



Crimes Legislation Amendment Bill (No. 2) 2011

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Law and Bills Digest Section

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Crimes Legislation Amendment Bill (No. 2) 2011

Date introduced: 23 March 2011

House: House of Representatives

Portfolio: Justice

Commencement: Sections 1 to 3 on Royal Assent
Schedule 1 and Part 2 of Schedule 2: on the day after Royal Assent
Schedule 2 items 1– 154 and items 195–242: on the later of 1 January 2012 and the day after Royal Assent
Schedule 2 items 155– 194: on a day fixed by proclamation or after a six month period has elapsed following Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The primary purposes of the Crimes Legislation Amendment Bill (No. 2) 2011 (the Bill) are to:

- amend the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) to include the Australian Customs and Border Protection Service within the jurisdiction of the Australian Law Enforcement and Integrity Commission (ACLEI),
- enable the Commissioner of the Australian Federal Police (AFP) to commence and conduct proceedings under the *Proceeds of Crime Act 2002* (Proceeds of Crime Act),
- enable Proceeds of Crime Act matters to be transferred between the Director of Public Prosecutions (DPP) and the Commissioner of the AFP,
- extend procedures in the *Family Law Act 1975* in relation to Commonwealth proceeds of crime orders and forfeiture applications that apply to property and related proceedings and to include the application of relevant State and Territory proceeds of crime orders and forfeiture applications in relation to property proceedings in the Family Court,
- improve the interaction between collection of tax related liabilities and proceeds of crime proceedings,

- extends the definition of documents in the property-tracking documents list that will now identify, locate and quantify a person's wealth, other than their current property to allow consistency with the unexplained wealth provisions in Proceeds of Crime Act.¹

Background/Issues

The Minister of Justice (the Minister) states in his second reading speech on the Bill:

The Bill contains amendments that are integral to the Government's efforts to tackle serious and organised crime, and to ensure the integrity of our law enforcement processes.²

Australian Commission for Law Enforcement Integrity

The Australian Commission for Law Enforcement Integrity (the Integrity Commission) was established under the *Law Enforcement Integrity Commissioner Act 2006*. The statutory role of the Integrity Commissioner is to:

- detect, investigate and prevent corruption in law enforcement agencies,
- maintain and improve the integrity of staff members of law enforcement agencies, and
- collect and process intelligence on corruption in law enforcement.³

Currently, the agencies subject to the scrutiny of the Integrity Commissioner under the LEIC Act are the Australian Federal Police (AFP), Australian Crime Commission (ACC) and the former National Crime Authority (NCA).

Australian Customs and Border Protection Service

Background

Regulations were made in December 2010 to prescribe the ACBPS as a *law enforcement agency* under the LEIC Act. The Explanatory Statement notes that the *Law Enforcement Integrity Commissioner Amendment Regulations 2010 (No. 1)* enable the Integrity Commissioner to investigate, report and refer any allegations of corrupt conduct in the ACBPS that relate to its law

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1. Based on the list in the Explanatory Memorandum, Crimes Legislation Amendment Bill (No. 2) 2011, p. 1.
 2. B O'Connor, 'Second reading speech: Crimes Legislation Amendment Bill (No. 2) 2011', House of Representatives, *Debates*, 23 March 2011, p. 2866.
 3. Australian Commission for Law Enforcement Integrity, *Annual report of the Integrity Commissioner, 2006-07*, Canberra, 2007, p. 15, viewed 18 May 2011, [http://www.aclei.gov.au/www/aclei/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~2007+ACLEI+-+AnnualReport_Web.pdf/\\$file/2007+ACLEI+-+AnnualReport_Web.pdf](http://www.aclei.gov.au/www/aclei/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~2007+ACLEI+-+AnnualReport_Web.pdf/$file/2007+ACLEI+-+AnnualReport_Web.pdf)

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enforcement function.⁴ The Integrity Commission has had oversight of the law enforcement functions of the ACBPS since 1 January 2011 when the regulations came into force.

Issue

The Bill proposes to bring the Australian Customs and Border Protection Service (ACBPS) within the jurisdiction of the Integrity Commission. The interim report of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (the Joint Committee) noted that the Integrity Commission currently has jurisdiction applying to all of the AFP and ACC staff regardless of their role.⁵ The interim report also stated that in the future, a whole-of-agency-focus should apply to any additional agencies brought within the jurisdiction of the Integrity Commission. The Integrity Commission's view is as follows:

Law Enforcement may be only one of a number of functions and services delivered by an agency. However, administrative staff and other employees or contractors support, or have access to, the agency's law enforcement functions, information, decision-making powers, staff and systems. These staff may be soft targets and are as attractive and vulnerable to subversion or coercion by criminal groups as law enforcement personnel.⁶

The Integrity Commissioner considered that although there were several agencies with high-risk profiles, the ACBPS should be brought within the jurisdiction of the Integrity Commission because it is a law enforcement agency and 'presents the greatest inherent corruption-risk of those agencies not subject to ACLEI's scrutiny in the current law enforcement environment.'⁷

The Integrity Commissioner further noted:

What attracts me to the suggestion that the Australian Customs and Border Protection Service be included in ACLEI's jurisdiction is that it is a law enforcement agency, so it keeps that focus on law enforcement that ACLEI presently has... it is a decentralised agency with officers having a high degree of discretion and autonomy in those decentralised locations. Customs protects the border in many ways, and of course the increase in corruption risk goes right up in that context. Customs and Border Protection would be attractive to organised crime—and, in saying 'organised crime', I also say to you 'transnational organised crime'—who have an interest in breaching the border. So Customs is protecting the border and it is in the interests of crime, both national and transnational, to breach it. The other phenomenon that is occurring in this area is that Customs is pushing protection of the border offshore into countries where corruption is sometimes an accepted business practice. So, for those reasons and possibly others as well, I

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4. Explanatory Statement, Law Enforcement Integrity Commissioner Amendment Regulations 2010 (No. 1), p. 1.
 5. Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006, Interim report*, February 2010, p. 12, viewed 23 May 2011, http://www.aph.gov.au/Senate/committee/aclei_ctte/integrity_com_act/interim_report/index.htm
 6. *Ibid.*, p. 12.
 7. *Ibid.*, p. 13.

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think that Customs and Border Protection would be well suited to inclusion in ACLEI's jurisdiction.⁸

The Joint Committee recommended that, as a matter of urgency, the ACBPS should be brought within the jurisdiction of the Integrity Commission on a whole-of-agency basis by regulation and that, in the longer term, the ACBPS should be prescribed as a law enforcement agency within the LEIC Act.⁹

The Government responded by agreeing to extend the Integrity Commission's jurisdiction to include the ACBPS 'in recognition of ACBPS's critical law enforcement and related functions'.¹⁰ The Government stated, however, that agreement to extend the Integrity Commission's jurisdiction to include the ACBPS would be subject to the finalisation of consultations involving the resources required by the Commission.¹¹

Criminal Assets Confiscation Taskforce

When the Bill was introduced, a joint press release by the Attorney-General and the Minister for Home Affairs and Justice stated that the Bill:

will support the implementation of the recently established Criminal Assets Confiscation Taskforce, by enabling the Australian Federal Police Commissioner to litigate under the *Proceeds of Crime Act 2002* on behalf of the Taskforce.¹²

The joint press release further pointed out that the establishment of the Criminal Assets Confiscation Taskforce (the Taskforce) implements Labor's 2010 Federal election commitment to further strengthen its attack on organised crime.¹³ The Taskforce comprises the resources of the AFP, ACC, Australian Taxation Office and the DPP 'to boost the identification and seizure of criminal assets'.¹⁴

The Taskforce is led by the AFP with its multi-agency focus to:

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8. Ibid.
 9. Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *op. cit.*, Recommendations 2 and 3.
 10. Australian Government, *Government response to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, Interim report, September 2010, p. 2, viewed 23 May 2011, http://www.aph.gov.au/Senate/committee/aclei_ctte/integrity_com_act/government_response/government_response_interimreport.pdf
 11. Ibid., p. 2.
 12. R McClelland (Attorney-General) and B O'Connor (Minister for Home Affairs and Justice), *Legislation to back new criminal asset taskforce*, joint media release, 23 March 2011, viewed 23 May 2011, http://www.classification.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FirstQuarter_23March2011-Legislationtobacknewcriminalassettaskforce
 13. R McClelland (Attorney-General) and B O'Connor (Minister for Home Affairs and Justice), *op. cit.*
 14. Ibid.

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Provide a more coordinated and integrated approach to identifying and removing the profits derived from organised criminal activity'.¹⁵

The Taskforce uses intelligence, operations, legal, policy and other specialist resources from all of the participating agencies.¹⁶ It is also noted that the operations of the Taskforce support the key capabilities identified in the Commonwealth Organised Crime Strategic Framework (the Framework).¹⁷

In 2009, the Framework was launched to enable a more integrated and collaborative Commonwealth response to combat organised crime:

The Commonwealth Organised Crime Strategic Framework will ensure Commonwealth intelligence, policy, regulatory and law enforcement agencies are working together to prevent, disrupt, investigate and prosecute organised crime.¹⁸

As part of this Framework and to complement the Commonwealth Organised Crime Response Plan launched in November 2010, the National Organised Crime Response Plan was developed and launched in December 2010 together with the State and Territory Attorneys-General. The joint press release notes:

The National Organised Crime Response Plan represents a new approach to fighting organised crime by facilitating a new level of multi-jurisdictional collaboration.¹⁹

It further notes that:

All jurisdictions have committed to work together on specific targets including:

- improving consistency of legislation across borders to fight organised crime
- removing impediments to effective sharing of information and intelligence
- targeting the priority organised crime risks identified in Organised Crime Threat Assessments.²⁰

15. Australian Federal Police, *Criminal Assets Confiscation Taskforce*, viewed 23 May 2011, <http://www.afp.gov.au/policing/proceeds-of-crime.aspx>

16. Ibid.

17. Ibid.

18. R McClelland (Attorney-General) and B O'Connor (Minister for Home Affairs), *Organised Crime Strategic Framework*, joint media release, 25 November 2009, viewed 23 May 2011, http://www.attorneygeneral.gov.au/www/ministers/mcClelland.nsf/Page/MediaReleases_2009_FourthQuarter_25November2009-OrganisedCrimeStrategicFramework

19. R McClelland (Attorney-General) and B O'Connor (Minister for Home Affairs and Justice), *A National approach to tackling organised crime*, joint media release, 10 December 2010, viewed 23 May 2011, http://www.ag.gov.au/www/ministers/mcClelland.nsf/Page/MediaReleases_2010_FourthQuarter_10December2010-Anationalapproachtotacklingorganisedcrime

Issue

Currently, under the Proceeds of Crime Act, the DPP is the only authority who can conduct litigation under the Act. The Bill enables the AFP to have that same power in relation to proceeds of crime matters. The Explanatory Memorandum comments that it is 'envisaged that the AFP will take responsibility for litigating all proceeds of crime matters relevant to the investigations undertaken by the Taskforce, and all non-conviction based proceeds of crimes matters'.²¹ The division of responsibilities between the two authorities will be the subject of a Memorandum of Understanding.²²

The Minister for Justice states:

Extending the Act to include the AFP will enable the Taskforce to become a specialised unit focused on proactively investigating and litigating proceeds of crime matters, which will lead to the more effective pursuit of criminal assets.²³

Committee consideration

Senate Selection of Bills Committee

The Senate Selection of Bills Committee resolved at its meeting on 12 May 2011 to recommend that the Bill not be referred to a parliamentary committee.²⁴

Senate Scrutiny of Bills Committee

The Senate Scrutiny of Bills Committee (the Scrutiny of Bills Committee) drew attention to **items 3 and 5** of the Commencement table of the Bill and noted that if the Bill was passed in this sitting, the commencement of these items would be longer than six months. The Explanatory Memorandum explained that the proposed commencement will allow arrangements to be put in place:

To enable the Commissioner to take action under the POCA on behalf of the newly established Criminal Assets Confiscation Taskforce which commenced operation in January 2011. Agencies participating in the Taskforce (including the AFP, DPP, Australian Crime Commission and Australian Taxation Office) are currently working on arrangements to enable the AFP to take on responsibility for litigation once these amendments commence. A commencement date of 1 January 2012 will give the Commissioner time to put in place structures, procedures and

20. Ibid.

21. Explanatory Memorandum, op. cit., p. 9.

22. Ibid.

23. B O'Connor, op. cit., p. 2866.

24. Senate Selection of Bills Committee, *Report No. 5 of 2011*, 12 May 2011, viewed 17 May 2011, http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2011/rep0511.pdf

safeguards in relation to the exercise of the powers, duties and functions which will be conferred on him or her by this Act.²⁵

The Scrutiny of Bills Committee made no further comment on this matter given the explanation provided in the Explanatory Memorandum.

The Scrutiny of Bills Committee also drew attention to **item 139**²⁶ in Part 1 of Schedule 1 and other provisions in the Bill, which have been given retrospective application. However the Committee acknowledged the detailed explanation provided in the Explanatory Memorandum and commented that it:

Leaves the question of whether the approach is appropriate to the consideration of the Senate as a whole.²⁷

The Scrutiny of Bills Committee made a similar comment in relation to the other items with retrospective application. It also referred to the inclusion of certain decisions (such as those referred to in **items 140** and **141**) into Schedule 1 of the ADJR Act (which excludes judicial review under the ADJR Act) but states that the explanation provided is detailed and satisfactory.²⁸

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity

As mentioned previously, the Joint Committee is currently inquiring into the operation of the LEIC Act and has issued an interim report containing several recommendations, some of which related to the inclusion of the ACBPS within the jurisdiction of the Integrity Commission.²⁹ The recommendations were as follows:

Recommendation 2

The committee recommends that, as an immediate measure, the Australian Customs and Border Protection Service be brought under ACLEI's jurisdiction on a whole-of-agency basis by regulation.

25. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 4 of 2011, 11 May 2011, p. 24, viewed 17 May 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2011/d04.pdf>

26. Item 139 are application provisions for items 3-138 containing amendments to the *Proceeds of Crime Act 2002*. The Committee also raised issues with the retrospective application of amendments to other pieces of legislation in items 150, 153, 194, 197, 209, 217, 239, 242, 246 and 249.

27. *Op. cit.*, p. 25.

28. *Ibid.*

29. Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *op. cit.*, recommendations 2, 3 and 4.

Recommendation 3

The committee recommends that, in the longer term, the Australian Customs and Border Protection Service be prescribed as a law enforcement agency within the *Law Enforcement Integrity Commissioner Act 2006* through the amendment of section 5 of the Act.

Recommendation 4

The committee recommends that ACLEI be appropriately staffed and funded as commensurate with the task of detecting, preventing and investigating corruption in an agency of the size and complexity of the Australian Customs and Border Protection Service.³⁰

Parliamentary Joint Committee on the Australian Crime Commission

In 2009 the Parliamentary Joint Committee on the Australian Crime Commission in its inquiry into the legislative arrangements to outlaw serious and organised crime groups recommended the following:

Recommendation 6

The Committee recommends that the Commonwealth government examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency, such as the ACC.³¹

The Committee further noted:

The best model for investigating and prosecuting criminal assets confiscation matters and other confiscation matters was not the primary focus of this inquiry. However, the Committee did hear substantial evidence and received numerous recommendations as to how the Commonwealth's approach to these issues could be strengthened, thereby improving the success of criminal assets confiscation laws in Australia.

In the Committee's view, Australia may benefit from an assets recovery agency like CAB,³² for example by vesting the capacity to bring proceeds of crime and unexplained wealth matters in the ACC, or by the establishment of permanent criminal assets recovery matters, or from a combination of these approaches.³³

30. The Government response agreed with recommendations 2 and 3 subject at the time to the finalisation of consultations on resources.

31. Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p. 127, viewed 26 May 2011, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/report/report.pdf

32. Ireland, Criminal Assets Bureau.

33. Op. cit.

International examples of combining the investigative and prosecutorial functions were canvassed in this report.

United Kingdom

5.120 It is not uncommon in some international jurisdictions for the 'prosecutorial' function for civil, proceeds of crime related matters to be handled by a law enforcement or assets recovery agency rather than by the public prosecution service. For example the Director of the UK's Serious and Organised Crime Agency (SOCA) has the ability to apply directly to the courts for assets confiscation orders.³⁴

Canada

6.73 Department of Justice officers highlighted a range of reforms currently being implemented in Canada to address the challenges that complex criminal cases present to law enforcement and prosecutors... Integrated Justice Units were flagged as a significant new approach. The units integrate the investigation and prosecution of criminal cases by having both police and prosecutors involved in cases from the outset. This approach moves away from the more traditional silo approach in which police are responsible for the investigation of a case and then hand it over to the Public Prosecution Service of Canada to prosecute. Integrated Justice Units allow prosecutors to be involved with police to ensure that the case and brief of evidence are collected and prepared in a manner which is compatible with the prosecution process. It was noted that while this approach has little public or political appeal, it has significant benefits for law enforcement.³⁵

Financial implications

The Explanatory Memorandum states that amendments in the Bill have little or no financial impact on Government revenue.³⁶

34. Ibid., p. 124.

35. Ibid., pp. 148-49.

36. Explanatory Memorandum, op. cit., p. 3.

Key provisions

Schedule 1 – Australian Commission for Law Enforcement Integrity amendments

Law Enforcement Integrity Commissioner Act 2006

Section 5 of the LEIC Act defines terms for the purposes of that Act.

Items 2 and 3 of Schedule 1 of the Bill propose to amend **subsection 5(1)** by inserting a reference to *Customs and its CEO* into the definition of *head of a government agency* and a reference to *Customs* into the definition of *law enforcement agency*.

Section 10 of the LEIC Act lists staff members of law enforcement agencies for the purpose of the Act.

Item 4 of Schedule 1 of the Bill proposes to insert **new subsection 10(2A)**, which lists the staff members of the ACBPS for the purposes of this Act. They are the CEO of the ACBPS, a member of staff referred to in section 15(1) of the *Customs Administration Act 1985* or a person authorised by the CEO of the ACBPS, in writing, to perform a function of a person employed by the ACBPS.

Existing subsection 10(5) of the LEIC Act deals with secondees.

Item 5 of Schedule 1 of the Bill proposes to insert **new paragraph 10(5)(ba)** to the effect that a person authorised by the CEO of ACBPS to perform a function of an ACBPS employee is a secondee to the ACBPS.

Schedule 2 – Proceeds of crime amendments

Part 1 – Responsible authorities for proceeds of crime: the DPP and AFP

Australian Federal Police Act 1979

Section 69C of the *Australian Federal Police Act 1979* (the AFP Act) deals with the Commissioner of Police's delegation powers to any person nominated in the section.

Item 1 of Part 1 of Schedule 2 of the Bill proposes to insert **new subsection 69C(3)** into the AFP Act to provide that the Commissioner of Police may delegate in writing any of the Commissioner's powers, functions or duties as a proceeds of crime authority to the Deputy Commissioner of Police or a senior executive AFP employee under the Proceeds of Crime Act or any other Act. Definitions of

proceeds of crime authority and *responsible authority* can be found in **proposed section 338** as amended by **items 4–6** of **Part 1** of **Schedule 2** of the Bill.

Proceeds of Crimes Act 2002

Item 3 of **Part 1** of **Schedule 2** of the Bill proposes to insert **new section 315B** into the Proceeds of Crime Act, which provides for the transfer of responsibility for principal orders and applications thereof between either, the Commissioner of Police and the DPP.

In particular, **proposed subsection 315B(6)** sets out the effects of the transfer of responsibility on proceeds of crime proceedings, which will include:

- the transfer authority replaces the original authority as a party to any applications or proceedings under the Proceeds of Crime Act or any other Act relating to or arising out of the application or order or to which the application or order is relevant
- the transferee authority may initiate, conduct or respond to any related applications or proceedings, and
- the transferee authority is responsible for any functions, powers or duties under the Proceeds of Crime Act or any other Act, to be performed or exercised by a responsible authority in relation to the application or order, any related applications or proceedings or any orders arising out of related applications or proceedings.

Proposed subsection 315B(7) relates to the effects of the transfer of responsibility as between the transferor and the transferee on or after the day of effect of the transfer. In relation to the application or order and any related applications or proceedings:

- the transferor authority's functions, powers and duties cease subject to the operation of subsection (8)
- the transferee authority is bound by the actions of the transferor authority while it was the responsible authority;
- the transferee authority is bound by any undertakings as to payment of damages and/or costs incurred by the transferor authority while the transferor authority was the responsible authority. The transferee authority is also liable for damages or costs awarded by a court against the transferor authority, irrespective of whether it was the result of action taken or a failure to act by the transferor authority while it was the responsible authority.

Proposed subsection 315B(8) provides that the transferor authority continues to be liable for damages and costs awarded against it, while it was the responsible agency, in relation to the application or order and any related applications or proceedings.

Item 4 of **Part 1** of **Schedule 2** of the Bill proposes to amend **section 338** of the Proceeds of Crime Act to insert a definition of *principal order*. A principal order means any of the following orders:

- restraining order
- forfeiture order
- pecuniary penalty order
- literary proceeds order, or
- unexplained wealth order.

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Item 5 of Part 1 of Schedule 2 of the Bill proposes to amend **section 338** of the Proceeds of Crime Act so that the definition of *proceeds of crime authority* will refer to the Commissioner of Police or the DPP.

Item 6 of Part 1 of Schedule 2 of the Bill proposes to amend **section 338** of the Proceeds of Crime Act to include a definition of *responsible authority*. The proceeds of crime authority that either made; or following a transfer of authority, is responsible for the application or the order that has been made; is the responsible authority.

Other items in **Part 1 of Schedule 2** of the Bill propose consequential amendments to the Proceeds of Crime Act, for example, **items 8–30** and **items 32–114**.

Existing section 15Q of the Proceeds of Crime Act provides that a magistrate may vary a freezing order to allow withdrawal of funds from an account to cover certain reasonable expenses related to the person in whose name the account is in.

Item 115 of Part 1 of Schedule 2 of the Bill proposes to substitute **paragraph 15Q(2)(b)** to provide that a person must give written notice of the application and grounds for the application to vary a freezing order to the enforcement agency with which the authorised officer that applied for the freezing order is associated. The Explanatory Memorandum states that the proposed amendment would be consistent with the existing requirements in subsection 15R(2) of the Proceeds of Crime Act in relation to an application to revoke a freezing order.³⁷

Consequential amendments to various legislation

Administrative Decisions (Judicial Review) Act 1977

As mentioned previously, existing Schedule 1 of the ADJR Act lists classes of decisions that are not decisions to which the ADJR Act applies.

Item 141 of Part 1 of Schedule 2 of the Bill proposes to insert **new paragraph (yc)** to include decisions of a proceeds of crime authority to transfer responsibility for applications for principal orders or principal orders to another proceeds of crime authority, made under **proposed section 315B** (see **item 3 of Part 1 of Schedule 2** of the Bill above), into this list.

Bankruptcy Act 1966

Item 147 of Part 1 of Schedule 2 of the Bill proposes to insert **new subsection 154(6A)** into the Bankruptcy Act 1966 (the Bankruptcy Act).

Existing section 154 deals with the effect of annulment of bankruptcy. Under existing subsection 154(6), the Court may make an order directing the trustee not to pay or transfer certain property to

37. Explanatory Memorandum, op. cit., p. 14.

the former bankrupt on application by the DPP or a person entitled to apply for an interstate confiscation order and if the Court is satisfied that particular circumstances exist, such as if there are proceeds of crime proceedings pending.

Proposed subsection 154(6A) will enable application for confiscation orders to be made by:

- a Commonwealth proceeds of crime authority where there are pending proceedings under the Proceeds of Crime Act , or
- a person entitled to apply for an interstate confiscation order where there are pending proceedings under a corresponding law.

Similar amendments are made by **item 149 of Part 1 of Schedule 2** of the Bill, which proposes to insert **new subsection 231A(2A)** into the Bankruptcy Act.

Existing section 231A relates to the right of a debtor to remaining property under the Act. Existing subsection 231A(2) enables the Court to make an order directing the trustee not to pay or transfer property to the debtor, on application by the DPP or a person entitled to apply for an interstate confiscation order, where the Court is satisfied that particular circumstances exist, such as if there are proceeds of crime proceedings pending.

Proposed subsection 231A(2A) will enable application for orders directing the trustee not to pay or transfer property to the debtor to be made by:

- a Commonwealth proceeds of crime authority where there are pending proceedings under the Proceeds of Crime Act , or
- a person entitled to apply for an interstate confiscation order where there are pending proceedings under a corresponding law.

Family Law Act 1975

Existing section 4 of the Family Law Act sets out definitions of terms in relation to the Act.

Item 157 of Part 1 of Schedule 2 of the Bill proposes to substitute the definition of *forfeiture order* in subsection 4(1) of the *Family Law Act 1975* (the Family Law Act).

Item 158 of Part 1 of Schedule 2 of the Bill proposes to insert a new definition of ***freezing order*** into **subsection 4(1)** of the Family Law Act.

Item 161 of Part 1 of Schedule 2 of the Bill proposes to insert a new definition of *restraining order* into **subsection 4(1)** of the Family Law Act.

These definitions relate to orders made under the Proceeds of Crime Act or state or territory proceeds of crime law.

Item 163 of Part 1 of Schedule 2 of the Bill proposes to insert **new section 4C** into the Family Law Act, which provides the meaning of *proceeds of crime authority* in relation to the following:

- any restraining order, a forfeiture order or an application for a forfeiture order under the Proceeds of Crime Act (or any proceedings, orders, powers, functions or duties under that Act arising out of or related to such orders or application) (**proposed paragraph 4C(1)(a)**)—the responsible authority for the relevant restraining order or forfeiture order (or application thereof) under the Act (see **proposed subsection 4C(2)**)
- a freezing order under the Proceeds of Crime Act (or any proceedings, et cetera, in relation to or arising out of that Act) (**proposed paragraph 4C(1)(b)**)—the Police Commissioner or DPP (see **proposed subsection 4C(3)**), and
- a proceeds of crime order or an application for a forfeiture order under state or territory proceeds of crime law (or any proceedings, et cetera, in relation to or arising out of that Act) (**proposed paragraph 4C(1)(c)**)—the person or body prescribed by particular regulations (see **proposed subsection 4C(4)**).

Existing section 79B of the Family Law Act relates to proceeds of crime orders under Part VIII—property, spousal maintenance and maintenance agreements.

Item 165 of Part 1 of Schedule 2 of the Bill proposes to amend **subsection 79B(3)** so as to extend the notification requirements of a party to a property settlement or spousal maintenance to include giving the Registry Manager a copy of the notification from a proceeds of crime authority, as well as a copy of the proceeds of crime order or forfeiture application if the notification is accompanied by copies of these documents. At present, the person must only notify the Registry Manager in writing of the proceeds of crime order or the forfeiture application.

Similar provisions apply in relation to extending notification requirements in **item 175 of Part 1 of Schedule 2** of the Bill—**subsection 90M(3)** (notification of proceeds of crime orders under Part VIIIA—Financial agreements), and in **item 185 of Part 1 of Schedule 2** of the Bill —**subsection 90VA(3)** (notification of proceeds of crime orders under Division 5 Proceeds of crime and forfeiture under Part VIII B—Financial matters relating de facto relationships).

Amendments to the *Proceeds of Crime Act 2002* relating to tax payments

Section 131 of the Proceeds of Crime Act currently provides that a court *must* reduce the penalty amount in a pecuniary penalty order against a person by an amount representing the extent to which that person has paid tax attributable to the benefits to which the order relates.

Item 243 of Part 1 of Schedule 2 of the Bill proposes to amend **subsection 131(1)** specifying that the tax paid must have been paid before the application for the order was made.

Item 244 of Part 1 of Schedule 2 of the Bill proposes to insert **new subsection 131(1A)**, which provides that the court *may*, if it considers it to be in the interests of justice, reduce the penalty amount in a pecuniary penalty order against a person in particular circumstances.

Existing subsection 202(5) of the Proceeds of Crime Act lists what are property-tracking documents.

Item 247 of Part 1 of Schedule 2 of the Bill proposes to amend paragraph 202(5)(ea) to refer to a document that identifies, locates or quantifies the 'property that constitutes part of a person's wealth' instead of 'property of a person'.³⁸

Existing section 202 relates to making production orders. Subsection 202(1) provides that a magistrate may make an order requiring a person to produce one or more property-tracking documents to an authorised officer or to make them available for inspection to an authorised officer. Item 248 amends paragraph 202(5)(ea) to substitute "the total value of the person's wealth" with "the person's total wealth".³⁹

Concluding Comments

The Bill allows the Commissioner of Police to commence proceeds of crime proceedings on behalf of the Criminal Assets Confiscation Taskforce. Although the Joint Committee on the Australian Crime Commission recommended the integration of investigative and prosecutorial functions in relation to asset recovery, it may be possible that conflicts of interest might arise where the one body has both investigative and prosecutorial roles. While the measure will ensure a streamlined process and support the role of the Taskforce and the creation of this specialist unit, there is no further commentary on whether statutory protections are required to ensure the separation of these two distinct functions.

This Bill also implements certain recommendations of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity made in their interim report. The recommendations concern the inclusion of the Australian Customs and Border Protection Service as a whole within the jurisdiction of the Integrity Commissioner. This has been done because of the critical nature of the law enforcement and related functions of the Australian Customs and Border Protection Service.⁴⁰ The law enforcement functions of the ACBPS are currently subject to the jurisdiction of the Integrity Commissioner.

The Bill contains consequential amendments to a number of Acts. Many of the proposed changes amend definitions. However retrospective amendments and the inclusion of further exceptions to ADJR have been noted but no further concerns have been raised at this stage.

38. For the meaning of 'wealth', see subsection 179G(1) of the Proceeds of Crime Act.

39. Total wealth is defined in subsection 179G(2) of the Proceeds of Crime Act. "The **total wealth** of a person is the sum of all the values of the property that constitutes the person's wealth".

40. Australian Government, *Government response to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, September 2010, p. 2, viewed 23 May 2011, http://www.aph.gov.au/Senate/committee/aclei_ctte/integrity_com_act/government_response/government_response_interimreport.pdf

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