



Australian Government
Attorney-General's Department

Criminal Justice Division

PROPOSAL FOR AMENDMENTS TO THE MONEY LAUNDERING PROVISIONS IN DIVISION 400 OF THE *CRIMINAL CODE ACT 1995*

Introduction

1. The Government is proposing legislative amendments to the money laundering provisions in Division 400 of the *Criminal Code Act 1995* (Criminal Code).
2. The purpose of this paper is to seek public comment on the proposals.
3. Division 400 was inserted into the Criminal Code in 2002, replacing the money laundering offences in sections 81 and 82 of the *Proceeds of Crime Act 1987*. The provisions were added to reflect the serious nature of money laundering and to implement recommendations from the Australian Law Reform Commission Report *Confiscation that Counts*.
4. The proposed reforms will ensure that the provisions operate correctly to implement Government policy, and implement several technical amendments.

Proposals

Correction to reference in section 400.9(3)(b)

5. The proposed amendment would correct a technical error in paragraph 400.9(3)(b) of the Criminal Code. Paragraph 400.9(3)(b) currently refers to 'a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution.' The reference to the Constitution should be corrected to refer to paragraph 51(v) (postal, telegraphic, telephonic, and other like services), not paragraph 51(xx), which is the Corporations power.

Amend definition of 'instrument of crime' and 'proceeds of crime'

6. It is proposed that the definitions of 'instrument of crime' and 'proceeds of crime' in subsection 400.1(1) be amended to clarify that the money laundering offences in Division 400 of the Criminal Code apply to instruments or proceeds of *all* indictable offences. This reflects the original policy intention of the amendments.
7. An 'instrument of crime' for the purposes of Division 400 will be money or other property used (or intended to be used) in, or in connection with, the commission of a Commonwealth, State, Territory or foreign indictable offence even if it may be dealt with summarily in some circumstances.
8. 'Proceeds of crime' for the purposes of Division 400 will be money or other property, wholly or partly derived or realised, whether directly or indirectly, by any person from the

commission of a Commonwealth, State, Territory or foreign indictable offence even if it may be dealt with summarily in some circumstances.

9. This amendment will also ensure consistency with the definitions of ‘instrument of crime’ and ‘proceeds of crime’ in the Proceeds of Crime Act.

Limit consideration at s 400.9(2)(c)

10. It is proposed to attach a timeframe to the consideration of the conduct at paragraph 400.9(2)(c) of whether the value of money or property is grossly out of proportion to a defendant’s income and expenditure. The timeframe would be reasonably proximate to the date of the conduct.
11. As presently formulated, paragraph 400.9(2)(c) satisfies the reasonable suspicion element of the offence if the trier of fact believes the value of the money or property in question is grossly out of proportion to the defendant’s income and expenditure. However, paragraph 400.9(2)(c) does not attach any timeframe to this. A decision of the NSW District Court in *R v Au Chung Fong [Unreported 23 September 2005]* established that the trier of fact is entitled to consider conduct in terms of an unlimited period of time. Unintentionally, this omission may limit the effectiveness of the presumption, as evidence will always be presented relative to a specific, not unlimited, period of time.

Ensure the definitions of ‘receives’, ‘possesses’, ‘conceals’ and ‘disposes’ capture the right to access money or property

12. It is proposed to insert a definition into subsection 400.1(1) of the Criminal Code to avoid doubt that the terms ‘receives’, ‘possesses’, ‘conceals’ and ‘disposes’ include circumstances where a right exists to access money or property.
13. Currently, the term ‘receives’, ‘possesses’, ‘conceals’ and ‘disposes’ are not defined in the Criminal Code and the common law definitions apply. The common law definition of ‘possess’ does not include a circumstance where a right exists to access money or property, for example, money deposited in a bank account. An unintended consequence is that a person who has deposited funds in a bank account cannot be said to be in ‘possession’ of these funds, and therefore does not meet the physical fault element of the offences in Division 400.
14. The original policy intention to capture circumstances where a right exists to access money or property is clear. The definition of ‘property’ in Division 400 was drafted to ensure it included these circumstances. Specifying that ‘receives’, ‘possesses’, ‘conceals’ and ‘disposes’ includes circumstances where a right exists to access money or property would assist in removing any doubt and giving effect to the initial policy intention.

Amend definition of ‘deals with money or other property’ and insert new element to offences at sections 400.3-400.8.

15. It is proposed to amend the definition of ‘deals with money or other property’ at section 400.2 to separate the conduct of ‘dealing’ (paragraphs 400.2(1)(a) and 400.2(2)(a)) and the circumstances surrounding the dealing (paragraphs 400.2(1)(b) and 400.2(2)(b)). The circumstances surrounding the dealing specify the extent of the Commonwealth’s jurisdiction in relation to money laundering, and would be retained in a new definition in the Division.

16. The current definition of ‘deals with money or other property’ would be limited to the *conduct* of how the money is dealt with (i.e. paragraphs 400.2(1)(a) and 400.2(2)(a)). This would simplify and more accurately reflect the meaning of the term. A new definition would be created to capture the *circumstances* that surround the ‘dealing’ (i.e. paragraphs 400.2(1)(b) and 400.2(2)(b)).
17. It would be necessary to include a reference to this new definition in the offences at sections 400.3-400.8 to ensure that the prosecution is still required to establish the circumstances of how the money or other property is dealt with.
18. This additional item in the offences would be that one of the circumstances, as specified in the new definition, applied at the time of dealing with the money or other property. As jurisdictional elements, it is proposed that the circumstances attract absolute liability. This is consistent with the *Guide for Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and will correct the need to establish two different fault elements.

Any comments?

If you would like to make a submission on these proposals, please send it to the Attorney-General’s Department by email or post by Friday 14 November 2008.

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