Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012

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Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012

Date introduced: 28 November 2012

House: House of Representatives

Portfolio: Justice

Commencement: On the day after 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/Parliamentary_Business/Bills_Legislation. 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 of the Bill

The purpose of the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the Bill) is to:

- amend the Proceeds of Crime Act 2002 (the Proceeds of Crime Act) to amend the procedures and requirements for making unexplained wealth orders and
- amend the Criminal Code Act 1995 (the Criminal Code) to extend the application of existing domestic cross-border firearms trafficking offences to firearm parts, insert new aggravated offences for domestic cross-border trafficking of firearms and parts, and insert new basic and aggravated offences for international trafficking of firearms and parts.

Background

Unexplained wealth amendments

What is “unexplained wealth”?

“Unexplained wealth” provisions allow a court to issue a declaration unless the subject of the declaration can establish, on the balance of probabilities, that his or her wealth was lawfully acquired. Following an assessment of the quantum of unexplained wealth, the subject of a declaration must pay the amount to the jurisdiction.¹

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Unexplained wealth laws in the Proceeds of Crime Act

The introduction of the Proceeds of Crime Act was influenced by international trends that marked a new era in fighting transnational and global crime by pursuing the proceeds of criminal activities. Specific international initiatives included the UN Convention against Transnational Organized Crime (2000), which is also referred to as the Palermo Convention, and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) also referred to as the Vienna Convention, and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. Each of these contained specific provisions that targeted the proceeds and instrumentalities of crime. Specifically on the topic of unexplained wealth, the Interpol General Assembly passed a resolution in 1997 which:

   recognised that unexplained wealth is a legitimate subject of inquiry for law enforcement institutions in their efforts to detect criminal activity … [and that] subject to the fundamental principles of each country’s domestic law, [legislators should] reverse the burden of proof (use the concept of reverse onus) in respect of unexplained wealth.²

The Proceeds of Crime Act did not originally include unexplained wealth provisions. There does not seem to be an explicit reason for this omission. In 2009, the Commonwealth introduced the current unexplained wealth regime into the Proceeds of Crime Act in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the 2009 Bill).³ The Government agreed with law enforcement authorities that the regime would address the difficulties in obtaining sufficient real evidence to proceed with other confiscation action.⁴ In the Parliamentary Joint Committee on the Australian Crime Commission’s 2009 Inquiry into the legislative arrangements to outlaw serious and organised crime groups, it was noted that the Commonwealth’s proposed unexplained wealth provisions were a ‘reasoned and measured approach to the problem of organised crime’.⁵

Senate amendments

The 2009 Bill passed through the Parliament in 2010 but was amended significantly at the time to result in a regime criticised for being ‘so watered down by the time [it was] passed, that the effective tool to combat organised crime that it was promised to be was not delivered.’⁶

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4. Ibid., p. 5.

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The amendments inserted into the 2009 Bill during its passage through Parliament included:

- giving the court a general discretion not to make an order under the unexplained wealth provisions
- ordering that property may be disposed of or otherwise dealt with for the purposes of meeting a person’s reasonable legal expenses arising from an application made under the Act
- provisions relating to ordering costs to be made at the cessation of a restraining order and
- requiring Parliamentary oversight of the operation of the unexplained wealth provisions by the Parliamentary Joint Committee.\(^7\)

The 2011 Parliamentary Joint Committee on Law Enforcement’s subsequent and self-initiated *Inquiry into Commonwealth unexplained wealth legislation and arrangements* made a number of recommendations that are now reflected in this Bill.\(^8\) In some instances, the Bill is proposing to revert back to the original text of the 2009 Bill.

**Asset recovery under the Proceeds of Crime Act 2011–2012**

During 2011–2012 a total sum of $45.62 million was recovered as a result of litigation commenced by the Commonwealth Director of Public Prosecutions (CDPP) under the Proceeds of Crime Act. This figure is up from the $13.81 million recovered in 2010–2011 and $18.31 million in 2009–2010. This is the largest amount recovered in a financial year since the Proceeds of Crime Act commenced.\(^9\) However, it is worth noting that as at early 2013, no proceedings seeking an unexplained wealth order have been bought. Two cases are being investigated by the AFP.\(^10\)

**Constitutional limitations of Commonwealth unexplained wealth laws**

For the valid enactment of unexplained wealth orders under the Commonwealth’s Proceeds of Crime Act, a connection with a constitutional head of power must be made. The court must therefore be satisfied that there are reasonable grounds to suspect that the person committed a Commonwealth offence, a foreign indictable offence or a state offence with a federal aspect, or that

\(^7\) For details on the specific government amendments see the 2009 Bill’s homepage, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4166%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4166%22)


a part of a person’s wealth was derived from such an offence. It appears that the external affairs power would not be a reliable head of constitutional power in this regard:

The Senate Legal and Constitutional Affairs Committee’s inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 considered whether the external affairs power could be relied upon to broaden the application of the Commonwealth’s unexplained wealth provisions. The Attorney-General’s Department advised at that time that relying on the external affairs power in conjunction with international conventions relating to organised crime, corruption and money laundering would not support a comprehensive unexplained wealth regime. The Department is not aware of any international treaties established since that time that could support reliance on the external affairs power in relation to this issue.11

One avenue that has been used internationally to enact laws similar to unexplained wealth laws is to rely on Article 20 of the United Nations Convention Against Corruption (UNCAC) which prohibits the illicit enrichment of public officials.12 While the scope of any law relying on Article 20 of UNCAC would be narrowed to public officials, the conduct able to be captured may be broader than what is caught by Australia’s current laws. At the time the Rudd Government was considering unexplained wealth laws in 2009, it was thought that laws relying on the UNCAC Article would be in explicit conflict with the right to privacy. It is curious then, that Australia enacted an unexplained wealth regime at all, given that the existing legislation also infringes on a person’s right to privacy. However, the Government considered that this was counter-balanced by the need to deter organised crime.

Several countries have debated the possibility of introducing unexplained wealth orders into their legal systems, but most have decided to maintain traditional confiscation regime, in personam following conviction, and in rem proceedings targeting property. Few have ventured into the area of unexplained wealth orders, and some of those that have done so have faced constitutional and legal challenges. For example, in Italy the Constitutional Court declared law 12 quinquies to be unconstitutional after two years of use determining that shifting the burden of proof violates the Italian constitution. Other countries have adopted only some aspects of unexplained wealth laws, e.g., United Kingdom, South Africa, some states in Canada, and New Zealand, have a presumption in favour of forfeiture for unlawful activities or specific offenses, but not full unexplained wealth orders. Other countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offenses targeting the proceeds of corruption where the reversed burden of proof is part of the offense but yet apply only to political officials and not to all crimes and individuals as do unexplained wealth laws. A similar approach was followed by France with an amendment to its criminal code which introduced reversed burden of proof forfeiture measures targeting certain specific criminal offenders but it is still a post-conviction method. Only three countries thus far have adopted full unexplained wealth orders – no proof of the property being connected to a crime and a reversed burden of proof. These are Australia, Colombia, and Ireland.13


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The effectiveness of the Commonwealth’s unexplained wealth laws appears to be significantly limited and law enforcement authorities are reporting that they have encountered difficulties that are unique to the Commonwealth.\(^\text{14}\) The Commonwealth has subsequently sought the referral of powers from the states and territories with the intention of comprehensive and Constitutionally watertight national coverage but the states have, to date, rejected the Commonwealth’s request.\(^\text{15}\) It is assumed that this refusal is primarily due to the fact that assets confiscated under state legislation are returned to the state governments, and this is particularly lucrative. On this point, the Minister for Home Affairs has said that:

> A referral of power to the Commonwealth would help remove current constitutional limitations and enable the Commonwealth to enact more effective unexplained wealth laws. Importantly, the intention is not to take away the ability of States to act on unexplained wealth. Referring these powers is intended to boost the combined powers available nationally against organised crime. If a referral were made, jurisdictions would be able to retain and use their own unexplained wealth laws. They could also use the Commonwealth laws…. Unfortunately they [the States and Territories] have rejected our request to create a national unexplained wealth regime. This is a bad and short-sighted decision. It will mean more criminals will keep more of their illegal wealth.\(^\text{16}\)

**Firearms trafficking amendments**

**Existing offence regime**

Regulation of firearms in Australia is primarily a state and territory matter. However, the Commonwealth has a longstanding role in regulating the import and export of firearms and firearm parts. Criminal offences for the import and export of prohibited firearms were first enacted under the *Customs Legislation Amendment (Criminal Sanctions and Other Measures) Act 2000*, which amended the *Customs Act 1901*\(^\text{17}\) (Customs Act) to introduce a tiered penalty scheme for prohibited imports and exports to better reflect different levels of potential harm.\(^\text{18}\) The offences for import or export of tier 2 goods (which include, among other things, prohibited firearms, firearm accessories, firearm parts, firearm magazines, ammunition and components of ammunition), have remained


\(^{16}\) Ibid.

\(^{17}\) *The Customs Act 1901* is available at: http://www.comlaw.gov.au/Details/C2013C00064


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largely unchanged since then. Each carries a maximum penalty of imprisonment for ten years, a fine of 2500 penalty units (currently equivalent to $425 000), or both.

Offences for domestic cross-border trafficking of firearms were introduced by the Australian Government in 2002 to augment the suite of measures identified in the National Firearm Trafficking Policy Agreement 2002 (NFTPA). The then Minister for Justice and Customs stated that while endorsement of the NFTPA was an important step towards greater national consistency, Commonwealth offences were required in light of insufficient penalties for state and territory offences of illegal possession, sale and purchase of firearms. The offences inserted into the Criminal Code Act 1995 (Criminal Code) by the Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002 have remained unchanged since enactment. Each carries a maximum penalty of imprisonment for 10 years, a fine of 2500 penalty units (currently equivalent to $425 000), or both. These offences have seldom been used—14 charges were dealt with summarily in 2006–07 and none in any other year between 2002–03 and 2011–12. This may be because state or territory trafficking offences have been preferred.

**Illicit firearms in Australia**

The Australian Crime Commission (ACC) undertook a national intelligence assessment of the illegal firearms market in the first half of 2012. The ACC worked with Australian authorities and the United States Bureau of Alcohol, Tobacco and Firearms to gather intelligence, collate data on imports, exports, licensing and registrations and trace firearms manufactured in Australia and overseas.

While the ACC’s report on its assessment is not publicly available, some of the key findings were released by the Minister for Home Affairs and Minister for Justice on 29 June 2012, following the presentation of the report to the Standing Council of Police and Emergency Management (SCPEM). The findings included:

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19. The offences are in section 233BAB of the Customs Act 1901.
20. The Crimes Act 1914 provides, under section 4AA, that one penalty unit is currently equal to $170.
21. The NFTPA was proposed by the Australian Government in April 2002 and endorsed by the Australasian Police Ministers’ Council (which had the same representation as the current Standing Council for Police and Emergency Management) in July 2002: C Ellison (Minister for Justice and Customs), National firearms trafficking policy agreement, media release, 17 April 2002, viewed 7 January 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FDQC66%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FDQC66%22); C Ellison, Tough new penalties for gun trafficking, media release, 16 September 2002, viewed 7 January 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FBUE76%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FBUE76%22).
there are over 2.75 million registered firearms in Australia, held by more than 730 000 individual firearm licence holders

- the ACC conservatively estimates that there are over 250 000 long arms (such as rifles) and 10 000 handguns (around 6500 of which would be semi-automatic) in the Australian illicit firearms market and

- the durability of firearms means that once diverted to the illicit market, they remain available for decades, with the oldest firearm traced by the ACC a revolver that was manufactured in 1888.\(^\text{26}\)

As part of the assessment, the ACC undertook trace analysis of 3186 firearms seized by Australian law enforcement agencies. The findings with respect to the method of diversion of those firearms into the illicit market are set out in the table below.

### Method of diversion identified through trace analysis

<table>
<thead>
<tr>
<th>Source</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grey market, including long arms not surrendered or registered in accordance with the 1996 <em>National Firearms Agreement</em></td>
<td>44.6</td>
</tr>
<tr>
<td>Stolen, or suspected staged theft</td>
<td>12.7</td>
</tr>
<tr>
<td>Deactivation</td>
<td>3.3</td>
</tr>
<tr>
<td>Interstate transfer</td>
<td>1.5</td>
</tr>
<tr>
<td>Domestic manufacture</td>
<td>1.3</td>
</tr>
<tr>
<td>Illegal importation</td>
<td>0.5</td>
</tr>
<tr>
<td>Unknown (insufficient information)</td>
<td>33.5</td>
</tr>
<tr>
<td>Lost/missing and other</td>
<td>2.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: ACC, email, 8 January 2013

Only around 0.5 per cent of the firearms could be traced back to illegal importation, the source targeted by the international firearm trafficking offences included in the Bill.\(^\text{27}\) However, with the method of diversion not known for over a third of the firearms traced due to insufficient information, the true proportion of the illicit market attributable to illegal imports may be higher.\(^\text{28}\)

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These figures do not provide an indication of the proportion of firearms that have been trafficked across internal borders.

**National agreement on measures to address illicit use and trafficking of firearms**

The ACC’s intelligence assessment was commissioned by the Minister for Home Affairs and Minister for Justice in February 2012, following a series of shootings in Western Sydney and Adelaide, to inform recommendations for SCPEM. Upon presentation of the report on 29 June 2012, Commonwealth, state and territory ministers agreed to a range of measures designed to combat firearms crime. This included:

- in-principle agreement to a national roll-out of the Australian Ballistics Identification Network currently used by the Australian Federal Police and the New South Wales (NSW) Police Force to link seized firearms to previous crimes
- in-principle agreement to the development of a national firearms register (there are currently over 30 different registries and databases, which are not linked, allowing 14,000 firearms to be lost track of each year)
- in-principle agreement to the ACC developing an enhanced national firearms tracing serial number capability
- agreement on implementation of a National Firearms Identification Database
- agreement to a national campaign to raise community awareness about unlicensed firearms
- agreement that the ACC will provide illicit firearms intelligence assessments in 2013–14 and 2014–15 and
- agreement to strengthen legislation to target firearms trafficking.

With respect to legislative measures, the Commonwealth announced its intention to introduce aggravated offences for firearms trafficking across national and state borders with penalties of life imprisonment. The Bill will implement that commitment. It will also bring firearms parts within the scope of both the existing firearms trafficking offences in the Criminal Code and those proposed in the Bill so that a person cannot avoid criminal liability by trafficking parts that can be assembled into firearms instead of whole firearms. While not all undeclared items are brought in through deliberate, illegal import activity, of the 1344 undeclared firearms, parts and accessories the

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29. J Clare (Minister for Home Affairs and Minister for Justice), *Firearms used in drive by shootings to be traced by the Australian Crime Commission*, media release, 12 February 2012, viewed 13 December 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22media%2Fpressrel%2F1416786%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22media%2Fpressrel%2F1416786%22)
32. Explanatory Memorandum, p. 36.

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Australian Customs and Border Protection Service (Customs) detected in 2011–12, only 76 (or around 5.7 per cent) were whole firearms. Customised concealment methods are often used in attempts to import illicit goods, including firearms and firearm parts and accessories. Firearms are often disassembled into parts and imported over a series of consignments, concealed within other metal objects and mis-described on cargo reports and declarations. A case that received a lot of publicity in the first half of 2012, involving a large number of Glock pistols allegedly trafficked into Australia through a Sydney post office, reportedly employed such methods.

The contribution of state and territory governments towards stronger legislation will be determined through a working group formed to identify improvements to regulation of firearm possession and use. The Minister for Home Affairs and Minister for Justice stated that together the suite of measures agreed by SCPEM, along with the establishment of a Firearms Intelligence Targeting Team within Customs and a range of measures directed at identifying and targeting vulnerabilities in the international air stream ‘are designed to tackle the illicit firearms market from every angle—to seize illegal firearms, to break the code of silence, to improve our ability to trace illegal firearms, to strengthen laws and harden the border’. While not mentioned by the Minister in this context, recent allegations of the involvement of Customs officers in illegal importation of firearms suggest improvements to the Commonwealth’s anti-corruption framework such as those in the Law Enforcement Integrity Legislation Amendment Act 2012 may also have a part to play.


36. J Clare, Major agreement to tackle the illegal firearms market, op. cit.

37. Ibid.

In his second reading speech for the Bill, the Minister explained the penalty for the new aggravated offences as follows:

The maximum penalty for these offences will be life imprisonment.

This will make the maximum penalty for trafficking in firearms the same as the maximum penalty for trafficking in drugs.

It is designed to send a very strong message that trafficking large numbers of illegal firearms is just as dangerous and potentially deadly as trafficking large amounts of illegal drugs, and the same maximum penalty should apply.\(^{39}\)

### Committee consideration

The Bill has been referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 13 March 2013. Details of the inquiry are at:


As at the time of publication of this Digest there have been four submissions to the Committee. As these submissions only became available as the Digest was being finalised, the issues raised in these submissions are not considered in detail in this Digest. However, they are summarised briefly below.

The submission from the Australian Crime Commission and the joint submission from the Police Federation of Australia (PFA) and the Australian Federal Police Association (AFPA) are supportive of the Bill.\(^{40}\) However, the PFA and AFPA have suggested additional amendments to further strengthen both the unexplained wealth regime and the firearms trafficking provisions.\(^{41}\)

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Measures introduced by the *Law Enforcement Integrity Legislation Amendment Act 2012* included targeted integrity testing of Customs, AFP and ACC staff and powers for the Chief Executive Officer of Customs to require mandatory reporting of corruption and misconduct issues. The Act is available at:


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The Law Council of Australia (Law Council) is critical of the amendments to remove the discretion of the courts to allow legal expenses to be paid using assets restrained under the unexplained wealth regime. The Law Council considers that there is no evidence that the current discretion undermines the effectiveness of the regime and believes that access to legal aid will not offset the disadvantage that would result from a person not being able to choose a legal representative. Further, the Law Council is concerned about the amendments expanding the reach of officers executing a search warrant because ‘anything that is relevant to a person’s income or expenditure is relevant to unexplained wealth proceedings’.  

The New South Wales Government has raised some concerns about the choice of appropriate thresholds for the aggravated firearms offences. In particular, based upon NSW prosecutions for ongoing sale of firearms, it considers that the threshold for the number of firearms should be set substantially lower and the time period extended to twelve months, stating that the provisions may not otherwise result in any prosecutions. The NSW Government also considers the framing of the threshold relating to the quantity of firearms or firearms parts could lead to outcomes disproportionate to the criminality involved where the offences are applied to trafficking in firearms parts.

No other Parliamentary Committee has yet reported on this Bill.

### Policy position of non-government parties/independents

Following the Government’s announcement in February 2012 that the ACC would undertake a national intelligence assessment of the illegal firearm market, the Shadow Minister for Justice, Customs and Border Protection issued a media release stating that the Coalition supports measures that aim to combat the illegal gun trade in Australia, but that the first step is to reverse funding cuts to Customs cargo screening functions. The Australian Greens have called for tighter regulation of firearms in the context of NSW Government policies and a massacre at a United States school in late 2012. However, none of the non-government parties or independents appears to have made a

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public statement on the particular changes to firearm trafficking offences proposed in the Bill. Similarly, there has been no public statement on the unexplained wealth amendments.

**Position of major interest groups**

Groups such as Civil Liberties Australia are likely to have an interest in the unexplained wealth amendments but to date have not commented on this particular Bill. As noted earlier, the Law Council is not supportive of the unexplained wealth amendments, as, among other issues, it considers that it is speculative to assert that the laws are not effective.\(^{46}\)

The Sporting Shooters’ Association of Australia welcomed the Government’s focus on illicit firearms and announcement of increased penalties for firearm trafficking, stating that for too long Australian firearm reforms have been based upon placating the public instead of ‘tackling the root of the problem’.\(^{47}\)

**Financial implications**

The Explanatory Memorandum states that ‘Schedule 1 of the Bill will improve the Commonwealth’s ability to confiscate unexplained wealth’ and that the remaining amendments will have ‘little or no impact’ on Government revenue.\(^{48}\) Any impact of the firearms trafficking amendments in Schedule 2 of the Bill on investigative and prosecutorial agencies will be expected to be absorbed within existing resources.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.\(^{49}\) The Government considers that the Bill is compatible. The Statement of Compatibility examines the human rights implications of the Bill, particularly in Schedule 1, with the issues of concern including, but not limited to the right to privacy, right to a fair hearing and the prohibition on retrospective punishment. Schedule 2 raises issues relating to the presumption of innocence with respect to the firearms trafficking amendments. The Government considers that, to the extent that the measures in the Bill may limit

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46. Law Council, op. cit.
49. The Statement of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum.
rights and freedoms, the limitations are reasonable, necessary and proportionate to achieving the intended outcomes.

The Bill has not yet been considered by the Parliamentary Joint Committee on Human Rights.

**Key issues and provisions**

**Schedule 1: Unexplained wealth amendments**

The amendments proposed in Schedule 1 of the Bill will amend the Proceeds of Crime Act. Some of the amendments are directly reverting back to the first reading of the 2009 Bill. Others are clarifications and edits sought to improve the investigation and litigation of Commonwealth unexplained wealth matters.

**Item 1** will amend subsection 20A(1) of the Proceeds of Crime Act with the effect of removing the general discretion of the court not to make a restraining order over property that is the subject of an unexplained wealth order. However, there will still be some circumstances in which a court may refuse to make a restraining order. These circumstances are set out in **proposed subsection 20A(4)**, which provides that the court may refuse to make a restraining order if the court is satisfied that:

- (a) there are not reasonable grounds to suspect that the person’s total wealth exceeds by $100,000 or more, the value of the person’s wealth that was lawfully acquired
- or, as is currently the case,
- (b) it is not in the public interest to make the order.

It is also noted that a court can also refuse to make a restraining order if the Commonwealth refuses to give an appropriate undertaking with respect to the payment of damages or costs or both for the making and operation of the order: see existing section 21. Further, **proposed subsection 20A(4A)** clarifies that the court can make an order as to costs in the circumstances where the court refuses to make a restraining order under this section. **Proposed subsection 20A(5)** will require the court to make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

**Proposed subsection 45(6A)** complements an amendment to section 179SA (discussed below) to improve the restraint of property mechanism that might frustrate a charge under section 179SA. This amendment will provide that the restraining order will not cease to be in force until the charge over the property ceases to have effect (under **proposed subsection 179SA(2)**).

The proposed amendments to **section 45A** are to revert back to the original framework of the unexplained wealth provisions in the 2009 Bill. This section addresses when a restraining order

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51. A link to the homepage for this Bill is provided at footnote 7. A link to the Bills Digest for this Bill is at footnote 3.

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(made under section 20A of the Act) will cease to be in force when an application for an unexplained wealth order is made. **Proposed paragraphs 45A(1)(a) and (b)** will prescribe that a section 20A restraining order ceases to be in force if:

(a) no application for an unexplained wealth order had been made in relation to the suspect to whom the restraining order relates before the restraining order was made and

(b) no such application has been made in relation to the suspect within 28 days after the restraining order was made.

Further, if the court refuses to make a preliminary unexplained wealth order, or an unexplained wealth order, the restraining order made under section 20A will cease to be in force (**proposed subsection 45A(2)**).

**Proposed subsection 45A(3A)** prescribes the time period to be complied with before a restraining order ceases to be in force. If the application is made within 28 days after the making of the restraining order (45A(3)(b)); and the court makes the unexplained wealth order; and either:

(i) the unexplained wealth order is complied with; or
(ii) an appeal against the unexplained wealth order has been upheld and finally disposed of,

then the restraining order will cease to be in force.

**Division 1 of Part 2-6—Making unexplained wealth orders**

The amendment to **subsection 179B(1)** will remove the court’s discretion in making a preliminary unexplained wealth order where the amount of unexplained wealth is suspected to be $100 000 or more. The discretion will remain (under subsection 179B(4)) in cases where the court is satisfied that there are not reasonable grounds to suspect that the person’s total wealth exceeds by $100 000 or more the value of the person’s wealth that was lawfully acquired. The Explanatory Memorandum notes that this amendment implements Recommendation 12 of the Parliamentary Joint Committee on Law Enforcement’s final report.  

**Item 16** amends **subsection 179E(1)** with the effect of removing the court’s discretion in making an unexplained wealth order to the value of $100 000 or more. **Proposed subsection 179E(1)** provides that a court with proceeds jurisdiction **must** make an order (an unexplained wealth order) requiring a person to pay an amount to the Commonwealth if the court has made a preliminary unexplained wealth order in relation to the person and the court is not satisfied that the person’s wealth, or a part of that wealth, was not derived from a Commonwealth offence, a state offence with a federal aspect or a foreign indictable offence. An important amendment is made to **proposed subsection 179E(6)** where the court may refuse to make an unexplained wealth order if the court is satisfied that: (a) the person’s unexplained wealth amount is less than $100 000; or, as is currently the case, (b) it is not in the public interest to make the order. The Explanatory Memorandum details that this

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52. Explanatory Memorandum, p. 22.
amendment implements Recommendation 13 of the Parliamentary Joint Committee on Law Enforcement’s final report.53

Proposed subsection 179S(3) will be amended to remove any doubt that a restraining order made under this subsection has the same effect as one made under section 20A. This subsection will allow all or part of the property within the effective control (a defined term) of a person subject to an unexplained wealth order to be made available to satisfy that order.

Proposed section 179SA sets out when a restraining order will result in a charge on property. If an unexplained wealth order is made against a person; and the person is the suspect in relation to a restraining order that is or has been made against either the person’s property; or another person’s property in relation to which an order under subsection 179S(1) is, or has been, made; then, upon the making of the later of the orders, there is created a charge on the property. The charge ceases to have effect in respect of the property upon the discharge of the unexplained wealth order or restraining order, upon payment to satisfy the unexplained wealth order, or upon the sale or disposition of the property.

Proposed section 179SB will allow charges to be registered over restrained property to secure payment of unexplained wealth amounts. This will allow the Official Trustee (or responsible authority) to cause the charge created under proposed section 179SA to be registered. Subsequently any person who purchases or who has an interest in the property is taken to have notice of the charge.

An amendment to section 227, at item 23 of Schedule 1 to the Bill, will require a search warrant to state that the warrant authorises the seizure of other things found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be things relevant to unexplained wealth proceedings (proposed paragraph 227(1)(ha)). Similarly, proposed paragraph 228(1)(da) will authorise the seizure of things found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be things relevant to unexplained wealth proceedings.

The operation of the unexplained wealth regime and restraining orders made under section 20A is subject to Parliamentary scrutiny by the Parliamentary Joint Committee on Law Enforcement under Division 5 of Part 2-6 of the Act. A proposed amendment will require a yearly report on orders made under the Act. Proposed subsections 179U(3)–(5) require that:

(3) The Commissioner of the Australian Federal Police must give the Committee a report in respect of each financial year that contains the following information:

(a) The number of matters investigated in the year, by each enforcement agency, in respect of which a likely outcome may, or will, be the initiation of proceedings under this Part, and the basis for determining that number;


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(b) The number and results of applications in the year for:
   (i) Restraining orders under section 20A; and
   (ii) Unexplained wealth orders

(4) The report must be given as soon as practicable after the report under section 67 of the
Australian Federal Police Act 1979 in respect of the financial year is laid before a House
of the Parliament in accordance with that section.  

(5) If the Commissioner of the Australian Federal Police requests the DPP or the CEO of an
enforcement agency to give the Commission information that the Commissioner
considers necessary to prepare the report, the DPP or CEO must comply with the
request.

An amendment will be made to the Dictionary section (section 338), defining things relevant to
unexplained wealth proceedings, as:

a thing (including a thing in electronic form) as to which there are reasonable grounds for suspecting that it
may be relevant for the purposes of initiating or conducting proceedings under section 20A or Part 2-6.

Schedule 2: Firearms trafficking amendments

The amendments proposed in Schedule 2 of the Bill will amend Part 9.4 of the Criminal Code, which
deals with dangerous weapons.  

Domestic cross-border firearms trafficking

Section 360.1 of the Criminal Code defines disposal and acquisition of a firearm for the purposes of
Division 360, which contains offences relating to domestic cross-border trafficking of firearms.  

Items 1–5 will amend these definitions to include disposal and acquisition of firearm parts. Items 8
and 17 insert definitions of firearm part for the purposes of sections 360.2 and 360.3 respectively. As
both the existing offences and those inserted by the Bill rely upon conduct that would constitute an
offence under a state or territory firearm law, the definition in each case is a firearm part or a part
of, or for, a firearm or weapon within the meaning of the relevant state or territory law. The
Explanatory Memorandum does not address why it is necessary to refer to a part of, or for, a
weapon, in the definitions of firearm part when the definition of firearm includes no reference to
weapons.

Basic offences

Section 360.2 sets out the offence of domestic cross-border disposal or acquisition of a firearm.
Item 7 repeals the existing offence provisions in subsections 360.2(1) and (2) and replaces them with
basic and aggravated offences relating to cross-border disposal or acquisition of a firearm or firearm
part. Under proposed subsection 360.2(1), a person commits the basic offence if:

54. That is, the annual report on the administration and operations of the Australian Federal Police.
55. A link to the Criminal Code is provided in footnote 23.
56. Trafficking of firearms within a state or territory is dealt with under state and territory criminal law. For a summary of
• the person engages in conduct constituting an offence against a state or territory firearm law prescribed by the regulations (the underlying offence)
• the person does so in the course of interstate trade or commerce and
• the primary element of the underlying offence involves the disposal or acquisition of a firearm or part by the person.

The maximum penalty for the offence is imprisonment for ten years, a fine of 2500 penalty units (currently equivalent to $425,000), or both. This is the same as the existing offence.

Proposed subsection 360.2(2A) provides that for the first element of the offence, the prosecution will be required to prove the fault elements, if any, that apply to the underlying offence. Proposed subsection 360.2(2C) provides that absolute liability applies to the remaining elements of the offence. This means that no fault element needs to be proved for those elements and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. The application of absolute liability to these elements is justified in the Explanatory Memorandum and appears reasonable in the circumstances. 57

Existing section 360.3 provides that a person commits an offence if he or she takes or sends a firearm from one state or territory to another in the course of interstate trade or commerce if:

• the person does so intending that the firearm will be disposed of in the other state or territory (by themselves or someone else) and
• the person knows that, or is reckless as to whether, the disposal of the firearm or any resulting acquisition of the firearm would happen in circumstances that would constitute an offence against the firearm law of that other state or territory.

The maximum penalty for the offence is imprisonment for ten years, a fine of 2500 penalty units (currently equivalent to $425,000), or both.

Items 12–14 expand the scope of the existing basic offence to also cover taking and sending firearm parts. Proposed subsection 360.3(1B), inserted by item 15, provides that absolute liability applies to the element of the offence that the person engages in the conduct in the course of interstate trade or commerce. This is appropriate given that element of the offence is included only to mark a jurisdictional boundary between matters that are within Commonwealth legislative power and those that are not, and does not have a bearing on the defendant’s culpability.

Aggravated offences

Items 7 and 15 will also insert aggravated forms of the disposal or acquisition and taking or sending offences outlined above. Under proposed subsections 360.2(2) (item 7) and 360.3(1A) (item 15), the aggravated offences will apply if a person disposes or acquires, or takes or sends, either on one occasion, or over the course of two or more occasions during a six month period:

57. See pages 40–41 of the Explanatory Memorandum.
• 50 or more firearms
• 50 or more firearm parts that might be used to make one or more firearms or
• a combination of firearms and firearm parts ‘such that the sum of the actual firearms and the
  firearms that might be constituted by the parts is 50 or more’.

The maximum penalty for the aggravated offences is life imprisonment, a fine of 7500 penalty units
(currently equivalent to $1 275 000), or both. This is the same penalty that applies to trafficking
controlled drugs and importing or exporting commercial quantities of border controlled drugs or
plants under Divisions 302 and 307 of the Criminal Code. In light of the durability of firearms, which
means that once they are part of the illicit market, they can be used many times over a long period,
this penalty seems appropriate.

Under proposed subsections 360.2(2D) and 360.3(1C), strict liability applies to the elements of the
aggravated offences that the person’s conduct resulted in their disposal or acquisition, or their
taking or sending, of the specified number of firearms or parts. This means that no fault element
needs to be proved for those elements, but the defence of mistake of fact is available. The
Explanatory Memorandum justifies the application of strict liability to these elements of the offences
on the basis that it is reasonable to expect a defendant to be aware of the quantity of firearms or
parts with which they are dealing.58

Where the disposal or acquisition, or taking or sending, of firearms or parts resulted from conduct
on two or more occasions taken together, proposed subsections 360.2(2C) and 360.3(1B) provide
that absolute liability applies to the element of the offences that those occasions occurred during a
six month period. The Explanatory Memorandum states that ‘whether or not a defendant has
knowledge of the specific period of time over which they were trafficking firearms is not relevant to
their culpability’.59 This is in addition to the application of absolute liability to elements of the
aggravated offences that are shared with the basic offences, which is covered above.

The application of strict and absolute liability to these elements appears reasonable in the
circumstances.

Common provisions

Item 18 inserts provisions relating to both the disposal or acquisition offences in section 360.2 and
the taking or sending offences in section 360.3. Subsections 360.3A(1) to (3) ensure the principle of
double jeopardy is maintained by clarifying that a person may not be convicted of a basic offence for
the same alleged conduct for which they have been convicted or acquitted with respect to a
corresponding aggravated offence, and vice versa. Proposed subsection 360.3A(4) allows the trier of
fact to find a defendant not guilty of an aggravated offence but guilty of a corresponding basic
offence so long as he or she has been accorded procedural fairness in relation to the finding of guilt.

International firearms trafficking

**Item 21** will insert **new Division 361** into the Criminal Code to provide basic and aggravated offences for importing or exporting prohibited firearms or firearm parts.

**Proposed section 361.1** provides definitions for the purposes of Division 361. *Firearm* and *firearm part* will both have the same meanings as in the Customs (Prohibited Imports) Regulations 1956.60 *Import* is defined to include ‘deal with a firearm or part in connection with its importation’. ‘Deal’ is not defined, so holds its ordinary meaning.

**Importing prohibited firearms and parts**

**Proposed section 361.2** contains offences for importing prohibited firearms or parts. Under **proposed subsection 361.2(1)**, a person commits the basic offence if he or she imports a firearm or part and the importation:

- was prohibited under the *Customs Act 1901* (Customs Act)61 absolutely or
- was prohibited under the Customs Act unless the approval of a particular person had been obtained and, at the time of importation, it had not.

The maximum penalty for the offence is imprisonment for ten years, a fine of 2500 penalty units (currently equivalent to $425 000), or both. This penalty is the same that applies to domestic cross-border trafficking of firearms or parts under Division 360 and the existing offence of intentionally importing tier 2 goods (which include prohibited firearms, firearm accessories, firearm parts, firearm magazines, ammunition and components of ammunition) under subsection 233BAB(5) of the Customs Act.

**Proposed subsection 361.2(3)** provides that absolute liability applies to the element of the offence that importation was prohibited absolutely or unless an approval had been obtained. **Proposed subsection 361.2(4)** provides that strict liability applies to the element that a required approval had not been obtained at the time of importation. This is consistent with the approach taken in the existing Customs Act offence. It means that no fault element needs to be proved for those elements, but that the defendant may raise a defence of mistake of fact with respect to whether the required approval had been obtained at the time of importation. The application of absolute and strict liability to these elements is justified in the Explanatory Memorandum and appears reasonable in the circumstances.62

The conduct captured by the offence in proposed subsection 361.2(1) is already captured by subsection 233BAB(5) of the Customs Act, which has identical physical and fault elements, but applies to a wider range of goods. The only explanation provided for this duplication in the

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61. A link to the Customs Act is provided at footnote 17.
Explanatory Memorandum is ‘to link and ensure consistency with the existing cross-border offences in the Criminal Code that apply to trafficking across state and territory borders’.  

Under **proposed subsection 361.2(2)**, a person commits an aggravated offence if he or she imports, either on one occasion, or over the course of two or more occasions during a six month period:

- 50 or more firearms
- 50 or more firearm parts that might be used to make one or more firearms or
- a combination of firearms and firearm parts ‘such that the sum of the actual firearms and the firearms that might be constituted by the parts is 50 or more’.

where those firearms or parts were:

- prohibited under the Customs Act absolutely or
- prohibited under the Customs Act unless the approval of a particular person had been obtained and, at the time of importation, it had not.

The thresholds for the number of firearms, parts or a combination thereof would capture cases such as the alleged trafficking of around 120 handguns plus additional parts into Australia over a period of approximately three months, for which three Sydney men were charged with a range of offences in March 2012. NSW Police believed the guns and parts were being imported specifically for use by organised crime groups.

The maximum penalty for the aggravated offence is life imprisonment, a fine of 7500 penalty units (currently equivalent to $1 275 000), or both, consistent with the penalty for the aggravated offence of domestic cross-border trafficking of firearms or parts under Division 360.

**Proposed subsection 361.2(5)** provides that strict liability applies to the element of the aggravated offence that the person’s conduct resulted in their importing the specified number of firearms or parts. The Explanatory Memorandum justifies the application of strict liability to this element of the offence on the basis that it is reasonable to expect a defendant to take steps to ascertain the quantity of firearms or parts they are importing.

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63. Explanatory Memorandum, p. 54.

64. AAP and L Davies, ‘Post office smuggling case: “220 guns imported”’, smh.com.au, 14 March 2012, viewed 21 December 2012, [http://www.smh.com.au/nsw/post-office-smuggling-case-220-guns-imported-20120314-1u21j.html](http://www.smh.com.au/nsw/post-office-smuggling-case-220-guns-imported-20120314-1u21j.html). While initial media reports suggested a higher number, Customs indicated in May 2012 that the figure had been revised based on investigations to ‘around 122 Glocks plus a number of triggers and magazines and so on that could have taken the total number to between 140 and 150 or so’: M Carmody (Chief Executive Officer, Customs), Senate Legal and Constitutional Affairs Legislation Committee, Attorney-General’s portfolio, Budget estimates, 24 May 2012, p. 35, viewed 10 January 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F491ff9e9-09fe-477a-8714-7ca7430b793d%2F0002%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2F491ff9e9-09fe-477a-8714-7ca7430b793d%2F0002%22).

65. Explanatory Memorandum, p. 60.
Where the importation of firearms or parts resulted from conduct on two or more occasions taken together, proposed subsection 361.2(3) provides that absolute liability applies to the element of the offence that those occasions occurred during a six month period. The Explanatory Memorandum provides no justification for this. If it is for the same reasons given with respect to this element in the domestic cross-border trafficking offences in Division 360, this appears reasonable, but the matter should be addressed in the Explanatory Memorandum.

This is in addition to the application of strict and absolute liability to elements of the aggravated offence that are shared with the basic offence, which is covered above.

**Exporting prohibited firearms and parts**

Proposed subsection 361.3 contains basic and aggravated offences for exporting prohibited firearms or parts that exactly mirror the importation offences in proposed subsection 361.2, and the same penalties would apply. As with the basic importation offence in proposed subsection 361.2(1), the basic exportation offence duplicates an existing offence in the Customs Act, in this case the offence of intentionally exporting tier 2 goods under subsection 233BAB(6).

**Items captured by the international firearm trafficking offences**

As noted above, the basic import and export offences mirror existing offences in the Customs Act that apply to the import or export of prohibited firearms, firearm accessories, firearm parts, firearm magazines, ammunition and components of ammunition (as well as unrelated items such as child pornography). There has obviously been a policy decision not to include prohibited firearm accessories, firearm magazines, ammunition and components of ammunition in the proposed Criminal Code offences, despite their inclusion in the Customs Act offences. However, this has not been explained in the material accompanying the Bill. It may be that the Government considers that the penalty that applies to the aggravated offences would be disproportionate. However, it is not clear whether all such items present the same level of potential risk to the community.

Two of the items that fall within the definition of firearm accessory in the Customs (Prohibited Imports) Regulations 1956—devices designed to modify a firearm so as to give it a rapid fire capability and devices capable of converting a firearm into a fully automatic condition—would seem to fall at the more serious end of the scale. It may be appropriate for the Government to consider whether importing or exporting large numbers of such accessories warrants a penalty greater than that which applies to the basic Customs Act offence, but less than life imprisonment.

**Common provisions**

Proposed section 361.4 provides a defence to an offence against Division 361 of reasonable belief that the defendant’s conduct was justified or excused by or under a Commonwealth or state or territory law.

Subsections 361.5(1) to (3) ensure the principle of double jeopardy is maintained by clarifying that a person may not be convicted of a basic offence for the same alleged conduct for which they have been convicted or acquitted with respect to a corresponding aggravated offence, and vice versa.
Proposed subsection 361.5(4) allows the trier of fact to find a defendant not guilty of an aggravated offence but guilty of a corresponding basic offence so long as he or she has been accorded procedural fairness in relation to the finding of guilt.

Concluding comments

The unexplained wealth amendments will correct and clarify the new regime in the Proceeds of Crime Act. The most significant amendments are that the courts will no longer have discretion in making unexplained wealth orders where the amount of suspected unexplained wealth is greater than $100,000. Concerns about the regime’s effectiveness at the Commonwealth level, in its current form, will remain following the commencement of these provisions. A new reporting requirement that is created by this Bill may lead to more significant changes in the future to enhance the regime.

While they suffer limitations, the latest estimates indicate that illegal imports account for only a small proportion of Australia’s illicit firearm market. This may mean that other measures being pursued as part of a national response to illicit firearms, such as development of a national firearms register, will (if implemented) have more of an impact in addressing this illicit market. However, given the durability of firearms and firearm parts, it is appropriate that where large numbers of these items are imported over a short period, offenders face penalties equivalent to those that apply for serious drug offences.