

## 19. Personal Property Rights

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### Summary

19.1 Many Commonwealth laws interfere with personal property rights. The key areas of concern examined in this chapter include banking and taxation laws, personal property securities, intellectual property and criminal laws. Many have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court.

19.2 The breadth of the proceeds of crime legislation is one area that may require further consideration. The *Proceeds of Crime Act 2002* (Cth) provided for a review, which took place in 2006. The Parliamentary Joint Committee on Law Enforcement provides ongoing scrutiny of the Commonwealth legislation. Given the potential impact of unexplained wealth measures on personal property, and the proposal for a national coordinated scheme by the Law Enforcement Committee, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review be scheduled in due course.

### Laws that interfere with property rights

19.3 A wide range of Commonwealth laws may be seen as interfering with personal property rights. Grouped into areas, provisions affecting personal property are considered below under the following headings:

- banking laws;
- taxation;
- personal property securities;

- intellectual property;
- protection of cultural objects; and
- search and seizure provisions.

19.4 These laws are summarised below. Some of the justifications that have been advanced for laws that encroach on personal property rights, and public criticisms of laws on that basis, are also discussed.

## Banking laws

### *Unclaimed money laws*

19.5 Laws dealing with unclaimed money have a long history. On a person's death, in default of 'next of kin', the person's personal property would default to the Crown as *bona vacantia* (vacant or ownerless goods). This became, over time, part of the consolidated revenue of the states and territories, with an ability for certain persons to seek *ex gratia* payments in deserving cases.<sup>1</sup>

19.6 Banking is a head of Commonwealth legislative competence under s 51(xiii) of the *Australian Constitution*. In 1911, the Commonwealth enacted unclaimed money laws analogous to the laws concerning *bona vacantia* in intestate estates, including the concept of property vesting in the Crown.<sup>2</sup> The *Commonwealth Bank Act 1911* (Cth) provided that all moneys in an account which had not been operated on for 'seven years and upwards' would be transferred to a designated fund and if not claimed for a further 10 years, would become the property of the Bank.<sup>3</sup>

19.7 The modern successor to the provision in the 1911 Act was s 69 of the *Banking Act 1959* (Cth), which provided that, after a designated period, if there have been no deposits or withdrawals from an account, it is deemed 'inactive' and the bank is required to close the account and transfer the balance to the Commonwealth of Australia Consolidated Revenue Fund. The money remains in the possession of the Commonwealth until claimed, which requires an administrative process on behalf of the inactive account holder.

19.8 In 2012, the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) reduced the relevant period to three years. Similar changes

1 See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [5.31]. The Uniform Succession Laws Project produced a Model Intestacy Bill in 2007. See *Ibid* [5.12]. See also the discussion of the National Committee recommendations in New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy Report No 116* (2007). The history of the *bona vacantia* jurisdiction is described in *Brown v NSW Trustee and Guardian* [2012] NSWCA 431 [94]–[112].

2 The Bills Digest concerning the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 notes the origin of the unclaimed money laws in *bona vacantia*, and also the laws of escheat: Kai Swoboda, Parliament of Australia, *Bills Digest* No 50 of 2012–2013 (November 2012) 5. Escheat was a doctrine concerning land, where *bona vacantia* concerned personal property. Only the latter would concern bank accounts, as chosen in action.

3 Provision was made for the Governor of the Bank, with the consent of the Treasurer, to allow any claim after that period had expired, 'if he is satisfied that special reasons exist for the allowance of the claim': *Commonwealth Bank Act 1911* (Cth) s 51.

were made to first home owner accounts, life insurance and superannuation under the same amending Act.<sup>4</sup>

19.9 The Explanatory Memorandum to the Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012 asserted that the amendments to the *Banking Act 1959* (Cth) were ‘compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*’.<sup>5</sup> However, it did not elaborate on this proposition.

19.10 The Hon Bernie Ripoll, the then Parliamentary Secretary to the Treasurer, stated that ‘the reforms will ensure this lost money is properly protected so people can get what is rightfully theirs’.<sup>6</sup>

19.11 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the 2012 Bill. It stated that a person’s right to property is ‘not guaranteed as a freestanding right in the human rights treaties’ that fell under its consideration.<sup>7</sup> However, any ‘discrimination in the enjoyment of the right to property’ would be contained in a number of human rights guarantees, such as art 26 of the *International Covenant on Civil and Political Rights*, set out in Chapter 18.

19.12 The Human Rights Committee applied a structured proportionality test.<sup>8</sup> First, the Committee noted that the objective to ‘preserve a person’s funds from being eroded by fees and charges ... *could be* seen as a legitimate objective’. Secondly, the Committee considered that the removal of funds and the procedure in place to reclaim them did have a rational connection to preserving bank account balances. Thirdly, with respect to whether the limitation was proportionate to the restriction, the Committee considered this point less clear:

The objective advanced is thus to preserve the person’s funds from being eroded by fees and charges, which could be seen as a legitimate objective. The removal of funds to the ATO and the establishment of procedures for the reclaiming of those funds as well as the requirement to pay interest on balances, would have the effect of preserving balances. The issue of proportionality is less clear, and the explanatory memorandum does not offer a justification for the dramatic reduction in the period that must elapse before the obligation to transfer the funds to the ATO is activated.<sup>9</sup>

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4 *First Home Saver Accounts Act 2008* (Cth); *Life Insurance Act 1995* (Cth); *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Cth). A number of exceptions and different types of rules apply for particular accounts under the *Banking Regulations 1966* (Cth). For example, term deposits and farm management accounts are exempt from s 69 provided the account satisfies the criteria in s 69(1A). Further, children’s accounts must remain inactive for at least seven years before they are characterised as unclaimed moneys: reg 20(10).

5 Explanatory Memorandum, Banking Amendment (Unclaimed Money) Bill 2012 (Cth). The Act came into force on 1 July 2013.

6 See Bernie Ripoll, ‘Media Release’ (Media Release No 051, 26 November 2012).

7 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Seventh Report of 2012* (November 2012) [1.104].

8 See Ch 2 in relation to proportionality; and Ch 3 in relation to the functions of the Committee.

9 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Seventh Report of 2012* (November 2012) [1.107].

19.13 The Human Rights Committee sought clarification ‘of the basis for determining that the significant reduction in the time which must elapse before funds are required to be transferred is a proportionate means of achieving the objectives pursued by the bill’.<sup>10</sup>

19.14 The Senate Standing Committee on Economics also conducted an inquiry into the 2012 Bill. The Committee endorsed the Bill, arguing that the amendments

will be of significant benefit to consumers ... The amendments will help reunite people with their unclaimed money sooner, and will protect the real value of that money while it remains unclaimed.<sup>11</sup>

19.15 The Committee went on to address concerns that the reduction in the period of inactivity before accounts were treated as unclaimed could potentially lead to moneys that are not genuinely unclaimed being treated as such. However, the Committee considered that the Bill provided an ‘appropriate measure of flexibility to address the concerns of financial institutions and protect the interests of consumers as required’.<sup>12</sup>

19.16 In contrast, criticism of the 2012 legislation was reflected, for example, in a press release by the Institute of Public Affairs, that stated:

People should be able to leave money in bank accounts for as long as they wish without the fear that the government might come along and steal it from them. To do so is an arbitrary acquisition of property by the government. ...

Parents saving for their children’s education, young people saving for a home and others putting money aside for retirement are all at risk of losing their savings as a result of these changes ...<sup>13</sup>

19.17 In 2015, following a change of government, amending legislation was passed.<sup>14</sup>

19.18 The Explanatory Guide to the exposure draft Bill set out the reasons for the shift in policy, on the basis of the regulatory burden for authorised deposit-taking institutions (ADIs) and account holders:

Evidence suggests that many of the accounts that are declared unclaimed and transferred to the Commonwealth are effectively active as the account holder remains aware of them. For example, around 15 per cent of unclaimed funds transferred from ADIs are reclaimed in the same year they are transferred to the Commonwealth. Approximately 50 per cent of all funds transferred to the Commonwealth as unclaimed are reclaimed within two years.

The high proportion of effectively active accounts transferred to the Commonwealth each year under the current provisions increases the regulatory burden of the unclaimed moneys provisions for ADIs and account holders. ADIs have to assess and

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10 Ibid.

11 Senate Standing Committee on Economics, Parliament of Australia, *Treasury Amendment (Unclaimed Money and Other Measures) Bill 2012* (2012) [3.54]. There was a dissenting report released by the Coalition members of the Committee.

12 Ibid [3.54]–[3.55].

13 Institute of Public Affairs, ‘Gillard Government Seizure of Inactive Bank Accounts Is an Attack on Property Rights’ (Media Release, 28 February 2013).

14 *Banking Amendment (Unclaimed Money) Regulation 2015* (Cth); *Banking Laws Amendment (Unclaimed Money) Act 2015* (Cth).

transfer all accounts with unclaimed moneys to the Commonwealth even though many of the accounts are still effectively active. Once these accounts are transferred, account holders have to complete the necessary paperwork and verify their details in order to reclaim their accounts.<sup>15</sup>

19.19 The unclaimed moneys legislation is an example of an interference with personal property rights in the form of deposit accounts, which are forms of choses in action. Such interference has a long history. The period after which the interference occurs, and the process by which a person may seek to reclaim what has been deemed to be ‘unclaimed’ are both relevant to any consideration of whether the interference is justified. The parliamentary review processes may provide an effective vehicle for the assessment of the justification with respect to such legislation.

### **Taxation**

19.20 The Tax Institute suggested a range of provisions that may be considered as interfering with property rights. The Institute referred in particular to the Commissioner of Taxation’s powers to withhold refunds and to attach property.

19.21 The practice of staff of the Australian Taxation Office (ATO) is guided by Law Administration Practice Statements, ‘which provide instructions to ATO staff on the way they should perform certain duties involving the application of the laws administered by the Commissioner’.<sup>16</sup>

### ***Withholding refunds***

19.22 Under s 8AAZLGA of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation has the power to withhold a refund, pending verification of certain information. The Tax Institute suggested that a ‘right to a refund’ had certain property characteristics and that ‘a lay person would see a right to a refund of tax as a practical and important property right’.<sup>17</sup>

19.23 The Tax Institute pointed to a number of ‘defects’ in the Commissioner’s power to withhold a refund that should be addressed:

The power does not contain a requirement for written notice, giving rise to uncertainty as to the time at which the power has been exercised. There is also uncertainty as to time at which the Commissioner must begin considering entitlement to refund, and when the Commissioner must conclude that consideration.<sup>18</sup>

19.24 The Institute also noted that a taxpayer has limited review rights in relation to the exercise of the Commissioner’s power to withhold a refund.<sup>19</sup>

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15 *Banking Laws Amendment (Unclaimed Money) Bill 2015—Explanatory Guide* [1.4]–[1.5].

16 Australian Taxation Office, ‘Law Administration Practice Statements’ (PS LA 1998/1) [1].

17 The Tax Institute, *Submission 68*.

18 *Ibid.*

19 *Ibid.* The particular provisions identified were: *Taxation Administration Act 1953* (Cth) ss 14ZW(1)(aad)(i), 14ZYA.

19.25 Section 8AAZLGA of the *Taxation Administration Act* includes a number of matters to which the Commissioner must have regard when considering whether to withhold a refund, including, for example:

- (c) the impact of retaining the amount on the entity's financial position;
- (d) whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the notified information were found to be incorrect after the amount had been refunded.

### ***Attaching property***

19.26 The ATO's administrative practices with respect to the collection of tax liabilities is framed within the following expectations:

We expect tax debtors to pay their debts as and when they fall due for payment because:

- we are not a lending institution or a credit provider
- we expect tax debtors to organise their affairs to ensure payment of tax debts on time
- we expect tax debtors to give their tax debts equal priority with other debts.<sup>20</sup>

19.27 The *Taxation Administration Act* includes provisions to facilitate the collection of taxation debts by attaching to property in the hands of third parties through 'garnishee' powers:

Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the tax debtor or any other person who is entitled to all of part of that amount. The third party is indemnified for any money paid to the Commissioner.<sup>21</sup>

19.28 The Tax Institute acknowledged the existence of Practice Statements guiding the ATO's actions in this area, but submitted that 'there is no prior external oversight'. For example, a Practice Statement on enforcement measures provides for the Commissioner to give directions to ATO officers as to the appropriateness, timing of and amounts subject to garnishee notices. The Tax Institute expressed concern with respect to this power in that this direction 'represents the only oversight of this power prior to its exercise, and it occurs within the Commissioner's own office'. It submitted:

The Commissioner's powers to act without prior external oversight are extraordinary. There are policy reasons for those extraordinary powers, such as the necessity for the Commissioner to move quickly to prevent the withdrawal of funds from Australian shores. However, the existence of these powers makes it essential that there are quick, cost-effective and clearly defined mechanisms for reviewing those decisions once made.<sup>22</sup>

20 Australian Taxation Office, 'General Debt Collection Powers and Principles' (PS LA 2011/14) [6]–[7].

21 Australian Taxation Office, 'Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts' (PS LA 2011/18) [98]–[99].

22 The Tax Institute, *Submission 68*.

19.29 While the Practice Statements are for the guidance of ATO staff, they are regularly updated and available online.<sup>23</sup> There are public interest arguments in support of the powers, including the preservation of revenue and encouraging taxpayer compliance, notwithstanding that there may be some interference with property rights. Decisions of the Commissioner are reviewable as administrative decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 39B of the *Judiciary Act 1903* (Cth) and s 75(v) of the *Constitution*.

### Personal property securities

19.30 The Personal Properties Securities Register has replaced a number of Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sale, liens, chattel mortgages and security interests in motor vehicles such as the Register of Encumbered Vehicles and the Vehicle Securities Register.<sup>24</sup> As noted above, schemes such as these set out rules of priority of interests.

19.31 The Arts Law Centre submitted that the *Personal Property Securities Act 2009* (Cth) encroaches on property rights by determining the circumstances in which an owner of personal property may be deprived of their vested property rights in commercial transactions that are deemed to be arrangements for personal property securities. The Centre drew attention to the impact on individual artists and Indigenous Art Centres of the complexity of the registration system and commercial consignment arrangements.<sup>25</sup>

19.32 A review of the operation of the *Personal Property Securities Act* was conducted in 2014–15 by Bruce Whittaker.<sup>26</sup> One aspect of the review considered commercial consignment arrangements for artworks. Whittaker recommended an amendment to the definition of ‘commercial consignment’ in s 10(e) of the Act,<sup>27</sup> on the basis that

a sale of an artwork on consignment through an art gallery is unlikely to give rise to a commercial consignment for the purposes of the Act, and the artist should not need to register a financing statement or take other steps to protect their interest.<sup>28</sup>

19.33 Regular review mechanisms for new statutory schemes provide a way of ensuring that the operation of legislation is meeting its objectives. Whittaker made 394 recommendations for reform of the legislation and advocated that they be implemented ‘as a package’.<sup>29</sup> He urged that a collaborative drafting process be conducted, with

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23 PS LA 2011/18, for example, was issued first on 14 April 2011, and updated on 17 May 2013 and 3 July 2014. However a taxpayer cannot enforce adherence to a practice statement: *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (24 October 2013) [11].

24 See further Australian Financial Security Authority, *Personal Property Securities Register* <[www.ppsr.gov.au](http://www.ppsr.gov.au)>.

25 Arts Law Centre of Australia, *Submission 50*.

26 Bruce Whittaker, *Review of the Personal Property Securities Act 2009—Final Report* (2015). The report was tabled on 18 March 2015. A review of the Act was required under s 343.

27 *Ibid* rec 17.

28 *Ibid* 73.

29 *Ibid* [10.1.1].

private-sector input and public consultation, through an exposure draft bill.<sup>30</sup> Whittaker also recommended that whether a further review was needed be considered five years after his review.<sup>31</sup> Regular reviews of such a kind are one mechanism for assessing whether the justifications for legislation still apply.

## Intellectual property

### *Acquisition and the Constitution*

19.34 It was claimed in *JT International SA v Commonwealth* that the *Tobacco Plain Packaging Act 2011* (Cth) (TPP Act) interfered with vested intellectual property rights.<sup>32</sup> The TPP Act imposed significant restrictions upon the colour, shape and finish of retail packaging for tobacco products. It prohibited the use of trade marks on such packaging, other than as permitted by the TPP Act, which allowed the use of a brand, business or company name for the relevant tobacco product. In addition, pre-existing regulatory requirements for health messages and graphic warnings remained in place.<sup>33</sup>

19.35 The plaintiff tobacco companies argued that the TPP Act effected an acquisition of their intellectual property rights and goodwill other than on just terms, contrary to s 51(xxxi) of the *Constitution*. The TPP Act was enacted pursuant to the power of the Commonwealth Parliament to make laws with respect to external affairs—s 51(xxix)—giving effect in this instance to the *World Health Organization Framework Convention on Tobacco Control*.<sup>34</sup>

19.36 The High Court held that these statutory requirements for the plain packaging of tobacco did not constitute an acquisition of the intellectual property rights of the cigarette companies in their trademarks, designs and get up.<sup>35</sup> French CJ concluded:

In summary, the TPP Act is part of a legislative scheme which places controls on the way in which tobacco products can be marketed. While the imposition of those controls may be said to constitute a taking in the sense that the plaintiffs' enjoyment of their intellectual property rights and related rights is restricted, the corresponding imposition of controls on the packaging and presentation of tobacco products does not involve the accrual of a benefit of a proprietary character to the Commonwealth which would constitute an acquisition.<sup>36</sup>

19.37 The case is an illustration of an 'interference' with the enjoyment of vested property rights, in the trade marks held by the plaintiff companies, that did not amount to an acquisition by the Commonwealth.

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30 Ibid [10.1.2].

31 Ibid [10.3].

32 *JT International SA v Commonwealth* (2012) 250 CLR 1.

33 *Tobacco Plain Packaging Act 2011* (Cth) ss 18–19; *Tobacco Plain Packaging Regulations 2011* (Cth).

34 *Tobacco Plain Packaging Act 2011* (Cth) s 3(1)(b). See also *World Health Organization Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005). The legislation also relied on other constitutional powers, as set out in s 14.

35 *JT International SA v Commonwealth* (2012) 250 CLR 1.

36 Ibid [44].



### Copyright

19.38 Protection of intellectual property rights was an issue identified in the Rights and Responsibilities consultation conducted by the Australian Human Rights Commission (AHRC) in 2014.<sup>37</sup> Protection from ‘music theft’ and online copyright infringement were concerns expressed during the consultation.<sup>38</sup> The *Copyright Amendment (Online Infringement) Act 2015* (Cth), passed on 22 June 2015, is intended to address some of these concerns.<sup>39</sup>

19.39 Copyright, as noted in Chapter 18, is a type of property that has a long history. It is also expressly referred to in a range of international treaties to which Australia is a party.

19.40 One stakeholder in this ALRC Inquiry drew attention to the ALRC’s 2014 copyright report, in recommending a ‘fair use’ exception to copyright.<sup>40</sup> Dr Lucy Craddock made a property rights argument from the perspective of the user, in arguing that

just as authors/owners of copyright have *vested rights* regarding copyright works, so do users of those works—these are the *vested rights* represented in the statutorily created *fair dealing exceptions* to fairly deal with copyright works. These rights are being ‘intruded upon’ by the ongoing ‘advancement’ of authors/owners rights ‘beyond proper limits’ by means of contracting out of the fair dealing exceptions.<sup>41</sup>

19.41 This is essentially an argument for recognising another novel kind of property interest. Such a proposed ‘right’ has not been identified in law.<sup>42</sup> In the AHRC’s Rights and Responsibilities consultation, one online survey response suggested that current copyright laws did not provide ‘adequate protections for fair use for comment and artistic expression’.<sup>43</sup>

19.42 The Arts Law Centre of Australia also pointed to intellectual property issues, but from the perspective of the copyright owner:

Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. The recognition and protection of property rights are argued to be essential for promoting the intellectual and cultural development of society. The generally accepted rationale for those property rights is that the income that can be generated from copyright material is the incentive to innovation and creativity.<sup>44</sup>

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37 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015).

38 Ibid 44.

39 The *Copyright Amendment (Online Infringement) Act 2015* (Cth) allows owners of copyright to apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright: *Copyright Act 1968* (Cth) s 115A.

40 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014).

41 L Craddock, *Submission 67*. Craddock recommended that contracting out of copyright exceptions should be prohibited.

42 See Ch 18 concerning the fluidity and evolving nature of property rights.

43 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 44.

44 Arts Law Centre of Australia, *Submission 50*.

19.43 The Australian Publishers Association submitted to similar effect that

Copyright is not an example of Commonwealth law encroaching on rights or freedoms, it is the essential foundation for freedom of writers to ask a price for the use of their creations. Technologies have made it easier, in the words of the US Supreme Court ‘to make other people’s speeches’. That has made the principles of copyright more rather than less important to traditional rights and freedoms. There is a significant threat to traditional rights and freedoms, not from the inclusion of copyright in Commonwealth laws, but from the possibility of new exceptions that allow untrammelled free use of works and cut into the sustainability of an industry that has traditionally supported and expanded the freedom of expression that is a core tenet of our common law heritage.<sup>45</sup>

19.44 Such arguments were traversed by the ALRC in the copyright inquiry.<sup>46</sup>

### **Protection of cultural objects**

19.45 The *Protection of Cultural Objects on Loan Act 2013* (Cth) provides a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.<sup>47</sup>

19.46 The legislation operates to protect the property rights of the lenders, while potentially interfering with the property interests of others who have valid claims. The legislation contains an ‘historic shipwrecks’ clause to ensure its constitutionality.<sup>48</sup>

19.47 The Explanatory Memorandum to the Bill identified the legitimate objective of the Bill as being to encourage the loan of objects from overseas for temporary public exhibition in Australia:

The legislation addresses a significant obstacle that Australia’s major cultural institutions (such as museums, galleries and libraries) face in securing the loan of foreign objects and aligns Australia with an emerging international standard to provide protection for cultural objects on loan. Under existing Commonwealth legislation, protection for objects on loan only applies in specific and limited circumstances under the *Protection of Movable Cultural Heritage Act 1986*. The absence of more comprehensive legislation has made it increasingly difficult for those institutions to secure foreign loans.<sup>49</sup>

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45 Australian Publishers Association, *Submission 145*.

46 The recommendations are still under consideration by the Australian Government.

47 See, *Protection of Cultural Objects on Loan Bill 2012*, Explanatory Memorandum.

48 *Protection of Cultural Objects on Loan Act 2013* (Cth) s 20. See Ch 18.

49 *Protection of Cultural Objects on Loan Bill 2012*, Explanatory Memorandum.

19.48 Another objective was of ‘enhancing cultural life in Australia and promoting the right to enjoy and benefit from culture’.<sup>50</sup>

19.49 Given that the objective would have an impact on the assertion of rights by others, it said that ‘[t]o the extent that that Bill limits the right to an effective legal remedy, those limitations are reasonable, necessary and proportionate and the limitations are not arbitrary’.<sup>51</sup>

### Proceeds of crime

19.50 Each Australian jurisdiction has legislation concerning the confiscation of the proceeds of crime.<sup>52</sup> An expansion of such laws sought to attach ‘unexplained wealth’. As explained by Dr Lorana Bartels:

Laws of this nature place the onus of proof on the individual whose wealth is in dispute. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means.<sup>53</sup>

19.51 The Commonwealth laws include the *Proceeds of Crime Act 1987* (Cth) and the *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*). The 1987 Act was developed in consultation with the states and territories in what was ‘intended to form a consistent, if not uniform, Commonwealth wide legislative package providing for conviction based forfeiture of property with orders made in one jurisdiction being capable of enforcement in any other’.<sup>54</sup> In its 1999 report, *Confiscation that Counts—A Review of the Proceeds of Crime Act 1987*, the ALRC proposed legislation that is reflected in the 2002 Act, recommending the expansion of the earlier legislation to include a civil forfeiture regime.<sup>55</sup>

19.52 The 1987 Act is a conviction-based forfeiture regime; the 2002 Act, as explained in the Explanatory Memorandum, is ‘a civil forfeiture regime, that is, a regime directed to confiscating unlawfully acquired property, without first requiring a conviction’. One particular aspect was the targeting of ‘literary proceeds’. As set out in the Explanatory Memorandum to the 2002 Bill:

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- 50 This was said to engage art 15(1)(a) of the ICESCR: the right of everyone to take part in cultural life.
- 51 Protection of Cultural Objects on Loan Bill 2012, Explanatory Memorandum. This legislation also provides some protection for a claim of *jus tertii*—see Ch 18. Proceeds under the *Proceeds of Crime Act 2002* (Cth) are exempt, in recognition of Australia’s international obligations in relation to proceeds of crime, specifically the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the United Nations Convention Against Transnational Organised Crime and Its Protocol, and the United Nations Convention Against Corruption. See Craig Forrest, ‘Immunity from Seizure and Suit in Australia: The Protection of Cultural Objects on Loan Act 2013’ (2014) 21 *International Journal of Cultural Property* 143.
- 52 See summary in Lorana Bartels, ‘Unexplained Wealth Laws in Australia’ (Trends & Issues in Criminal Justice No 395, Australian Institute of Criminology, 2010).
- 53 Ibid.
- 54 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [1.6], [2.10]–[2.19].
- 55 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

The Bill introduces provisions for the forfeiture of literary proceeds, which are benefits a person derives from the commercial exploitation of their notoriety from committing a criminal offence. The expression 'literary proceeds' is intended to include 'cheque-book journalism' related to criminal activity. In general those proceeds tend to fall outside the scope of recoverable proceeds of crime as they are often not generated until after the person has been convicted (and achieved notoriety). The Bill sets out provisions for the confiscation of proceeds derived from the exploitation of criminal notoriety by means of a type of pecuniary penalty order against the person.<sup>56</sup>

19.53 Proceeds of crime legislation and other laws providing for forfeiture of property have a long history. As the ALRC commented in the 1999 report, '[f]orfeiture as a consequence of wrongful action is a concept whose origins in English law can be traced back to antiquity'.<sup>57</sup> The ALRC cited two early examples: the feudal law of 'deodand' (Deo—to god; dandam, to be given), and the felony forfeiture rule.<sup>58</sup> The effect of deodand was 'to render forfeit any instrument or animal that was the cause of accidental death of a person'.<sup>59</sup> With respect to forfeiture, the ALRC cited the common law rule under which the goods and chattels of a person convicted of a felony 'became forfeit to the Crown' and the related concept of 'attainder', 'under which all civil rights and capacities were automatically extinguished on sentence of death upon conviction for treason or felony'.<sup>60</sup>

19.54 With the disappearance of the old common law rules,<sup>61</sup> new ones were developed, such as the rule that prevented a killer from benefiting from the estate of the person killed.<sup>62</sup> In addition, new statutory forms of forfeiture have been introduced: 'in rem' forfeiture laws which permit confiscation of goods employed for, or derived from,

56 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.

57 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.1].

58 The origin of the word 'felony' is referred to by Gageler J in *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [103]. As Gageler J points out, there is a difference of view as to its origin: William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 7, 95; Fredrick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1899) vol II, vol ii, 464–5.

59 'This, in turn, had its genesis in the even earlier Anglo-Saxon concept of brana (the slayer) where the object causing death was forfeited and given to the family of the deceased': Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.2]. Deodand became a problem in the age of railways and industrial equipment. It was abolished at the same time as the introduction of a statutory right to seek compensation for wrongful death in Lord Campbell's Act: see Richard Fox and Arie Freiberg, 'Fighting Crime with Forfeiture: Lessons from History' (2000) 6 *Australian Journal of Legal History* 1, 36.

60 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.4]. The common law rule required the forfeiture of property in the case of offences punishable by death (the felony forfeiture rule). Dr KJ Kesselring cites two examples from the UK national archives in the public record office: KJ Kesselring, 'Felony Forfeiture in England, c. 1170–1870' (2009) 30 *The Journal of Legal History* 201, 201. For a consideration of the old rules see, also, eg, Jacob J Finkelstein, 'The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty' (1973) 46 *Temple Law Quarterly*; Richard Fox and Arie Freiberg, above n 59.

61 *Forfeitures for Treason and Felony Act 1870* 33 & 34 Vict, c 23. The legislation was followed in Australia: see Richard Fox and Arie Freiberg, above n 59, 44–7.

62 See, eg, *Forfeiture Act 1995* (NSW).

illegal activity'.<sup>63</sup> In the Australian context, the *Customs Act 1901* (Cth) was an early Commonwealth example—a modern iteration of the old law of deodand as its focus was upon the goods themselves, rather than upon conviction.<sup>64</sup>

19.55 The *Proceeds of Crime Act* was said to implement Australia's obligations under the *International Convention for the Suppression of the Financing of Terrorism*, and resolutions of the United Nations Security Council relevant to the seizure of terrorism-related property.<sup>65</sup>

19.56 Two particular aspects of the legislation which prompted stakeholder comment concern literary proceeds and unexplained wealth.

### ***Literary proceeds***

19.57 'Literary proceeds' are defined in s 153 as 'any benefit that a person derives from the commercial exploitation of':

- (a) the person's notoriety resulting, directly or indirectly from the person committing an indictable offence or a foreign indictable offence; or
- (b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.

19.58 If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. While there is no requirement that a person has been convicted of the offence, the court hearing the application for the order must be satisfied on the balance of probabilities that the person has committed the offence.<sup>66</sup>

19.59 The way the legislation operates is explained as follows:

The Australian Federal Police are responsible for investigating whether or not a person has obtained literary benefits. If there is sufficient evidence to indicate that the literary proceeds provisions in the Act could capture a person's profits, the matter will be referred to the Commonwealth Director of Public Prosecutions. An application by the Commonwealth Director of Public Prosecutions is then made for restraining orders over the profits and then a literary proceeds order. The literary proceeds order will require that payments, based on the literary proceeds that a person has derived, are made to the Commonwealth.<sup>67</sup>

63 Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [2.5].

64 Richard Fox and Arie Freiberg, above n 59, 38. Freiberg and Fox trace the customs forfeiture provisions to the reign of Richard II and the attempts to regulate trade and encourage English shipping. To restrict coastal trade to English ships, goods carried on foreign vessels were forfeited. This approach was chosen as it was administratively convenient, and did not require customs staff to have to prove the elements of a crime: 39–41. The authors refer in particular to Lawrence Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering* (Columbia University Press, 1939); Norman Gras, *The Early English Customs System* (Harvard University Press, 1918).

65 Explanatory Memorandum, *Proceeds of Crime Bill* (Cth) 2002.

66 *Proceeds of Crime Act 2002* (Cth) s 152. See summary of provisions in: Monica Biddington, 'Selling Your Story: Literary Proceeds Orders under the Commonwealth *Proceeds of Crime Act 2002*' (Research Paper No 27, Law and Bills Digest Section, Parliament of Australia, August 2007).

67 Biddington, above n 66.

19.60 The court has to consider a number of factors when considering whether to make a literary proceeds order, including ‘whether supplying the product or carrying out the activity was in the public interest’; and ‘the social, cultural or educational value of the product or activity’.<sup>68</sup>

19.61 The provisions were tested in relation to the publication of *My Story*, a book co-authored by convicted drug smuggler Schapelle Corby with Kathryn Bonella, based on a series of secret interviews Bonella conducted with Corby inside prison in Bali. The Commonwealth Director of Public Prosecutions (CDPP) applied to the Supreme Court of Queensland, pursuant to s 20 of the *Proceeds of Crime Act*, for an order ‘that any payments made by Pan Macmillan Australia to Schapelle Corby or her sister or brother-in-law or any other agent’, in respect of the biography written by Corby and another, ‘must not be disposed of otherwise than into the custody and control of the Official Trustee in Bankruptcy’. A similar order was sought concerning payments made to Corby’s sister concerning an article published in the magazine, *New Idea*. Freezing orders were sought concerning any such payments until the determination of the CDPP’s claim that these moneys should be paid to the Commonwealth.<sup>69</sup>

19.62 In March 2007 the Court of Appeal ruled in the CDPP’s favour and held that, as literary proceeds were generated in Australia in consequence of the publication in Australia of both the book and article, that was ‘sufficient to satisfy the test that a benefit was derived in Australia for the purposes of the legislation’.<sup>70</sup> The matter was then heard in the trial division of the Supreme Court. In 2009 the Court again ruled in the CDPP’s favour, that the CDPP could seize future payments made to Corby’s family as proceeds of crime. The order enabled the seizure of around \$128,000.<sup>71</sup>

19.63 Such orders are not frequent. As one commentator remarked:

Despite that success, applications for literary proceeds of crime orders ... are few and far between. ‘It’s very rare’, ... but, in the case of Corby, ‘you can’t have legislation that is intended to be a deterrent and not enforce it in a high-profile case, it would send the wrong message’.<sup>72</sup>

68 *Proceeds of Crime Act 2002* (Cth) ss 154(a)(ii)–(iii).

69 *DPP (Cth) v Corby* [2007] 2 Qd R 318, 319 (Keane JA).

70 *Ibid* 321 (Williams JA).

71 Daisy Dumas, ‘Corby Caught in the Murky World of Proceeds-of-Crime Laws’ *The Sydney Morning Herald* (Sydney), 20 February 2014 12; ‘Schapelle Corby Book Proceeds Seized by Director of Public Prosecutions’ *Herald Sun* (online), 8 April 2009 <www.heraldsun.com.au>. A US example involved Jordan Belfort (The Wolf of Wall St) who was convicted of fraud. He reportedly profited \$US1.7 m from the sale of his memoirs and the movie rights based on his book, but the funds were seized under US proceeds of crime laws: Eriq Gardner, ‘US Government Wants Jordan Belfort’s Pay from “Wolf of Wall Street”’ *The Hollywood Reporter* (online), 10 January 2014 <www.hollywoodreporter.com>. See also Lucas Bastin, ‘David Hicks and Australian Proceeds of Crime Legislation: Can He Sell His Story?’ (2009) 37 *Federal Law Review* 315; Rebecca Sullivan, ‘Could Schapelle Corby Make Money from Her Crime?’ *News.com.au* (online), 10 February 2014 <www.news.com.au>.

72 Dumas, above n 71, quoting Melbourne barrister Christian Juebner. A proposed interview of Corby by Channel 7 led to an AFP raid of the Sydney offices of Channel 7. When the likelihood of the interview changed, the AFP dropped its investigation: ‘Schapelle Corby: AFP Discontinues Proceeds of Crime Investigation’ *ABC News* (online), 14 March 2014 <http://www.abc.net.au/news/>.

19.64 The justification for the legislation is the avoidance of ‘chequebook journalism’ through the deterrence of possible seizure of assets. The Commonwealth is not alone in such legislation: Queensland, South Australia and the ACT have literary or ‘artistic’ proceeds confiscation provisions.<sup>73</sup>

19.65 Civil Liberties Australia submitted that, because the proceeds of literary works ‘are not the direct proceeds of the commission of a crime’, such targeting ‘is an encroachment on freedom of speech’.<sup>74</sup>

### ***Unexplained wealth***

19.66 In 2010 the reach of the legislation was expanded to include ‘unexplained wealth’ provisions.<sup>75</sup> These provisions

allow the court to make orders with respect to the restraint and forfeiture of assets where the court is satisfied that there are reasonable grounds to suspect that a person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired.<sup>76</sup>

19.67 The Revised Explanatory Memorandum said that the expansion of the legislation invoked art 20 of the *United Nations Convention Against Corruption*, entitled ‘Illicit Enrichment’:

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.<sup>77</sup>

19.68 The Commonwealth unexplained wealth regime draws on the Northern Territory and Western Australian experience, but the Commonwealth’s scheme is limited to confiscating unexplained wealth derived from offences within Commonwealth constitutional power.<sup>78</sup> In the background to the Commonwealth provisions was an agreement by the Standing Committee of Attorneys-General,<sup>79</sup> in April 2009, to a set of resolutions ‘for a comprehensive national response to combat organised crime’,

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73 *Criminal Proceeds Confiscation Act 2002* (Qld) ss 200–11; *Criminal Assets Confiscation Act 2005* (SA) ss 110–17; *Confiscation of Criminal Assets Act 2003* (ACT) ss 80–1, 83. See analysis in Bastin, above n 71, 318–21.

74 Civil Liberties Australia, *Submission 94*.

75 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

76 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 18.

77 *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005). The Convention entered into force on 14 December 2005. See also, Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

78 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 4.

79 This body is now referred to as the Law, Crime and Community Safety Council (LCCSC).

including to strengthen criminal asset confiscation by the introduction of unexplained wealth provisions.<sup>80</sup>

19.69 However, proceeds of crime legislation may raise concerns about its breadth. In 2006, Tom Sherman conducted the first independent review of the 2002 legislation, pursuant to the requirement for such a review in s 327 of the Act. He stated:

Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community?<sup>81</sup>

19.70 The Law Council of Australia (Law Council) submitted to this ALRC Inquiry that civil confiscation and unexplained wealth proceedings under the *Proceeds of Crime Act* ‘have the potential to interfere with property rights’ and that consideration should be given to ‘whether these schemes contain adequate safeguards to ensure proportionality and that intrusion upon property rights is justified’.<sup>82</sup> Similarly, in the AHRC Rights and Responsibilities consultation, concern was expressed particularly about state and territory legislation:

Property rights may be undermined by disproportionate criminal confiscation laws, which provide for the forfeiture of all assets owned by a person who is a declared ‘drug trafficker’. The submission from the Australian Lawyers Alliance noted:

... [C]riminal confiscation laws in the Northern Territory and Western Australia are currently grossly disproportional to an offence, and deeply impact upon an individual and their family’s rights to own property and for any acquisition to be on ‘just terms’.<sup>83</sup>

19.71 In 2014, in *Attorney-General (NT) v Emmerson*,<sup>84</sup> the High Court considered the forfeiture scheme of the Northern Territory. The Northern Territory Court of Appeal had held that a statutory scheme for the forfeiture of property of those convicted three or more times within a 10-year period of drug trafficking was invalid.<sup>85</sup> One ground of alleged invalidity of the scheme was that it provided for an acquisition of property otherwise than on just terms.<sup>86</sup>

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80 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 1. SCAG issued a communiqué on a national response to organised crime. In this communiqué, Ministers agreed to ‘arrangements to support the comprehensive national response ... to effectively prevent, investigate and prosecute organised crime activities and target the proceeds of organised criminal groups’: Standing Committee of Attorneys-General, *Communiqué 6–7 August 2009* <www.lccsc.gov.au>.

81 Tom Sherman, ‘Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)’ (Attorney-General’s Department, 2006) 37.

82 Law Council of Australia, *Submission 75*.

83 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 46.

84 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014).

85 *Emmerson v DPP* (2013) 33 NTLR 1. Under *Criminal Property Forfeiture Act* (NT) s 94(1). The history of such provisions is described in the judgment of the majority at *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [15]–[21].

86 *Emmerson v DPP* (2013) 33 NTLR 1, [100] (Barr J in agreement with Riley CJ).



19.72 The objectives of the scheme were: to deter criminal activity and to prevent the unjust enrichment of persons involved in criminal activities. The objects were penal and in addition to any punishment imposed in criminal proceedings.<sup>87</sup>

19.73 A majority of the High Court upheld the Northern Territory legislation. The Court stated:

The proper inquiry ... is the subject of the statutory scheme. The question is whether the statutory scheme can be properly characterised as a law with respect to forfeiture, that is, a law which exacts or imposes a penalty or sanction for breach of provisions which prescribe a rule of conduct. That inquiry must be answered positively, which precludes any inquiry into the proportionality, justice or wisdom of the legislature's chosen measures.<sup>88</sup>

19.74 The Court further explained that the provisions comprising the statutory scheme in respect of declared drug traffickers

do not cease to be laws with respect to the punishment of crime because some may hold a view that civil forfeiture of legally acquired assets is a harsh or draconian punishment. As Dixon CJ said, concerning the customs legislation providing for forfeiture considered in *Burton v Honan*:

'once the subject matter is fairly within the province of the Federal legislature the justice and wisdom of the provisions which it makes in the exercise of its powers over the subject matter are matters entirely for the Legislative and not for the Judiciary'.<sup>89</sup>

19.75 With respect to the argument that the breadth of the provisions amounted to an acquisition of property without provision of just terms, the Court said that characterising them in this way was 'erroneous':

It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both 'deter' and 'deal with' such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature.<sup>90</sup>

19.76 The Court's judgment is an example of an application of the principle of legality: the legislature having made its intention clear, the question of assessing things like 'proportionality' were not a matter for the Court, but for the 'elected Parliament'.<sup>91</sup>

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87 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [37]. It was argued that the penal aspect of the scheme was revenue-raising and played 'no legislative role in the enforcement of the criminal law in relation to drug offences or in the deterrence of such activities'.

88 *Ibid* [80] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

89 *Ibid* [81]; *Burton v Honan* (1994) 86 CLR 169, 180.

90 *Attorney-General (NT) v Emmerson* [2014] HCA 13 (2014) [85]. Compare Gageler J who concluded that the dominant character of the laws was the acquisition of property, and the acquisition was otherwise than on just terms: *Ibid* [140].

91 A clear intention could not have overcome s 51(xxxi) of the *Constitution*, if it applied.

19.77 In 2012 the Parliamentary Joint Committee on Law Enforcement (Law Enforcement Committee) recommended strengthening the proceeds of crime legislation further (the Law Enforcement Committee report).<sup>92</sup> The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2014* (Cth) was passed on 9 February 2015 to amend the *Proceeds of Crime Act*.

19.78 The Law Enforcement Committee recommended ‘major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws’.<sup>93</sup>

Unexplained wealth legislation represents a new form of law enforcement. Where traditional policing has focused on securing prosecutions, unexplained wealth provisions contribute to a growing body of measures aimed at prevention and disruption. In particular, unexplained wealth provisions fill an existing gap which has been exploited, where the heads of criminal networks remain insulated from the commission of offences, enjoying their ill-gotten gains.<sup>94</sup>

19.79 The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee (Legal and Constitutional Affairs Committee) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee). The Committee supported the amendments to strengthen the *Proceeds of Crime Act*, informed by its view that ‘serious and organised crime poses a significant threat to Australian communities’.<sup>95</sup>

19.80 The Law Enforcement Committee made two recommendations of relevance to this chapter that were included in the Bill: one concerning the evidence relevant to unexplained wealth proceedings that could be seized under a search warrant;<sup>96</sup> the other concerning the removal of a court’s discretion to make unexplained wealth restraining orders where a person’s wealth is over \$100,000.<sup>97</sup>

19.81 There are three types of orders that can be sought in relation to unexplained wealth: unexplained wealth restraining orders—s 20A; preliminary unexplained wealth orders—s 179B; and unexplained wealth orders—s 179E.

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92 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012). Legislation reflecting some of the recommendations was introduced in November 2012: Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (Cth) sch 1. This Bill lapsed.

93 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) viii.

94 *Ibid.*

95 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.43]. There was a single recommendation in the report: to support the passage of the Bill in the Senate: *Ibid* Rec 1, [2.51].

96 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 5; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 27–8.

97 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 12–13; Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) sch 1 items 2, 4, 18.

19.82 The removal of discretion was traversed fully in the Law Enforcement Committee report and by the Legislation Committee.

In the making of final orders for most proceedings under the [*Proceeds of Crime Act*], if the appropriate conditions and tests are satisfied, then the court must make that final order. In the case of unexplained wealth orders, however, the court retains a discretion and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements.<sup>98</sup>

19.83 The Law Enforcement Committee report recommended that the court's discretion to make a restraining or preliminary unexplained wealth order be removed in cases where the amount of unexplained wealth was more than \$100,000.<sup>99</sup> The Legal and Constitutional Affairs Committee supported this approach, noting the additional safeguards in cases concerning unexplained wealth restraining orders and final unexplained wealth orders, which provided that the court may refuse an order if 'it is not in the public interest to make the order':<sup>100</sup>

In relation to concerns raised in respect of removing the court's discretion to make an unexplained wealth order, the committee considers that the safeguards provided by the bill to retain the discretion where unexplained wealth is less than \$100,000 or where it is not in the public interest to make the order are adequate and will reinforce the purpose of the unexplained wealth provisions to target the 'Mr and Mrs Bigs' of organised crime.<sup>101</sup>

19.84 The kinds of concerns addressed by the Legal and Constitutional Affairs Committee are reflected in the submission of the Law Council, which was concerned about there being 'adequate safeguards ... to protect individual rights, or clear limits on the scope of prescribed power'.<sup>102</sup>

19.85 An assessment that takes into account safeguards and issues of proportionality is one that may occur within the parliamentary context, forming part of the scrutiny mechanisms applying to parliamentary bills. This is discussed in Chapter 3. As noted above, the various bills to expand or 'strengthen' the proceeds of crime legislation have been subject to such scrutiny. The 2002 legislation expressly included a review requirement. This is one mechanism for ensuring that the potential breadth of

98 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) [3.183]. The Committee noted that a discretion was not included in the original Bill, when first introduced in 2009, but it was included by amendment in the Senate.

99 Ibid rec 12. Additional statutory oversight mechanisms were recommended: Ibid rec 13.

100 *Proceeds of Crime Act 2002* (Cth) ss 20A(4), 179E(6).

101 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014) [2.45].

102 Law Council of Australia, Submission No 5 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (June 2014). See also Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) rec 13.

legislation is reviewed periodically. Since 2010 the confiscation scheme has been expressly subject to the oversight of the Law Enforcement Committee.<sup>103</sup>

19.86 The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act* was intended to improve the operation of the Commonwealth unexplained wealth provisions. The Act implemented a number of recommendations made in the Law Enforcement Committee report. These related to clarifying the investigation and litigation of Commonwealth unexplained wealth matters, such as streamlining affidavit requirements and removing a court's discretion to make unexplained wealth orders once relevant criteria are satisfied.<sup>104</sup> The amendments also included the stipulation of a report to the Law Enforcement Committee by the Commissioner of the Australian Federal Police about unexplained wealth investigations and proceedings.<sup>105</sup>

19.87 The Law Enforcement Committee also recommended that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime, and that a referral of powers be sought towards that end.<sup>106</sup> The 2015 amendments did not expressly refer to these recommendations but may be seen as a first step in this direction.

19.88 The *Proceeds of Crime Act* is subject to ongoing review by the Law Enforcement Committee. The breadth of the unexplained wealth provisions is a matter that falls within these ongoing functions.

19.89 The Law Council supported a review of the breadth of the Commonwealth proceeds of crime legislation by the Law Enforcement Committee 'to determine whether it unduly interferes with vested personal property rights' and whether the scheme was 'proportionate'. The Law Council considered that this was important because of the introduction of unexplained wealth measures into the Commonwealth legislation and the amendment in 2014 to prevent restrained assets being used to meet reasonable legal expenses for the purposes of defending unexplained wealth proceedings.

19.90 The Law Council suggested that such a review should take into account the following:

- (a) personal property rights;
- (b) the equality-of-arms principle;
- (c) the presumption of innocence;

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103 *Proceeds of Crime Act 2002* (Cth) s 179U. This provision was introduced by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

104 Explanatory Memorandum, *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (Cth).

105 *Proceeds of Crime Act 2002* (Cth) ss 179U(3)–(5).

106 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) recs 14, 15. See also recs 16–18.

(d) legal aid commissions; and

(e) consistency with the *United Nations Convention Against Corruption*.<sup>107</sup>

19.91 The Law Council also pointed to an announcement in August 2015 for further changes to the unexplained wealth legislation as a matter that should be included in any review.<sup>108</sup>

19.92 The Law Council drew attention to the *Australian Border Force Act 2015* (Cth) and the amendment to s 213(3)(g) permitting the Comptroller-General of Customs to issue notices to financial institutions. ‘Authorised officers’, for the purposes of issuing notices, now include a Department of Immigration and Border Protection worker who is an Australian Public Service employee authorised by the Comptroller-General of Customs. The Law Council stated that the effect of this is that

any authorised DIBP employee may apply for a freezing order where there is suspicion that funds in an account are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concerns or is wholly or partly an instrument of a serious offence. A magistrate must then make the freezing order if satisfied that there is a risk that the balance of the account will be reduced.

19.93 The Law Council was concerned that the granting of a freeze order ‘is a low threshold which leaves the court with limited discretion to refuse to make such an order’, once the requirements of s 15B of the *Proceeds of Crime Act* have been met. The freeze order suspends a person’s right to deal with their property, without:

- (a) establishing beyond reasonable doubt that the person whose property is subject to the order has committed an offence; and
- (b) the affected party being heard.<sup>109</sup>

19.94 The Law Council considered that the officers authorised to make a freeze order application ‘should be limited to those with a demonstrated need to do so in the law enforcement context’:

It has not been demonstrated that such a need exists for APS employees within the broader DIBP and therefore may be unjustified. It is also noted that there is no time restriction on the power to freeze assets, which suggests its use may be disproportionate in its impact on those subjected to a freeze order. The Law Council recommends that the law be amended to impose a maximum time period, requiring authorised officers to justify the ongoing need for a freeze order.<sup>110</sup>

19.95 Concerns of this kind could be addressed through the ongoing review functions of the Law Enforcement Committee. Given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee’s proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the

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107 Law Council of Australia, *Submission 140*.

108 ‘PM Urges Australians To Dob In Ice Dealers’ *The Sydney Morning Herald* (online), 16 August 2015 <[www.smh.com.au](http://www.smh.com.au)>; Michael McKenna, ‘PM To Give Anti-Bikie Ice Watchdog More Bite’ *The Australian* (online), 17 August 2015 <[www.theaustralian.com.au](http://www.theaustralian.com.au)>.

109 Law Council of Australia, *Submission 140*.

110 *Ibid.*

*United Nations Convention Against Corruption*. The ALRC considers that a further review in due course, like the one in 2006, should be scheduled in due course. Specific areas of review may include safeguards and procedural fairness issues.<sup>111</sup>

### Search and seizure provisions

19.96 A number of Commonwealth criminal law provisions may interfere with property rights.<sup>112</sup> The Law Council identified, in particular, search and seizure provisions.<sup>113</sup>

19.97 Under provisions introduced into the *Crimes Act 1914* (Cth) through the *Crimes Legislation Amendment Act 2011* (Cth), electronic equipment may be temporarily removed from warrant premises for the purposes of examination.<sup>114</sup> An executing officer need not inform the person where and when the equipment will be examined, if the officer believes on reasonable grounds that having the person present might endanger the safety of a person or prejudice an investigation or prosecution. The Law Council submitted that the 14-day time limit allowed for examination of removed electronic equipment ‘may involve a significant disruption to business and unjustifiably interfere with property rights, if a more proportionate measure is available to achieve the same end’.<sup>115</sup>

19.98 While the Crimes Legislation Amendment Bill 2010 was discussed by the Scrutiny of Bills Committee, there was no comment on these provisions.<sup>116</sup>

19.99 The Law Council also drew attention to pt 1AAA of the *Crimes Act*, which was introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). These provisions allow an Australian Federal Police member or special member to search a property under a delayed notification search warrant without immediate notification to the occupier. The Law Council submitted that, as there is provision for compensation for damage only to electronic equipment (s 3ZZCI) and not any other property owned by an individual, ‘questions arise as to whether the scheme is reasonable or proportionate’.<sup>117</sup>

19.100 In reviewing the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Scrutiny of Bills Committee commented that there was a ‘potential for a delayed notification search warrant scheme to trespass on personal rights and liberties (by allowing Australian Federal Police officers to covertly enter and

111 These were matters raised during parliamentary committee scrutiny: see, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014).

112 The definition of ‘property’ in the *Crimes Act 1914* (Cth) is very broad, including ‘money and every thing, animate or inanimate, capable of being the subject of ownership’: *Ibid* s 3.

113 Law Council of Australia, *Submission 75*.

114 *Crimes Act 1914* (Cth) ss 3K(3), (3AA).

115 Law Council of Australia, *Submission 75*.

116 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2010* (November 2010) 330–4.

117 Law Council of Australia, *Submission 75*.

search premises, without the knowledge of the occupier of the premises)'.<sup>118</sup> However, these comments addressed the extension of powers to issue warrants to new categories of legal officers, rather than addressing issues of interference with personal property.

19.101 The Parliamentary Joint Committee on Intelligence and Security's Advisory Report into the Bill also noted that submissions had raised the 'adequacy of compensation' as a concern with the delayed notifications search warrant scheme.<sup>119</sup> The Intelligence and Security Committee did not make specific recommendations about compensation for the seizure of property.

19.102 The Attorney-General's Department's submission to the Intelligence and Security Committee included the following comments about the justification for pt 1AAA:

These amendments are a response to the challenge posed by current requirements to notify the occupier of the premises in relation to the execution of a search warrant. Such notification alerts suspects of police interest in their activities, and can disrupt the investigation allowing a person to avoid further detection, conceal or destroy evidence, or notify their associates, who may not yet be known to police. The item introduces a new scheme, limited to terrorism offences, to allow delaying notification of the execution of the warrant. This will give the AFP the significant tactical advantage of allowing an investigation to remain confidential. An application for a delayed notification search warrant will be subject to multiple levels of scrutiny and authorisation. Extensive safeguards will ensure that the Bill balances the legitimate interests of law enforcement in preventing serious terrorism offences with the need to protect important human rights.<sup>120</sup>

19.103 While not specifying which provisions in the Bill act as 'extensive safeguards', it may be understood that they include the threshold for issuing a warrant under pt 1AA of the *Crimes Act*, which provides that a magistrate may issue a warrant to search premises where there are reasonable grounds for suspecting that there is, or will be in the next 72 hours, any evidentiary material at the premises.<sup>121</sup> Sections 3F and 3J outline the things that are authorised by the search warrant and the powers of executing officers. Section 3M provides that the owner be afforded compensation for damage to equipment sustained in the execution of a warrant, in some circumstances. Powers of search and seizure relating to terrorist acts and offences are subject to a sunset clause.<sup>122</sup> The inclusion of such a clause is one way of counterbalancing concerns about potential encroachment on rights—by giving it a limited duration.

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118 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 786.

119 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) [2.49].

120 Attorney-General's Department, Submission No 8 to the Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters Bill 2014)* (2014).

121 *Crimes Act 1914* (Cth) s 3E(1).

122 *Ibid* s 3UK.

19.104 The Law Council also expressed concerns about s 35K of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). This provision creates an immunity, subject to a number of conditions, for authorised conduct that is part of a special intelligence operation. Although the immunity does not extend to conduct that ‘causes significant loss of, or serious damage to, property’,<sup>123</sup> the Law Council submitted that the immunity

may not be justified in many cases as a matter of national security if, for example, the property is owned by a third party or becomes damaged incidentally to the special intelligence operation. Further, precluding payment of compensation tends to increase the likelihood that such an encroachment is disproportionate.<sup>124</sup>

19.105 Despite the immunity, the Inspector-General of Intelligence and Security (IGIS) can recommend that ASIO pay compensation to aggrieved individuals in appropriate cases.<sup>125</sup> The Explanatory Memorandum for the Bill that inserted s 35K into the *ASIO Act* stated that

the oversight role and function of the IGIS is an effective and important means of ensuring that consideration is given to the payment of compensation to individuals in appropriate cases concerning actions taken under Division 4, while preventing any prejudice to national security that could arise if participants in an SIO were subject to civil liability in respect of their conduct as part of the SIO.<sup>126</sup>

19.106 The Independent National Security Legislation Monitor’s (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.<sup>127</sup> The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation, effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.<sup>128</sup>

19.107 The Independent National Security Legislation Monitor’s (INSLM) ongoing oversight roles include div 3, pt III of the *ASIO Act*, in which s 35K is located.<sup>129</sup> The Parliamentary Joint Committee on Intelligence and Security (Intelligence and Security Committee) is required to complete, by 7 March 2018, a review of the operation,

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123 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35K(1)(e)(iii).

124 Law Council of Australia, *Submission 75*.

125 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

126 *Ibid.*

127 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM’s functions include reviewing the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.

128 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: *Ibid* s 29(1)(a).

129 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6. Under s 5, the INSLM’s functions include reviewing the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation. Counter-terrorism and national security legislation is defined to include div 3 pt III of the *ASIO Act*: s 4.



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effectiveness and implications of a number of provisions, including div 3, pt III of the *ASIO Act*.<sup>130</sup>

## Conclusion

19.108 Many Commonwealth laws identified as interfering with personal property rights have been the subject of recent reviews or extended consideration by parliamentary committees or the High Court. The parliamentary committees included an assessment of the laws in terms of their impact on rights and liberties and, in the case of the Human Rights Committee, compatibility with international human rights instruments using a proportionality analysis.

19.109 The ALRC concludes that the breadth of the *Proceeds of Crime Act* is one area that may require further consideration. The 2002 Act expressly provided for a review, which took place in 2006. The legislation was expanded in 2010 to extend to ‘unexplained wealth’ and was amended further in 2015. The Law Enforcement Committee provides ongoing scrutiny of the Commonwealth legislation and the Australian Federal Police must provide annual reports. However, given the potential impact of unexplained wealth measures on personal property, and the Law Enforcement Committee’s proposal for a national coordinated scheme, the ongoing scrutiny needs to ensure that such a scheme is proportionate in light of its objectives to meet the obligations agreed to under the *United Nations Convention Against Corruption*. The ALRC also suggests that a further review, like the one conducted in 2006, be scheduled in due course.

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130 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). The Intelligence and Security Committee also has the power to question ASIO officials about decisions to conduct a special intelligence operation, as part of its power to review the administration and expenditure of the intelligence agencies, including ASIO: *Ibid* s 29(1)(a).

