CRIMINAL PROPERTY CONFISCATION BILL 2000
CRIMINAL PROPERTY CONFISCATION (CONSEQUENTIAL PROVISIONS) BILL 2000

Cognate Debate

On motion by Hon Peter Foss (Attorney General), resolved -

> That leave be granted for the Bills to be discussed concurrently at the second reading stage in accordance with Standing Order No 228.

Second Reading

Resumed from 14 and 15 November respectively.

HON N.D. GRIFFITHS (East Metropolitan) [10.17 pm]: The Criminal Property Confiscation Bill 2000 and its allied Bill, the Criminal Property (Consequential Provisions) Bill 2000, are measures introduced by this Government towards the end of its second and, hopefully, last term. They are being brought on for debate in this House towards the end of this Parliament. Whether they have the capacity to be effective or otherwise will not be known before the people of Western Australia decide the fate of this Government and elect a new Parliament. They are measures which are more about political form, given their timing, than substance. Notwithstanding that, they must be dealt with on their merits.

The Australian Labor Party, through its spokesperson on these issues, the member for Fremantle, Mr McGinty, has pointed out that it supports the Bills. He gave the ALP's reasons for supporting the Bills. He has made it clear that we support the Bills because we are sick to death of the inability of this Government to come to grips with crime in our community, with the drug trade, with organised crime and with those who feed into and off it. The Labor Party wants this mess fixed. The member for Fremantle has made it clear that the Labor Party wants to ensure that people who create and feed off human misery are brought to justice and do not get away with their ill-gotten gains. I note the passage of these measures through the other place and that that has taken some little time, although not as a result of the actions of the Australian Labor Party. Reports have circulated about what has taken place.

In dealing with these measures, this House is fulfilling its review function. It is not necessary or desirable to rake over the coals that have been dealt with elsewhere. I am aware that the composition of this House is different from the composition of the other place and, as such, different points of view must be expressed, and no doubt they will be addressed. It is important that I point out to the House that the ALP's views, which I am obliged to represent in this House on these issues, have already been put - they are firmly on the public record - and I do not propose to go over them any more than is necessary at this stage. I do not want to engage in repetition, but ours is a separate House and it is important that I acknowledge on behalf of the Labor Party what is involved in this Bill.

Before I do so, I will return to the timing and the fact that the Government in so many ways has failed to deal with those matters that the Bill seeks to address. I regret that. No-one is perfect, but I regret that the Government's role in these matters has fallen short of an appropriate legislative and administrative response in terms of timing and what it is doing and what it has done.

This Bill deals with the confiscation of property. In general terms, property is proposed to be confiscated in three broad categories: Unexplained wealth; criminal benefits; and the assets of drug traffickers. I say this advisedly, but this legislation involves very significant retrospectivity. The mechanism of freezing orders is very broad and the legislation reverses the onus of proof. The intention of the Bill is to remove the courts' discretion in relation to confiscation. The Bill contains very wide powers to freeze property without prior notice to owners, and gives the Director of Public Prosecutions extended recovery powers, and the police substantial seizure powers. There are some interesting potential difficulties in respect of financial institutions. The Bill provides for the distribution of confiscated property. It is different in many respects from legislation currently in force; it is not conviction-based. It is also different from the regime that exists in New South Wales. I would be very interested in having the Attorney General's view about how the New South Wales legislation is working, and if he does not know, why he does not know. I would be very interested in his opinion on these matters, and where the Bill differs in substance from the legislation in New South Wales. The Australian Labor Party has already placed itself on record as supporting this legislation.

The Criminal Assets Recovery Act 1990 is the relevant New South Wales legislation. It has a limitation period of six years, while this Bill is retrospective, and if the property is obtained unlawfully and we are talking about questions of unexplained wealth, the limitation period is, to put it mildly, somewhat longer. New South Wales has limitations on categories of offences, while this Bill does not. The confiscation procedures in New South Wales seem to be more onerous. Maybe the explanation could be that the New South Wales Act dates from 1990, and this is 2000, so we have the benefit of experience. The New South Wales legislation has a regime that

allows for a court to obtain an undertaking on damages, in the event that somebody exercising the powers of the Director of Public Prosecutions was to behave in an improper manner. There is no provision for that in the Bill. The New South Wales legislation allows a person subject to proceedings under the Act to have access to funds to pay for their legal expenses, while this legislation does not. I can understand some of the circumstances where this may be appropriate. Those are some of the differences between Western Australia and New South Wales. I have pointed out that Labor is on record as supporting the Bill. The member for Fremantle has made that very clear.

The Bill is not really about tackling the problems that the Government says it seeks to tackle because of its timing. It will not take effect before the next election. Labor is very concerned that the public knows that certain people are very wealthy because of living off property that has been obtained unlawfully. I do not think I need mention their names, but I read a book in the library about a certain gentleman which was called *Going for Broke*. The book was published earlier this year. The member for Fremantle made reference to that person through the media in the course of the overall discussion of this Bill. The public of Western Australia is offended by the fact that blatant crooks are living high on the hog and it wants something done about it, and we also want something done about it. For the reasons I have outlined, I conclude my comments at this stage.

HON HELEN HODGSON (North Metropolitan) [10.32 pm]: The Australian Democrats do not have any problem with the concept that people who live off immoral earnings should not be able to keep those earnings, but we have problems with this Bill because it goes far beyond what is reasonable and acceptable when deciding who is living off immoral earnings. I will go into my reasons for saying that and explain why although the concept is fine, the execution is the real problem. The problems the Bill could raise outweigh the good that can come from this Bill. I am not saying that the regime does not need to be tightened up in some ways. The public wants to see people who are living off the profits of crime being appropriately treated. However, the inherent flaws in this approach and the extent to which this Bill goes mean that I cannot support it.

The policy behind the Bill is clearly to deprive alleged offenders of the profits of their crimes. My problem is that it goes to a non-conviction based confiscation regime. Such regimes are already in place in some other States and jurisdictions in Australia, but none of them go as far as this Bill. The Attorney is fond of referring to innovative practices. He is quite open about the fact that this Bill goes further, but I believe those extra steps go past the point of what is acceptable.

The concept of confiscation laws is not new. Forfeiture laws go back to Norman times, when a feudal law rendered forfeit any instrument or animal that was the cause of an accidental death of a person. The development of laws to permit the confiscation of goods employed for or derived from illegal activity is a more recent concept. Across Australia in various jurisdictions laws have been developed which build upon the premise that if a person has profited from criminal activity, those profits should be returned to society. If lawfully obtained property is used in the commission of an offence, it can be forfeited. As I have said, we have no problem with that. Our problem arises when one goes beyond that to a system that does not require conviction. Some of the issues in the Bill of the infringements of people's rights and the reversals of conventions and conditions of the law, of not only this State but this country, go beyond what is acceptable.

Confiscation legislation has a number of objectives generally: That persons who gain material advantage from illegal activities should be deprived of the whole of those profits; that persons who use or permit any property to be used in the commission of a crime should be exposed to losing that property; and that law enforcement agencies must have adequate powers to achieve those objectives. The deficiency in the current law is in the third objective. Although a criminal confiscation regime which depends on conviction is in place, some of the problems that have emerged in obtaining confiscation under that law relate to the extent of powers and the ability to obtain the appropriate orders to allow the confiscation to occur. To the extent that the Bill goes beyond fixing a system that deals with the circumstances in which a person is convicted of a crime this Bill goes too far.

The aim of the Bill is to prevent unjust enrichment to wrongdoers and it can be seen as part of the punitive measures. The Australian Democrats have some natural civil liberty concerns. One of the issues that the Bill raises for me particularly is the move from a criminal conviction regime to a civil regime. In some areas the operation of this Bill will have a curious mix of the civil and criminal regimes. I have some reservations as to how that will operate in practice. I accept that this is a philosophical point of view, and we have already heard from Hon Nick Griffiths that the Australian Labor Party does not share my concerns to this extent.

The Democrats have less difficulty with the parts of the Bill that deal with freezing notices and orders, primarily because they relate to a conviction-based regime. However, we still have some concerns inasmuch as they can impact on third parties, families and dependants.

I have some concerns about the provisions that deal with unexplained wealth and confiscation. When I left the employment of the Australian Taxation Office more than decade ago, I thought I had seen the last of what we used to call "asset betterment statements". However, I see them rearing their head in this Bill, although they are

not called that. It is the practice under which we assess what a person owns now and compare it with what he owned 20, 30 or 40 years ago. If a person cannot explain how he or she achieved that increase in wealth then assumptions are made. In taxation matters the Government assumes that a person has earned that money and, therefore, tax must be paid on it. A person will get a bill for 30 per cent, 40 per cent or 50 per cent of the amount, depending on his or her tax bracket. Under this confiscation of profits regime, a person will get a bill for the whole value of that property. I have some serious reservations about how that will apply in practice. I can speak from my personal experience.

I spent a short time in the unit that dealt with these issues, and a longer period in the appeals unit that dealt with the objections that arose from them. We had to deal with some serious issues. For example, how does one value these properties, how does one assess their value now and when they were first acquired; and how does one prove acquisition? As has already been indicated, this Bill reverses the onus of proof. The person who is the subject of the confiscation proceedings will have to prove how they acquired the property. When I quickly researched the case history on asset betterments, it became clear that the onus of proof reverts to the taxpayer in cases of tax law. It was suggested to me earlier this week that the courts would be able to exercise some discretion on the extent of the proof required to decide whether the value is correct or how the property was acquired.

The only precedent that I am aware of is in tax law, which states that the onus is on the taxpayer. The Attorney General referred to tax law when he discussed this concept. In this case, the onus is on the person who is facing confiscation. If that person does not have records or proof of ownership, he will face the most severe penalty, which is confiscation of that property. That would not be so bad if the regime went back one, two or five years. Going back beyond five years would make it hard for a person to produce the necessary records. Under tax law, which most people know about, taxpayers are required to retain receipts for five years. If a person did not have those receipts, it would be his fault or problem. However, there is no starting point with this regime - it can go back a long way. A person could be asked when he acquired the property, how it was acquired, and for evidence of purchase. That imposes a difficult hurdle on an innocent person who simply may have done what his accountant said could be done and disposed of his records after the five-year limitation. I have serious reservations about the practicality of using this approach to obtain a genuine, real and fair value for the amount by which somebody has increased his wealth over a period.

A 1984 tax case said that there were four ways to challenge this sort of statement. These are -

(1) that the cost of opening . . . assets has been understated;

(2) that the cost of closing . . . assets has been overstated;

I do not think that (3) non-deductible expenditure or (4) receipts of a capital nature are greater than the commissioner acknowledges, are relevant. Unless the taxpayer can prove one or more errors in those categories, the understatement remains unchanged. Unless the courts start to develop a new series of precedents - it is a new area of law so perhaps it will do that - the current precedents will create an enormous difficulty for people who are trying to prove that they acquired their property legally.

The potential impact of these measures on innocent third parties is worrying. In particular, there are concerns about the treatment of the spouse or partner of the person who is subject to the confiscation, and of any dependants. These measures could touch legitimate business partners, who had no knowledge of the outside activities of that person and it could touch employees or anyone else who has had financial dealings with that person. Those interests must be properly protected in the development of the confiscation regime.

Although other confiscation regimes have handled this in a fairly considered manner, I do not believe the same could be said of the regime before the House today. The provisions to look after the interests of third parties are woefully inadequate. I have particular concerns about the lack of provisions for the care of the dependants of a person who is accused under this regime. There are threats to the bona fide rights of third parties by the use of restraining orders and forfeiture provisions. A third party must become a party to the proceedings to prove his rights to the property. That will place an enormous strain and burden on people who probably had no knowledge of, or dealings in, the alleged illegal actions. The Australian Law Reform Commission produced a report on this issue, titled *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*. In that report, the Australian Law Reform Commission has recognised that it is manifestly unfair for a third party to be required to discharge the burden of proving or disproving something in respect of which an innocent third party at arm's length from the defendant cannot reasonably be expected to be in a position to offer evidence. Innocent third parties will be placed in a position where they will need to offer evidence and proof of something that is beyond their competence. Third parties will also need to incur costs in order to become part of the proceedings, to object to the confiscation and to have their own property returned to them.

Under this Bill, dependants will be left with no support, even if they are unaware of their partner's or parents' alleged illegal activities. For example, the Bill provides that the court may make allowance for the reasonable living expenses of the respondent. However, the Bill makes no reference to the reasonable living expenses of a dependant. We could say that that should include any dependant, but this area of the Bill is too grey and should be spelt out. We need to acknowledge that dependants do have living expenses that must be met, and that if a person who is subject to this regime cannot meet those expenses, the burden will fall on the State. We could even say that it will be a form of cost-shifting, because the burden will fall not on the State Government but on the Commonwealth Government through the social security provisions. The Bill should contain a mechanism to ensure that dependants and families have access to reasonable living expenses. The New South Wales legislation contains such a provision.

The commonwealth Act makes provision for a person who is subject to a freezing order to meet debts that have been incurred honestly. This Bill makes no such provision. Therefore, a person who had entered into a legitimate business arrangement with a person shortly before a freezing order had been placed on that person's property would be denied access to funds to pay legitimate business debts. That is unreasonable. Innocent third parties will need to fight for their rights. The Bill should make it easier for innocent third parties to obtain their entitlements where they have had no involvement in the illegal activity.

Another issue raised by the Australian Law Reform Commission is that under clause 33, a broad discretion has been placed in the hands of the police to seize property without the need for judicial approval. Some actions will require the use of a justice of the peace and other actions will need to take place before a court. The commonwealth Act requires that a warrant be issued. We need some safeguards in that respect. I have reservations about the use of justices of the peace to issue freezing notices. I acknowledge that in a State as vast as Western Australia it is difficult to ensure that magistrates are available, and I recognise that justices of the peace play an important role. However, it is essential that justices of the peace be given appropriate training in these situations. Speaking from the work I have done recently on a ministerial committee in respect of restraining orders, I am concerned that we have heard about a number of instances where justices of the peace have had the best of intentions but have not had the necessary training, knowledge and understanding and have made mistakes.

The Law Reform Commission also raised the issue that innocent third parties cannot seek damages to compensate for any suffering that is caused by a freezing order being placed on a property. A person who has entered into a commercial transaction with a person shortly before a freezing order has been placed on that person's property, and who has not been paid a substantial sum of money but has incurred additional expenses and business problems of his own, will have no comeback under this Bill. In most civil proceedings, that right does exist. A curious mixture of civil and criminal issues arises in this Bill. Therefore, we believe that right should exist in this Bill. That would also act as a check on the abuse of power. I note that the federal Act provides that right.

I note that no reference is made in the measure to legal expenses being met from frozen property. My concern relates to how an innocent person will get this matter resolved. It has been put to me that the proceedings are designed to be straightforward and enable a person to take the matter himself or herself before a court. However, many complexities are involved. What happens if one wanted some expert accounting advice, but one could not get the advice, to find out how to put the case together to prove the property was acquired legally? It presents some serious holes in the measure. What happens if at the same time as facing confiscation proceedings, one faces serious criminal proceedings on the cause of the confiscation; say, drug trafficking charges? If one cannot get a lawyer, the case will probably be a Dietrich case and be put on hold until the State pays an ex gratia payment to fund the conclusion of the legal proceedings. While that takes place, a person will have a frozen asset order in place. The exclusion of legal expenses from the matters to be provided from frozen property is a significant issue and will become increasingly important once these orders started to come through. The New South Wales legislation provides for legal expenses but places restrictions on the circumstances involved.

Briefings earlier this week indicated that this would be a civil regime, and costs and appeals would be covered by the court processes anyway. Nevertheless, it is a failing not to have stated in the Bill that the Director of Public Prosecutions can be liable for costs if an action fails. An appeals process should be provided. The Bill should be explicit rather than implicit on that matter.

The Australian Democrats are concerned about the removal of legal professional privilege, which is one of the fundamental bases of our legal system. I note the provision for closing the court, but the Democrats are very concerned that information obtained in the civil matter can become part of the case in a subsequent criminal trial. That is very worrying.

The legislation removes the right to refuse to answer questions. A fundamental of our justice system is that people expect the right not to self-incriminate. It is explicitly removed by the legislation. Will discovery be

available? What happens if people want access to the working papers that prove the amount that the Director of Public Prosecutions claims by way of confiscation order? A method of accessing the papers must be provided. Of course, concerns arise about the onus of proof.

The aims of the legislation are legitimate, but the Democrats have a huge number of problems with its detail. They cannot be resolved by drafting as they are policy issues. Therefore, although we agree with the umbrella policy, we cannot agree to the passage of the legislation in its current form because of the issues involved within that policy. It would be better to take another look at the legislation, take into account concerns raised and ensure it is more acceptable next time around. We do not agree with the Attorney General's claim in the second reading speech that the measure is fair, particularly not on third parties. The Bill goes much further than the recommendations of the Australian Law Reform Commission. The extent to which the measure departs from standard legal principles is very worrying. The measure would enlarge powers, and the Democrats could accept the enlargement of powers only if it would fulfil the aims of the measure. However, research on confiscation regimes to stop the crime in the first place indicates that they are ineffective and do not deter the Mr Bigs from entering into crime.

An article by Arie Freiberg and Richard Fox of the University of Melbourne and Monash University law faculties respectively concludes -

> Confiscation laws are necessary, but not sufficient tools to deal with major criminal and social problems.

They have some individual success. They prevent unjust enrichment in a particular case, and in that particular case they will have a social benefit. However, no larger overall deterrent effect has been demonstrated in any jurisdiction. With the massive amounts of money that can be made in drugs and other illegal activities, confiscation legislation will not of itself prevent those who are willing to take the risk in return for obscene profits.

We do not believe this Bill will fix the Mr Bigs of crime. We do not believe it will do much more than make a political statement and we do not support the extent to which this legislation goes.

HON GIZ WATSON (North Metropolitan) [10.55 pm]: On behalf of the Greens (WA), I express our concerns about the Bill and shall make a few comments on it. As stated by the previous speaker, nobody would argue against the objective of wanting to tackle the issue of assets unlawfully obtained, whether that be from drug trafficking or other criminal activity. Having read the Bill and the second reading speech, I can see that the second reading speech is full of emotive and political rhetoric and adopts a very populist approach. Needless to say, both the major parties in this State, in a very timely fashion, want to show themselves as tough on crime and wanting to tackle the criminal element in this State.

One of the supposed aims of the Bill is to tackle the drug issue in this State. However, it tackles the wrong part of the problem. If we put the same amount of energy into drafting legislation for drug law reform as has gone into the drafting of this Bill, we could have a system that would remove the criminal element from the drug trade - in fact, we would not have a drug trade. We would achieve the objective of taking out the criminal profit from the trade in drugs; however, that will not happen with legislation such as this.

Specific concerns of the Greens with the Bill are, firstly, the reversal of the onus of proof. Prior to being convicted, people will have to prove that they have come by a particular asset lawfully. As I understand the current law, people who are charged, for example, with a serious drug trafficking offence, can have their assets frozen but not immediately taken; however, under this Bill those assets would become the property of the State before the court case is resolved.

Another matter of concern is that the standard of proof required by a person charged is the balance of probabilities; that is, a person must prove on the balance of probabilities that the asset was lawfully acquired. I acknowledge that that is a lesser standard of proof than beyond reasonable doubt. However, the fundamental issue of reversing the onus of proof proposed by the Bill is of great concern to the Greens. Members of the legal profession have raised this issue with me as they believe that this legislation will turn on its head some very fundamental principles of law.

It has been noted that the Bill will remove the discretion of the courts. We have seen a lot of legislation introduced that is aimed at doing precisely that. I feel that it is a fundamental undermining of the separation of powers and the role of the court system in our administration of law.

Debate adjourned, pursuant to standing orders.