original identity. However, while they would only ever be using one identity at a particular point of time, NWPP participants may be provided with more than one

41. M McKinnon and M Dodd, [‘Terror suspects to be resettled here’](#), *Australian*, 26 September 2006, p. 4.

42. See for example, Australian Federal Police, *Witness Protection Annual Report 2007-08*, September 2008, p. 8.

43. R McClelland, Second reading speech, op. cit., p. 9706.

44. Explanatory Memorandum, p. 93.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

identity in addition to their original identity. This can happen if the first identity provided to the person under the NWPP is compromised in some way.⁴⁵

Section 13 provides what actions can be taken to protect a witness who has been included in the NWPP. **Item 22** adds **new subsection 13(5)** to include a former participant, or any other person whose relationship with the former participant that the Commissioner considers appropriate, in need of protection. **Item 37** inserts **new subsection 18(2A)** which will allow the Commissioner to terminate that protection and assistance in certain circumstances, for example, if the person had given false and misleading information, or the person's conduct could jeopardise the integrity of the NWPP (**new paragraphs 18(2A)(b)(i) and (ii).**)

Items 10 and **11** also insert definitions of 'State participant' and 'Territory participant' into section 3 of the WP Act to mean a participant in relation to an offence, commission or inquiry against a law of a State or Territory, or in relation to a State offence that does or does not have 'a federal aspect'. A State offence that has a federal aspect is defined in **new section 3AB** to mean offences that would be taken to be such under the *Australian Federal Police Act 1979* (the AFP Act) and the *Australian Crime Commission Act 2002*.

Essentially, 'a State offence has a federal aspect' if the provision creating the offence would have been a valid law if it had been made by the Commonwealth, or if the AFP is investigating a criminal matter relating to a Commonwealth or Territory offence. According to the definition contained in AFP Act, it is irrelevant whether the State offence is an ancillary or primary offence. The term 'ancillary offence' is defined as conspiracy to commit the primary offence; aiding, abetting or otherwise being knowingly concerned with the commission of the primary offence; and attempting to commit the primary offence.⁴⁶

Item 52 repeals the current offence provision, section 22, and inserts **new sections 22, 22A, 22B** and **22C**. The offences relate to Commonwealth or Territory participants, about State participants and about disclosure of information. **New section 22C** provides that the non-disclosure requirements extend to courts, tribunals, Royal Commissions and commissions of inquiry.

Schedule 4 – Criminal organisation and association offences

Schedule 4 will insert **new Part 9.9, new sections 390.1- 390.7** into the Criminal Code. The new offences being created are:

1. associating in support of serious and organised criminal activity (**new section 390.3**)

45. *ibid.*, p. 94.

46. M Donaldson, *Australian Federal Police and other Legislation Amendment Bill 2004*, Bills digest no. 78, 2003-04, Parliamentary Library, Canberra.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

2. supporting a criminal organisation (**new section 390.4**)
3. committing an offence for the benefit of, or at the direction of, a criminal organisation (**new section 390.5**) and
4. directing the activities of a criminal organisation (**new section 390.6**)

According to the Attorney-General:

The bill includes new organised crime offences that target persons who associate with those involved in organised criminal activity, and those who support, commit crimes for, or direct the activities of, a criminal organisation.

The investigation of these serious criminal offences will be supported by amendments to enable greater access to telecommunications given that the nature of these associations is that communication within organisation will be a very important and significant aspect of the criminal association.⁴⁷

Key definitions for the new Part are set out in **new section 390.1**. The Senate Legal and Constitutional Legislation Committee Report gives a neat summary of some of the expressions as follows:

2.9 The term ‘constitutionally covered offence’ would include Commonwealth offences, state offences that have a federal aspect, territory offences and foreign offences that are constituted by conduct that would constitute an Australian offence, if it occurred in Australia. ‘State offences that have a federal aspect’ would be defined by proposed section 390.2 and essentially means state offences that involve Commonwealth matters such as telecommunications, postal services or trade and commerce.⁴⁸

‘Associate’ means meet or communicate (by electronic communication or otherwise). In its comments on the association offence, (**new section 390.3**) the Law Council of Australia (raised concerns that in their the day to day operations the police will overlook the finer details of the provision in determining when and how they exercise their powers. The Law Council goes on:

These concerns are confirmed by the proposed amendments to the *Telecommunications (Interception and Access) Act* (the TIA Act) contained in item 4, schedule 4 of the Bill. The proposed amendments will ensure that law enforcement agencies have access to interception powers under the TIA Act when investigating the new association and criminal organisation offences, notwithstanding that those

47. R McClelland, Second reading speech, op. cit., p. 9705.

48. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., paragraph 2.9, p. 6.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

offences carry penalties below the threshold ordinarily required to obtain a telephone interception warrant.⁴⁹

In brief, under **new subsection 390.3(1)** an offence will be committed if a person associates on 2 or more occasions with another person and this other person engages, or proposes to engage in conduct that constitutes, or in part constitutes, an offence which attracts a penalty of imprisonment from 3 years to life. The association must 'facilitate' the conduct, and the offence must involve 2 or more persons. **New subsection 390.3(2)** is in similar terms, and applies to a person who has previously been convicted of an offence under the previous subsection. Both offences attract a maximum 3 year penalty. According to the Explanatory Memorandum:⁵⁰

The rationale for the repeat offence lies in the fact that if a person has already been convicted of the association offence in subsection 390.3(1), any further association (even if it is only once), warrants criminal sanction.

Apart from concerns that the Law Council had about even the need at all for the provision (see further below), it had 2 major objections to the provision. The Law Council points out that it is not necessary that the person charged with the offence knows or intends that his or her association with the second person will facilitate the commission of the offence, it is sufficient that he or she is reckless about that possible outcome. This is because the proposed provisions do not provide a default fault element, which means that 'recklessness' will apply. 'Recklessness', under section 5.4(1) of the Criminal Code, with respect to a circumstance, requires proof that the person is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances that are known to him or her, it is unjustifiable to take the risk.

The Law Council submitted that the proposed provisions are based on the flawed association with terrorists organisations provision of the Code (section 102.8) and 'offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction'.⁵¹ In essence the Law Council states that persons who do not actually themselves plan, assist or participate in the commission of an offence, 'should not have to live in the shadow of offence provisions as these'.⁵² As the Law Council states:

⁴⁹. Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2), October 2009, p. 11.

⁵⁰. Explanatory Memorandum, p. 135.

⁵¹. Law Council of Australia, op. cit., p. 9.

⁵². *ibid.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

In short, the Law Council's concern is that because this provision is focused on a person's associations, the provision potentially affords law enforcement agencies very wide latitude to intrude on people's privacy and liberty, based purely on who they know and interact with, rather than on their conduct.⁵³

The Senate Legal and Constitutional Affairs Legislation Committee addressed this matter, and have recommended that this provision be amended by 'limiting its application to circumstances where the accused **intended** that the association would facilitate the criminal conduct or proposed criminal conduct'.⁵⁴

The Law Council also had objection to the undefined expression 'facilitate' used in **proposed subparagraphs 390.3(1)(C) and 390.3(2)(do)**, where the associations must 'facilitate' the other person engaging in the crime. In response to questions on the broadness of this expression, the Department responded to Senators as follows:

'Again, many terms that are used are not defined. It is not a term of art but an ordinary term that a court would interpret. We do not think it is too broad. The clear connotation of 'facilitate' is that it has to assist or support in some way, It is not clear to me why the Law Council thinks that 'facilitate' is a term of uncertainty or great breadth'.⁵⁵

In 'Additional Comments' by the Liberal Senators on the Senate Committee, Senators Barnett and Fisher have picked up the Law Council's comments and recommend that the Bill be amended to define the term 'facilitate' to ensure that it does not capture activities that are only of peripheral relevance to the commission of an offence.⁵⁶

In relation to the defences provided in **new subsection 390.6** the Senate Committee also proposes amendments to ensure there is a general defence that the association was reasonable in the circumstances, and to replace the existing proposed defences for legal practitioners to a more general defence that the association was only for providing legal advice or representation.⁵⁷ The Law Council noted in its submission⁵⁸ that the way the defences are currently drafted the legal practitioner bears the evidentiary burden and this will be difficult in situations where the client does not waive legal professional immunity

53. *ibid.*, p. 10.

54. Senate Legal and Constitutional Affairs Legislation Committee, *op. cit.*, Recommendation 1, paragraph 7.11.

55. S Chidgey, Senate Legal and Constitutional Legislation Committee, Reference: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009, *Proof Committee Hansard*, 29 October 2009, p. 5.

56. Senate Legal and Constitutional Affairs Legislation Committee, *op. cit.*, p. 71.

57. *ibid.*, Recommendation 2. Paragraph 7.12.

58. Law Council of Australia, *op. cit.*, p. 10.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

(privileged communications). The Department, in the additional answers to questions to the Senate Committee, refute this claim saying:

Accordingly, any refusal by a client to waive legal professional privilege would not prevent a defendant [the legal practitioner] from adducing evidence of a general nature about the existence of such a relationship between the practitioner and client and the general purpose for which the advice was provided.⁵⁹

The offence of providing support to a criminal organisation in **new subsection 390.4** entails, amongst other things, a person to provide material support or resources to an organisation or member and this aids or there is a risk it will aid the organisation to commit an offence. It carries a penalty of 5 years imprisonment. **New subsection 390.4(3)** provides that a conviction can be made even if the provision of support or resources does not actually aid the organisation. Again there is no requirement for ‘intention’ to aid the organisation (although there must be an intention to provide the support or resources). Accordingly, the Senate Committee has recommended that the proposed provision be amended to provide, in **new paragraph 309.4(1)(b)** ‘the person **intended** the provision of the support or resources would aid the organisation to engage in conduct constituting an offence against any law’ (**Recommendation 3, paragraph 7.15**). This would address concerns of the Law Council, and other submitters. This issue was addressed in the written questions and answers to the Department with the Department maintaining that adding intention to this part of the offence ‘would significantly restrict the application of the offence’.⁶⁰

The other issue with this particular subsection is that the maximum penalty for the offence will be 5 years imprisonment, but the purported offence that is being assisted need only carry a penalty of 12 months imprisonment. The Law Council submitted that if the provision is to be introduced it should be limited to assisting only activity which assists very serious offences being committed.⁶¹ The Senate Committee does address this matter in **Recommendation 4, paragraph 7.16** by recommending that the penalty for this provision should be the maximum penalty for the offence the accused intended to support. This is slightly different from the Law Council’s submission in that the Government could simply in response reduce the penalty to 12 months. However, the Department’s view to this is that the matter turns on the elements which define ‘criminal organisation’:

That is, the organisation must consist of two or more persons and its aims or activities must include facilitating engagement in, or engaging in, the commission of serious criminal offences (carrying maximum penalties of three years or above) for the benefit of the organisation. The defendant must be reckless as to the circumstance

59. Attorney-General’s Department, Australian Crime Commission and Australian Federal Police, *Additional Information and Responses to Questions on Notice*, November 2009, p. 5.

60. *ibid.*, p. 8.

61. Law Council of Australia, *op. cit.*, p. 12.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

that, for example in relation to the supporting offence, the organisation to which they are providing support or resources, is a criminal organisation.⁶²

This Departmental response is drawing from **new paragraphs 309.4(1)(d) and (e)** which refer to the aims or activities of the organisation which would attract an offence of 3 years or more, which is different from the conduct that is being supported by the alleged offender, namely conduct which could attract an offence of only 12 months. That is, the response does not clearly address the concerns of the Law Council, or the Senate Committee, and hence the recommendation to amend.

The Law Council in its written submission made the fundamental argument in its general comments that the existing provisions of the Criminal Code already adequately enable the investigation and prosecution of those who engage in, assist, plan or commission substantive criminal offences. The Law Council specifically refers to provisions in the Code dealing with attempt, complicity and common purpose, ‘innocent agency’, incitement, and conspiracy.⁶³ In addition there are provisions which already deal offences such as possession, transfer or receipt of property or funds. Summing up its concerns, the Law Council states:

If every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised⁶⁴

The Liberal Senators in their Additional Comments also drew attention to this comment and noted that they intend to closely monitor through the Estimates process whether these powers are being exercised appropriately.⁶⁵ This suggests that they will not be opposed in the Senate.

The Committee notes the Government’s response to the argument of the Law Council, by referring to the Acting Deputy Commissioner of the AFP, Mr Quaedvlieg’s evidence given on the day of hearings, where he said that the offences were specialised offences:

designed to combat organised crime that is not fully covered by the current existing criminal responsibility provisions such as conspiracy, complicity, and association.⁶⁶

In addition, Mr Quaedvlieg also said in response to a question at the hearings:

62. Attorney-General’s Department, Australian Crime Commission and Australian Federal Police, op. cit., p. 9.

63. Law Council of Australia, op. cit., pp. 4–5.

64. *ibid.*, p. 7.

65. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 72.

66. *ibid.*, p. 16.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

It [the Bill] will give us an extended suite of powers. The existing provisions that we use to target members have been effective in the past but, with the increasing sophistication, internationalisation and fluidity of organised crime groups, these extended powers give us that little bit more reach where we can actually hit the upper echelons, and that is where our focus is.⁶⁷

In his closing comments in the House of Representatives at the third reading stage of the Bill the Attorney-General summed up the safeguards of the association and criminal organisation offences;

Firstly, with respect to the association and criminal organisation offences, the offences articulate clear boundaries of criminal by requiring proof by the prosecution of certain specific elements. The offences require proof that the offender was aware of a substantial risk that their conduct would facilitate serious and organised crime. The offences criminalise varying levels of involvement in a criminal organisation and carry penalties reflecting the spectrum of seriousness, from supporting conduct to more serious conduct of directing the affairs of the organisations. Defences will also apply to ensure legitimate associations are protected.⁶⁸

There has been little public comment on this second Bill, reflected perhaps in that major comments were made on the first serious and organised crime bill and the amount of time allowed to consider this Bill. As the Liberal Senators noted in their Additional Comments:

There is only one schedule in the Bill which contains urgent amendments [schedule 6 – Unfitness to Plead]. It is unclear to Liberal Senators why these amendments could not have been dealt with separately to enable more thorough consideration of a Bill which introduces major new offences and powers.⁶⁹

Schedule 5 – Money laundering

Part 1 of Schedule 5 contains proposed amendments to Division 400 of the Criminal Code Act, which aim to address impediments to the investigation and prosecution of money laundering offences set out in Division 400, which were identified by the AFP and DPP.

Part 2 of Schedule 5 contains proposed amendments to the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (the AML/CTF Act), which aim to improve both

67. R Quaedvlieg, Senate Legal and Constitutional Legislation Committee, Reference: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009, *Proof Committee Hansard*, 29 October 2009, p. 7.

68. R McClelland (Attorney-General), *Hansard*, 18 November 2009, p. 91.

69. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 72.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the operation of the AML/CTF Act and AUSTRAC's ability to enforce obligations of reporting entities under the AML/CTF Act.⁷⁰

Part 1 – Amendments to the *Criminal Code Act 1995*

Items 1 and 3 propose to amend the definitions of *'instrument of crime'* and *'proceeds of crime'*, respectively, in **subsection 400.1(1)** of the Criminal Code Act by clarifying that the money laundering offences in Division 400 would apply to all indictable offences, not just Commonwealth offences. In other words, this would include State, Territory and foreign indictable offences.⁷¹

Item 2 proposes to further amend the definition of *'proceeds of crime'* in **subsection 400.1(1)** by including money or other property that is wholly or partly derived or realised from the commission of a Commonwealth, State, Territory or foreign indictable offence (even those that may be summarily dealt with in certain circumstances).

Item 4 proposes to substitute the meaning of *'deals with money or other property'* in **section 400.2** and inserts **new section 400.2A** into the Act.

New section 400.2 provides that a person deals with money or other property if he or she:

- (a) receives, possesses, conceals or disposes of money or other property
- (b) imports or exports money or other property into or from Australia, or
- (c) engages in a banking transaction relating to money or other property.⁷²

New section 400.2A provides that sections 400.3–400.8 would only apply in certain circumstances where a person deals with money or property that:

- (a) is intended by the person to become an instrument of crime, or
- (b) is at risk of becoming an instrument of crime.

Such circumstances are as follows:

- (a) where such money or other property is intended to become, or is at risk of becoming, an instrument of crime relating to:

70. As to the meaning of *'reporting entity'*, see in particular *Anti-Money Laundering and Counter Terrorism Financing Act 2006* section 5 (definition) and Part 3 (reporting obligations).

71. As to the meanings of State, Territory and foreign indictable offence, see *Criminal Code Act 1995* subsection 400.1(1).

72. Note that *'property'* *'export money or other property'* from Australia, *'import money or other property'* into Australia, and *'banking transaction'* are defined in subsection 400.1(1) of the Criminal Code Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- a Commonwealth, Territory or foreign indictable offence, or
 - a State indictable offence with a federal aspect, or
- (b) where the dealing with such money or other property occurs:
- in the course of or for purposes of importing goods into Australia or exporting goods from Australia
 - by means of a postal, telegraphic, telephonic or such service under paragraph 51(v) of the Constitution
 - in the course of banking (other than intra-State banking), or
 - outside Australia.

Note that **new subsection 400.2A(5)** provides that absolute liability would apply to **new subsections 400.2A(3) and (4)**, which set out the above mentioned circumstances. This effectively means that it would not be necessary to prove a fault element and nor would the defence of mistake be available.

It is stated in the Explanatory Memorandum that:

these subsections are both jurisdictional elements ... A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not. Absolute liability is appropriate and required for these elements of the offences. This is consistent with Commonwealth criminal law policy, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, and consistent with the approach taken in other offences in the Criminal Code.⁷³

Items 5–15 propose amendments in the Criminal Code Act that are consequential to **item 4**.

Item 16 proposes to substitute **subsection 400.9(1)** and insert **new subsection 400.9(1A)** into the Criminal Code Act.

New subsection 400.9(1) provides that a person commits an offence if he or she:

- (a) deals with money or other property (see **item 4**)
- (b) it is reasonable to suspect that the money or property constitutes proceeds of crime (see **items 2 and 3**), and
- (c) the value of the money and other property is \$100 000 or more at the time of dealing.

73. Explanatory Memorandum, p. 154.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The penalty for this offence would be three years imprisonment and/or 180 penalty units.⁷⁴

It is stated in the Explanatory Memorandum that:

A penalty of 3 years for the possession of money or property reasonably suspected of being the proceeds of crime worth more than \$100,000 reflects the serious nature of possessing the proceeds of crime worth more than \$100,000 and the significant criminal activity that has generated \$100,000 or more.⁷⁵

New subsection 400.9(1A) is a similar offence provision applying where the value of the money and other property being less than \$100 000 at the time of dealing. The penalty for this offence would be two years imprisonment and/or 120 penalty units, presumably reflecting the lesser degree of seriousness of the offence.⁷⁶

Items 17 and 20 propose amendments essentially consequential to **item 16**. However, note that under **item 20**, absolute liability would apply to **new paragraphs 400.9(1)(b) and (c)**, as well as **new paragraphs 400.9(1A)(b) and (c)**. It is stated in the Explanatory Memorandum that:

... This is consistent with the application of absolute liability to these elements in the current money-laundering offences.

As paragraph (b) establishes an objective standard of fault, being 'reasonable to suspect', it is appropriate to apply absolute liability to ensure that subjective fault elements, such as knowledge or recklessness, do not apply.

It is also appropriate to apply absolute liability to paragraph (c), as this element does not relate to the substance of the offence but merely specifies the monetary threshold for the application of the offence.⁷⁷

Item 18 proposes to amend **paragraph 400.9(2)(c)** of the Criminal Code Act to include a timeframe within which the value of money or other property, that is grossly out of proportion to the defendant's income and expenditure, would be considered. In other words, the proposed amendment:

will ensure that consideration is given to the defendant's income and expenditure over a reasonable period within which the conduct occurs.⁷⁸

74. This is consistent with *Crimes Act 1914* subsection 4AB(2). Note that for natural persons, one penalty unit is \$110: *ibid.*, subsection 4AA(1).

75. Explanatory Memorandum, p. 155.

76. This is also consistent with *Crimes Act 1914* subsection 4AB(2).

77. Explanatory Memorandum.

78. *ibid.*, p. 156.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 19 proposes to repeal **subsection 400.9(3)** of the Criminal Code Act, which is no longer considered to be necessary because the offence is supported under the external affairs power in section 51(xxix) of the Constitution:

... by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, to which Australia is a party.⁷⁹

Item 21 proposes to repeal **subsection 400.9(6)** of the Criminal Code Act, consequential to amendments proposed in **item 4** (see above).

Similarly, **item 22** proposes to amend **subsection 400.10(1)** of the Criminal Code Act, consequential to amendments proposed in **item 16** (see above). This means that, in addition to offences under sections 400.3–400.7, a person would not be criminally responsible for a section 400.9 offence, as proposed in the Bill, where that person:

- (a) was under a mistaken but reasonable belief as to the value of the money or property at or before the time of dealing with that money or property, and
- (b) if the value had been what the person believed it to be—the person’s conduct would have constituted another Division 400 offence and the maximum penalty units would be less than the maximum penalty units for the actual offence charged.

Item 23 proposes to substitute **section 400.15** in the Criminal Code Act, extending the geographical jurisdiction for money laundering offences under Division 400 of the Act. The geographical jurisdiction is being amended to be Category B, as set out in section 15.2 of the Criminal Code. This means that the provisions will apply to conduct that occurs wholly or partly in Australia, to Australian citizens, Australian bodies corporate and Australian residents for what they do anywhere in the world. It will cover conduct that has a result in Australia. If the conduct occurs wholly in a foreign country, and the offender is not an Australian citizen or an Australian body corporate, there is a defence based on the law of the foreign country. Extending the geographical jurisdiction will increase the prospects of more investigations and successful prosecutions under this section.

79. *ibid.* For details about the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, see Department of Foreign Affairs and Trade, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*, viewed 12 November 2009, <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/3DD96FA86446D74CCA256BA300003CAB>

See also Council of Europe, *Explanatory Report: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*, ETS no. 141, viewed 16 November 2009, <http://conventions.coe.int/Treaty/EN/Reports/Html/141.htm>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Part 2 – Amendments to the Anti-Money Laundering and Counter Terrorism Financing Act 2006

Item 25 proposes to insert new definition of ‘non-financier’ into section 5 of the AML/CTF Act. ‘Non-financier’ would mean a person who is not:

- (a) an ADI
- (b) a bank
- (c) a building society
- (d) a credit union, or
- (e) a person specified in the AML/CTF Rules.

Item 26 proposes to amend the definition of ‘stored value card’ in **section 5** of the AML/CTF Act. ‘Stored value card’ would not include a debit or credit card but would include any other portable device capable of:

- (f) storing monetary value in a non-physical currency form, or
- (g) being used to access monetary value stored in such form.

It would also include a portable device (other than a debit or credit card) of a kind prescribed by regulations.

According to the Explanatory Memorandum, **item 26** would:

ensure that stored value cards that do not store the monetary value on the card itself are capable of being a stored value card for the purposes of the AML/CTF Act.⁸⁰

It should be noted that this definition differs from the definition “stored value card being inserted into the Criminal Code, section 338, by **item 148, Schedule 1, Part 4** of this Bill.

Item 28 proposes to **substitute table items 31 and 32 in subsection 6(2) Table 1** in the AML/CTF Act. Table 1 relates to ‘designated services’ in financial services for the purposes of this Act.

New table items 31 and 32 would limit the provision of designated services, which relate to designated remittance arrangements, to non-financiers (as defined in **item 25** above) carrying on businesses that give effect to such arrangements. The proposed amendment means that an ADI, bank building society, credit union or person specified in the AML/CTF Rules would not provide the designated services in **new table items 31 and 32**. In addition, as stated in the Explanatory Memorandum, a non-financier would only be able

80. Explanatory Memorandum, p. 157.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

to provide such designated services in the course of carrying on a business of giving effect to remittance arrangements.⁸¹

Lastly, as pointed out in the Explanatory Memorandum:

Providers of remittance services that use the financial system to ‘accept’ or ‘make money or property available’ for customers appear to have been inadvertently excluded from both the definition of ‘designated remittance arrangement’ and the related designated services at items 31 and 32.

This amendment will address this issue and implement the original policy intention by ensuring that remittance dealers who accept money from a customer, and make money available to a customer, through the financial system are providing designated services at items 31 and 32.⁸²

Item 30 proposes to substitute **paragraph 10(1)(a)** and repeal **paragraph 10(1)(b)** of the AML/CTF Act.

New paragraph 10(1)(a) provides that a reference to a designated remittance arrangement in the AML/CTF Act includes a reference to a remittance arrangement where at least one of the following people is a non-financier:

- (a) someone accepting an instruction from the transferor entity to transfer money or property under the remittance arrangement, or
- (b) someone making money or property available, or arranging for this to happen, to an ultimate transferor entity as a result of a transfer under the remittance arrangement.

There are two aspects to these proposed amendments. First, as stated in the Explanatory Memorandum:

AUSTRAC has experienced difficulties relating to the taking of enforcement action against providers of designated remittance services in response to non-compliance with obligations under the AML/CTF Act. It is difficult to prove that the entity located in a foreign country is not an ADI, a bank, a credit union, a building society or a person specified in the AML/CTF Rules to satisfy the definition in section 10.

This amendment will remove the requirement to prove that the entity located in a foreign country is not an ADI, a bank, a building society, a credit union or a person specified in the AML/CTF Rules, when proving the existence of a designated remittance arrangement.⁸³

81. *ibid.*, p. 158.

82. *ibid.*

83. *ibid.*, pp. 158–159.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Second, the amended definition of ‘designated remittance arrangement’ captures the following:

- (a) arrangements where someone receives and accepts an instruction from a transferor entity for the transfer of money or property under a remittance arrangement, and
- (b) people making money or property available, or arranging for it to be made available, to ultimate transfer entities as a result of transfers under remittance arrangements.

Item 32 is consequential to **items 28** and **30**, proposing to amend the definition of ‘the transferor entity’ in **paragraph 10(3)(a)** of the AML/CTF Act, which would capture arrangements where instruction is accepted from a transferor entity for the transfer of money or property under a designated remittance arrangement.

Item 33 is also consequential to **items 28** and **30**, proposing to amend **table items 3** and **4** in **section 46** of the AML/CTF Act by substituting ‘non-financier in Australia’ for ‘person in Australia’. This means that an ADI, bank, building society, credit union or person specified in the AML/CTF Rules would not fall within the meaning of ‘international funds transfer instruction’ and would not have the requisite reporting obligations.

Item 34 proposes to amend **subsection 59(1)** of the AML/CTF Act, by specifying that anyone who must provide a report about bearer negotiable instruments (BNIs) to AUSTRAC, a customs officer or police officer, must do so immediately rather than as soon as possible.

According to the Explanatory Memorandum:

This amendment will address problems encountered by AUSTRAC, Customs and the AFP when issuing an infringement notice for the failure to provide a report about the movement of a BNI. The requirement to report a BNI ‘as soon as possible’ has created uncertainty over when a report must be provided.

This amendment will provide greater certainty over when a report must be provided and ensure consistency with the timing of the requirement to report the movement of physical currency.⁸⁴

Item 35 proposes to substitute **subsection 123(3)** in the AML/CTF Act. Section 123 relates to the offence of tipping off. Currently, subsection 123(3):

prohibits a reporting entity that has given information or produced a document to a person under subsection 49(1) from disclosing to anyone else that the information or document was provided.

However, this prohibition only operates if the reporting entity gives information or produces a document. The prohibition does not exist prior to the giving of information

84. *ibid.*, p. 160.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

or production of a document and section 123 does not prohibit a reporting entity from disclosing to another person that it has received a request for information.⁸⁵

Schedule 6 – Unfitness to plead

Schedule 6 makes a minor amendment to the *Crimes Act 1914* which the Minister states is urgent and its purpose is to ‘preserve the ability of a person who has been charged with a Commonwealth offence and who is being tried in Victoria for a Commonwealth offence, to appeal a finding that they are unfit to plead’.⁸⁶

In Victoria, the yet-to-be proclaimed *Criminal Procedure Act 2009* (Vic) will repeal section 570C of the *Crimes Act 1958* (Vic) which currently provides a right to appeal to the Court of Appeal when a jury has made a finding that a person is unfit to stand for trial. This section applies to federal defendants by the operation of the *Judiciary Act 1903* which applies State and Territory procedural and other laws to people who have been charged with a Commonwealth offence. Due to changes in Victorian mental health laws, section 570C has become obsolete and hence it’s proposed repeal.⁸⁷

According to the Explanatory Memorandum therefore:

The Commonwealth Crimes Act does not provide federal defendants with a right of appeal equivalent to that in current section 570C of the Victorian Crimes Act. As a result, although that section is no longer required for people accused of offences against Victorian law, it retains relevance for federal offenders. If the appeal mechanism provided by section 570C is not maintained in some form, a federal defendant in Victoria would not be able to appeal a finding that he or she is unfit to plead...

Accordingly, this Schedule amends Division 6 of Part 1B of the Commonwealth Crimes Act to provide federal defendants with the ability to appeal a finding that they are unfit to plead, in a manner that reflects current section 570C of the Victorian Crimes Act.

The Explanatory Memorandum asserts that section 570C was repealed ‘with effect from October 2009’, by the *Criminal Procedure Act* (Vic). Note this Schedule will commence once the Victorian Act is proclaimed.

Item 1 adds **new section 20BI** the Commonwealth Crimes Act to insert a right of appeal to the Court of Appeal of Victoria from a jury finding that an accused is unfit to stand trial. It refers to federal offences alone. **Items 2** and **3** apply the new provision to findings made

85. *ibid.*

86. R McClelland, Second reading speech, *op. cit.*, p. 9704.

87. Explanatory memorandum, p. 161.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

before, on or after the commencement of the provision, and make transitional provision for proceedings that have not been completed prior to the repeal of section 570C, if any.

Schedule 7 – Amendments relating to the Australian Crime Commission

Items 4 and 6 amend the *Australian Crime Commission Act 2002* (the ACC Act) to repeal and substitute the definition of ‘intelligence operation’ to include the notion that an operation may involve the ‘investigation’ of matters relating to criminal activity. According to the Explanatory Memorandum:

this amendment will recognise that a specific investigation can be part of an intelligence operation and will allow the ACC to undertake actions which may otherwise be reserved for an ‘investigation’. For example, a search warrant under section 3E of the Crimes Act can only be obtained for the investigation of an offence. A search warrant cannot be obtained under the Crimes Act for an intelligence operation of intelligence gathering in general. This amendment will mean that while conducting an intelligence operation, the ACC will be able to obtain a search warrant under the Crimes Act if it is conducting an investigation into an offence which is a necessary part of the operation.⁸⁸

Item 7 amends subsection 7B(2) to include the Commissioner of Taxation on the ACC Board to provide the expertise of the Commissioner to the Board. This amendment has been recommended in four separate Parliamentary Joint Committee-ACC reports.⁸⁹

Under the ACC Act, examiners are given powers to issue summons for persons to appear to give evidence and to produce documents or other things as outlined in the summons. When issuing summons, examiners must be satisfied that it is reasonable to do so and are required to record reasons for issuing the summons or notice to appear or provide documents. Currently an examiner can record reasons before, at the same time or as soon as practicable after issuing a summons or notice (subsections 28(1A) and 29(1A)). As a result of recommendations of the Parliamentary Joint Committee, these provisions are being amended to ensure that an examiner provides reasons at or before the time a summons or notice is issued (**items 10 and 13**). This addresses the concern of the use of coercive powers being properly accounted for and recorded. The Parliamentary Joint Committee also recommended that the provisions that stated that a summons or notice was valid despite a failure to record reasons should be repealed.⁹⁰

Item 18 inserts **new sections 34A to 34F** to strengthen the powers of the ACC in relation to contempt. These amendments are to deal with the problem the ACC has been having with uncooperative witnesses who appear before examiners and either fail or refuse to take

88. *ibid.*, p. 166.

89. *ibid.*, p. 167.

90. *ibid.*, p. 170.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

the oath or affirmation, or refuse to answer questions or produce documents. The current procedure requires the ACC to issue summons and require the person to appear before a court to have the matter dealt with. This process can be time-consuming and cumbersome according to the evidence of the ACC.⁹¹

There are several aspects of the proposed amendments that have brought criticism. These are in relation to legal professional privilege, and the power to detain pending appearing before a court.

New paragraphs 34A(b), (c), (d), (e) and (f) extend the coercive powers over legal practitioners who appear before the ACC and who refuse to provide the name and address of a client when an answer to a question or a document would reveal a privileged communication, who give false or misleading material to an examiner, who obstruct or hinder an examiner, who disrupt an examination or who threaten a person present at an examination. The Explanatory Memorandum is silent on the rationale to make specific provision in relation to legal practitioners. In evidence before the Senate Legal and Constitutional Legislation Committee any evidence of problems with lawyers conduct was only briefly alluded to. In response to a question as to whether claiming privilege was a lawyers' tactic to evade the intention of the legislation, Mr Lawler replied:⁹²

I do not think there is any doubt about that. Whether it is by the lawyers or acting on instructions on behalf of their clients there is no doubt in my mind that this is a coordinated attempt to frustrate the system

The evidence given to the Committee was that the provision did not override legal professional privilege, and only requires the lawyer to provide the name and address of the client so that the ACC can make independent inquiries as to whether the client wishes to claim the privilege, or waive it.⁹³ The Law Council does not take issue with the provision applying to practitioners although it does have other problems with the proposed provisions, mentioned below. The Attorney-General and Minister for Corrective Services, WA, does raise the concern that **new section 34A** appears to prevail over legal professional privilege and, in principle, he did not support it.⁹⁴

The Law Council submitted that **new paragraphs 34A(d), (e) and (f)** (obstruction, disruption and threats) were not necessary and should not be made. This is because there

91. J Lawler, Senate Legal and Constitutional Legislation Committee, Reference: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009, *Proof Committee Hansard*, 29 October 2009, p. 4.

92. *ibid.*, p. 4.

93. S Chidgey, *op. cit.*, p. 8.

94. C Porter, Submission to the Senate Legal and Constitutional Affairs Legislation Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

are already sufficient offence provisions dealing with these types of contempts under the ACC Act.⁹⁵

A significant objection was made by the Law Council to the procedure adopted in the Bill as to how contempt was to be dealt with. Under the Bill if an examiner is of the opinion a person is in contempt the examiner may apply to a court to deal with the contempt (**new subsection 34B(1)**). If the court finds that the person was in contempt of the ACC, the court may deal with the person as if the acts or omissions involved constituted a contempt of that court (**new subsection 34B(5)**). The Law Council of Australia prefers a process recommended by the Australian Law Reform Commission that where an inquiry body, such as the ACC, gives a notice or direction that a person fails to comply with, then the matter should be referred to a court for a court to enforce the notice or direction. It is only then that if the person still fails to comply that this refusal will become a contempt to be dealt with by the court. The subtle difference being proposed by the Law Council of Australia deals with the perceived mischief of the misuse of the law of contempt.

the law of contempt was developed to protect the administration of justice. Therefore, it should only be employed to safeguard and reinforce the authority of the court, and not executive bodies exercising executive powers – such as the ACC.⁹⁶

The application to the court by the examiner must be accompanied by a certificate stating the grounds for making the application, and the evidence in support of the application (**new subsection 34B(3)**). **New subsection 34C(3)** goes on to provide that this certificate is prima facie evidence of the matters specified in the certificate. The Law Council of Australia objects to the subsection and submits it should not be enacted on the basis also of ALRC recommendations that the power to determine the facts should be exercised independently of the inquiring body such as the ACC. That is, that this should be left to the court.

New section 34D gives the examiner the power to direct a constable⁹⁷ to detain an alleged offender for the purposes of bringing the person before the court. The Law Council of Australia objects to this proposed provision on two grounds, namely that persons such as the examiners who are not judicial officers should not be given such a power for any purpose or period, and because if a person has appeared voluntarily before the examiner in compliance with a summons he or she will also volunteer to respond to a court summons to appear.⁹⁸ The Law Council recommends that **new section 34D** not be enacted at all. The WA Attorney-General also had objection to this provision, not on separation of powers grounds, but in its application to legal practitioners:

95. Law Council of Australia, op. cit., p. 20.

96. ibid., p. 18.

97. ‘Constable’ is defined in **item 1** as an Australian Federal Police member, or a member of a State police service.

98. Law Council of Australia, op. cit., p. 20.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

In my view, unless there are compelling empirical statistics and examples to support the need for such deterrence, this aspect ought, at least, be amended to provide for contempt applications to be dealt with expeditiously by the courts rather than immediate detention at the behest of the examiner.⁹⁹

Departmental officers before the Legal and Constitutional Legislation Committee advised the Committee that the Department is confident that the contempt provisions are constitutional, as are the rest of the provisions.¹⁰⁰ In its response to questions on notice, the Department advised that it received legal advice from the Australian Government Solicitor on 6 April 2009, and that the Attorney-General wished to claim immunity over the disclosure of that advice.¹⁰¹

In the response to questions on notice the Department has indicated that it may consider a Government amendment to proposed section 34D to clarify that the examiner makes the application to the court as soon as practicable when a person is detained, rather than the ACC making the application.¹⁰²

Item 21 adds **new subsections 35(2) and (3)** to have the effect that if a person is dealt with for contempt under the ACC Act then he or she cannot be prosecuted for the conduct (act or omission), but if a person is prosecuted for an offence in relation to an act or omission then he or she cannot be dealt with under the ACC Act for the contempt. As an examiner can choose which path to follow in dealing with the contempt, these provisions ensure that once one path is followed, the other is ruled out, thus complying with the double jeopardy rule.¹⁰³

Schedule 8 – Penalties for bribery

Items 3 and 6 increase the penalties for the offences of bribing a foreign public official (section 70.2 of the Criminal Code Act), and bribery of a Commonwealth public official (section 141.1 of the Criminal Code Act) respectively. Currently both offences carry a penalty of 10 years imprisonment. Under section 4B of the *Crimes Act 1914*, the courts can impose a pecuniary penalty as well, and in relation to these offences, the amount is \$66 000 for an individual, and \$330 000 for a corporation.¹⁰⁴

99. C Porter, op. cit.

100. S Chidgey, op. cit., p. 11.

101. Attorney-General's Department, Australian Crime Commission and Australian Federal Police, op. cit., p. 15.

102. *ibid.*, p. 16.

103. For further details, see Explanatory Memorandum, p. 180.

104. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 25.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The amendments will mean that the penalty for an individual will be a maximum of 10 years imprisonment, a fine of \$1 100 000 or both. The Explanatory Memorandum sets out the penalty for a corporation as follows:¹⁰⁵

- (a) 100 000 penalty units (\$11 000 000)
- (b) Three times the value of any benefit that was directly or indirectly obtained and that is reasonably attributable to the conduct constituting the offence (including any body corporate related to the body corporate)
- (c) If the court cannot determine the value of the benefit, then 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month in which the conduct constituting the offence occurred.

The rationale for the amendments is that a review by the Organisation for Economic Cooperation and Development considered that the penalties were not ‘effective, proportionate and dissuasive’ as required the relevant international Convention governing bribery of foreign public officials.¹⁰⁶

Schedule 9 – Drug importation

The definition of ‘import’ in **section 300.2** of the Criminal Code is repealed and replaced in this amendment. Currently ‘import’ is merely defined as ‘includes bring into Australia’ and it is being expanded as follows:

Import, in relation to a substance, means import the substance into Australia and includes;

- (a) bring the substance into Australia, and
- (b) deal with the substance in connection with its importation.

According to the Explanatory Memorandum:

The effect of this amendment is that the Commonwealth drug importation offences will capture criminal activity related to the bringing of drugs into Australia *and* subsequent criminal activity connected with the importation of drugs.¹⁰⁷

The amendment expands the operation of importation from when goods first arrive in Australia, to a process that extends before and beyond the time of arrival in Australia.

105. Explanatory Memorandum, p. 185.

106. *ibid.*, p. 184.

107. *ibid.*, p. 188.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 10 – Amendments consequential on enactment of joint commission offence

These amendments are consequential to the enactment of the joint commission offence which is proposed by Part 1 of Schedule 4 to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009. Thus, if that Bill is not enacted, this Schedule will not operate.

The consequential amendments are made to the following existing Acts and will insert “11.2A” into the relevant offence provisions:

Aboriginal and Torres Strait Islander Act 2005

A New Tax System (Family Assistance) (Administration) Act 1999

Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Corporations Act 2001

Crimes Act 1914

Crimes (Biological Weapons) Act 1976

Crimes (Internationally Protected Persons) Act 1976

Crimes (Ships and Fixed Platforms) Act 1992

Customs Administration Act 1985

Defence Force Discipline Act 1982

Excise Act 1901

Great Barrier Reef Marine Park Act 1975

Historic Shipwrecks Act 1976

Patents Act 1990

Privacy Act 1988

Proceeds of Crime Act 2002

Sea Installations Act 1987

Social Security Act 1991

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Social Security (Administration) Act 1999

Superannuation (Resolution of Complaints) Act 1993

Trade Marks Act 1995

War Crimes Act 1945

Concluding comments

The amendments proposed in the Bill, along with the considerable Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, have been dealt with quickly by Parliament considering the complexity and some concerns expressed, particularly by the Law Council. This haste seems unwarranted given that, as noted by Liberal Senators, only Schedule 6, relating to unfitness to plead is considered urgent by the Government.

© Copyright Commonwealth of Australia

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2430.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.