DRAFT SECOND READING SPEECH

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Crime (Confiscation of Profits) Amendment Bill 2018

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Madam Speaker, this Bill introduces a number of amendments to improve the operation of the unexplained wealth forfeiture provisions that are contained within Part 9 of the *Crime (Confiscation of Profits) Act 1993*. These are non-conviction based wealth forfeiture laws.

Background

The genesis for these laws arises from meetings of the former Standing Committee of Attorneys-General which were held in 2009. At that time, it was agreed that the introduction of non-conviction based confiscation or forfeiture laws, or "unexplained wealth" laws with mutual recognition across borders would be of great assistance in combating organised crime.

The fundamental principle of confiscation legislation is that people who engage in unlawful activity should not profit from breaking the laws of society, and the specific focus of the unexplained wealth forfeiture laws contained within Part 9 of the Act is on all those who profit from crime, whose wealth is unexplained and cannot be linked to a crime or crimes of which they are charged and convicted. These laws are squarely aimed at people who apparently live beyond the income provided by their lawful occupation or investments, that is, they appear to have available to them quantities of 'unexplained wealth'.

Part 9 of the Act commenced on 1 March 2014. It introduced processes to examine a person's wealth, and if the person cannot account to the Supreme Court for the acquisition of their wealth by lawful means, the Court will make an 'unexplained wealth declaration'. This has the effect of making the person liable to the State for a sum of money equal to the value of the unexplained component of the person's wealth.

It also contains provisions relating to, among other things:

- restraining, forfeiting and valuing property;
- investigations;
- searches;
- applications and declarations; and
- a requirement for an independent review of Part 9 of the Act.

The independent review of Part 9 of the Act was undertaken by former Tasmanian and Commonwealth Director of Public Prosecutions, Mr Damian Bugg AM QC in 2017. Mr Bugg's *Report of the Independent Reviewer* (the Report) was subsequently tabled in both Houses of Parliament on 17 August 2017.

The Report has been considered and the Bill introduces the majority of the recommendations of the Report, as well as a small number of additional amendments that were identified during consultation on the Bill.

Consultation was undertaken with key government agencies, the Director of Public Prosecutions, the Public Trustee, the legal profession, civil liberties groups and the Australian Banking Association.

The key amendments to Part 9 provide for the following matters.

Clubs and Associations

The Report identifies that currently there are impediments to investigating and pursuing the unexplained wealth of clubs and associations and associated office holders.

This is because section 85 of the Act, which reverses the onus of proof that wealth is not lawfully acquired, only applies if it is a constituent of a person's wealth. While it is possible to argue that a 'person' extends to a club or association, the Report suggested that this should be put beyond question.

The Report also identifies that where a club or association has unexplained wealth on its premises, there will not always be records such as bank statements to assist with the investigation of the club or association. In some cases it may be necessary to investigate an office holder, where for example money is found in their office at the club. The Report also notes that some clubs do not have written rules or receipt books and it is not always possible to formally identify who is responsible for the finances of the club.

The Bill amends section 80 of the Act to clarify that where a requirement is made or obligation held by a body of persons, such as an incorporated or unincorporated club or association, it is also held by each person within that club or association to the extent that the person can fulfil the requirement or satisfy the obligation given their actual or apparent authority within that club or association.

Obtaining information from financial organisations

The Report identifies that while it is clear that section 87 notices can be used to discover the existence of relevant information that is held by financial institutions, it is not entirely clear that the actual content of bank statements of the person being investigated can be obtained under this section.

This has been problematic for investigations because once the existence of information has been confirmed, the Director of Public Prosecutions must then obtain a search warrant under section 111 of the Act in order to obtain more specific information. However, no time limit is provided for the financial institutions to comply with the warrant and this has caused undue time delays with investigations.

The provisions which apply to government business enterprises under section 88 on the other hand, make it clear that the DPP may require financial institutions to produce all records, information, material and things in the custody, possession or control of the organisation.

The Bill amends section 87 by clarifying that the Director of Public Prosecutions may by written notice require financial organisations to provide any record, information, material or thing that may be relevant to unexplained wealth proceedings or persons specified in a notice.

A number of additional minor amendments are made to section 87 to give effect to this requirement.

Scope of examination orders

The Report identifies that there is a restriction on the use of examination orders under section 92, such that examination orders currently can only be used to examine someone about another person's financial affairs.

The report notes that this provision is unnecessarily restrictive.

The Bill extends the operation of examination orders to allow for a person to be examined about whether his or her own wealth is lawfully acquired.

The Report also recommends that section 92 be amended to provide for a person to be examined to allow for the identification of who has control of property and how it was acquired.

Section 92 does not currently allow for a person to be examined about the nature, location and source of property that is subject to a restraining order or the identity of a person who may have possession or control of relevant property or documents.

The Bill provides that a person may be examined about the nature, location and source of property that forms or may form part of the wealth, liabilities, income and expenditure of a person who has or is suspected on reasonable grounds of having wealth this is not lawfully acquired.

It also provides that a person may be examined about the identity of any person who may have the possession, control, custody or management of particular wealth, liabilities, income and expenditure and property-tracking documents.

Scope of production orders

The use of document production orders under section 97 are currently restricted to documents that relate to another person. That is, they do not allow the person who is the subject of unexplained wealth proceedings to be required to produce documents that are relevant to their own wealth. This makes section 97 of the Act unnecessarily restrictive.

The Bill amends section 97 to clarify that document production orders may also apply to the subject of unexplained wealth proceedings.

Restriction on use of evidence

Another impediment which was identified in the Report, is that it appears that Part 9 unintentionally restricts the use to which evidence gathered from examination orders and production orders may be put.

The Report notes that while the purpose of these types of orders is to obtain evidence for unexplained wealth declarations, Part 9 appears to limit the use of information obtained under these orders to facilitating the identification of such property, rather than allowing it to be used to elicit information such as proof of ownership, control of property and how it has been acquired.

The Bill extends the provisions relating to the admissibility of statements or disclosures made by persons to allow for statements and disclosures that have been made by persons, including the subject of unexplained wealth proceedings to be used for proceedings under the Act that may lead to the forfeiture of property.

The Bill also extends the provisions relating to the admissibility of information contained in a property tracking document or statement or disclosure made by a person in complying with a document production order to allow for those documents to be used for proceedings under the Act that may lead to the forfeiture of property.

Time limits on interim wealth restraining orders and wealth restraining orders

Under Part 9 of the Act, an unexplained wealth application may be made after a wealth restraining order has been issued. The time that is available for an unexplained wealth declaration application to be made by the Director of Public Prosecutions following a wealth restraining order being issued is currently a maximum of 21 days.

The Report identifies that 21 days is insufficient time for the Director of Public Prosecutions to properly analyse the amount of unexplained wealth of a person.

The Report recommends that the decision be left to the discretion of the Supreme Court at the time the order is made, subject to a provision enabling the Court to require the Director of Public Prosecutions to give an undertaking on behalf of the State to pay damages if any application is not proceeded with.

The Bill provides that the Supreme Court may only make a wealth restraining order if satisfied that the Director of Public Prosecutions intends to make an unexplained wealth declaration application within a reasonable period that is not less than 21 days.

The Bill further provides that the Supreme Court may refuse to make a wealth restraining order if the Director of Public Prosecutions refuses or fails to give to the Court such undertakings as the Court considers appropriate in relation to the payment of damages or costs, or both. This provision ensures that the person who is the subject of the order is not disadvantaged if the Director of Public Prosecutions subsequently chooses not to make an unexplained wealth declaration application.

A similar problem under Part 9 of the Act has been identified in relation to interim-wealth restraining orders. Under Part 9, an interim-wealth restraining order may be sought where there is an urgent need to ensure that property is preserved.

Currently under the Act, the Court may only make an interim-wealth restraining order if it is satisfied that an application is to be made for a wealth restraining order as soon as is reasonably practicable. Further, an interim-wealth restraining lasts for just 3 days, excluding Saturdays, Sundays or statutory holidays. Again, this timeframe does not provide the Director of Public Prosecutions with sufficient time to make proper inquiries.

In order to address this issue, the Bill provides that an interim wealth-restraining order lasts for 3 days, excluding Saturdays, Sundays or statutory holidays, or for a further period as the Court specifies.

In order to ensure that the person who is the subject of the order is not disadvantaged if the Director of Public Prosecutions subsequently chooses not to make an application for a wealth restraining order, the Bill provides that the Court may refuse to make an interim wealth-restraining order if the Director of Public Prosecutions refuses or fails to give such undertakings as the Court considers appropriate in relation to the payment of damages or costs, or both.

Recovery of fees and expenses by Public Trustee

The Report also notes that while it appears that the Public Trustee is entitled to charge the usual capital commission based fees and to claim reimbursement for the cost of pre-sale valuations under the Act, if that is not the case, the Government may wish to put the question beyond doubt.

In order to provide clarity around this issue, the Bill amends the *Crime (Confiscation of Profits) Regulations 2014* to provide for the Public Trustee to be reimbursed for any reasonable costs or expenses incurred as a result of having control or management of property under Part 9, in circumstances where those costs or expenses have not already been reimbursed.

While sections 169 and 37 are intended to work together to provide a mechanism for the Public Trustee to recover fees and costs for work performed, the use of inconsistent terminology has been problematic. This is because section 37 adopts the phrase 'custody and control of property', whereas Part 9 adopts the phrase 'control and management' of property.

To address this issue, the Bill also makes minor textual amendments to section 169 to ensure that wording that is used in Part 9 is consistent with the wording that is used in sections 35, 36 and 37 of the Act.

Finally, in order to remove all doubt and in order to respond to suggestions made in the Report about clarifying the intention of both Part 9 and the *Crime (Confiscation of Profits) Act 1993* more broadly, I reaffirm that it is the intention of the Act that criminal and civil proceedings may proceed concurrently.

I also reaffirm that it is intended that the unexplained wealth forfeiture laws contained within Part 9 of the Act may apply to people who apparently live beyond the income provided by their lawful occupation or investments. Importantly, it should be noted that to date, these laws have only been used when individuals have been identified in the course of drug trafficking, money laundering or other investigations where large sums of money have been seized or wealth has been identified. Further, the use of strict protocols and procedures that have been developed by the Director of Public Prosecutions and the requirement for orders to be made by the Supreme Court ensures that ordinary citizens have not been affected by these laws.

In concluding, it is worth noting that between 9 October 2015 and November 2017, approximately $2 200 000 has been forfeited to the Crown under Part 9. This is a promising start for these laws given that Part 9 has only been in operation since 1 March 2014, and some provisions have not yet been utilised because of the impediments which will be rectified by this Bill. I also wish to point out that to date, all unexplained wealth orders have been made by consent and there have not been any challenges to the operations of the Act or the work of the Criminal Assets Recovery Unit.

The Government is confident that the provisions of the Bill will further improve the operation of unexplained wealth forfeiture laws in Tasmania. More importantly however, these reforms will assist with preventing the unjust enrichment of those who seek to profit from crime at society's expenses.

I commend the Bill to the House.