



Parliamentary Joint Committee on Law Enforcement

Inquiry into Commonwealth unexplained
wealth legislation and arrangements

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on Law Enforcement

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CHAIR'S FOREWORD

Serious and organised crime, motivated by greed, power and money, has serious impacts, threatening the economy, national security and the wellbeing of Australians. The financial cost to the community is conservatively estimated to be around \$15 billion a year.¹ In December 2008, the then Prime Minister Kevin Rudd in his National Security Statement noted the transnational nature of serious and organised crime and its relevance to national security.

The importance of serious and organised crime had already been recognised internationally, with a 1997 Interpol resolution recommending that member countries consider adopting effective laws, that give law enforcement officials the powers they need to combat money laundering both domestically and internationally, including reversing the burden of proof (using the concept of reverse onus) in respect of the confiscation of alleged proceeds of crime.²

The idea of confiscation of unexplained wealth in international agreements can be traced back as far as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Convention stated that 'each party consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation'.³ Similar recommendations appear in the United Nations Convention Against Transnational Organised Crime (2000) and the United Nations Convention Against Corruption (2003).⁴ In 2003, the Financial Action Task Force on Money Laundering recommended that countries adopt measures laid out in the conventions above, including confiscation without conviction and requiring persons to demonstrate the lawful origins of property.⁵

Several nations have introduced legislation in line with these agreements. The proceeds of crime legislation introduced by Ireland in 1996 has been particularly effective. Many other countries have adopted proceeds of crime type laws and arrangements, including the United States, the United Kingdom, and Italy.

Proceeds of crime laws include civil based unexplained wealth provisions in some cases, which can be used to target serious and organised crime bosses who arrange their affairs so that they can enjoy the proceeds of crime, without committing the actual crimes themselves. In Australia, both Western Australia and the Northern

1 Australian Crime Commission, Annual report, 2010-11, p. 14.

2 Interpol Resolution No AGN/66/RES/17 October 1997, Money laundering: Investigations and international police co-operation.

3 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Article 5, Paragraph 7.

4 Victoria Police, *Submission 4*, p. 2.

5 Victoria Police, *Submission 4*, p. 2.

Territory have had such laws for around a decade and other jurisdictions have followed later.

The committee has previously inquired into legislative arrangements to address serious and organised crime. The then Chair of the committee, Senator Steve Hutchins, noted:

One of the things that came through time and time again from law enforcement agencies throughout the world was that they found that the best method to deal with serious and organised crime was to target the asset rather than the person.⁶

The inquiry report was tabled in August 2009, and the committee recommended the introduction of unexplained wealth provisions in Commonwealth legislation, noting that:

[I]n the view of the committee unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime including:

- preventing crime from occurring by ensuring profits cannot be reinvested in criminal activity, as opposed to simply reacting to serious and organised crime;
- disrupting criminal enterprises;
- targeting the profit motive of organised criminal groups; and
- ensuring that those benefiting most from organised crime – i.e. those gaining profits – are the ones captured by the law, which they are often not under ordinary criminal laws, and proceeds of crime laws which require a link to a predicate offence.⁷

At the Commonwealth level, proceeds of crime can be addressed through the *Proceeds of Crime Act 2002* (PoCA). Unexplained wealth provisions were added to the PoCA and enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. The Attorney-General, the Hon Robert McClelland MP, articulated the purpose of the Bill during its passage through Parliament:

It is important that we put strong laws in place to combat organised crime. We need to target the profits of crime and remove the incentive for criminals to engage in organised criminal activity. We also need to empower our law enforcement agencies to defeat the sophisticated methods used by those involved in organised criminal activity to avoid detection, often with the assistance of highly skilled professionals. Appropriate access to covert investigative tools, such as controlled operations, assumed identities and telecommunications interception, will assist police to

6 Senator Steve Hutchins, *Senate Hansard*, 17 August 2009, p. 5022.

7 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, p. 117.

investigate and disrupt criminal activities. It is also vital to ensure offences extend to people who commit crimes as part of a group...

New unexplained wealth provisions will be a key addition to the Commonwealth criminal asset confiscation regime. These provisions will target people who derive profit from crime and whose wealth exceeds the value of their lawful earnings. In many cases, senior organised crime figures who organise and derive profit from crime are not linked directly to the commission of the offence. They may seek to distance themselves from the offence to avoid prosecution or confiscation action. Unlike existing confiscation orders, unexplained wealth orders will not require proof of a link to the commission of a specific offence and in that sense they represent a quantum leap in terms of law enforcement strategy.⁸

Unfortunately however, the unexplained wealth aspects of the PoCA have not worked as intended by the committee, or in the legislation as introduced to the Parliament. To date, no cases have been able to be brought before the courts under the Commonwealth legislation due to a range of limitations as noted by the Attorney-General's Department in its submission:

No proceedings have been brought under the Proceeds of Crime Act seeking an unexplained wealth order, although the AFP are investigating two cases. Accordingly, there has not yet been an opportunity to test the effectiveness of the provisions in practice.

The inclusion within the Commonwealth unexplained wealth provisions of links to offences within Commonwealth constitutional power places some limitations on the operation of those provisions as compared to similar State and Territory regimes.

The ability of a person to dispose of property to meet legal costs may weaken the effectiveness of the provisions by allowing the wealth which law enforcement agencies suspect to have been unlawfully acquired to be used to contest the proceedings. By contrast, those who are subject to other proceeds of crime orders have access to legal aid and the legal aid costs are met from the value of confiscated property.

A court's power to make costs orders in relation to unexplained wealth proceedings is more onerous than is the case for other types of orders under the Proceeds of Crime Act. This may create a disincentive to seek unexplained wealth orders.

In addition, a court has general discretion as to whether to make an unexplained wealth order, even when it is satisfied that the relevant criteria have been met. This is in contrast to other types of proceeds of crime order, which a court must make if it is satisfied that the criteria have been met.⁹

⁸ Mr Robert McClelland, Attorney-General, *House of Representatives Hansard*, 24 June 2009, p. 6964–6965.

⁹ AGD, *Submission 6*, p. 6.

Certainly the fact that there have been no cases suggests that there is something wrong, but whether there is something wrong with the act or whether there is something wrong with the way in which it is being approached, at this stage we cannot say. It is disappointing that there have not been the cases yet.¹⁰

The committee welcomes the changes in the recently passed Crimes Legislation Amendment Bill (No. 2) 2011, which will allow the AFP-led Criminal Assets Confiscation Taskforce to take responsibility for litigating all PoCA actions relevant to investigations undertaken by the Taskforce, and all non-conviction based PoCA matters (including unexplained wealth matters) referred by other agencies.¹¹

In this report, the committee makes further recommendations that will significantly enhance the effectiveness of the Commonwealth unexplained wealth provisions.

In particular, the committee has recommended major reform of the way unexplained wealth is dealt with in Australia as part of a harmonisation of Commonwealth, state and territory laws. While complementing the national strategic approach to organised crime, harmonisation may also allow the Commonwealth to make use of unexplained wealth provisions that are not linked to a predicate offence. This approach has been found to be the most effective, both in Australia and abroad. Harmonisation would help to eliminate gaps that can be exploited between jurisdictions.

In addition, the committee has recommended a series of technical amendments that would ensure that unexplained wealth proceedings are efficient and fair, correcting deficiencies that were identified during the course of this inquiry.

Unexplained wealth legislation represents a new form of law enforcement. Where traditional policing has focussed 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.

Effective unexplained wealth legislation can take the profit out of criminal enterprise, undermining the business model of serious and organised criminal networks and protecting the community from the damage caused by these individuals and organisations. I commend this report and its recommendations, and urge the government to ensure that crime doesn't pay.

10 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 37.

11 AFP, *Submission 9*, p. 4.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACC	Australian Crime Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
Board	Australian Crime Commission Board
CAB	Criminal Assets Bureau (Ireland)
CACT	Criminal Assets Confiscation Taskforce
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CLA	Civil Liberties Australia
CMC	Crime and Misconduct Commission (Queensland)
Customs	Australian Customs and Border Protection Service
DPP	Director of Public Prosecutions
Law Council	Law Council of Australia
MA Act	<i>Mutual Assistance in Criminal Matters Act 1987</i>
NSW	New South Wales
NT	Northern Territory
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJC-LE	Parliamentary Joint Committee on Law Enforcement
PoCA	<i>Proceeds of Crime Act 2002</i>
QLS	Queensland Law Society
RICO	Racketeer Influenced and Corrupt Organizations (US)
SOCA	Serious and Organised Crime Agency (UK)

Tax Administration Act	<i>Taxation Administration Act 1953</i>
TIA Act	<i>Telecommunications (Interception and Access) Act 1979</i>
the committee	Parliamentary Joint Committee on Law Enforcement
UK	United Kingdom
UK-POCA	<i>Proceeds of Crime Act 2002 (UK)</i>
WA	Western Australia

RECOMMENDATIONS

Recommendation 1

3.22 The committee recommends that the objects of the *Proceeds of Crime Act 2002* be amended so as to include a statement about undermining the profitability of criminal enterprise, including but not limited to serious and organised crime. Such a statement should be drafted in such a way to avoid causing unnecessary complication of unexplained wealth proceedings.

Recommendation 2

3.78 The committee recommends that Commonwealth Government explore the possibility of amending legislation to allow the Australian Crime Commission Board to issue a determination on unexplained wealth, so as to enable the Australian Crime Commission to use its coercive powers to provide evidence in support of unexplained wealth proceedings.

Recommendation 3

3.80 The committee recommends that the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002* be amended as necessary to make clear that the Australian Crime Commission's examination material can be used as evidence in proceedings under the *Proceeds of Crime Act 2002*.

Recommendation 4

3.96 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.

Recommendation 5

3.105 The committee recommends that search warrant provisions of the *Proceeds of Crime Act 2002* be amended so as to allow for the collection of evidence that is relevant to unexplained wealth provisions. The committee's preferred means of amending the provisions would be to amend:

- subsection 228(1) to enable material that is relevant to an unexplained wealth proceeding to be seized during the execution of a search warrant; and
- subparagraph 228(1)(d)(iii) to remove the requirement that the evidential material relate to an indictable offence.

Recommendation 6

3.114 The committee recommends that the Criminal Assets Confiscation Taskforce be prescribed as a taskforce under the *Taxation Administration Act 1953* and associated regulations.

Recommendation 7

3.121 The committee recommends amending the *Telecommunications (Interception and Access) Act 1979* so as to allow the Australian Taxation Office to use information gained through telecommunications interception, in the course of joint investigations by taskforces prescribed under the *Taxation Administration Act 1953*, for the purpose of the protection of public finances.

Recommendation 8

3.140 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to eliminate the requirement for authorised officers to meet an evidence threshold test for a preliminary unexplained wealth order where the evidence threshold test for a restraining order has already been met. Any amendment should recognise the need to be able to update an affidavit to reflect new evidence as appropriate.

Recommendation 9

3.151 The committee recommends that provision be made for extending the time limit for serving notice of a preliminary unexplained wealth order to accommodate extraordinary circumstances.

Recommendation 10

3.178 The committee recommends that legal expense and legal aid provisions for unexplained wealth cases be harmonised with those for other *Proceeds of Crime Act 2002* proceedings so as to prevent restrained assets being used to meet legal expenses.

Recommendation 11

3.182 The committee recommends that the enforcement provisions for unexplained wealth orders include an ability to create and register a charge over property that has been restrained by the court to secure the payment of an unexplained wealth order.

Recommendation 12

3.197 The committee recommends that the court's discretion to make a restraining or preliminary unexplained wealth order under subsections 20A(1) and 179B(1) of the *Proceeds of Crime Act 2002* be removed in cases where the amount of unexplained wealth is more than \$100 000, so that the court must make the order in cases over \$100 000.

Recommendation 13

3.200 The committee recommends the court's discretion to make an unexplained wealth order under subsection 179E(1) of the *Proceeds of Crime Act 2002* be removed where the amount of unexplained wealth is above \$100 000, so that the court must make the order in cases over \$100 000, and that the following additional statutory oversight arrangements be made:

- law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations;
- the Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that Ombudsman does for controlled operations; and
- the oversight by the Parliamentary Joint Committee on Law Enforcement be enhanced so that in addition to appearing when required, that the ACC, AFP, DPP and any other federal agency or authority must brief the committee on their use of unexplained wealth provisions as part of the committee's annual examination of annual reports of the ACC and AFP.

Recommendation 14

4.45 The committee recommends that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime.

Recommendation 15

4.67 The committee recommends that the Australian Government seek a referral of powers from the states and territories for the purpose of legislating for a national unexplained wealth scheme, where unexplained wealth provisions are not limited by having to prove a predicate offence.

Recommendation 16

4.88 The committee recommends that the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth.

Recommendation 17

4.96 The committee recommends that the Commonwealth Government create and commit to a plan for the development of national unexplained wealth scheme including the following elements:

- identification and implementation of short-term measures including cooperation with states with existing unexplained wealth legislation;
- negotiation with States and Territories to create or improve supporting mechanisms such as equitable sharing programs and mutual assistance agreements;
- development of agreed guiding principles around unexplained wealth; and
- a final objective of achieving a referral of powers from States and Territories to enable the Commonwealth to legislate for an effective and nationally consistent unexplained wealth scheme.

Recommendation 18

4.98 The committee recommends that the Commonwealth Attorney-General immediately place the issue of harmonisation of unexplained wealth laws on the agenda of the Standing Committee on Law and Justice.

CHAPTER 1

Overview of the inquiry process

Background

1.1 On 13 July 2011, the Parliamentary Joint Committee on Law Enforcement (the committee) initiated an inquiry into Commonwealth unexplained wealth legislation and arrangements with the terms of reference set out below

1.2 The committee has examined unexplained wealth provisions in the course of two previous inquiries. The committee reported in September 2007 on its inquiry into the future impact of serious and organised crime on Australian society, making 22 recommendations including that:

- the recommendations of the Sherman report into the *Proceeds of Crime Act 2002*, where appropriate, be implemented without delay; and
- Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime as a matter of priority.

1.3 The committee also inquired into legislative arrangements to outlaw serious and organised crime groups in 2009. The committee collected evidence from international and state police agencies that suggested the effectiveness of combating serious and organised crime could be enhanced through the pursuit of criminal assets. The committee recommended the introduction of unexplained wealth provisions in Commonwealth legislation, in part leading to the establishment of the current Commonwealth scheme, described in detail in Chapter 2.

Terms of reference

1.4 Pursuant to the committee's functions set out in paragraph 7(1)(g) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*:

- (g) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC or the AFP.

1.5 The committee is examining law enforcement legislation and administrative arrangements that target unexplained wealth in connection with serious and organised crime, through bodies including the Australian Federal Police, the Australian Crime Commission and the Criminal Assets Confiscation Taskforce. In particular the committee is examining:

- (a) the effectiveness and operation of current Commonwealth unexplained wealth legislation and associated administrative arrangements and

- whether they are working as intended in countering serious and organised crime;
- (b) the likely effectiveness of proposed relevant Commonwealth legislation;
 - (c) the effectiveness of and potential changes to unexplained wealth legislation and associated administrative arrangements in other countries.
 - (d) the extent and effectiveness of international agreements and arrangements for law enforcement activities in relation to unexplained wealth;
 - (e) the interaction of Commonwealth, state and territory legislation and law enforcement activity in relation to the targeting of criminal assets of serious and organised criminal networks; and
 - (f) the need for any further unexplained wealth legislative or administrative reform.

Conduct of the inquiry

1.6 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website. In addition, the committee wrote to a range of organisations and individuals inviting submissions.

1.7 The committee received 12 submissions, of which one was confidential, and a further six supplementary submissions. Public submissions were published on the committee's website. A list of submissions is included at Appendix 1.

1.8 In addition, the committee held public hearings in Canberra and Perth and an *in-camera* hearing in Sydney. The witnesses who appeared before the committee at the public hearings are listed at Appendix 2.

1.9 On 30 November 2011, the committee released a discussion paper containing the evidence it had received up to that point, and preliminary observations which it circulated for comment. The committee thanks those who provided comment on the paper for their further contribution to the inquiry.

Structure of the report

1.10 The chapters of this report are organised around the key themes which emerged during this inquiry and therefore do not directly mirror the terms of reference.

1.11 Chapter 2 describes approaches to confiscating criminal assets and existing legislation and arrangements in the Commonwealth, states and territories and internationally.

1.12 Chapter 3 deals with resolving issues relating to Commonwealth unexplained wealth laws, including Constitutional requirements, unexplained wealth investigations and proceedings.

1.13 Chapter 4 focuses on harmonisation of Commonwealth, state and territory unexplained wealth laws.

Acknowledgements

1.14 The committee wishes to express its appreciation to all parties that contributed to the conduct of this inquiry, whether by making a written submission or through attendance at a hearing, or in many cases, both.

Note on references

1.15 References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard*.

CHAPTER 2

Overview of Commonwealth unexplained wealth laws

What are unexplained wealth laws?

2.1 Unexplained wealth laws represent a relatively new form of criminal assets confiscation, whereby, in essence, individuals who cannot account for the wealth they hold may be liable for forfeiture of those assets to the state. In this sense, unexplained wealth laws go further than most established proceeds of crime laws.

Proceeds of crime

2.2 Modern proceeds of crime provisions generally take two forms: conviction based laws and civil confiscation laws.¹ The former requires a criminal conviction before assets may be confiscated, while the latter uses the courts' civil jurisdiction to confiscate criminal assets. Civil forfeiture laws are generally based on a civil, rather than criminal standard of proof, as is the situation under the Commonwealth's *Proceeds of Crime Act 2002* (PoCA), which provides that a court may make an order restraining assets, if 'there are reasonable grounds to suspect that' the assets are the proceeds of crime.²

2.3 The reason for this extension of confiscation laws from conviction-based to civil, is due to the effectiveness of the laws in preventing organised crime from occurring. Confiscating illegally obtained assets undermines the profit motive of crime and prevents the re-investment of those assets into further criminal ventures.

Unexplained wealth provisions

2.4 Unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings.

2.5 A number of jurisdictions have already adopted legislation which reverses the onus of proof, enabling authorities to restrain assets that appear to be additional to an individual's legitimate income and requiring that individual to demonstrate that those assets were obtained legally.

2.6 For example, the legislation in Western Australia (WA) and the Northern Territory (NT) allows the respective Directors of Public Prosecutions to apply to the courts for a confiscation order if a person has 'unexplained wealth'.

1 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, p. 4.

2 *Proceeds of Crime Act 2002*, s. 18.

2.7 In practice, this means that, on the basis of covert financial investigation of an individual, it is determined that they have wealth exceeding what would reasonably be expected given an individual's lifestyle. Using this financial information, a court may order that an individual prove the legitimacy of the unexplained amount of wealth. At this point, the onus of proof has been reversed.

2.8 This means that in those jurisdictions, in principle, it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead places the onus on an individual to prove their wealth was acquired legally.

Undermining serious and organised crime networks

2.9 The value of unexplained wealth provisions lies in their potential ability to significantly undermine the business model of serious and organised crime. The incentive behind organised crime is to make money. By removing unexplained wealth from serious and organised criminal networks and associated individuals, this incentive is removed.

2.10 In the course of its previous inquiry into legislative arrangements to outlaw serious and organised crime groups, the committee collected evidence from a wide range of law enforcement agencies around Australia and overseas. The committee repeatedly heard that one of the most effective ways of preventing organised crime is by 'following the money trail'. As the Australian Crime Commission (ACC) informed the committee:

...organised crime is for the most part about profit. They are not generally about a better quality of firearm or a better quality of drug. Perhaps there is something of that in there but by and large it is about the balance sheet for them. Our focus then is not necessarily about the predicate activities or even some of the individuals involved in it, but recognising that, wherever the criminal activity takes place and whatever crimes are involved in it, if we can take away the profit benefit then we are having more impact than we would through any number of—and I hesitate to use this term—minor charges. If we drive at what is the profit motive here, I think we will be more successful in unpicking and deterring—and perhaps even in the crime prevention area.³

As the ACC noted, while serious and organised criminal groups continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities.⁴

3 Mr Kevin Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 5.

4 Inquiry into the legislative arrangements to outlaw serious and organised crime groups, ACC, *Submission 15*, p. 11.

2.11 The committee has heard that while organised crime figures may be prepared to spend time in prison, taking their assets was what really constituted harm to them. For this reason, Mr Raffaele Grassi, from the Italian National Police, highlighted the importance of 'going after the money' and depriving criminal groups of their assets.⁵

2.12 This same point was reiterated by the Australian Federal Police (AFP) during the current inquiry. As Commander Ian McCartney informed the committee, targeting the business model of criminal enterprise represented a new way of attacking organised crime:

In terms of mindset, I think that what is also important—and we have to put our hand up—is that the work that we are doing now has to be seen as traditional policing. We have to change the culture within our policing agencies on the importance of following the money to target organised crime activity, and it is still a work in progress in policing agencies around Australia, which are focused on the drug or on the predicate offence. With the importance and benefit of utilising proceeds of crime and money laundering legislation to target organised crime, I think that is traditional policing in the new environment.⁶

2.13 The AFP informed the committee that unexplained wealth provisions are particularly valuable as they can be used to target criminals who derive an income from criminal activity, but because of where they sit in a criminal enterprise and their lack of proximity to the offences committed, cannot be pursued through criminal prosecution or traditional proceeds of crime action. In this way, unexplained wealth provisions are a particularly effective tool for law enforcement agencies to use to target the profits of serious and organised crime.⁷ As Commander McCartney pointed out, unexplained wealth provisions worked alongside other measures, filling a specific gap in existing legislation:

We have said right from the start that we never viewed unexplained wealth as the panacea for targeting organised crime. But we view the concept as a very important tool in the toolbox. Where in dealing with serious and organised criminals we have the situation where we have sufficient evidence to prosecute and sufficient evidence to utilise the existing proceeds of crime legislation in relation to restraint and forfeiture, our focus is on utilising that. But where we have a situation where there is a significant serious and organised crime target who has disassociated himself from the criminal activity, that is where the vulnerability is. If we know he is involved in criminal activity and we know the assets he has

5 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

6 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 8.

7 AFP, *Submission 9*, p. 2.

obtained are from criminal activity, without the opportunity for robust unexplained wealth legislation that is a real vulnerability for us.⁸

2.14 The Committee heard from Western Australia Police that unexplained wealth provisions can be a significant deterrent to serious and organised criminals, who would otherwise feel protected from the activities of law enforcement agencies. In addition, Assistant Commissioner Nick Anticich informed the committee:

I...think that, if we are able to remove assets that have been acquired through illicit activities well after the event, that sends a really powerful message. It has been my experience that incarceration, imprisonment and other forms of more legitimate punishment for offences often do not have as great an effect as the removal of assets and wealth from these particular individuals.

There is also an economic benefit from this. Looking at some of the figures quoted regarding organised crime and its value, if we are able to return that money to the funds that are available for the community and for other uses, it is going to be extremely beneficial and a real, tangible measure for the community in terms of the effect.⁹

2.15 Furthermore, unexplained wealth provisions that do not require proof of a predicate offence enable law enforcement agencies to take an assets-based rather than individual-based approach to confiscation. For example, the Northern Territory Police noted the capacity under some unexplained wealth laws to pursue assets to third parties:

In respect to the specifics of an Unexplained Wealth Declaration, Northern Territory legislation does not have a predicate offence provision and therefore it is not necessary to convict a person prior to commencing proceedings. This simplifies the pursuit of third parties and receivers of crime derived assets. Further, it has been used successfully to target [asset] rich spouses, family members and close associates of targets where there is no apparent lawful income evident to support their wealth position.¹⁰

2.16 The committee considers that unexplained wealth provisions of this type can therefore play a significant role in countering the techniques organised crime figures use to insulate themselves from more traditional law enforcement techniques, which are generally aimed at securing a prosecution. Mr Tony Negus, Commissioner of the AFP, commented on the growing importance of the prevention work undertaken by law enforcement agencies, stating:

Across law enforcement over the last decade or more we have realised that the arrest of offenders is one very strong deterrent, but it is only one and there needs to be a range of other treatments put in place. Prevention is very

8 Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, p. 2.

9 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

10 Northern Territory Police, *Submission 10*, p. 1.

much at the forefront of the thinking of most law enforcement agencies around the world these days. If we can devise processes and systems that help to destabilise or undermine the creation of wealth across those criminal syndicates then prevention will be one of the outcomes that we will be looking for. There have to be different ways of attacking the root of serious and organised crime. These are very resourceful and sometimes very clever people who will devise methods to avoid detection and apprehension. We need to be very creative in the way that we look at dealing with the wider syndicates.¹¹

2.17 It is the committee's opinion that unexplained wealth provisions represent an important new way to protect the community from the malevolent effects of serious and organised crime, through disruption of its underlying business model. In cases where it is not possible to catch the ringleaders of organised crime through traditional techniques, unexplained wealth provisions offer a way to bring these figures down, to the benefit of the wider community.

Intrusive nature of unexplained wealth laws

2.18 Unexplained wealth laws are controversial because they reverse the longstanding legal tradition of the presumption of innocence. Under most unexplained wealth regimes, once certain tests or thresholds have been satisfied, it is the respondent who must prove that wealth has been legitimately acquired.

2.19 Unexplained wealth laws are more intrusive than proceeds of crime laws because, in their purest form, they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard. As such there is a greater likelihood that the assets of crime will be confiscated. Though the reversal of the onus of proof is a key element of effective unexplained wealth legislation, it is this very element that raises concern.

2.20 The Law Council of Australia, using the example of the Western Australia legislation, was concerned about unexplained wealth provisions undermining principles of common law, submitting:

The Law Council continues to be concerned that by reversing the onus of proof and enacting a presumption against the respondent, the unexplained wealth provisions remove the safeguards that have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. As a result a person may be liable to have their lawfully acquired property confiscated as unexplained wealth in WA, even though there is no evidence that the property in question has been associated with, used for or derived from criminal activity.¹²

11 Mr Tony Negus, Commissioner, AFP, *Committee Hansard*, 7 March 2012, p. 2.

12 Law Council of Australia, *Submission 3 (Supplementary Submission)*, p. 16.

2.21 Furthermore, the Law Council submitted that unexplained wealth models of the type used in WA and the NT infringe the right to silence, have the potential for arbitrary application, create prosecutorial difficulties, and are unnecessary in light of other confiscation mechanisms.¹³

2.22 Western Australia Police had a rather different view of the same legislation, reporting difficulty in succeeding in unexplained wealth cases, despite the reverse onus of proof, stating:

The reversal of onus of proof is often talked about. In reality...the standard of proof can be discharged at what we consider to be a very low level. For example, a person could come before a court and say, 'The unexplained funds in my bank account I received as a result of doing my job.' Then the onus is back on the prosecution to prove that that is not the case, and that is at a very high standard. So, whilst the reversal of onus within the act is talked about, in reality it is a lot harder.¹⁴

2.23 The committee also notes that, in practice, it is difficult to conceive of scenarios by which an individual had significant amounts of unexplained wealth with no way of accounting for their legitimate accumulation, if that was in fact what had occurred. The committee sought evidence on whether there was any way that an individual could legitimately accumulate wealth without being able to explain or document how they accumulated that wealth. Several witnesses indicated that they could not think of any ways.¹⁵ The ACC noted one possible, but rare, scenario where a legitimate reason could be offered:

A couple examples that have been brought to our notice would be if someone were fleeing persecution, liquidated their assets and arrived in Australia claiming refugee status with those assets. That might be a possibility. There might want to be some exploration of where those assets came from.¹⁶

2.24 The committee is therefore of the view that, with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.

13 Law Council of Australia, *Submission 3 (Supplementary Submission)*, p. 4.

14 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 5.

15 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 5, Mr Michael Cranston, ATO, *Committee Hansard*, 4 November 2011, p. 21, Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 38.

16 Mrs Karen Harfield, ACC, *Committee Hansard*, 4 November 2011, p. 15.

The growth of unexplained wealth laws here and abroad

Domestic laws

2.25 Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws in 2000. The Northern Territory enacted a similar scheme in 2003. Since the introduction of Commonwealth unexplained wealth legislation in 2010, similar laws have been enacted in Queensland, South Australia and New South Wales.¹⁷

2.26 State and territory models are discussed further in Chapter 4, including details of each scheme.

International approaches

2.27 In September 2011, the Chair of the committee, Mr Chris Hayes MP, visited a range of law enforcement, policy and legislative organizations in the United Kingdom, Ireland, Italy and France to gain a better understanding of how relevant agencies in these countries deal with unexplained wealth and proceeds of crime matters.

2.28 This supplemented earlier research done by the committee during a study tour undertaken as part of the committee's inquiry into legislative arrangements to outlaw serious and organised crime groups.

2.29 The following section examines three models considered by the committee.

The Irish approach

2.30 Ireland's approach to the seizure of criminal assets is governed by the *Proceeds of Crime Act 1996* (Ireland) (since amended by the *Proceeds of Crime (Amendment) Act 2005*) and the *Criminal Assets Bureau Act 1996*.

2.31 The agency responsible for the carriage of investigations into suspected proceeds of criminal conduct is the Criminal Assets Bureau (CAB). While CAB is nominally part of Ireland's national police service, An Garda Síochána, it uses a multi-agency multi-disciplinary approach in its investigations, using officers from a number of agencies including An Garda Síochána, the Office of the Revenue Commissioners, the Department of Social Protection, the Department of Justice and Law Reform and the Bureau Legal Officer.¹⁸

17 Attorney-General's Department, *Submission 6*, p. 1.

18 Criminal Assets Bureau, Annual Report 2009, p. 10.

2.32 CAB identifies assets of persons which derive (or are suspected to derive) directly or indirectly from criminal conduct. It then takes appropriate action to deprive or deny those persons of the assets and the proceeds of their criminal conduct.¹⁹

2.33 Powers of the CAB include the ability to make an application to the High Court seeking an interim order, which prohibits dealing with property if the court is satisfied, on the civil standard of proof, that such property is the proceeds of criminal conduct and has a value of more than €13 000.²⁰

2.34 To maintain the freeze on the assets, the interim order must be followed by a successful application for an Interlocutory Order. Such an order effectively freezes the property until further notice, unless the court is satisfied that all or part of the property is not the proceeds of criminal conduct.²¹ An interim order is not necessary, but acts to restrain the property until the Interlocutory Order is made.

2.35 Once an order is in place, it is open to any person to seek to vary or set aside the order if that person can satisfy the court that they have a legitimate right to the property and/or the property is not the proceeds of crime.²²

2.36 The property must remain frozen for seven years, during which time the affected individual can seek to prove the legitimacy of the property. However, after seven years the High Court may make an order transferring the assets to the Minister of Finance for the benefit of the Central Fund.²³ The 2005 amendment allowed for, under certain circumstances, the disposal of assets within the seven year period.²⁴

2.37 The CAB 2009 Annual Report notes that, in that year, almost €1.5 million was paid over to the Minister of Finance.²⁵

2.38 In addition, CAB makes use of tax powers to target the profits or gains derived from criminal conduct and suspected criminal conduct. As the CAB notes:

The application of these powers enables the Bureau to carry out its statutory remit and is an effective means of depriving those engaged in criminal conduct, of such profits and gains.²⁶

19 Criminal Assets Bureau, An Garda Síochána website, accessed 11 November 2011 at <http://www.garda.ie/Controller.aspx?Page=28#>

20 Criminal Assets Bureau, Annual Report 2009, p. 14.

21 Criminal Assets Bureau, Annual Report 2009, p. 14.

22 Criminal Assets Bureau, Annual Report 2009, p. 15.

23 Criminal Assets Bureau, Annual Report 2009, p. 15.

24 Criminal Assets Bureau, Annual Report 2009, p. 15.

25 Criminal Assets Bureau, Annual Report 2009, p. 16.

26 Criminal Assets Bureau, Annual Report 2009, p. 18.

2.39 In 2009, CAB raised assessments on 21 individuals and three corporate entities. In total, over €5 million in tax and interest was collected in 2009.²⁷ In addition, CAB was also able to terminate a number of social welfare payments that had been claimed inappropriately.²⁸

The UK approach

2.40 Detective Inspector John Folan, head of the Dedicated Cheque and Plastic Crime Unit in the UK, previously told the committee that the historical approach to policing involving 'identifying suspects and getting prosecutions' had failed with regard to organised crime. Detective Inspector Folan argued, like his counterparts around the world, that UK law enforcement needs to focus on the motivations of criminals, and target the profits of organised crime in order to successfully dismantle criminal groups.²⁹

2.41 The *Proceeds of Crime Act 2002* (UK) (UK-POCA) provides for the confiscation and restraint of proceeds of crime. In order for a person's assets to be confiscated under the Act, the person must have been convicted. However, in order for assets to be restrained, it is only necessary that the person is being investigated and that there is reasonable cause to believe that they have committed an offence.

2.42 The UK also has a set of offences under the UK-POCA which enable the confiscation of assets obtained from a 'criminal lifestyle'. Under section 75 of the Act, a person has a 'criminal lifestyle' if they:

- have been convicted of one of the offences listed in Schedule 2 (drug trafficking offences);
- have been convicted of any offence over a period of at least 6 months, from which they obtained at least £5000, or
- have been convicted of a combination of offences which amount to 'a course of criminal activity' which is either:
 - (a) conviction in the current proceedings of at least four offences from which they have benefited; or
 - (b) conviction in the current proceedings of one offence from which they have benefited in addition to at least two other convictions on at least two separate occasions in the past 6 years.

27 Criminal Assets Bureau, Annual Report 2009, p. 20.

28 Criminal Assets Bureau, Annual Report 2009, p. 22.

29 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86.

http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

2.43 Where a court has decided that a defendant has a criminal lifestyle, section 10 of the UK-POCA contains provisions which enable an assessment to be made as to the financial benefit they have derived from their criminal lifestyle. The court may make certain assumptions in relation to property and expenditure, which the defendant is then required to disprove, thus reversing the onus of proof in relation to the assets held by those proven to have a criminal lifestyle.

2.44 The amount recoverable by the Crown is an amount equal to the defendant's total benefit from criminal conduct, unless the defendant is able to prove that the available amount is less than the recoverable amount.

2.45 In 2009, the committee was informed by Mr Ian Cruxton, from the Proceeds of Crime Office within the Serious and Organised Crime Agency (SOCA), that the 'criminal lifestyle' provisions have been an effective tool for recovering criminal assets. However, it was also acknowledged by SOCA officers and other UK police officers that the civil recovery process in the UK is extremely lengthy, and can take up to three years to go to trial.³⁰

The Italian approach

2.46 The committee was told in 2009 that Italy has also developed laws based on a reverse onus of proof which allow law enforcement to prevent the mafia from using illegally obtained assets to reinvest in further criminal enterprises.

2.47 Officers from the Italian Central Directorate for Antidrug Services informed the Committee in 2009 that Chief Police Officers and Public Prosecutors can undertake investigations into suspected illegally obtained assets without having *prima facie* evidence of a predicate offence. At the conclusion of such an administrative investigation, the matter can be referred to a judge who can investigate the matter further to establish the source of the assets. During the trial process, the burden of proof falls on the defendant to explain the source of their assets.³¹

2.48 The committee was told in 2009 that this process had been very effective in confiscating criminal assets and preventing organised crime in Italy.

2.49 Italy is a civil law jurisdiction with an inquisitorial judicial system and in this context a judge can investigate the source of the individual's assets and require evidence from the individual. The same system could not be applied in the same form

30 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp 86–87.

http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

31 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62.

http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

in the Australia. However, the committee was interested to learn about the successful use of reverse onus of proof investigations in a civil law jurisdiction.

The Commonwealth Scheme

2.50 The Commonwealth's unexplained wealth provisions were enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. The bill amended the *Proceeds of Crime Act 2002* (PoCA) to include provisions relating to the confiscation of unexplained wealth. Part 2-6 of the PoCA sets out how unexplained wealth orders work.

Parliamentary debate and amendment

2.51 During the passage of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, the proposed unexplained wealth provisions underwent significant amendment.

2.52 The bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee, which wholeheartedly endorsed the purpose of the unexplained wealth provisions: namely, targeting the people at the head of criminal networks who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences. It also made a number of recommendations including:

- (a) that the court should have a discretion under proposed section 179C of the *Proceeds of Crime Act 2002* to revoke a preliminary unexplained wealth order if it is in the public interest to do so.
- (b) that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so.
- (c) that proposed subsection 179B(2) of the *Proceeds of Crime Act 2002* specify that an officer must state in the affidavit supporting an application for a preliminary unexplained wealth order the grounds on which he or she holds a reasonable suspicion that a person's total wealth exceeds his or her lawfully acquired wealth.
- (d) that the disclosure of information acquired under the *Proceeds of Crime Act 2002* to law enforcement and prosecuting agencies should be limited to disclosure for the purpose of investigation, prosecution or prevention of an indictable offence punishable by imprisonment for three or more years; and
- (e) that disclosure of information acquired under the *Proceeds of Crime Act 2002* to foreign law enforcement agencies should not be made unless the

offence under investigation would be an indictable offence punishable by imprisonment for three or more years if it had occurred in Australia.³²

2.53 Some of these recommendations were the basis of amendments made in the Senate, alongside other amendments³³ which addressed issues including disposal of property to cover legal expenses, awarding of damages, costs or indemnities, parliamentary supervision, requirements for making and revoking freezing orders, and revocation of restraining orders.

2.54 The committee notes that the effect of these amendments was to change the nature of the unexplained wealth provisions from that recommended by this committee in its previous reports. Chapter 3 contains analysis of some of the issues raised as a result of these amendments, with proposals for reform.

Current Commonwealth unexplained wealth legislative provisions

2.55 Unexplained wealth provisions form one of five types of asset confiscation proceedings provided for in PoCA. The Commonwealth Director of Public Prosecutions (CDPP) may apply to a State or Territory court for:

- restraining orders prohibiting a person from disposing or dealing with the subject property;
- forfeiture orders which require a person to forfeit property to the Commonwealth;
- pecuniary penalty orders which require a person to pay money to the Commonwealth based on the proceeds they have received from crime;
- literary proceeds orders which require a person to pay money to the Commonwealth based on literary proceeds of crime; and
- unexplained wealth orders requiring payment of unexplained wealth amounts.³⁴

2.56 Unexplained wealth orders are made under Part 2-6 of the PoCA. Using these provisions, if a 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, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court may order them

32 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, p. xi.

33 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, *Schedule of the amendments made by the Senate*, 4 February 2010.

34 *Proceeds of Crime Act 2002*, s. 7.

to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.³⁵

2.57 There are three types of order which can be sought in relation to unexplained wealth:

- unexplained wealth restraining orders;
- preliminary unexplained wealth orders; and
- unexplained wealth orders.³⁶

Unexplained wealth restraining orders

2.58 Unexplained wealth restraining orders are interim orders that restrict a person's ability to dispose of or otherwise deal with property. These provisions ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.³⁷

2.59 Restraining orders in relation to unexplained wealth are governed by section 20A of PoCA. They are made upon application by the Commonwealth Director of Public Prosecutions, can be made *ex parte*, and are subject to two main requirements:

- (a) a court must be satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of wealth that they have lawfully acquired, and
- (b) a court must be satisfied that there are reasonable grounds to suspect that:
 - the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, and/or
 - the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.³⁸

Preliminary unexplained wealth orders

2.60 A preliminary unexplained wealth order requires a person to attend court to determine whether or not an unexplained wealth order should be made. Under section 179B of PoCA, a court may make a preliminary unexplained wealth order if it is

35 Attorney-General's Department, *Submission 6*, pp 1–2.

36 Attorney-General's Department, *Submission 6*, p. 2.

37 Attorney-General's Department, *Submission 6*, p. 2.

38 Attorney-General's Department, *Submission 6*, p. 2.

satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired.³⁹

2.61 Whether reasonable grounds exist is informed by assessment of the person's wealth in accordance with section 179G, which defines what property constitutes a person's wealth and the time at which the property's value is to be calculated.⁴⁰

Unexplained wealth orders

2.62 If a preliminary unexplained wealth order has been made and the court is not satisfied that the person's wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, it may make an unexplained wealth order.

2.63 The burden of showing that wealth was not derived from offences with a link to Commonwealth power falls on the person in relation to whom the preliminary order was issued. The person is required to satisfy the court on the balance of probabilities, which is a civil standard of proof.

2.64 An unexplained wealth order makes payable to the Commonwealth an amount which, in the court's opinion, constitutes the difference between the person's total wealth and the value of the person's property which the court is satisfied did not derive from the commission of a relevant offence. That is, the difference between their total wealth and the wealth that has been legitimately acquired.

2.65 A court making an unexplained wealth order must direct the Commonwealth to pay a specified amount to a dependant of the person, if it is satisfied that the amount is necessary to offset hardship. If the dependant is over 18 years old, they must not have been aware of the conduct that was the subject of the order.⁴¹

Current oversight arrangements

2.66 The oversight arrangements applying to unexplained wealth provisions include a monitoring role by this committee. The operation of Part 2-6 (on unexplained wealth orders) and section 20A of the PoCA is subject the oversight of the committee and the committee may require the ACC, AFP, CDPP or any other federal agency of authority that is the recipient of any material disclosed under Part 2-6 to appear before it to give evidence.⁴²

39 Attorney-General's Department, *Submission 6*, p. 3.

40 Attorney-General's Department, *Submission 6*, p. 3.

41 Attorney-General's Department, *Submission 6*, p. 4.

42 *Proceeds of Crime Act 2002*, s. 179U.

The Criminal Assets Confiscation Taskforce and other administrative arrangements

2.67 In order to provide administrative support for the investigation and litigation of proceeds of crime matters, including unexplained wealth, the Commonwealth formed the Criminal Assets Confiscation Taskforce (CACT) in March 2011.

2.68 The CACT arrangements were put in place to boost the identification of assets that should be seized, and strengthen the pursuit of wealth collected by criminals at the expense of the community.⁴³

2.69 On establishment, the CACT comprised 68 AFP members, including its Financial Investigations Teams, five tax officers from the Australian Taxation Office (ATO) and six officers of the ACC.⁴⁴

2.70 The AFP noted that it had considered arrangements in other countries, when putting together the Criminal Assets Confiscation Taskforce:

In particular, the AFP examined the Serious and Organised Crime Agency in the United Kingdom, and the Irish Criminal Assets Bureau. While the approach of SOCA, CAB and the Taskforce differ, they all recognise the merit in pursuing non-conviction based action to target the profits of crime.⁴⁵

2.71 The AFP informed the committee that the taskforce, in addition to its in-house investigative capabilities, was able to select from a range of confiscation methods under PoCA, including unexplained wealth provisions:

In assessing potential proceeds of crime action the Taskforce considers all available options, including possible unexplained wealth proceedings. Where multiple criminal asset confiscation pathways are available, the operational decision to undertake an investigation to support particular type of proceeds action, or refer the matter for other types of non PoCA treatment (such as taxation remedies), is made on a case-by-case basis. To ensure, as far as possible, consistent decision making, the Taskforce takes a range of factors into account including: the strength of the available evidence; the resources required to obtain further evidence to support a particular type of action; the total value of assets involved; and the likelihood of a successful outcome.⁴⁶

2.72 The AFP indicated that prior to the establishment of the CACT, it had restrained \$41.1 million in assets, while \$3.7 million in assets were forfeited. Pecuniary penalty orders to the value of \$17.1 million were also made. The AFP

43 AFP, *Submission 9*, p. 2.

44 AFP, ACC, CDPP and ATO, 'ACC, AFP-led taskforce targeting organised crime's deep pockets', joint agency media release, 10 March 2011.

45 AFP, *Submission 9*, p. 9.

46 AFP, *Submission 9*, p. 5.

informed the committee that this experience provided a foundation to develop capabilities to undertake conviction and non-conviction based asset confiscation action under the new taskforce arrangements.⁴⁷

2.73 The CACT is yet to bring any proceedings under PoCA seeking an unexplained wealth order, however, although the AFP is currently investigating potential two cases. Indeed, as discussed below, no unexplained wealth proceedings have been brought before the courts as yet.⁴⁸

Responsibility for litigation

2.74 Under the original CACT arrangements, the CDPP remained responsible for litigating PoCA cases on behalf of the taskforce. With the passage of the Crime Legislation Amendment Bill (No. 2) 2011 in late 2011, however, this responsibility has passed to the taskforce itself. It may now litigate all PoCA actions relevant to investigations undertaken by the Taskforce, and all non-conviction based PoCA matters (including unexplained wealth matters) referred by other agencies.⁴⁹

Limited use of existing provisions

2.75 Despite unexplained wealth provisions having existed for two years, they are yet to be used. As the AFP observed:

The unexplained wealth provisions...commenced on 19 February 2010. To date, no unexplained wealth matters have been tested in the courts. It remains to be seen how the legislation will be interpreted by the judiciary. It will take some time and case law to determine whether or not the unexplained wealth provisions operate as intended. The application of the unexplained wealth provisions has been under active consideration by the AFP.⁵⁰

2.76 While the Law Council suggested that the lack of proceedings indicated it was too early to review the unexplained wealth provisions,⁵¹ the Attorney-General's Department (AGD) also noted:

Certainly the fact that there have been no cases suggests that there is something wrong, but whether there is something wrong with the act or whether there is something wrong with the way in which it is being approached, at this stage we cannot say. It is disappointing that there have not been the cases yet.⁵²

47 AFP, *Submission 9*, p. 4.

48 Attorney-General's Department, *Submission 6*, p. 6.

49 AFP, *Submission 9*, p. 4.

50 AFP, *Submission 9*, p. 5.

51 Law Council of Australia, *Submission 3*, p. 3.

52 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 37.

2.77 By way of comparison, the unexplained wealth provisions in WA have also had limited use, with only six declarations leading to confiscation made between July 2004 and June 2011.⁵³

2.78 The committee is concerned that the Commonwealth unexplained provisions have not been used since their introduction. In the next chapter, the committee examines issues with the existing provisions that were raised during the course of this inquiry.

53 Western Australia Director of Public Prosecutions, *Annual Report: 2010-11*, p. 30.

CHAPTER 3

Issues with Commonwealth unexplained wealth provisions

Overview

3.1 This chapter examines a number of issues and suggested enhancements relating to unexplained wealth provisions in the *Proceeds of Crime Act 2002* (PoCA). Many of these issues were included in the committee's discussion paper in order to attract further evidence. The issues and suggested enhancements have been grouped under four main headings:

- ensuring that unexplained wealth laws are used against serious and organised crime networks and their leadership;
- Constitutional requirements and the link to an offence;
- enhancing unexplained wealth investigations; and
- improving the effectiveness and efficiency of unexplained wealth proceedings.

Targeting the beneficiaries of serious and organised crime

3.2 While unexplained wealth laws have the potential to be highly effective against serious and organised crime, they may also represent a significant intrusion into the affairs of citizens. As such, the committee recognises that a careful balance must be achieved in delivering workable laws that are acceptable to the public and appropriate to Australia's democratic system.

3.3 In order to achieve this fundamental balance, the committee considered means by which unexplained wealth provisions would remain targeted at the beneficiaries of serious and organised crime: specifically, senior members of criminal networks who receive a large share of criminal proceeds while distancing themselves from the actual commission of criminal acts.

3.4 The committee received evidence noting the potential effectiveness of unexplained wealth in its previous inquiry into legislative arrangements to outlaw serious and organised crime groups.¹ During the current inquiry, the committee received further evidence supporting these views. For example, Western Australia Police informed the committee that the establishment of a nationally consistent unexplained wealth regime would enable them to penetrate the high or upper echelons

1 See for example, Parliamentary Joint Committee on the Australian Crime Commission, *Legislative arrangements to outlaw serious and organised crime groups*, Final Report, Chapter 5.

of organised crime.² As Assistant Commissioner Nick Anticich, Western Australia Police noted:

It will send a clear message to those involved in organised crime at the upper levels that they are not untouchable and that, in fact, law enforcement has the capacity to engage them.³

3.5 While there was generally agreement amongst law enforcement agencies that unexplained wealth laws would be used against high level organised crime figures, organisations including the Law Council of Australia (Law Council) and Civil Liberties Australia (CLA) expressed concern about the potential for abuse.

3.6 The Law Council objected to the reversal of the onus of proof within the unexplained wealth regimes, arguing that it ran contrary to established common law principles and runs counter to the presumption of innocence, a point discussed further in Chapter 2.⁴

3.7 The Law Council submitted that unexplained wealth provisions remove the safeguards that have evolved to protect innocent parties from the wrongful forfeiture of their property, providing some possible scenarios were this may occur:

As the Law Council has stated in previous submissions, the reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained. The respondent may be unable to show that assets were lawfully obtained because of a lack of capacity to explain how they acquired particular assets due to age, cultural and linguistic background or physical or mental incapacity, or a lack of skills in record keeping.⁵

3.8 Dr David Neal SC, Law Council, was concerned about the discretionary use of far-reaching powers by law enforcement agencies, particularly if such measures were delinked from the need to prove an offence, stating:

Every day they do make decisions but when we see them in the courts—and there is a particularly bad example going on in Victoria at the moment—it turns out they are making mistakes. It is a quality control issue. You said earlier that these will be persons of interest because we know that they are Mr Bigs. If it is in fact known that these are the people and then there can be a connection made between their criminal activity and this wealth, I feel a lot more comfortable with that because there is a good deal more precision. The evil we are talking about here is simply that they have got

2 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

3 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

4 Law Council of Australia, *Submission 3 (supplementary submission)*, p. 16.

5 Law Council, *Submission 3 (supplementary submission)*, p. 16.

wealth that they cannot explain. If it is that in connection with criminal activity then it makes more sense and it is less prone to error.⁶

3.9 CLA gave in principle support to unexplained wealth legislation, on the grounds that serious and organised crime itself significantly harmed civil liberties. As Mr Bill Rowlings, CLA, observed in most cases, criminal profit is derived from removing or interfering with the civil liberties of normal citizens.⁷

3.10 Nevertheless, CLA was particularly concerned about the potential for individuals who should not be considered serious or organised criminals to be targeted by such laws. Mr Rowlings used the example of a proceeds of crime case from the Northern Territory where a man was caught growing 20 cannabis plants in a shipping container and pursued under proceeds of crime legislation.⁸

3.11 To ensure that unexplained wealth provisions were not used in such a manner, one of CLA's recommendations was that they be limited to addressing serious and organised crime:

[W]hatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.

3.12 The committee considers that unexplained wealth laws represent a powerful and intrusive tool, and are most appropriately targeted towards serious and organised crime. The committee was informed by the AFP that, in practice, this would already occur as resource constraints were likely to ensure that Commonwealth unexplained wealth provisions would only be used in serious cases.⁹ As Commander McCartney observed:

I think the issue of the AFP utilising this legislation on the wrong people has been raised before. When I say the wrong people, I mean mothers and fathers who have cash under the bed. I think it is important to say that we have finite resources to deal with the serious and organised crime problem in Australia at the minute. To be quite frank, we are not going to waste the resources on those cases; we want to direct our resources to the serious and organised crime targets.¹⁰

3.13 While the committee accepts that, in practice, resource constraints mean that unexplained wealth proceedings are only likely to be commenced in serious cases, it is

6 Dr David Neal, Law Council, *Committee Hansard*, 10 February 2012, p. 48.

7 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 44.

8 Mr Bill Rowlings, CLA, *Committee Hansard*, 4 November 2011, p. 39.

9 AFP, *Submission 9 (Supplementary Submission)*, p. 4.

10 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 5.

not comfortable basing significant public policy on this assurance. The committee is of the view that serious and intrusive law enforcement provisions should be accompanied by legislative, rather than administrative safeguards.

3.14 A more compelling argument, therefore, is that the AFP (and other officers of the Criminal Assets Confiscation Taskforce) is already subject to a suite of significant oversight and accountability mechanisms which act as checks and balances on the use of all law enforcement tools, including unexplained wealth provisions. These include:

- the AFP Core Values and Code of Conduct and associated arrangements;
- statutory provisions for a framework for the internal management of AFP professional conduct issues;
- in cases of PoCA proceedings, scrutiny of the court; and
- oversight by the Commonwealth Ombudsman, Law Enforcement Integrity Commissioner and Parliamentary committees.

3.15 The AFP considered these to be adequate controls to ensure unexplained wealth provisions were used appropriately.¹¹

3.16 Nevertheless, the committee was cognisant of the need to consider mechanisms by which the public might be assured that effective unexplained wealth laws were accompanied by appropriate safeguards. Three particular methods, intended to ensure that unexplained wealth provisions were targeted against serious and organised criminal enterprise, were canvassed by the committee:

- amending the objects of unexplained wealth provisions;
- establishing a monetary threshold for unexplained wealth amounts; and
- separating unexplained wealth provisions from PoCA in favour of stand-alone legislation.

Further defining the objects of unexplained wealth provisions in PoCA

3.17 The *Proceeds of Crime 2002 Act* includes eight principal objects, including depriving persons of the proceeds of or benefits derived from offences, and preventing the reinvestment of these funds into further criminal activity. It does not, however, contain a clear statement of what the committee has nominated as a primary object: to undermine the business model of serious and organised crime through eliminating criminal profit.

3.18 The ACC recommended providing a statement of clear and unambiguous objectives in the PoCA to remove doubt regarding Parliament's intention as to the

11 AFP, *Submission 9 (Supplementary Submission)*, p. 5.

operation of the unexplained wealth provisions and to provide clarity as to the basis on which judicial discretion is exercised, in line with those objectives.¹²

3.19 The Law Council disagreed, submitting that the inclusion of an additional objects clause was unnecessary given existing objects and the existence of clear statements of legislative intent in the explanatory memorandum, second reading speech and parliamentary debate.¹³

3.20 The Attorney-General's Department (AGD) warned that a specific objective relating to serious and organised crime may unintentionally limit the use of unexplained wealth provisions, stating:

It is important that the objectives are framed broadly in a way that reflects that the unexplained wealth provisions are not confined only to serious and organised crime, and that does not restrict the circumstances in which the laws may need to be used in the future. For example, narrowly defining ‘serious and organised crime’ may make it more difficult for unexplained wealth provisions to be used in relation to emerging crime threats that may not always be linked to criminal groups, such as cyber crime or large scale fraud. Additionally, linking the application of unexplained wealth provisions to serious and organised crime could suggest that evidence of specific serious and organised crime offences is required.¹⁴

3.21 While noting comments by the Law Council and the AGD, the committee considers that amending the objectives of PoCA is desirable. In particular, the committee is of the view that a new object stating that unexplained wealth provisions are intended to be used to undermine the profitability of criminal enterprise should be included. The committee recognises that such a statement should be drafted so as not to unduly limit the use of unexplained wealth provisions.

Recommendation 1

3.22 The committee recommends that the objects of the *Proceeds of Crime Act 2002* be amended so as to include a statement about undermining the profitability of criminal enterprise, including but not limited to serious and organised crime. Such a statement should be drafted in such a way to avoid causing unnecessary complication of unexplained wealth proceedings.

12 ACC, *Submission 8*, p. 5.

13 Law Council, *Submission 3 (supplementary submission)*, p. 16.

14 Attorney-General's Department, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 1.

Establishment of a threshold below which unexplained wealth matters cannot proceed

3.23 A related suggestion put to the committee was the focussing of unexplained wealth provisions on serious and organised crime by means of threshold amounts relating to unexplained wealth, below which unexplained wealth measures could not proceed. For example the *Proceeds of Crime Act 1996* (Ireland) set a threshold of 10,000 pounds initially,¹⁵ which has later been changed to 13,000 euros.¹⁶

3.24 In the committee's discussion paper on unexplained wealth, issued as part of this inquiry, the committee asked for comment on the introduction of a threshold amount, using the amount in the Irish legislation for comparison.

3.25 The Queensland Law Society (QLS) expressed support for the proposal, submitting that it could help to ensure that applications are limited and focus on the most serious instances of unexplained wealth. QLS was of the opinion that, for example, subjecting drug traffickers, who traffick small amounts of cannabis, to unexplained wealth orders would be a wholly disproportionate reaction. QLS warned that perceived abuse of the provisions risked significant public backlash.¹⁷

3.26 AGD noted that the establishment of a threshold could further complicate proceedings as it would require a greater emphasis on law enforcement agencies having a comprehensive understanding of a person's financial affairs prior to proceedings being commenced. Additionally, the legislation would have to include provisions to deal with situations in which a matter commences in relation to an amount of wealth that is above the threshold, but that amount is subsequently reduced so that the unexplained portion of a person's wealth falls below the threshold.¹⁸

3.27 The AFP was similarly concerned that a threshold provision could cause further investigatory burden, for example leading to a greater emphasis on litigating the value of property rather than leaving the focus on the respondent establishing that his or her property was not unlawfully obtained.¹⁹ As Commander McCartney noted:

Our resources are finite and we are not going to focus on these sorts of targets. In the cases that we do we are talking about millions of dollars, not thousands of dollars. If the committee and the parliament saw the need to bring in a threshold, then one issue we have been discussing is the link to 'may' versus 'must' in the discretion of the court. An option we have been considering, if the value of the property is less than \$25,000, is that the

15 *Proceeds of Crime Act 1996* (Ireland), ss. 2(b).

16 Mr Chris Hayes, Report on Parliamentary study leave visit to Europe, 23 September – 10 October 2011, tabled 21 November 2011, p. 31.

17 Queensland Law Society, *Submission 12*, p. 2.

18 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

19 AFP, *Submission 9 (Supplementary Submission)*, p. 7.

court continues to have this discretion that it may issue a restraining order in relation to unexplained wealth.²⁰

3.28 Furthermore, the AFP argued that if a threshold were to be introduced, it should be clear that the threshold applied to total accumulated wealth rather than to the individual value of each item of property.²¹

3.29 The committee understands that there are arguments for and against the introduction of a monetary threshold to limit the applicability of unexplained wealth provisions. On balance, however, it is the committee's view that the introduction of a threshold would provide increased public assurance that unexplained wealth provisions are intended for use against serious and organised criminal targets.

3.30 The committee discusses the issue of the discretion given to the courts to make an unexplained wealth order later in this chapter. The committee supports the introduction of a monetary threshold to limit the use of this court discretion, so that in unexplained wealth cases above \$100 000, judicial discretion is removed. Recommendations 10 and 11 later in this chapter give effect to this intention.

Separating unexplained wealth provisions from PoCA and placing them in stand-alone legislation

3.31 A further proposal aimed at better targeting the use of unexplained wealth provisions at serious and organised criminal figures was the separation of the measures from PoCA, in favour of a stand-alone unexplained wealth act. The committee considered whether a purpose-built act could further clarify the unique nature of unexplained wealth provisions and how they were intended to be used. For example, South Australia created a separate act for its unexplained wealth provisions, although it is the only jurisdiction to have done so.²²

3.32 There was little support, however, for creating separate Commonwealth unexplained wealth legislation. The Attorney-General's Department informed the committee that it was not clear what the benefit of placing unexplained wealth provisions in stand-alone legislation would bring, while there were a number of benefits to keeping unexplained wealth provisions within PoCA.²³

3.33 Firstly, evidence for proceedings under the PoCA framework can be obtained from a broad range of sources due to connections with existing legislation, including information held by other domestic and international law enforcement agencies. Secondly, the PoCA contains a number of provisions which make it relatively simple to change between orders under the PoCA during the course of proceedings. Finally,

20 Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, p. 4.

21 AFP, *Submission 9 (Supplementary Submission)*, p. 7.

22 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 13.

23 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

AGD noted that unexplained wealth orders share a common goal with other proceeds of crime orders —to confiscate wealth that has been, or is suspected to be, unlawfully obtained.²⁴

3.34 The Law Council also argued that the creation of stand-alone unexplained wealth legislation was not supported by relevant overseas practice and did not support the proposal.²⁵

Constitutional requirements and the link to an offence

3.35 In order for the Commonwealth to have the Constitutional authority to legislate for a particular matter, there must be a link to a head of power under Section 51 of the Constitution.

3.36 To ensure that unexplained wealth orders have a link to a constitutional head of power, the making of unexplained wealth restraining orders is contingent on a court being satisfied either that there are reasonable grounds to suspect that the person committed a Commonwealth offence, a foreign indictable offence or a State offence with a federal aspect, or that a part of a person's wealth was derived from such an offence. In their submission to the inquiry, the AFP explained how this Constitutional requirement related to unexplained wealth proceedings:

Firstly, depending on the type of unexplained wealth order that is sought, there must be a link between the person and a criminal offence, or a link between the wealth and a criminal offence. Secondly, the criminal offence must be a Commonwealth offence, foreign indictable offence or State offence with a federal aspect (which includes all Territory offences). The jurisdictional nexus requirements create two key challenges for unexplained wealth cases.

The first challenge is that the need to demonstrate a link between the person/wealth and a crime may effectively impose an onus of having to make out a predicate offence (that is, the crime from which money was originally derived) before unexplained wealth action can be taken. This could be particularly problematic where there is a disconnect between the illicit wealth and the criminal activity from which that wealth has been derived. This is often the case in money laundering offences, in which the facilitators involved may have no knowledge or involvement in the predicate offence (such as drug trafficking).

The second challenge is that the need to demonstrate a link between the person/wealth and a crime within the Commonwealth's legislative power means that wealth derived from State offences that do not have a federal aspect (such as murder, theft of property etc) will not be captured by the Commonwealth scheme.²⁶

24 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

25 Law Council, *Submission 3(Supplementary Submission)*, p. 14.

26 AFP, *Submission 9*, pp 5–6.

3.37 Similarly, in the final stage of an unexplained wealth proceeding, an unexplained wealth order can only be made where a court is not satisfied that the whole of a person's wealth, or a part of their wealth, was not derived from an offence linked to a Commonwealth head of power.²⁷ The inclusion within the Commonwealth unexplained wealth provisions of links to offences within Commonwealth constitutional power is a key difference compared to the operation of state and territory unexplained wealth regimes.²⁸

3.38 The need to prove a link to such an offence limits one of the key aims of unexplained wealth provisions, discussed in Chapter 2, which is to target the assets of senior members of organised crime groups, who may distance themselves from the actual commission of criminal offences, yet receive the subsequent profits. As the AFP submitted:

The AFP accepts that unexplained wealth provisions are currently expressed to operate to the fullest extent constitutionally possible. Nevertheless, the AFP notes that the jurisdictional nexus requirements described above operate as an inherent limitation on Commonwealth unexplained wealth provisions. That is, if the unexplained wealth is not linked to an offence that is an offence within Commonwealth power, the unexplained wealth proceeding will fail.²⁹

3.39 For example, the AFP highlighted the increased prevalence of 'professional' money-laundering syndicates. As Commander Ian McCartney explained:

The challenge for us in terms of the money-laundering legislation and the proceeds of crime legislation is the ability to show a nexus between what they are doing and their knowledge of the predicate offence. The problem that exists is that they will always be removed from that predicate offence; they will know it is bad but they will not know what particular criminal activity the money related to. This is a significant problem.³⁰

3.40 The Northern Territory Police reported that one strength of unexplained wealth laws that did not require a predicate offence, was the ability to focus on particular criminal assets rather than just the individual. Northern Territory Police noted that the pursuit of third parties and receivers of crime derived assets had been effective under the Northern Territory laws, undermining asset dissipation strategies adopted by criminals.³¹

3.41 In their submission to the inquiry, the AFP further argued:

27 AGD, *Submission 6*, p. 4.

28 AGD, *Submission 6*, p. 6.

29 AFP, *Submission 9*, p. 6.

30 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 6.

31 Northern Territory Police, *Submission 10*, p. 1.

If we are serious about providing law enforcement with an effective tool to target those in the upper echelons of organised crime groups – who profit from crime at an arm’s length – then action needs to be taken to address the gap in the Commonwealth’s unexplained wealth regime.³²

3.42 In order to improve the operation of unexplained wealth provisions in light of constitutional requirements, there were several suggestions. These include the use of money-laundering provisions, international treaties and seeking a referral of powers from the states.

Use of Section 400.9 of the Criminal Code

3.43 Section 400.9 of the Commonwealth Criminal Code creates the offence of dealing with money or property that is reasonably suspected to be the proceeds of crime.³³ This offence may therefore be of use in cases of unexplained wealth, if it can be proved that there was reasonable suspicion that the wealth was the proceeds of crime. The AFP noted that this could be used to target money launderers, although not without its own difficulties:

Particularly with these issues where they have no knowledge of the predicate offence, we have to rely on section 400.9 of the Commonwealth money laundering legislation, when in fact you have to show reasonable grounds to suspect it could be linked into a criminal offence.³⁴

3.44 The CDPP agreed that because section 400.9 does not make specific reference to Commonwealth offences, but has other constitutional foundations, it may be a provision that could be used in certain circumstances.³⁵

Use of external affairs powers

3.45 Section 51 of the Constitution grants the Commonwealth legislative powers in matters relating to external affairs.³⁶ The ACC noted that this could possibly provide a head of power by linking unexplained wealth provisions to international treaty obligations.³⁷ For example, the committee heard that the offence created in section 400.9, discussed above, is supported in its entirety through the external affairs power, by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, to which Australia is a party.³⁸

32 AFP, *Submission 9*, p. 6.

33 *Criminal Code Act 1995*, s. 400.9.

34 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 9.

35 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 27.

36 Australian Constitution, ss. 51(xxix).

37 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

38 Replacement explanatory memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, item 19, p. 160.

3.46 The unique nature of unexplained wealth provisions, however, may not be supported by any relevant treaties. The Attorney-General's Department previously advised the Senate Legal and Constitutional Affairs Legislation Committee that existing international conventions relating to organised crime, corruption and money laundering would not support a comprehensive unexplained wealth regime.³⁹

3.47 AGD informed the committee that it remains unaware of any international treaties established since that time that could support reliance in the external affairs power in relation to this issue.⁴⁰

Referral of powers from the states

3.48 The committee heard that a far more effective way to establish an unexplained wealth regime that was not linked to a predicate offence would be to seek a referral of power in this area from the states, as the states are subject to different Constitutional requirements. Subsection 51(xxxvii) grants the Commonwealth legislative power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.⁴¹

3.49 In addition to providing a mechanism by which the Commonwealth could create a comprehensive unexplained wealth regime, a referral of powers may also assist in achieving national consistency in the approach taken to serious and organised crime and unexplained wealth.

3.50 The potential for a referral of powers is discussed further in Chapter 4 which deals with harmonisation of unexplained wealth laws across Australia.

Enhancing unexplained wealth investigations

3.51 Unexplained wealth investigations can be complex and time consuming, not least due to the intricacies of unravelling an individual's personal finances which may include accounts, equities, real estate, physical assets and legitimate business interests. Unexplained wealth investigations, which may commence as an offshoot of a criminal investigation or as the result of specific intelligence, generally begin as a covert investigation, which at some stage becomes an overt investigation potentially necessitating freezing or restraining orders to prevent liquid and other wealth dissipating prior to the resolution of the investigation.

39 AGD, *Submission 6*, p. 2.

40 AGD, *Submission 6*, p. 2.

41 Australian Constitution, ss. 51(xxxvii).

3.52 The committee was informed by Commonwealth law enforcement agencies that, in practice, the nature of current unexplained wealth provisions necessitated an overly burdensome investigation, limiting the use of those provisions.

3.53 The ACC submitted that existing unexplained wealth provisions impose an excessive burden of proof on law enforcement agencies while allowing too much flexibility in the application of the proceedings by courts.⁴²

Obtaining any unexplained wealth order, including the preliminary unexplained wealth order, inevitably requires investigators to build a comprehensive financial picture of all the property a person owns or has owned, effectively controls or has controlled and their sources of income. It is usually necessary to investigate the whole of the person's working life. This means that in many cases it is simply not practicable to embark on proceedings.

As ACC predicted in 2009, the work required to satisfy the court and do the complex financial analysis to distinguish legitimate from co-mingled illegitimate funds has meant that other proceeds of crime recovery options are generally preferred (including traditional proceeds of crime action, taxation and debt recovery methods).⁴³

3.54 The committee was provided with a number of suggestions for improving the ability of law enforcement agencies to successfully conduct investigations into unexplained wealth, including:

- revising definitions of total wealth within PoCA;
- using ACC coercive powers in unexplained wealth investigations;
- amending search warrant powers in PoCA;
- improving information sharing with the Australian Taxation Office;
- deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity; and
- further developing international and domestic cooperation in this area through mutual assistance treaties and arrangements.

Definitions of total wealth

3.55 The ACC informed the committee that one of the major drawbacks of the existing unexplained wealth provisions was the requirement for the investigating agency to conduct a complete analysis of all of a person's financial circumstances over a long period. While unexplained wealth provisions are intended to reverse the onus of proof onto the accused, in practice, this is a very easy onus to discharge, and may

42 ACC, *Submission 8*, p. 1.

43 ACC, *Submission 8*, p. 2.

require nothing more than a credible denial on oath.⁴⁴ As Mrs Karen Harfield, ACC, explained:

It is usually necessary to investigate the whole of a person's working life, and this results in significant resource impediments for law enforcement to find and analyse this amount of financial documentation often where the individual themselves is the only person who has access to it.⁴⁵

3.56 The ACC referred the committee to a case study taken from New South Wales, where NSW Police arrested two people at a train station carrying over \$2.5 million in suitcases. The arrests were made under NSW's unexplained wealth provisions, based on the 'unexplainability' of why somebody would have that enormous amount of money, yet not have a reasonable explanation as to where it came from. The money was later forfeited to the NSW Crime Commission.⁴⁶

3.57 The ACC noted that under the Commonwealth provisions:

[I]t is unlikely that unexplained wealth proceedings would have commenced in relation to these people without extensive investigative research into their whole life earnings and the ability of prosecutors to demonstrate a direct linkage of the money to a Commonwealth offence.⁴⁷

3.58 The CDPP provided further evidence, drawing the committee's attention to the definitions of wealth within PoCA:

[I]t goes back to the definitions of total wealth and wealth in, section 179G of the Proceeds of Crime Act. If I can paraphrase that, the total wealth of a person is the sum of all the values of the property that constitutes the person's wealth. Wealth is defined to mean property owned by the person at any time, property that has been under the effective control of the person at any time and property that the person has disposed of, whether by sale, gift or otherwise, or consumed at any time.⁴⁸

3.59 The committee notes that it may be possible to alter the provisions so that unexplained wealth orders could apply to the change in a person's wealth in a specified period, for example, if a person's wealth increased dramatically within a period of a few years.

3.60 The ACC submission indicated that if the provisions were altered in this way, cases like the following scenario presented in its submission could be more effectively dealt with:

44 ACC, *Submission 8*, p. 2.

45 Mrs Karen Harfield, ACC, *Committee Hansard*, 4 November 2011, p. 11.

46 ACC, *Submission 8*, p. 4.

47 ACC, *Submission 8*, p. 2.

48 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 30.

In June 2010, ACC met with CDPP to brief them on a matter in which a significant amount of information was held to indicate that a person had accumulated large amounts of unexplained wealth over several years, with asset holdings being disproportionate with declared income. Intelligence indicated the person had been involved in criminal activity, but there was insufficient evidence to charge, and the person has never been convicted of an offence.

Between January and June 2011, all relevant financial and banking records were sourced and a detailed financial analysis prepared to support the unexplained wealth case. This analysis has shown that the person has unsourced income of approximately \$2.7 million. The complexity of the matter, and the extent of the information required to satisfy the unexplained wealth provisions, is such that the case requires very careful consideration, and no decision has yet been made as to whether action will be taken, and if so whether unexplained wealth is the appropriate course.⁴⁹

3.61 The committee notes that revising the definition of total wealth within the unexplained wealth provisions may be desirable, but that it remains to be seen how the courts will choose to interpret the existing definition and other provisions. In principle, the committee considers that the provisions should be able to be used to effectively address situations where it can be proven that a large amount of unexplained wealth has been obtained over a specific timeframe. The committee will therefore remain seized of the matter.

Using ACC coercive powers in unexplained wealth investigations

3.62 The ACC proposed a significant new measure to contribute to unexplained wealth investigations through the use of its coercive powers to obtain information about unexplained wealth. The ACC proposal, as outlined in its submission, would involve an ACC examiner being empowered, in appropriate circumstances and with existing safeguards, to use the ACC's coercive powers for the purpose of an unexplained wealth investigation and to order temporary freezing of assets.⁵⁰

3.63 The ACC proposal would work in conjunction with the PoCA measures currently in existence, and involves four steps.

3.64 Firstly, the ACC Board would approve a special investigation in relation to unexplained wealth, in order to give the ACC authority to use its coercive powers. This may require amendment of the ACC Act, as a Board determination currently requires a link to a relevant offence, which may not be present in an unexplained wealth investigation.⁵¹

49 ACC, *Submission 8*, p. 3.

50 ACC, *Submission 8 (Supplementary Submission)*, p. 2.

51 ACC, *Submission 8 (Supplementary Submission)*, p. 2.

3.65 Secondly, the ACC would need to identify possible unexplained wealth. During the course of an investigation, the ACC or its partner agencies may obtain intelligence that a person of interest has unexplained wealth that is potentially subject to Commonwealth unexplained wealth provisions. The ACC notes that this could be as the result of suspected criminal activity, or could involve a person who is suspected of benefiting from a life of crime or from offences committed by others.⁵²

3.66 The third step would be to apply to an ACC examiner for the use of coercive powers and a restraining order. Obtaining a restraining order is considered critical, as once a person of interest is notified of the requirement to produce documents or attend an examination, they may seek to dissipate their assets to prevent seizure. An ACC examiner does not currently have the power to issue an asset restraining order, necessitating amendment of the ACC Act if this were to occur.

3.67 The final stage of the ACC proposal would be to use the ACC coercive powers, including demanding the production of documents and undertaking examinations. The ACC foresees three possible outcomes from this process:

- (a) the wealth is satisfactorily explained, with any appropriate costs incurred by the person of interest to be borne by the ACC;
- (b) the wealth cannot be legitimately explained, with the evidence being used in proceeds of crime or unexplained wealth proceedings, but not in criminal proceedings.
- (c) the individual commits an ACC Act offence/contempt, for example by lying to an examiner. The act of contempt could potentially be used as evidence in a PoCA proceeding.⁵³

3.68 A flowchart depicting this process is reproduced at Appendix 3.

Related amendments

3.69 The ACC proposed two measures complementary to the proposal: ensuring that ACC examination material could be used in PoCA proceedings and alibi-style provisions.

3.70 The ACC informed the committee that despite recent court decisions, uncertainty remained over the scope of permitted use of ACC examination material in the context of proceeds of crime proceedings. The ACC proposed that, regardless of whether the measure discussed above was adopted, the ACC Act and PoCA be amended to make it clear that examination material could be used as evidence in PoCA proceedings, and that the ACC could continue conduct coercive hearings even after PoCA proceedings had commenced.⁵⁴

52 ACC, *Submission 8 (Supplementary Submission)*, p. 3.

53 ACC, *Submission 8 (Supplementary Submission)*, p. 5.

54 ACC, *Submission 8 (Supplementary Submission)*, p. 6.

3.71 Secondly, the ACC recommended the introduction of provisions, similar in nature to existing alibi notice provisions, within PoCA. The intent of these provisions would be to reduce the scope for a respondent to assert a legitimate source for restrained property at a late stage in the case, despite having provided different evidence up until that point. As the ACC explained:

The use of alibi-type notice provisions do not significantly diminish the rights of the respondent as their right to explain the source of the wealth still exists. Instead, such provisions would ensure that the resources of law enforcement are targeted and the investigation can be appropriately limited. Further, these provisions would not remove the need for law enforcement to prepare a brief satisfying the court to the necessary standard and to undertake an initial investigation before commencing applications under the PoCA, but would simply act to narrow the scope of additional investigation to those issues defined by the respondent.⁵⁵

3.72 The ACC also raised the issue of the ATO receiving telecommunications intercepts, which is discussed below.

Issues with the ACC proposal

3.73 While the committee considers that the ACC proposal could provide great value in assisting unexplained wealth investigations, it received evidence suggesting that a number of legal issues would need to be resolved before it could go ahead.

3.74 Firstly, there may be Constitutional issues arising from the proposal to allow the ACC Board to grant a determination in relation to unexplained wealth without a link to a relevant offence, for the same reason that the unexplained wealth orders currently require a link to a federally relevant offence. In both cases, the link is necessary to obtain a Commonwealth head of power.⁵⁶ In the ACC's case, however, each State and Territory has enacted its own ACC legislation which enables the Board to authorise operations and investigations into State criminal activity, and confers coercive powers on the ACC in respect of those operations and investigations.⁵⁷

3.75 Currently, Board determinations can only be made in relation to a relevant crime, defined as either 'serious and organised crime' or 'indigenous violence or child abuse'. The ACC noted that limiting the scope of the use of coercive powers to only those unexplained wealth matters involving serious and organised crime unduly restricts the breadth of matters that the ACC can be involved in. As the ACC submitted:

This is not because the ACC wishes to use its coercive powers in relation to minor indiscretions but because in unexplained wealth matters a demonstrated link to serious and organised crime may not always be

55 ACC, *Submission 8 (Supplementary Submission)*, p. 7.

56 Ms Sarah Chidgey, AGD, Committee Hansard, 10 February 2011, p. 22.

57 AGD, Answer to question on notice, 10 February 2012 (received 29 February 2012), p. 3.

evident at the initial investigation phase. For example, it is not uncommon for persons of interest who have accumulated vast wealth from serious crime to be so well insulated from the commission of those crimes so as to prevent the ACC investigating the matter, because the connection to serious and organised crime can not be readily and initially established.⁵⁸

3.76 The ACC explained that the proposal would require amendments to the ACC Act to allow the ACC to use its coercive powers specifically in relation to unexplained wealth, independent of a link to a 'relevant crime' being established.⁵⁹ Given the need for a link to Commonwealth power if the Commonwealth act was used, the committee notes that this may also require amendment of the state and territory enabling legislation.

3.77 The committee agrees that, in principle, the use of ACC examination powers in support of unexplained wealth proceedings could be very effective, and recommends that the Commonwealth Government pursue an expansion of the ACC's remit to include support of unexplained wealth investigations.

Recommendation 2

3.78 The committee recommends that Commonwealth Government explore the possibility of amending legislation to allow the Australian Crime Commission Board to issue a determination on unexplained wealth, so as to enable the Australian Crime Commission to use its coercive powers to provide evidence in support of unexplained wealth proceedings.

3.79 Furthermore, the committee agrees with Australian Crime Commission's suggestion that, regardless of whether other recommendations relating to the proposal to use the ACC's powers to support unexplained wealth proceedings are adopted by the government, the PoCA and ACC Act should be amended to make clear that examination material could be used as evidence in PoCA proceedings.

Recommendation 3

3.80 The committee recommends that the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002* be amended as necessary to make clear that the Australian Crime Commission's examination material can be used as evidence in proceedings under the *Proceeds of Crime Act 2002*.

3.81 Secondly, and perhaps more importantly, granting an ACC examiner the authority to restrain a person's assets may be considered a breach of the separation of powers, in that it may be considered to be giving a judicial power to an executive agency. As Mr Iain Anderson, AGD, explained:

58 ACC, *Submission 8 (Supplementary Submission)*, p. 3.

59 ACC, *Submission 8 (Supplementary Submission)*, pp 2–3.

It is one thing for them to use their coercive powers for the hearing. But if it was envisaged that they would somehow make orders that would affect the assets of the person of interest, that may well be a judicial power that could not be bestowed upon a part of the executive.⁶⁰

3.82 The ACC responded to this evidence, noting that, if the exercise of a power does not result in a binding, permanent decision, or does not purport to determine rights, it will generally not be considered a judicial function.⁶¹ Furthermore, the ACC observed that:

In some cases a power may be judicial or non-judicial, depending on the body exercising the power. Proceeds of crime legislation, for example, commonly provides for the making of freezing orders or restraining orders. Although such orders have relevantly identical effects (ie, a person is prevented from dealing with their property), the powers may be judicial or non-judicial depending on whether they are conferred on a court or an administrative officer.

Legislation which treats the power to temporarily freeze assets (typically where the property is suspected of being related to a crime) as a non-judicial function to be exercised by administrative officers (such as Ministers or their delegates, authorised justices and justices of the peace) is relatively common. In NSW, the legislation explicitly provides that the function is non-judicial.

Typical characteristics of non-judicial freezing orders are that they are limited in duration (for example 14 or 21 days), and are subject to a court's ultimate supervision (for example, there may be a requirement for a court to confirm a notice within a specified period).

Administrative officers such as examiners and authorised justices exercise a wide range of other functions which temporarily affect a person's right to deal with their property. For example, ACC examiners have the power to order production of documents or things, authorised justices have powers to issue search warrants, and public servants have powers to freeze bank accounts in limited circumstances.

Although punitive detention is a judicial function, ordering detention in certain circumstances is not considered a judicial function, such as the power of a Minister to detain a person for non-punitive purposes (eg immigration detention), or for police to initially detain a person charged with a criminal offence pending a judicial bail consideration.⁶²

3.83 A further issue arising is the potential for contempt of a court. In the event that the ACC was unable to issue restraining orders, and instead had to rely on the court-based provisions within PoCA, the use of ACC coercive powers after PoCA proceedings have commenced could be considered a contempt of court. This may be

60 Mr Iain Anderson, AGD, *Committee Hansard*, 10 February 2010, p. 19.

61 ACC, *Submission 8 (Second Supplementary Submission)*, p. 2.

62 ACC, *Submission 8 (Second Supplementary Submission)*, pp 2–3.

the case, given that the information gathering powers provided by PoCA include enabling the court to conduct its own examination process. Mr Anderson gave a scenario where:

... you have got proceeds of crime proceedings in a court going on and the ACC examiner is at the same time seeking to coercively examine someone about the subject of the proceeds of crime proceedings. In that situation, that might constitute a contempt of court by the examiner. If the ACC does it prior to matters being commenced in the court, the issue would not arise.⁶³

3.84 The combination of these issues resulted in a chicken-and-egg type dilemma. Under the ACC's proposal, it would issue its own restraining order prior to an examination to prevent asset dissipation by the person of interest upon notification of the ACC's interest. If this was not Constitutionally possible, however, and the ACC sought a restraining order through PoCA prior to an examination, then its examination could constitute a contempt of the court. The timing of the restraint of assets and the use of the ACC's examination powers is of critical importance.

3.85 The ACC informed the committee that, in the event that a freezing or restraining order could not be issued by the ACC, provision should be made within PoCA to ensure that the ACC's examination powers could be used to complement the PoCA processes. The ACC observed that it may be possible to give a court the option to authorise the ACC to conduct examinations, submitting:

We note that there have been many instances where information obtained through the use of coercive examinations has been introduced in confiscation proceedings without objection in the past. However, to avoid doubt, the ACC proposes that consideration be given to amending the POC Act to allow the Court, in its discretion, to authorise or endorse the use of ACC examinations when it becomes vested of the matter. The issue of contempt would then not arise.⁶⁴

3.86 Such an amendment would need to be carefully drafted to ensure that the discretion and independence of both the court and the ACC examiners remained. The ACC informed the committee that the legislation would need to clearly state that the court could refuse to authorise the use of the ACC's examination powers. Similarly, the independence of the ACC examiner would have to be preserved, with a court authorisation not predetermining whether the ACC examiner would in fact conduct an examination.⁶⁵

3.87 In practice, it may be possible for the ACC proposal to be revised along these lines, so that the AFP or CDPP, upon making an application for a PoCA restraining

⁶³ Mr Iain Anderson, AGD, *Committee Hansard*, 10 February 2010, p. 23.

⁶⁴ ACC, *Submission 8 (Second Supplementary Submission)*, p. 4.

⁶⁵ ACC, *Submission 8 (Second Supplementary Submission)*, p. 4.

order, could also apply for an order giving approval from the Court to use the ACC examination process instead of, or in addition to the PoCA examination process.

3.88 The Attorney-General's Department suggested a similar variation of the ACC's original proposal, noting that an alternative could be to amend the Proceeds of Crime Regulations 2002 to specify ACC Examiners as approved examiners for the purposes of PoCA.⁶⁶

3.89 In AGD's view, this would enable the expertise of ACC examiners to be employed in conducting POCA examinations. ACC examiners serving in this capacity, however, would be exercising powers under the POCA, not the ACC Act, and would be subject to the provisions of that Act in conducting examinations. AGD noted that it would nevertheless be possible to use ACC facilities, capabilities and information in conducting the examinations.⁶⁷

3.90 Coopting an ACC examiner into the PoCA examination process in this way would limit the broader use of the information gained in the examination. Under the existing POCA provisions, information obtained from these examinations would only be able to be disclosed to other ACC investigators if the examiner believed it would assist in the investigation or prosecution of an offence punishable by over 3 years imprisonment. To allow the information to be used for broader ACC purposes, the PoCA would need further amendment.⁶⁸

3.91 The ACC informed the committee that placing the ACC Examiner within the PoCA examination framework could cause other problems, including interfering with the independent function of the ACC Examiner, confusing the governance and responsibilities of ACC officers, and limiting the scope of what could be asked in such examinations.⁶⁹

3.92 In general, the committee notes that there may be considerable merit in using the ACC examination process rather than that provided for under PoCA, for several reasons described by the ACC, including:

- the ACC has far more experience in conducting examinations involving serious and organised crime, holding over 500 such examinations in 2010–11, compared to four conducted under the auspices of PoCA;
- the ACC examination process is more developed, featuring robust practices and procedures to ensure legal compliance, access to specialised professionals such as forensic psychologists, intelligence analysts and forensic accountants; and

66 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), p. 4.

67 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), p. 4.

68 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), pp 4–5.

69 ACC, *Submission 8 (Second Supplementary Submission)*, pp 5–6.

- the ACC is used to conducting secret hearings that protect the identity of those involved using secure facilities at short notice.⁷⁰

3.93 The committee notes that, under the PoCA examination provisions, a court appointed examiner could also conduct confidential examinations.⁷¹ In practice, however, the ACC handles a larger volume of such examinations and therefore is likely to have greater experience in such matters. A more detailed comparison of the PoCA and ACC examination processes has been included at Appendix 4.

Committee view

3.94 While the proposal to give ACC examiners the power to temporarily restrain assets could be highly effective from a law enforcement perspective, the committee remains conscious of the Constitutional arguments raised by AGD. The committee is not in a position to make a determination on whether the proposal is appropriate under the circumstances and is therefore hesitant to recommend amendments along these lines.

3.95 The committee is, however, supportive of amending PoCA so as to allow for ACC examinations to be conducted after a restraining order has been made by a court, in such a way that the evidence could be used in an unexplained wealth proceeding. Such a provision would have to be carefully drafted so as to ensure that both the court and ACC examiners retained appropriate discretion and independence.

Recommendation 4

3.96 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.

3.97 The committee's preference would be for the establishment of a court-approval mechanism whereby the AFP or CDPP could apply to the court seeking authorisation for the ACC to conduct examinations after a restraining order had been made by the court. Examinations would be conducted under the terms of the ACC Act rather than the PoCA, as discussed above. An alternative would be for the PoCA to be amended to allow the court to appoint an ACC examiner to conduct a PoCA examination with the consent of the ACC examiner. In all cases, the court would maintain the ability to conduct examinations under existing PoCA provisions if it so chose.

70 ACC, *Submission 8 (Second Supplementary Submission)*, pp 6–7.

71 Ms Sarah Chidgey, AGD, *Committee Hansard*, 10 February 2012, p. 26.

Amending search warrant powers

3.98 Part 3-5 of PoCA establishes a mechanism by which an authorised officer of a law enforcement agency can apply to a magistrate for a warrant to search a premises, or persons in the vicinity of the premises, for 'tainted property' or 'evidential material'. These search warrants are one of a number of information gathering measures provided for under PoCA.

3.99 Tainted property is defined as proceeds of certain indictable offences or an instrument of an indictable offence (such as vessels used to import narcotics or computers used to transmit child exploitation material). Evidential material means evidence relating to: property in respect of which PoCA action has or could be taken; benefits derived from the commission of certain offences; or literary proceeds.⁷²

3.100 The AFP informed the committee that while these search powers are a valuable investigative tool, they may not be able to be used for unexplained wealth proceedings. Specifically, the AFP notes that the definition of evidential material does not appear to extend to evidence of unlawful activities from which a person has derived wealth. The AFP therefore argued in favour of amending Part 3-5 to ensure that evidence relevant to unexplained wealth proceedings can be obtained.⁷³

3.101 AGD provided further clarification of the issue, agreeing that while the current search and seizure provisions would allow collection of some evidence in relation to property relating to unexplained wealth proceedings, significant limitations remained. For example, AGD was of the view that it was not clear whether existing provisions would cover property relevant to ascertaining the total wealth of the person (e.g. evidence of a person's income or legitimately acquired property) or evidence of unlawful activities from which a person has derived wealth. Furthermore, officers would not be able to collect evidence relating to summary offences, despite the fact that restraint action in unexplained wealth matters can be based on the commission of either a summary or indictable Commonwealth offence.⁷⁴

3.102 AGD raised two possible remedies by which the search warrant provisions could be amended. One method would be to expand the definition of 'evidential material' to include evidence relevant to unexplained wealth proceedings. However, AGD warned that doing so may result in powers of very broad application:

For example, amending this definition to include evidence relevant to ascertaining the total wealth of a person would allow for a warrant to be issued in relation to any premises where a person keeps evidence of their financial affairs (i.e. most homes and businesses).⁷⁵

72 AFP, *Submission 9*, p. 15.

73 AFP, *Submission 9*, p. 15.

74 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 3.

75 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 3.

3.103 A second option would be to amend subsection 228(1) of the POCA to enable material that is relevant to an unexplained wealth proceeding to be seized during the execution of a search warrant. Subparagraph 228(1)(d)(iii) could also be amended to remove the requirement that the evidential material relate to an indictable offence. This would allow for the collection of evidence in relation to summary offences and for that material to be used in an application for an unexplained wealth restraining order under section 20A.

3.104 The committee considers that the investigation framework within PoCA in relation to unexplained wealth would be greatly enhanced through improvement of the search warrant regime to allow necessary evidence to be collected. Of the two proposals put forward by AGD, the committee considers the second to be the superior of the two.

Recommendation 5

3.105 The committee recommends that search warrant provisions of the *Proceeds of Crime Act 2002* be amended so as to allow for the collection of evidence that is relevant to unexplained wealth provisions. The committee's preferred means of amending the provisions would be to amend:

- **subsection 228(1) to enable material that is relevant to an unexplained wealth proceeding to be seized during the execution of a search warrant; and**
- **subparagraph 228(1)(d)(iii) to remove the requirement that the evidential material relate to an indictable offence.**

Improving information sharing with the Australian Taxation Office

3.106 Given the key role that financial data plays in unexplained wealth proceedings, information held by the ATO is likely to be of great importance in unexplained wealth investigations. The mission, powers and abilities of the ATO are closely aligned with the aim of unexplained wealth provisions. Indeed, so much so that the Crime and Misconduct Commission (CMC) of Queensland preferred the use of taxation laws to unexplained wealth laws, submitting:

In the CMC's view, the taxation laws provide a more appropriate and effective mechanism to address the accumulation of unexplained wealth notwithstanding potential criticism of 'taxing' organised crime rather than removing the criminally derived benefits through confiscation.⁷⁶

3.107 The committee considered means by which the ATO could better coordinate its efforts with those of law enforcement agencies, thereby contributing to both serious and organised crime investigations and to the integrity of the national taxation system.

76 Crime and Misconduct Commission, *Submission 1*, pp 2–3.

Prescription of taskforces under the Taxation Administration Regulations 1976

3.108 In December 2010, the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* amended the provisions in the *Taxation Administration Act 1953* (Tax Administration Act) governing disclosure of taxpayer information to law enforcement agencies. The amendments in conjunction with other Commonwealth organised crime related legislative reforms:

- removed limitations on the use of taxpayer information enabling use of this information for the prosecution of serious offences; and
- allow for the disclosure of taxpayer information to law enforcement agencies and courts for the investigation of unexplained wealth matters.⁷⁷

3.109 The committee supports such initiatives as information sharing and increased coordination significantly enhance the Commonwealth's approach to tackling serious and organised crime.

3.110 The AFP informed the committee of a further reform for consideration. Under the Tax Administration Act, the ATO can disclose taxpayer information to an officer of a prescribed taskforce for or in connection with a purpose of the prescribed taskforce. A taskforce can be prescribed if a major purpose of the relevant taskforce must be the protection of public finances.⁷⁸

3.111 For this reason, the AFP suggested that the Criminal Assets Confiscation Taskforce be prescribed, enabling the ATO to disclose taxpayer information for the broader purposes of the Taskforce. Specifically, the AFP identified as benefits the ability to better identify assets for seizure and pursue wealth collected by criminals at the expense of the community.⁷⁹

3.112 The ATO also supported taskforce prescription, stating that:

Success in tackling organised crime depends largely on sufficient information sharing powers for law enforcement agencies. It is expected that further taskforces will be established both at the Commonwealth and State levels to address serious and organised crime. Prescription of a taskforce allows the ATO to disclose information to an officer of an agency in any prescribed taskforce for a purpose of that taskforce. The ATO considers the prescription of taskforces as imperative for effective information sharing with law enforcement agencies.⁸⁰

3.113 The committee supports the prescription of the CACT as information held by the ATO is likely to be essential to its activities.

77 AFP, *Submission 9*, p. 15.

78 AFP, *Submission 9*, p. 15.

79 AFP, *Submission 9*, p. 16.

80 ATO, *Submission 5*, p. 2.

Recommendation 6

3.114 The committee recommends that the Criminal Assets Confiscation Taskforce be prescribed as a taskforce under the *Taxation Administration Act 1953* and associated regulations.

Enabling the ATO to receive intercept information

3.115 The committee heard that the ATO is currently only able to make limited use of information collected by law enforcement agencies through telecommunication intercepts. Commander Ian McCartney, head of the Criminal Assets Confiscation Taskforce, highlighted the benefit that could arise if intercept information could be used more widely by the ATO:

[W]here we have identified a matter, a key operational strategy for us, particularly in terms of organised crime, is the use of telephone intercepts on special projects. If we identify through our investigation a tax mischief that we believe would be relevant to the tax office, we cannot refer telephone intercept material to the tax office; we are precluded under the legislation. So there are some barriers there.⁸¹

3.116 Section 67 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) currently enables an interception agency (such as AFP or ACC) to communicate information to the ATO to assist in the interception agency's investigations, for example, in joint operations into serious tax fraud.⁸² The receiving agency is only able to use the information for the purposes for which it received that information, meaning that the ATO would be prevented from using the information for their own investigations or tax assessments.

3.117 The TIA Act does not currently allow for the communication of intercepted information to the Australian Taxation Office (ATO) for the ATO's own purposes.⁸³ In practice, this means the ATO cannot receive such information for the purpose of raising tax assessments, which would be useful both in disrupting organised crime and collecting unpaid tax.

3.118 The ATO submitted that it could play a greater role in assisting law enforcement agencies to combat serious and organised crime if it more freely access telephone intercept information, stating:

Enabling the ATO to receive and use intercept information that law enforcement agencies have obtained under telecommunication laws for the purposes of raising taxation assessment would enhance the Commonwealth's ability to address unexplained wealth associated with organised crime. It would also enable the ATO to better support law

81 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 7.

82 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 4.

83 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 4.

enforcement agencies in their activities through being able to analyse intercept material relating to financial transactions and structures so as to provide insights back to the referring agency.⁸⁴

3.119 The committee is of the view that the ATO and the enforcement of Australian tax law should form a key part of the response to serious and organised crime. The committee has previously recommended, in the course of its review of the *Australian Crime Commission Act 2002*, the inclusion of the Tax Commissioner on the Board of the Australian Crime Commission; a recommendation since accepted and implemented by the Government.⁸⁵ The committee observes that this is part of the rationale for the inclusion of officers from the ATO in the Criminal Assets Confiscation Taskforce, and involvement in serious tax fraud investigations such as Project Wickenby.

3.120 The committee notes that obtaining an interception warrant is currently subject to significant control, and given the highly intrusive nature of this measure, does not propose that this be altered. However, the committee recommends that serious consideration be given to enabling the ATO to use information obtained by law enforcement agencies through telephone intercepts in the course of investigations into unexplained wealth and serious and organised crime for the purpose of raising tax assessments. To limit the use of the intercept information appropriately, the committee considers that such a practice could be restricted, for example to taskforces prescribed under the *Taxation Administration Act 1953*.

Recommendation 7

3.121 The committee recommends amending the *Telecommunications (Interception and Access) Act 1979* so as to allow the Australian Taxation Office to use information gained through telecommunications interception, in the course of joint investigations by taskforces prescribed under the *Taxation Administration Act 1953*, for the purpose of the protection of public finances.

Access to financial information

3.122 The committee heard that there can be limitations arising from the timeframes to access financial information. For example WA Police noted:

One of the major issues we have with our act is that, whilst we can request information from financial institutions, there are no time frames for when information comes to us. It is very important in any investigation, whether criminal or civil based, that there be timeliness with the information coming to us. Sometimes we can wait up to three months for financial information to come back from a bank, for example.

84 ATO, *Submission 5*, p. 2.

85 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, Final report, p. 56.

They have other agencies and organisations which request information from them. Some of those organisations have time frames within their legislation, so our requests just go to the bottom of the pile. That is just the way it is. I certainly do not begrudge the financial institutions. They obviously have to prioritise their work.⁸⁶

3.123 At the Commonwealth level, access to financial information did not appear to be a major issue. The ATO indicated that they generally had sufficient access to information from banks⁸⁷ and the ACC did not see any serious problems, but noted the amount of information can be challenging:

The financial institutions are dealing with a huge amount of requests for law enforcement. I think that as the criminals move more and more into hiding their assets and using various trusts there will be more and more requests from law enforcement for information from the financial institutions. I think it is a struggle sometimes for the banks or financial institutions to cope with that. My sense is that we have quite good relations with those financial institutions and, where there is something required to be done urgently, by and large that is achieved. It would be nice to have a service level agreement where we could put a request in that there would be a turnaround in a particular time, but there is an impost on the financial institutions to do that. But by and large the relationships we have with the financial institutions are such that, if we need something done urgently, it will be done.⁸⁸

3.124 The committee observes that the concentration of specialised officers in the CACT should assist in effectively accessing and analysing financial information. The committee is aware that financial investigation is increasingly important in modern crime-fighting and will continue to monitor developments in this field.

Deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity

3.125 The ACC proposed the introduction of express provisions to deem amounts in relation to which an individual has no explanation, or which are inconsistent with levels of income declared in taxation returns, or obtained in years for which no taxation return was filed, to be illegally obtained. The ACC informed the committee that it had historical examples where such provisions would have been valuable.⁸⁹

3.126 Ms Kate Deakin, ACC, elaborated further, stating:

86 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 5.

87 Mr John Ford, ATO, *Committee Hansard*, 4 November 2011, p. 22.

88 Mr Richard Grant, ACC, *Committee Hansard*, 4 November 2011, p. 14.

89 ACC, *Submission 8*, p. 4.

We are suggesting—and it might be a reasonable middle ground—deeming provisions or presumptions, so that if, for example, you have assets far in excess of your tax-declared wealth, or significant assets acquired in years for which no tax returns were filed, or if assets were purchased with large amounts of cash—that sort of thing—if we can put in place presumptions that say, 'Unless you can prove otherwise, we are going to assume that those amounts were illegitimately obtained'.⁹⁰

3.127 In a similar vein, the ACC also suggested introducing laws which, in appropriate circumstances, treat cash as a criminal commodity, by creating a rebuttable presumption that possession of large amounts of cash without adequate explanation is connected to criminality.⁹¹

3.128 The Attorney-General's Department advised that this would extend the current unexplained wealth laws and would place an additional burden on people to prove their wealth was lawfully obtained citing examples where this may be undesirable:

This is especially true if money is deemed to be illegally obtained if it does not accord with the level of income declared in a person's tax returns. For example, money that has been legitimately obtained (e.g. through an inheritance, gift, scholarship or certain overseas sources) may not necessarily appear in a person's tax returns.⁹²

3.129 AGD further advised that if these measures were adopted, the inclusion of safeguards would be desirable, while consideration would also need to be given to constitutional validity.⁹³

3.130 The Law Council of Australia and the Queensland Law Society were against the proposals. The Law Council argued that they increased the risk of capturing the behaviour of individuals who lack capacity to explain how they acquired particular amounts of money perhaps due to age, cultural and linguistic background or physical or mental incapacity. Additionally, they may also capture the behaviour of people who have simply failed to keep receipts or records, have made errors in tax returns or have not filed tax returns for legitimate reasons, such as illness.⁹⁴

Improving the efficiency of unexplained wealth proceedings

3.131 The committee received evidence suggesting the need for a number of reforms associated with unexplained wealth proceedings under PoCA. These included:

- removing the requirement to meet an evidence threshold twice;

90 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 13.

91 ACC, *Submission 8*, p. 4.

92 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

93 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

94 Law Council, *Submission 3(Supplementary Submission)*, p. 14; see also Queensland Law Society, *Submission 12*, pp 2–3.

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- options for dispute resolution;
 - extending the time limit for notices of preliminary unexplained wealth orders;
 - setting up special courts or judges;
 - preventing legal expenses being met from restrained property; and
 - granting the ability to create and register a charge over restrained property.

Removing the requirement to meet an evidence threshold twice

3.132 Unexplained wealth proceedings can commence either with an application for a restraining order (and then an application for a preliminary unexplained wealth order), or with an application for a preliminary unexplained wealth order. Applications for unexplained wealth restraining orders and preliminary unexplained wealth orders must be accompanied by an affidavit made by an authorised officer. The court may then make a restraining order or preliminary unexplained wealth order if it is satisfied of the matters dealt with in the affidavit. In this way, the affidavit requirements form the basis for the threshold test which must be met before the court may make an order.⁹⁵

3.133 The AFP informed the committee that there is an overlap between the matters required to be addressed in the affidavit for a restraining order, and the affidavit required for a preliminary unexplained wealth restraining order. Specifically, both affidavits must state that the authorised officer suspects (on reasonable grounds) that the person's total wealth exceeds the value of the person's lawfully acquired wealth.⁹⁶

3.134 The practical effect of this requirement appears to be that where a restraining order is sought before an application for a preliminary unexplained wealth order is made, the Commonwealth will need to meet the same threshold test twice. As orders may be sought from different judges, the result may be that two different judges are required to be satisfied of the same threshold.⁹⁷

3.135 In order to eliminate this duplication of effort, the AFP proposed to the committee that the process could be streamlined by amending the relevant provisions to provide that where an unexplained wealth restraining order has been made (and the court is satisfied that the authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's lawfully acquired wealth), the affidavit for a preliminary unexplained wealth order does not have to address the same matter.⁹⁸

95 AFP, *Submission 9*, p. 13.

96 AFP, *Submission 9*, p. 13.

97 AFP, *Submission 9*, p. 13.

98 AFP, *Submission 9*, p. 13.

3.136 AGD supported the AFP's view, noting that removing this duplication would have a beneficial impact on efficiency and resourcing for law enforcement agencies and for the courts.

3.137 AGD cautioned that the option to provide or otherwise update an affidavit at stages subsequent to a restraining order should remain as it is possible that further evidence would be uncovered and should therefore be included in a revised affidavit. Furthermore, in cases where a restraining order was not sought prior to a preliminary unexplained wealth order, an affidavit should be required in applying of the preliminary unexplained wealth order.⁹⁹ The committee agrees that any amendments should be mindful of these issues.

3.138 The committee agrees that the duplication of the evidence threshold test is unnecessary and notes that AGD has proposed one method by which this might be achieved:

[T]he PoCA could be amended to include a presumption that, where a restraining order has been made under section 20A, there is a reasonable suspicion that the person's total wealth exceeds their lawfully acquired wealth. This would ensure that there is consistency between judicial decisions made at restraining order stage and preliminary unexplained wealth order stage, and would enable any additional evidence that is uncovered to be included in the affidavit.¹⁰⁰

3.139 The committee therefore recommends that the duplication of the evidence threshold test be eliminated.

Recommendation 8

3.140 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to eliminate the requirement for authorised officers to meet an evidence threshold test for a preliminary unexplained wealth order where the evidence threshold test for a restraining order has already been met. Any amendment should recognise the need to be able to update an affidavit to reflect new evidence as appropriate.

Options for dispute resolution and administrative forfeiture

3.141 In its submission the ACC recommended strengthening options to alternative dispute resolution and administrative forfeiture.¹⁰¹ During the hearing, the ACC elaborated further, stating:

That is not an option that we have explored in any great detail, but it simply would go to reducing the costs and risks which are inherently involved in

99 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 9.

100 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 9.

101 ACC, *Submission 8*, p. 5.

litigation. If there were ways to achieve the objectives without dragging matters through court unnecessarily, we would see that as a benefit, but that is not a matter that we can give any further detailed advice on.¹⁰²

3.142 The Attorney-General's Department informed the committee that under section 316 of the PoCA, it is possible for the court to make orders by consent, without necessarily having to consider the matters that the court would otherwise consider in the proceeding. It is this provision that is used by prosecuting authorities to 'settle' matters.¹⁰³ The committee understands that settlement is, in this case, subject to court oversight.

3.143 The Commonwealth Director of Public Prosecutions indicated the benefit of being able to settle proceeds of crime cases in some circumstances, stating:

To date our experience is that we will settle matters where we have applied for proceeds orders and, having regard to a number of factors such as the risk of litigation, the prospect of recovery and evidential concerns, we might agree with a defendant that certain orders should be made which would pay certain moneys to the Commonwealth and sometimes that will not include all the moneys that might have been restrained. There are provisions in the Proceeds of Crime Act for such orders to be entered into and made by the court without determination of the merits.¹⁰⁴

3.144 AGD noted that introducing alternative dispute resolution into the PoCA for unexplained wealth cases could raise the following concerns:

- it may imply that there is a middle ground where a 'deal' can be done allowing criminals to avoid forfeiting all of the proceeds of their offences;
- in some cases, there will be a public interest in litigating matters to ensure that all proceeds and instruments of crime are confiscated; and
- alternative dispute resolution may be used as a delaying tactic by litigants.¹⁰⁵

3.145 AGD also noted that administrative forfeiture was not common in Commonwealth legislation and generally limited to narrow classes of items that are easy to identify, whereas proceeds of crimes cases were relatively complex.¹⁰⁶

3.146 In the committee's view, dispute resolution of unexplained wealth proceedings risks creating a perception that the government is negotiating deals with serious and organised criminal networks. It is the committee's preference, therefore, that unexplained wealth cases are litigated using the full process outlined in the PoCA.

¹⁰² Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 14.

¹⁰³ AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

¹⁰⁴ Mr Graeme Davidson, CDPP, *Committee Hansard*, 10 February 2012, p. 35.

¹⁰⁵ AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

¹⁰⁶ AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

Extending the time limit for notices of preliminary unexplained wealth orders

3.147 The AFP drew the committee's attention to an issue arising from the requirement that the Commonwealth give a person notice of a preliminary unexplained wealth order, including providing a copy of the application and accompanying affidavit within seven days.¹⁰⁷

3.148 The AFP informed the committee that, in some situations, there may be difficulty or delays in locating the individual or facilitating the giving of notice. The AFP therefore proposed that the court be given the ability to extend the time limit for notice, on application of the Commonwealth, to accommodate extraordinary circumstances.¹⁰⁸

3.149 AGD provided evidence in support of this proposal, stating that extending the time limit for giving notice of an application for a preliminary unexplained wealth order would make the provisions more flexible in circumstances where it is not feasible for notice to be given within 7 days of an application being made. AGD further noted that if, as is the case in the AFP's proposal, extensions are made upon application by the Commonwealth, there would be court oversight to ensure that extensions are granted appropriately.

3.150 The Queensland Law Society suggested that the Commonwealth should be able to apply to the court for an extension of time for service to accommodate extraordinary circumstances.¹⁰⁹

Recommendation 9

3.151 The committee recommends that provision be made for extending the time limit for serving notice of a preliminary unexplained wealth order to accommodate extraordinary circumstances.

Setting up special courts or judges

3.152 Proceeds of crime proceedings are inherently complex and unexplained wealth proceedings are likely to involve an added layer of complexity. For this reason, the ACC suggested establishing a specialist proceeds of crime court or tribunal to deal with proceeds of crime matters, submitting:

Given the specialist and complex nature of both the legislation and the financial and criminal evidence, and the need for swift response times in cases where funds can be transferred overseas within hours, a specialist

107 AFP, *Submission 9*, p. 14.

108 AFP, *Submission 9*, p. 14.

109 Queensland Law Society, *Submission 12*, p. 3.

court would allow for the development of both judicial expertise and tailor-made procedures.¹¹⁰

3.153 The committee sought evidence on whether there would be value in having special courts or prescribed judges for proceeds of crime matters, as there are in some other countries. The AFP referred to the Irish model, explaining:

It is a model that is adopted in Ireland with their structure. There are a couple of issues at play. One is the size of the jurisdiction in Ireland—it is a lot smaller. It is something we have considered but we do not see as an organisation significant impediments in how the current system works. The ability to bring the system into Australia will require a policy change, a legislation change and a funding change, but it is something we would consider in future discussion.¹¹¹

3.154 The Queensland Law Society supported the introduction of nominated judicial officers, noting that specialised judges will be better equipped to appreciate the complexities involved with proceeds of crime matters.¹¹²

3.155 Representatives from the CDPP provided evidence to the committee on how proceeds of crime proceedings are currently litigated, stating:

At the moment basically we litigate our matters in the state courts. So, depending on which state we are in and which court has the appropriate jurisdiction, we will litigate in those and nor would we attempt to select who might be the adjudicator of those matters. I suppose it might be said that any court with experience in these sorts of matters is going to provide a more consistent type of outcome on that, but it is not really a matter that we as DPP should be commenting on as to its desirability. The general approach in Commonwealth criminal matters and proceeds of crime matters is that we litigate in the state courts with the appropriate jurisdiction. Like any litigant we accept whatever bench is given to us.¹¹³

3.156 The Attorney-General's Department advised the committee of some of the disadvantage of special courts and judges:

[C]reating specific courts is a step that can be fraught with dangers, as well. There are issues in creating a specialist court if you have judiciary who only sit in that court—whether they have sufficient workload to keep them fully occupied, particularly if you create judges who then stay there until they are aged 70. There is an expense involved in creating separate judges.

Just looking at other scenarios, there have been questions raised as to whether the federal court, for example, should have specialist divisions, particularly with judges only hearing certain types of matters. Generally,

110 ACC, *Submission 8*, p. 5.

111 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 8.

112 Queensland Law Society, *Submission 12*, p. 4.

113 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 31.

the Commonwealth has refrained from doing that because the view is that judges bring a range of experiences to hearing matters and that it is better that they have a broad experience rather than only practicing in a single area, where people can become too narrow over time. There are arguments against creating new courts for that reason.¹¹⁴

- 3.157 AGD provided subsequent evidence noting the following:
- new courts are costly, requiring new administration and resourcing;
 - where overlap between proceeds of crime proceedings and other matters exist, non-specialist courts provide flexibility to hear both matters at once; and
 - State and Territory courts with jurisdiction for indictable criminal offences have extensive experience with criminal law and bring this expertise to proceeds of crime matters.¹¹⁵

3.158 The committee acknowledges the difficulty and cost of setting up a special court or tribunal, but is also concerned to see that proceeds of crime matters can be effectively dealt with, particularly with future adjudication of as-yet unused unexplained wealth provisions.

3.159 The committee considers that there would be value in ensuring that courts and judges have appropriate training and experience and that proceeds of crime matters can be given attention in a timely way to prevent the dispersal or disposal of assets overseas and through other means.

Preventing legal expenses being met from restrained property

3.160 In the original iteration of the *Proceeds of Crime Act 1987*, restrained assets could be used by the defendant to meet legal expenses incurred in relation to proceedings under that act. However, in 1999 the Australian Law Reform Commission reported that this practice was contrary to the principles of PoCA, which were that property liable to forfeiture should be preserved for that purpose.¹¹⁶ Commander Ian McCartney, AFP elaborated further, explaining:

When the proceeds of crime legislation was brought in in 1987 there was an ability for suspects to access assets that had been restrained, for legal costs. We believe that that system was abused. It was used by suspects to frustrate the system and, basically, siphon off the assets that had been restrained.¹¹⁷

114 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 37.

115 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

116 AFP, *Submission 9*, p. 14.

117 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 4.

3.161 Accordingly, in 2002, the legislation was changed to preclude the use of restrained property to meet legal expenses incurred in connection with PoCA or criminal proceedings.¹¹⁸

3.162 However, this prohibition on using restrained assets to meet legal expenses was not applied to unexplained wealth provisions when they were subsequently introduced.

3.163 The stated purpose was to ensure that persons subject to unexplained wealth proceedings could fund an appropriate and sufficient defence against such proceedings as they differed from ordinary PoCA proceedings, with no specific crime needing to be alleged. This difference therefore justified a different policy approach to whether legal expenses could be met from restrained property.¹¹⁹

3.164 The committee notes that the court can engage a costs assessor to certify that legal expenses in defending unexplained wealth proceedings have been properly incurred, as a safeguard against abuse of this provision.¹²⁰

3.165 Currently, a court does not consider the amount paid for a person's legal expenses in calculating the proportion of a person's wealth that is unexplained. For example, if the court determined that a person had \$200 000 in unexplained wealth, they could make an order requiring the person to pay the Commonwealth \$200 000 (as a civil debt owing to the Commonwealth).

3.166 If, for example, the person used \$20 000 of that restrained amount to fund legal expenses, the person would still be liable to pay the Commonwealth the full \$200 000 amount, though the order may ultimately be enforced against the remaining \$180 000 of restrained funds. The remainder of the amount due to the Commonwealth under the unexplained wealth order would still be a civil debt due by the person to the Commonwealth, but, in practice, could be difficult to recover if there were no other restrained assets.¹²¹

3.167 Both the AFP and the ACC continue to have concerns about the potential use of restrained assets to meet legal expenses in unexplained wealth cases. As the AFP submitted:

The AFP's experience under PoCA 1987 was that the provisions allowing legal expenses to be paid for out of restrained property were exploited to deliberately frustrate the objectives of the scheme and dissipate property through protracted litigation.

118 AFP, *Submission 9*, p. 14.

119 AFP, *Submission 9*, p. 14.

120 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 1.

121 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), pp 5–6.

The AFP is concerned that this will happen under the unexplained wealth provisions. The AFP is not convinced that provisions which require a costs assessor to certify that legal expenses have been properly incurred will act as a sufficient safeguard to prevent the inappropriate dissipation of assets.¹²²

3.168 For this reason, the AFP proposed that PoCA be amended so that legal expenses cannot be met from property restrained as part of unexplained wealth proceeding, in a manner consistent with other elements of that act.¹²³

3.169 Currently, people who are subject to orders under the POCA, including unexplained wealth orders, are entitled to legal aid. Legal aid costs are then met from the Confiscated Assets Account — the account into which the value of confiscated proceeds and instruments of crime is paid.¹²⁴ In the last two years, a total of \$1.1 million has been paid from the Confiscated Assets Account to legal aid commissions in this manner.¹²⁵

3.170 Under paragraph 330(4)(c) of PoCA, if a suspect uses proceeds of crime to pay a lawyer for reasonable legal expenses incurred in connection with an application under PoCA or defending a criminal charge, the money paid to the legal practitioner would cease to be the proceeds of crime. This protects lawyers from being found to be in possession of proceeds of crime.¹²⁶

3.171 The Law Council of Australia was against the AFP proposal, arguing that respondents should continue to exercise a degree of control over their choice of legal representative as a fundamental aspect of the right to fair trial. Furthermore, the Law Council was concerned about the burden on legal aid commissions arising from complex PoCA proceedings.¹²⁷

3.172 Whilst the Law Council would like to see the PoCA amended so that respondents are able to access restrained assets for the purposes of funding their legal costs for all proceeds of crime proceedings under the PoCA, the Law Council submits that it is particularly important that such a provision is retained in relation to unexplained wealth matters, which involve a reverse onus of proof. Similar arguments were made by the Queensland Law Society.¹²⁸

122 AFP, *Submission 9*, p. 14–15. See also ACC, *Submission 8*, p.3.

123 AFP, *Submission 9*, p. 14.

124 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 6.

125 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 7.

126 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 5.

127 Law Council, *Submission 3 (supplementary submission)*, p. 13.

128 Law Council, *Submission 3 (supplementary submission)*, p. 13; Queensland Law Society, *Submission 12*, p. 4.

3.173 The committee was concerned about the potential for further burden to be placed on the legal aid system and sought supplementary evidence from AGD. The committee notes that Part 4-2 of PoCA allows a legal aid commission to recover legal costs for:

- representing a person whose property was, at the time of the representation, covered by a restraining order, and
- representing a person who was a suspect at the time of the representation and whose property was at that time covered by a restraining order, in proceedings for defending any criminal charge against the person.¹²⁹

3.174 To recover their legal costs, legal aid commissions must give the Official Trustee a bill for their costs. The process through which the reimbursement is provided appears to be relatively swift.¹³⁰ Given that legal aid commissions are recompensed in this way for PoCA work, the committee is of the view that the budget of legal aid commissions would not be significantly affected if the same system applied to unexplained wealth proceedings.

3.175 In response to the view that a respondent should be entitled to exercise a degree of control over their choice of legal representative as a fundamental aspect of the right to a fair trial, AGD noted that the right to fair trial only applies in criminal proceedings.¹³¹ Article 14 of the International Covenant on Civil and Political Rights states, in part, that in the determination of a criminal charge against a person, he is entitled to defend himself in person or through legal assistance of his own choosing.¹³²

3.176 The committee agrees with AGD's view that it is nevertheless important to ensure that people who are subject to proceedings under the PoCA have access to legal advice and representation, which in this case can be achieved through the provision of legal aid in PoCA matters.¹³³

3.177 On balance, the committee is of view that the provisions relating to legal expenses should be harmonised so that unexplained wealth provisions and other types of proceedings within PoCA are treated in a similar manner.

Recommendation 10

3.178 The committee recommends that legal expense and legal aid provisions for unexplained wealth cases be harmonised with those for other *Proceeds of Crime Act 2002* proceedings so as to prevent restrained assets being used to meet legal expenses.

129 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 3.

130 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 3.

131 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 4.

132 *International Covenant on Civil and Political Rights*, Article 14.3(d).

133 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 4.

Granting the ability to create and register a charge over restrained property

3.179 Under sections 142 and 169 of the PoCA, a charge can be created over restrained property to secure the payment to the Commonwealth of either a pecuniary penalty order or a literary proceeds order. However, a charge on the property is only possible where the restraining order over the property relates to the offence that led to the pecuniary penalty order or literary proceeds order being made, or a related offence. This ensures that property is available to satisfy a pecuniary penalty order or a literary proceeds order if a person does not pay the amount specified in the order.¹³⁴

3.180 The AFP was concerned that provisions within PoCA may complicate the enforcement of unexplained wealth orders. Specifically, the AFP noted while the process for enforcing an unexplained wealth order is substantially similar to that for pecuniary penalty orders, it does not include any equivalent provisions which deal with the creation and registration of charges over property restrained to satisfy an unexplained wealth order. As the AFP submitted:

This creates the potential for a situation in which, following the making of an unexplained wealth order, the Commonwealth cannot effectively enforce the order because its interests over property cannot be secured.¹³⁵

3.181 For this reason, the AFP proposed that provisions similar to sections 142 and 143 be inserted into Division 4 of Part 2-6 of PoCA. This would ensure that the Commonwealth could create and register a charge over property that has been restrained by the court to satisfy an unexplained wealth order.¹³⁶ AGD also saw an advantage in this proposal.¹³⁷

Recommendation 11

3.182 The committee recommends that the enforcement provisions for unexplained wealth orders include an ability to create and register a charge over property that has been restrained by the court to secure the payment of an unexplained wealth order.

Judicial discretion

3.183 In the making of final orders for most proceedings under the PoCA, 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. As the ACC informed the

134 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 11.

135 AFP, *Submission 9*, p. 16.

136 AFP, *Submission 9*, p. 16.

137 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 11.

committee, there is no information within the legislation that guides that discretion or explains why the order might be refused.¹³⁸

3.184 When the original bill for an unexplained wealth scheme, the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, was first introduced to Parliament, the provisions in the bill did not include judicial discretion of the type now in place. Under the original terms, when appropriate conditions and tests were satisfied, the courts must make unexplained wealth orders, relating to: restraint (section 20A); a preliminary order to appear (section 179B); and payment of an amount of unexplained wealth to the Commonwealth (section 179E).¹³⁹

3.185 The Senate Legal and Constitutional Affairs Legislation Committee recommended that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so. The committee cited concerns about a range of matters including:

- the potential for the provisions to be used where it has proved too difficult or time consuming to meet the exacting requirements of criminal prosecution of offences;
- that the provisions are not limited to the targeting of major criminal figures; and
- the potential inability of respondents to proceedings to produce records that may have been accidentally destroyed.¹⁴⁰

3.186 Amendments made in the Senate adopted the recommendation to create judicial discretion for orders to pay an amount of unexplained wealth to the Commonwealth under section 179E. The amendments made in the Senate also went further and created a judicial discretion for restraining orders (Section 20A) and preliminary orders to appear (section 179B).

3.187 Civil Liberties Australia was keen for the discretion to remain, stating:

Our No. 2 recommendation is that, whatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.¹⁴¹

138 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, pp 12, 15–16.

139 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, first reading.

140 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, pp 57–59.

141 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 40.

3.188 Similarly, the Law Council highlighted the need for judicial discretion to remain due to the unique nature of unexplained wealth provisions.¹⁴²

3.189 The Queensland Law Society objected to the removal of judicial discretion in these provisions, as it allows courts to be responsive and flexible to the individual circumstances of a case. It argued that this is particularly important in the case of unexplained wealth provisions as they reverse the onus of proof. It also pointed out that no cases have come before the courts as yet, and are therefore uncontested.¹⁴³

3.190 The ACC informed the committee that there were three levels of discretion in place, in the form of 'may versus must', a general public interest test and an interests of justice test. As the ACC explained:

The interests of justice provision was inserted to meet the High Court international finance case that arose out of the New South Wales Crime Commission's legislation. Clearly, there is a sensible constitutional reason to put that level of discretion in, but it seems to us that we cannot see a policy reason for the inconsistency between the broad scope of the discretion under unexplained wealth as opposed to the other provisions...

3.191 The ACC noted that there may be an opportunity to guide the judicial discretion, which has informed other recommendations in this report, including amending the objects of PoCA to include undermining criminal enterprise.¹⁴⁴

3.192 Representatives from the CDPP noted that particular concerns may emerge if the case was based on criminal intelligence and judicial discretion was removed, stating:

To basically have a system whereby a court did not have a discretion not to restrain a person's assets based on material that might be of an intelligence nature only might be something that would create an issue for the courts. I would need to consider it a bit more carefully.¹⁴⁵

3.193 The Attorney-General's Department indicated that its preference for the unexplained wealth provisions would be for consistency between the various measures of PoCA, including unexplained wealth orders, meaning if the necessary tests were satisfied, the court would be obliged to make the order. As Mr Iain Anderson, AGD explained:

I am not suggesting that the judiciary should not have a discretion as to whether they make orders at all. They will always have the ability to refuse to make an order [brought] by the party. Obviously, if we remove that discretion completely, then that would be constitutionally invalid in itself

142 Law Council, *Submission 3 (supplementary submission)*, p. 12.

143 Queensland Law Society, *Submission 12*, p. 3.

144 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, pp 12, 15–16.

145 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 29.

under chapter 3. So the court will always have to be satisfied by the Commonwealth that an order should be made and that there is sufficient case for the onus to be put on to the other person to justify why their assets should not be forfeited or restrained. So, if the person can provide an explanation of the sources of their wealth that is credible, then they have nothing to worry about.¹⁴⁶

3.194 The committee is of the view that there does not seem to be a strong case for a specific unexplained wealth judicial discretion relating to restraining orders and preliminary orders to appear, given there is limited impact on an individual subject to those types of orders and that there are already significant safeguards in place, such as:

- the requirement for a court to be satisfied that the tests for the orders have been met;
- the judicial discretions of general public interest and the interests of justice tests that need to be satisfied;
- the standard powers courts have to order costs; and
- oversight by this committee.

3.195 The committee also notes that the Senate Legal and Constitutional Affairs Legislation Committee did not make any recommendations regarding the orders under PoCA section 20A and 179B.

3.196 For this reason, the committee recommends that the judicial discretion in relation to unexplained wealth restraining orders and preliminary unexplained wealth orders be removed in cases where the amount of unexplained wealth is greater than \$100 000. The discretion, and hence extra safeguard, would remain in place for cases where the amount of unexplained wealth was below this amount.

Recommendation 12

3.197 The committee recommends that the court's discretion to make a restraining or preliminary unexplained wealth order under subsections 20A(1) and 179B(1) of the *Proceeds of Crime Act 2002* be removed in cases where the amount of unexplained wealth is more than \$100 000, so that the court must make the order in cases over \$100 000.

3.198 The committee is aware that orders to pay an amount of unexplained wealth under section 179E of the PoCA to the Commonwealth, may have a significant impact on the individuals concerned. The committee notes however, that the test to be satisfied is substantial. Paragraph 179E(1)(b) requires that an unexplained wealth order **may** be made if:

¹⁴⁶ Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, pp 37–38.

- (a) the court is not satisfied that the whole or any part of the person's wealth was not derived from one or more of the following:
- (i) an offence against a law of the Commonwealth;
 - (ii) a foreign indictable offence;
 - (iii) a State offence that has a federal aspect.¹⁴⁷

3.199 The committee observes that judicial discretion relating to orders to pay an amount of unexplained wealth to the Commonwealth under section 179E of the PoCA may limit the effective use of the unexplained wealth laws, and recommends its removal where the amount of unexplained wealth is above \$100 000.

Recommendation 13

3.200 The committee recommends the court's discretion to make an unexplained wealth order under subsection 179E(1) of the *Proceeds of Crime Act 2002* be removed where the amount of unexplained wealth is above \$100 000, so that the court must make the order in cases over \$100 000, and that the following additional statutory oversight arrangements be made:

- **law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations;**
- **the Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that Ombudsman does for controlled operations; and**
- **the oversight by the Parliamentary Joint Committee on Law Enforcement be enhanced so that in addition to appearing when required, that the ACC, AFP, DPP and any other federal agency or authority must brief the committee on their use of unexplained wealth provisions as part of the committee's annual examination of annual reports of the ACC and AFP.**

¹⁴⁷ *Proceeds of Crime Act 2002*, ss. 179E(1)(b).

CHAPTER 4

The need for national harmonisation

Current domestic schemes and the Commonwealth compared

4.1 Unexplained wealth or similar laws currently exist in six Australian jurisdictions: Western Australia, the Northern Territory, New South Wales, Queensland, South Australia and the Commonwealth. Of these, the Western Australian and Northern Territory schemes are the longest running, having been established in 2000 and 2003 respectively. Other schemes are more recent, having been established in 2009 or later.¹

4.2 There are significant differences between the models, with these differences broadly relating to the following aspects:

- whether a link to an offence is required (through either a reasonable suspicion that an offence has occurred or that a person has obtained the proceeds of an offence);
- whether a court has a discretion to make an order;
- whether unexplained wealth provisions form part of a State's asset confiscation legislation or are in stand-alone legislation; and
- time limits on unexplained wealth orders.²

Western Australia and Northern Territory approaches

4.3 Western Australia introduced unexplained wealth provisions in 2000 in the *Criminal Property Confiscation Act 2000* (WA), and the Northern Territory followed in 2003 with the *Criminal Property Forfeiture Act 2002* (NT).

4.4 The laws both provide that the relevant DPP may apply to the court for an unexplained wealth declaration against a person. Under neither law is there a requirement to show reasonable grounds to suspect that a person committed an offence.³

4.5 Judicial discretion is limited, in that the court must make a declaration that a respondent has unexplained wealth 'if it is more likely than not that the total value of

1 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 1.

2 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 5.

3 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), pp 1–2.

the person's wealth is greater than the value of the person's lawfully acquired wealth'.⁴ Both Acts also reverse the onus of proof.

4.6 The key aspects of the laws are:

- the *requirement* that courts make an order if satisfied that a person's total wealth is greater than their lawfully acquired wealth.⁵ Courts therefore have minimal discretion regarding the making of such orders;
- the reversal of the onus of proof in favour of the Crown, providing that 'any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary';⁶
- both Acts set out how law enforcement and prosecutors can obtain information about criminal assets;⁷
- provisions to ensure that property remains available for forfeiture;⁸ and
- people have a right to object to their property being restrained within 28 days of being served with an order restraining the property.⁹ The Acts also allow orders to be made against 'declared drug traffickers'.

4.7 Though the WA and NT laws are broadly similar, there are a few differences between them, including court consideration of cooperation, the process by which a person is declared a drug trafficker and have their assets confiscated, and Constitutional requirements arising from the Northern Territory's status as a territory.

South Australia

4.8 The South Australian *Serious and Organised Crime (Unexplained Wealth) Act 2009* was proclaimed on 29 August 2010.¹⁰ It provides for a scheme broadly similar to that of WA and NT. South Australia is unique, in that unexplained wealth legislation sits independently of other proceeds of crime legislation.

4 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

5 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

6 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(2); *Property Confiscation Act 2000* (WA), section 12(2).

7 *Criminal Property Forfeiture Act 2002* (NT), Part 3; *Property Confiscation Act 2000* (WA), Part 5.

8 *Criminal Property Forfeiture Act*, Part 4, Division 3; *Property Confiscation Act 2000* (WA), section 50.

9 *Criminal Property Forfeiture Act*, Part 5; *Property Confiscation Act 2000* (WA), Part 6.

10 South Australia Police, *Submission 7*, p. 1.

4.9 Under the South Australian legislation, the DPP may authorise the Crown Solicitor to apply to the court for an unexplained wealth order, if the DPP reasonably suspects that a person has wealth that has not been lawfully acquired. Restraining orders may be made on application by the Commissioner of Police. As with the WA and NT, there is no requirement to show reasonable grounds to suspect that a person committed an offence.

4.10 The court has final discretion as to whether an order is made, and may make an unexplained wealth order if it finds that any components of a person's wealth specified in the application have been unlawfully acquired. The onus of proof is reversed in favour of the Crown ('each component of a person's wealth specified in the application will be presumed not to have been lawfully acquired unless the person proves otherwise').

4.11 There are limitations on the investigative powers under the South Australian act, which can only be used:

- in relation to investigating or restraining the wealth of a person who has been convicted of a serious offence (or declared liable to supervision in relation to a charge of a serious offence) or is (or has been) the subject of a restraining order; or
- where the DPP reasonably suspects the person: engages or has engaged in serious criminal activity (ie the commission of serious offences); associates/has regularly associated with such persons; is or has been a member of a declared organisation; or
- has acquired property or a benefit as a gift from a person who fits these categories.¹¹

4.12 A further safeguard was included, in that the court may also exclude portions of a person's wealth from an application if satisfied that it is not reasonably possible for a person to prove that that part of their wealth was lawfully acquired.¹²

New South Wales

4.13 The New South Wales *Criminal Assets Recovery Act 1990* was amended to include unexplained wealth provisions in September 2010.¹³ The legislation is administered by the New South Wales Crime Commission.

11 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), pp 2–3.

12 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 3.

13 *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*. Assented to 10 September 2010.

4.14 Under the New South Wales provisions, the New South Wales Crime Commission may apply to the Supreme Court for an unexplained wealth order against a person. It may apply for a restraining order on the basis that an authorised officer has a reasonable suspicion that a person has engaged in serious crime related activities, a person has acquired serious crime derived property, or that property is serious crime derived property or illegally acquired property.¹⁴

4.15 The court must make an unexplained wealth order if there is a reasonable suspicion that the person has, at any time, engaged in a serious crime related activity or acquired serious crime derived property from another person's serious crime-related activity.

4.16 The New South Wales unexplained wealth provisions require a finding that a person has engaged in, or acquired property from, serious crime-related activity, but need not be based on a reasonable suspicion as to the commission of a particular offence.

4.17 While the Commissioner must satisfy the court that a person has engaged in, or acquired property from, serious crime-related activity, the onus is on the person to prove that his or her current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity. Though the provisions require a finding that a person has engaged in, or acquired property from, serious crime-related activity, this need not be based on a reasonable suspicion as to the commission of a particular offence.

4.18 The New South Wales provisions contain an additional safeguard, in that the court may refuse to make an unexplained wealth order if it finds that it is not in the public interest to do so, or may reduce the amount that would otherwise be payable.

Queensland

4.19 While Queensland does not have unexplained wealth laws along the lines of the states above, it does have laws that allow for the making of 'proceeds assessment orders', which require a person to pay to the State the value of proceeds derived from the person's illegal activity.

4.20 Under the *Criminal Proceeds Confiscation Act 2002*, the State DPP may apply to the Supreme Court for a proceeds assessment order against a person requiring a person to pay to the State the value of proceeds derived from the person's illegal activity that took place in the 6 years prior to the application for the order being made. The State must bring evidence to establish the value of property (or expenditure) over the previous 6 years.

14 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 3.

4.21 The court must make an order if satisfied that it is more probable than not that a person engaged in serious crime related activity within the last 6 years, but this does not require a finding that any particular offence has been committed.

4.22 The Queensland provisions, while not generally regarded as unexplained wealth laws, instead create a statutory presumption that the unexplained portion of a person's wealth is derived from illegal activity, subject to a finding that the person engaged in 'serious crime-related activity' and evidence being led that they have unexplained wealth. The onus then falls upon the respondent to rebut that presumption by satisfying the court that the increase in wealth was not related to illegal activity.

4.23 As with New South Wales, the court may refuse to make a proceeds assessment order if it finds that it is not in the public interest to make the order.¹⁵

Issues arising from inconsistency between jurisdictions

4.24 Even between those states that have established unexplained wealth laws, there are significant differences in the operation of the provisions. Furthermore, several states have not sought to introduce unexplained wealth laws, giving rise to a potentially uneven application of law enforcement efforts across Australia.

Targeting the weakest link

4.25 Inconsistency in Commonwealth, state and territory approaches to address serious and organised crime risks introducing vulnerability to the national organised crime strategy. As Mr Tony Negus, Commissioner of the AFP and Chair of the ACC Board observed:

It is agreed across the board of the Australian Crime Commission that criminals will exploit any weaknesses that they can identify, and that includes weaknesses in legislation across jurisdictions or the weakest link, if you like, in the way that legislative processes have been constructed.¹⁶

4.26 One concern arising from the significant differences between jurisdictions is the risk that serious and organised criminal networks may relocate some or all of their activities to states and territories with a more favourable legislative framework. For example, the committee has obtained some evidence that crime groups in the Northern Territory have relocated across the border to avoid the provisions in that jurisdiction. In evidence to the committee in an earlier inquiry, Commander Colleen Gwynne, NT Police, explained:

We have had a couple of cases where people have chosen to move. We had an unexplained wealth case in Alice Springs where we restrained \$2.2 million worth of assets and cash. That matter has now finalised. At the end

15 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 4.

16 Commissioner Tony Negus, AFP, *Committee Hansard*, 7 March 2012, p. 2.

of the day, nearly \$1 million was forfeited. In a lot of these cases, people also have to pay their debts off. If they have \$2.2 million worth of assets, they may owe a bank or a financial institution half of that, so part of the assets pays the debt off before the government sees the end amount. People involved in that couple of cases, who are quite significant in trafficking illegal drugs within Central Australia, have since moved interstate. There have been other cases that I could talk about where people have chosen to move elsewhere.¹⁷

4.27 The committee is also understands that a similar phenomenon has occurred in Ireland, where the activities of the Criminal Asset Bureau has led to the relocation of organised crime activity to foreign jurisdictions.

4.28 In an earlier inquiry by the committee, it heard from Detective Superintendent Hollowood from Victoria Police, who gave evidence about the difficulties that Australian law enforcement agencies have in identifying and confiscating assets which may be located in, or moved between, various jurisdictions.¹⁸ Some of these problems could potentially be overcome if there was nationally consistent unexplained wealth legislation, a point discussed further below.

Enhancing a preventative culture

4.29 As described in Chapter 2, unexplained wealth legislation represents a new approach to law enforcement, adding to a developing the law enforcement crime prevention culture. Heads of law enforcement agencies that attended the committee's roundtable on unexplained wealth in March 2012 agreed that the successful use of unexplained wealth provisions required a shift in thinking from the traditional focus on prosecution.

4.30 For example, Victoria Police, which currently does not have access to state unexplained wealth provisions, noted that their introduction may require cultural development in some areas of the organisation. As Mr Graham Ashton, Deputy Commissioner, Victoria Police noted:

We have work to do around shaping our culture within the detective cohort towards tackling unexplained wealth if we get those powers or access to another scheme in Victoria. The current mindset is very much around investigating a particular criminal offence, getting it before the courts and then presenting a worthwhile prosecution...We will have to do some education on thinking about the unexplained wealth rather than the criminal

17 Commander Colleen Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, pp 7–8.

18 Detective Superintendent Paul Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

offence; but, as the Northern Territory has already shown, it is possible to do that.¹⁹

4.31 Commissioner Mal Hyde observed that this shift in thinking was already occurring in the context of adopting a proactive and preventative approach to law enforcement, stating:

I am not sure that the cultural shift is such an impediment as it might have been, say, 15 years ago, when police were primarily reactive rather than proactive. There has been a big shift in policing culture to adopt a problem-solving, preventative model. That has occurred. I think it is more about organisational design because the reality is the work to use this form of legislation will be highly specialised. It is how you design your legislation to get the outcomes you seek. Most of us around the country are prepared to change our organisations to make sure they are in line with the strategies and tactics that we employ to get outcomes for the community. So I would be more confident that the legislation could be effectively used. It is really more about how you design the focus of your resources to get the outcomes you want.²⁰

4.32 Commissioner Hyde further noted that law enforcement agencies may need to invest further in specialists such as forensic accountants and people with highly sophisticated information and communication technology skills. In practice, however, he noted that law enforcement agencies were used to adjusting in this manner to counter evolving threats such as cyber investigations or drug importation and distribution methodologies.²¹

4.33 The committee observes that, in the development of a national approach to unexplained wealth, the Commonwealth may be in a position to facilitate or provide education and training to support a nationally consistent approach to unexplained wealth.

The case for harmonisation of Commonwealth and state and territory laws

4.34 There was widespread support for harmonising unexplained wealth laws across Australia, though views diverged on which model should be adopted. Harmonisation of the laws could potentially achieve two ends: a coordinated national approach to serious and organised crime using unexplained wealth laws and enabling the Commonwealth to enact a more effective regime that did not require a predicate offence to be proven.

4.35 The Australian Federal Police argued forcefully for the creation of a national unexplained wealth scheme, submitting:

19 Deputy Commissioner Graham Ashton, Victoria Police, *Committee Hansard*, 7 March 2012, pp 5–6.

20 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 6.

21 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 6.

If we are serious about providing law enforcement with an effective tool to target those in the upper echelons of organised crime groups – who profit from crime at an arm’s length – then action needs to be taken to address the gap in the Commonwealth’s unexplained wealth regime. What is needed is nationally consistent unexplained wealth laws that could address the gap that – because of constitutional limitations – the Commonwealth cannot address.²²

4.36 The Police Federation of Australia likewise saw the establishment of a national scheme as means to facilitate cooperation and an effective regime, submitting:

The Police Federation of Australia...calls for a system to be created with a view to implement a truly national scheme, one which facilitates the cooperation of the legislature and law enforcement agencies of the Commonwealth and all States and Territories. A national scheme should provide the law enforcement agencies across Australia with an effective mechanism for information sharing and collaborative investigations and taskforces, such that there is no jurisdiction within which organised crime can hide. A national scheme is also the solution to the constitutional problem; utilising the State and Territory legislative powers to remove the requirement that unexplained wealth be linked to a predicate offence completely.²³

4.37 The Australian Crime Commission also expressed strong support for national consistency, noting the option of a model criminal code:

I see that there is a great working relationship between the AFP and all the states in terms of asset forfeiture. On each occasion you are looking for opportunities to use the best tool that you can at any particular time. Some states have quite sophisticated unexplained wealth provisions. To make it a far more workable regime...if you have a model criminal code or consistency in each of the states and territories along with the Commonwealth then you prevent the criminals from exploiting gaps in the legislation. Federation is a great thing, but when you have criminals working across the country and across the globe then you need a nationally consistent way in which you approach this. My sense is that if we had that consistency between the Commonwealth and the states, however it was achieved, that would be a great thing in tackling serious organised crime.²⁴

4.38 South Australia Police noted that the effectiveness of the committee's inquiry may be enhanced through acknowledging and potentially addressing the existing inconsistencies of the current State and Commonwealth unexplained wealth legislation and arrangements, noting in particular the opportunity for cooperation, coordination and information sharing including the targeting of assets. South Australia

22 AFP, *Submission 9*, p. 6.

23 Police Federation of Australia, *Submission 2 (Supplementary Submission)*, p. 2.

24 Mr Richard Grant, ACC, *Committee Hansard*, 4 November 2011, p. 16.

Police submitted that the ultimate aim of these enhancements would be the development of a robust national approach.²⁵

4.39 Victoria Police informed the committee that the call for a consistent national approach to criminal asset confiscation has been an ongoing issue for many years, citing the Premier's Conference on Drugs in 1985, where it was proposed that uniform legislation throughout Australia be introduced to confiscate the proceeds of drug dealing.²⁶ Victoria Police highlighted the challenges of harmonisation, submitting:

It is a fact that in each state and territory there are peculiar challenges to law enforcement, there are different political pressures and there are different natures of criminality. However, the difficulties that Australian law enforcement agencies have in identifying and confiscating assets which may be located in, or moved between, various jurisdictions may be significantly overcome if there was nationally consistent unexplained wealth legislation.²⁷

4.40 The Western Australian Police, noting the difficulties they had experienced in progressing unexplained wealth matters within their own state, expressed a desire to work closely with the AFP, using Commonwealth provisions. As Assistant Commissioner Anticich explained:

There are a number of models that are currently operating across the states, including ours, and I suggest that all of them have strengths and weaknesses. I think it is a great opportunity for the Commonwealth and this committee to show some leadership and come up with a pragmatic model that will hopefully guide others.²⁸

4.41 Civil Liberties Australia also argued for harmonisation in principle, although it did not lend support to the removal of predicate offence requirements, stating:

For that reason, our No. 1 recommendation to this committee is to refer part (e) of your terms of reference, 'the interaction of Commonwealth, state and territory legislation and law enforcement activity in relation to the targeting of criminal assets of serious and organised criminal networks', to the Standing Committee on Law and Justice to produce a national approach. We think that this type of legislation is crying out for national consistency. Crimes are cross-border, but the laws are patchy depending on where you live.²⁹

25 South Australia Police, *Submission 7*, p. 1–2.

26 Victoria Police, *Submission 4*, p. 3.

27 Victoria Police, *Submission 4*, p. 4.

28 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, pp 3–4.

29 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 40.

4.42 The Law Council of Australia encouraged national consistency in principle, while the Queensland Law Society noted the strategic and resource benefits of harmonisation. Nevertheless, both organisations reiterated opposition to any unexplained wealth regimes involving a reverse onus of proof.³⁰

4.43 The AFP noted that, in 2009, all Australian jurisdictions agreed to a nationally coordinated response to organised crime, including a coordinated national effort to target the proceeds of crime and nationally consistent criminal asset confiscation schemes.³¹ As detailed in Chapter 2, however, while several states and territories have unexplained wealth laws, these laws operate in different ways.

4.44 The committee agrees that the national response to serious and organised crime would benefit from consistent laws on unexplained wealth, and recommends that the Commonwealth Government take a lead role in the development of such laws.

Recommendation 14

4.45 The committee recommends that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime.

The way forward

4.46 In considering methods for the harmonisation of Commonwealth and state and territory laws, the committee examined three main options:

- creation of model laws for adoption by each jurisdiction;
- guiding principles; and
- a referral of power from states and territories to the Commonwealth.

4.47 In evaluating each method, the committee was mindful of the need to enable the Commonwealth to enact an effective unexplained wealth regime that was not forced to rely on proving the commission of a federal offence or state offence with a federal aspect.

Model legislation

4.48 Model laws are one possible method for achieving nationally consistent unexplained wealth laws and AGD informed the committee that they have been used extensively in a number of other areas.³²

30 Mr Tim Game SC, Law Council, *Committee Hansard*, 10 February 2012, p. 41; Queensland Law Society, *Submission 12*, p. 2.

31 AFP, *Submission 9*, p. 6.

32 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

4.49 However, there are drawbacks to the use of model legislation. One disadvantage of model laws is that they are susceptible to inconsistent implementation and can tend to drift apart over time. As Mr Iain Anderson, AGD, explained:

The problem with model laws is that they do not always stay model for very long. Jurisdictions can, of course, always depart from and introduce minor nuances and wrinkles. So you might start with what appears to be a consistent model, but gradually the consistency breaks down. That is the problem with that approach. But, that said, if there were not a reference of powers then we could take the model laws approach.³³

4.50 AGD also informed the committee that the development of model laws would not remove the need for Commonwealth laws to require a link to an offence within Commonwealth power. Consequently, for the Commonwealth to adopt model laws, the model laws would need to have some connection to an offence with a link to a Commonwealth head of power, or the Commonwealth would need to include such a link when implementing them.³⁴

4.51 The AFP described a typical model legislation process, noting that some work had previously been done with the states and territories over proceeds of crime legislation:

[T]he normal process with the model legislation ... would be for us to work at an officials level with our counterparts in the states and territories to see what the ideal elements of a particular process would be—in this case it would be unexplained wealth—and get ministerial approval for that through either the police ministers council or the Standing Committee of Attorneys-General.

That is what we have done in the past but I guess one of the experiences we have learnt from in that is...that if we have consistency across the jurisdictions we can talk about models and look at [the] principles. In a sense we did some work around this when SCAG last dealt with organised crime matters. I think that was about two years ago, and that was when there was a bit of activity around proceeds generally. On the back of that the Commonwealth introduced its unexplained wealth provisions. It is about talking to the states and territories and seeing whether they agree that this is the best way to deal with the problem in their jurisdictions.³⁵

4.52 The Attorney-General and Minister for Justice of New South Wales, the Hon Greg Smith, SC, was of the view that sufficient harmonisation could be achieved through a model legislation process. The Attorney-General referred to similar

33 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 34.

34 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

35 Mr Peter Whowell, AFP, *Committee Hansard*, 4 November 2011, p. 3.

processes around outlaw motorcycle gang legislation, stating that a similar harmony could be achieved in relation to unexplained wealth.³⁶

4.53 The committee notes that many national schemes have been created through model laws. In practice, model laws may easier to negotiate, relative to obtaining a referral of powers. However, the committee is aware of criticism of the use of model legislation, such as in the establishment of the National Classification Scheme, under which significant differences remain between states and territories. While model laws may serve to improve upon the status quo, the committee notes that the Commonwealth would remain limited in its ability to enact an effective unexplained wealth regime.

Guiding principles

4.54 The Attorney-General's Department informed the committee that another option for achieving nationally consistent unexplained wealth laws could be the development of guiding principles in relation to unexplained wealth.³⁷

4.55 The development of guiding principles would be a simpler option than a referral of powers or the development of model laws, as it would not require all jurisdictions to agree on specific legislative text for referral or implementation. However, guiding principles may result in inconsistencies between jurisdictions in the detail of legislation, undermining the desired outcome of national consistency.³⁸

4.56 Furthermore, the committee notes that the development of guiding principles would not remove the need for Commonwealth laws to require a link to an offence within Commonwealth power. As a result, the use of guiding principles would not enable the establishment of the type of national unexplained wealth laws envisioned by the committee, although they may serve to inform negotiations in the pursuit of a stronger, national scheme.

Referral of powers

4.57 As described in Chapter 3 of this report, the Australian Constitution includes a means by which states can refer power to the Commonwealth to enable them to legislate in a particular area. In this case, a referral of power would involve the states and territories formally agreeing to allow the Commonwealth to legislate in relation to unexplained wealth.

36 The Hon Greg Smith, SC, Attorney-General and Minister for Justice, New South Wales Government, *Committee Hansard*, 7 March 2012, p. 11.

37 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

38 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

4.58 AGD advised the committee that there are a number of different types of referrals:

- subject referrals, whereby a general subject matter is referred to the Commonwealth, without any specification as to how the Commonwealth is to deal with it;
- text referrals, whereby the Commonwealth is given the necessary power to enact the text of a particular Bill; and
- hybrid referrals, generally referring to a situation where a lead state refers power to the Commonwealth to create relevant legislation, and other states subsequently adopt the Commonwealth law and simultaneously give an amendment referral to the Commonwealth.

4.59 The AFP noted that referral of powers from the States to the Commonwealth could provide a means to establish an unexplained wealth regime that did not require a link to a Commonwealth offence, stating:

There are a number of ways of that being overcome. One is a referral of powers from the states to the Commonwealth...What we have put in our submission is the need for consistent legislation. We have legislation in Western Australia and the Northern Territory, and then we have the Commonwealth legislation. We believe there is a gap that exists because of the constitutional issue, but there is also a gap that exists because of criminals living in other states.³⁹

4.60 The ACC indicated it might be possible to look at referral of powers, or possibly the expansion of the taxation or money-laundering legislation.⁴⁰ The Attorney-General's Department saw referral of powers as a preferred approach:

Our preferred approach, if it were possible—in an ideal world—would be a reference of powers. I think a reference of powers so that there could be a single law would be the best way to have the nationally consistent approach.

References of powers could be approached in a range of different ways, obviously. The intended outcome would be a situation where, by referring powers, the Commonwealth had a broader ability and would not necessarily need a connection to a Commonwealth offence in the laws. But, of course, states and territories would still be able to act themselves under that regime.

That would usually be the way. I should say, just as a matter of caution, that each of the different referral of powers schemes has had some slight differences.⁴¹

39 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 3.

40 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

41 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 34.

4.61 The committee is of the view that a referral of power from states and territories would provide the most effective framework for establishing effective and consistent national unexplained wealth provisions.

4.62 Specifically, a referral of powers provides the best mechanism for surmounting Constitutional issues discussed in Chapter 3, whereby a head of power is not available to support unexplained wealth provisions that do not rely on proving that an a person of interest has committed an federal offence or state offence with a federal aspect.

4.63 The difficulties in securing a referral of powers should not be underestimated. The committee understands that some states and territories may fear any amendment of existing effective unexplained wealth regimes. For example, the NSW Attorney-General informed the committee that:

I do not think referral is the best way to deal with it. I am not bragging but I think our state is doing well in this area and it would be very difficult to convince us that we should refer the power when it is working well. But, just as with the outlaw bikie legislation and other laws to do with organised crime, I think there has to be as much consistency as we can possibly get together.⁴²

4.64 Similarly, achieving an agreement on the appropriate balance between law enforcement outcomes and the protection of civil rights across jurisdictions may not be easy. Despite these difficulties, the committee recognises that an effective national approach to unexplained wealth would be best achieved through a referral of powers to the Commonwealth, facilitating the development of a truly national approach.

4.65 The committee therefore recommends that the Australian Government seek a referral of powers from states and territories for the purpose of establishing a national unexplained wealth provisions that do not require a link to a predicate offence. In practice, the committee notes that the simplest course of action may be to seek a 'hybrid' referral, commencing with one state or territory. As Mr Iain Anderson, AGD, explained:

The hybrid referral is the more common way of dealing with references at the moment. One possible approach would be to have a reference of power to adopt the Northern Territory model. Then the other states and territories would join in...I indicated last time that I gave evidence to the committee that no reference of powers is straightforward. There are a number of matters of detail to work through...

On the other hand, we have a number of very successful models of references as well. The detail is not a reason not to go down that path. We believe that a reference of powers is strongly desirable. It is a fairly

42 The Hon Greg Smith, SC, Attorney-General and Minister for Justice, New South Wales Government, *Committee Hansard*, 7 March 2012, p. 11.

common model to have one jurisdiction on side at the time that the Commonwealth legislates, for example, under the hybrid model.⁴³

4.66 The committee notes that a subject referral would be the most effective form of referral, but political realities may necessitate other forms, such as a text or hybrid referral.

Recommendation 15

4.67 The committee recommends that the Australian Government seek a referral of powers from the states and territories for the purpose of legislating for a national unexplained wealth scheme, where unexplained wealth provisions are not limited by having to prove a predicate offence.

Using state legislation

4.68 In addition to a referral of powers to the Commonwealth from the states, it may also be possible for Commonwealth officers to instead cooperate with state jurisdictions to use state-based legislation. When put to AGD, Mr Iain Anderson responded:

That would certainly be a reasonable way of doing it as well. An issue that would need to be addressed then would be making sure that each state had the ability to share proceeds. Not all states currently have the ability to share proceeds in their legislation. If we went down the path of having states with the legislation and the Commonwealth assisting them, say, then we would want to make sure that at least some of the proceeds could flow back.⁴⁴

4.69 The committee notes that this could be a useful mechanism to adopt prior to the achievement of a national scheme or if the Commonwealth failed to obtain a referral of powers and instead led the establishment of model legislation.

Related issues

Equitable sharing program

4.70 A subsidiary issue relating to cooperation between state and federal law enforcement agencies, and international partners, is the sharing of seized assets between the jurisdictions. In its submission to the inquiry, the AFP noted the importance of international cooperation, submitting:

The United Nations Convention Against Corruption (to which Australia is a party) obliges parties to the Convention to share profits of crime where assistance in the recovery of those profits contributes to legal enforcement cooperation. Part 4-3 of PoCA provides for the making of payments to

43 Mr Iain Anderson, AGD, *Committee Hansard*, 7 March 2012, p. 3.

44 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 36.

foreign countries under the ‘equitable sharing program’. The equitable sharing program refers to arrangements under which the Commonwealth shares, with a foreign country, a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister’s opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

There have been a number of successful examples of sharing under the program. Countries with which equitable sharing has occurred include China, Indonesia and Singapore.⁴⁵

4.71 Furthermore, the AFP noted that Part 4-3 of PoCA also provides for the making of payments to States and Territories under the equitable sharing program. Participating States and Territories share proceeds with the Commonwealth where Commonwealth agencies have made a significant contribution to the recovery of those proceeds. Mr Tony Negus, Commissioner of the AFP, explained that the sharing of proceeds was also an issue commonly addressed in the creation of joint taskforces, stating:

The law enforcement methodology of this century is very much one of joint partnerships. At the very beginning of any of these investigations we sign a joint agency agreement in which the issues of proceeds and asset confiscation are discussed and agreed to. The appropriate sharing of those assets between Commonwealth and state regimes is also settled and agreed.⁴⁶

4.72 However, the AFP informed the committee that some Australian jurisdictions do not have reciprocal sharing provisions in their legislation and are currently unable to share proceeds that they recover.⁴⁷ The AFP therefore proposes some improvements to equitable sharing arrangements as follows:

[T]he AFP considers that current equitable sharing processes could benefit from non-participating States and Territories developing legislative provisions to enable the sharing of confiscated proceeds with State, Territory, Commonwealth and international jurisdictions. Ensuring that all jurisdictions can share proceeds with each other would enhance cooperation on criminal asset confiscation matters.⁴⁸

4.73 The committee encourages equitable sharing programs to be put in place where possible, to make joint work on proceeds of crime matters easier. The development of effective sharing programs could be further negotiated in the course of establishing a national unexplained wealth regime.

45 AFP, *Submission 9*, p. 11.

46 Commissioner Tony Negus, AFP, *Committee Hansard*, 7 March 2012, p. 3.

47 AFP, *Submission 9*, p. 12.

48 AFP, *Submission 9*, p. 16.

Mutual assistance reforms

4.74 'Mutual assistance' describes the process by which jurisdictions provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and some criminal asset confiscation matters.⁴⁹

4.75 For example, the AFP informed the committee that under the *Mutual Assistance in Criminal Matters Act 1987* (MA Act), Australia can register and enforce both conviction and non-conviction based foreign forfeiture and pecuniary orders (a foreign proceeds of crime order). Once registered, a foreign proceeds of crime order can be enforced as if it were an Australian proceeds of crime order.⁵⁰

4.76 However, because unexplained wealth investigations and proceedings are non-conviction based and do not necessarily contain a link to a criminal offence, they fall outside the scope of the mutual assistance regime. The AFP may therefore find it difficult to refute a claim by an individual that their wealth was derived from legitimate overseas sources due to an inability to obtain evidence from foreign jurisdictions in relation to unexplained wealth proceedings.⁵¹

4.77 Similar issues may arise in the mutual assistance agreements between Australian jurisdictions. As such agreements are based on the use of traditional conviction-based or civil offence proceedings, it is possible that information could not be shared and orders could not be enforced in the case of unexplained wealth proceedings.

4.78 Negotiations over the creation of a national unexplained wealth scheme may therefore require analysis and reform of domestic law enforcement cooperation measures.

4.79 In the case of international impediments, the AFP proposed that the MA Act be amended to allow Australia to request assistance of, and provide assistance to, foreign countries in relation to unexplained wealth matters.⁵²

4.80 This was a view echoed by Commissioner Mal Hyde, South Australia Police, who informed the committee that a substantial amount of criminal assets were remitted overseas stating:

...[T]he committee would be well aware of money laundering and the scale on which that occurs. So any scheme should be looking at how that can be recouped or frozen and retrieved. That, of course, is a very complex environment in which to operate. I would suggest—and this is without any detailed information—that, from a state or territory point of view, that

49 AFP, *Submission 9*, p. 10.

50 AFP, *Submission 9*, p. 10–11.

51 AFP, *Submission 9*, p. 11.

52 AFP, *Submission 9*, p. 11.

would be a big limitation for the capacity of the states and territories to trace the funds in that way, and it may well be that the Commonwealth would need to have some legislation because of the international treaties that would be involved and that states and territories might be able to tap into. Eventually, whatever happens on the type of scheme we get, if the states and territories still have their own schemes in place then it may well be that they can link up with a Commonwealth arrangement which is going to be able to reach out and retrieve funds that have gone offshore.⁵³

4.81 AGD informed the committee that it is considering legislative options of this nature, noting that:

- Australia is at the forefront of implementing and developing unexplained wealth laws, which are relatively new internationally. As a result, some countries may initially be reluctant to provide information relating to unexplained wealth proceedings, particularly in situations where there is no link to an offence.
- AGD is also working to increase awareness of unexplained wealth laws in its law and justice capacity building programs in the region.
- AGD is open to consideration of other options for improving international cooperation.⁵⁴

4.82 The committee is not aware of any international treaties or conventions which specifically address unexplained wealth. There are, however, conventions to which Australia is a signatory that address the importance of pursuing the proceeds of crime.⁵⁵

4.83 Victoria Police informed the committee that the notion of confiscation of unexplained wealth in international agreements can be traced back as far as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Convention stated that 'each party consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation.'⁵⁶

4.84 The recommendations in that convention were reinforced through the United Nations Convention Against Transnational Organised Crime (2000) and the United Nations Convention Against Corruption (2003).⁵⁷

53 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 7.

54 AGD, answer to first question on notice, 16 December 2011 (received 1 February 2012), p. 11.

55 AFP, *Submission 9*, p. 9.

56 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Article 5, Paragraph 7.

57 Victoria Police, *Submission 4*, p. 2.

4.85 Similarly, in 2003, the Financial Action Task Force on Money Laundering recommended that countries adopt measures laid out in the conventions above, including confiscation without conviction and requiring persons to demonstrate the lawful origins of property.⁵⁸

4.86 Victoria Police informed the committee that, given the differing constitutional requirements of parties to these conventions, state parties are only required to consider implementing such measures to the extent that they are consistent with the fundamental principles of their law, complicating any attempt to harmonise laws internationally.⁵⁹

4.87 The committee recommends that the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth, noting that crime is an increasingly globalised phenomenon requiring close international cooperation.

Recommendation 16

4.88 The committee recommends that the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth.

Developing a plan for a national scheme

4.89 The committee notes that the harmonisation of unexplained wealth laws across Australia will require the investment of political effort by all concerned. The committee encourages the Commonwealth Government to develop a plan for undertaking the negotiations, drawing on the various observations and recommendations in this chapter.

4.90 The creation of a plan will provide substance to efforts to create a national scheme, promoting engagement of the states and territories and providing accountability in relation to progress. The discussion within this chapter provides a starting point for such a plan.

4.91 The committee considers that immediate steps could be taken to better coordinate unexplained wealth actions with those states that have enacted relevant legislation. For example, taskforces including state law enforcement agencies could be formed, perhaps based on the Criminal Assets Confiscation Taskforce, to secure cooperation using existing Commonwealth, state and territory laws.

4.92 Negotiations over mutual assistance and equitable sharing programs could also improve the situation prior to reform of Commonwealth unexplained wealth provisions themselves.

58 Victoria Police, *Submission 4*, p. 2.

59 Victoria Police, *Submission 4*, p. 2.

4.93 The development of national guiding principles on unexplained wealth could serve as a good starting point in achieving nationally consistent unexplained wealth laws.

4.94 As the committee has recommended, the goal for any plan to harmonise unexplained wealth laws should be to achieve a referral of power to the Commonwealth so that it can legislate for a truly effective, nationally consistent unexplained wealth scheme.

4.95 Though achieving this result may take time and effort, the committee encourages the government to commence this undertaking as soon as possible. Unexplained wealth laws represent a new form of policing with the potential to seriously undermine the incentive to become involved in serious and organised crime. For this reason, the committee wholeheartedly endorses the creation of an effective national scheme.

Recommendation 17

4.96 The committee recommends that the Commonwealth Government create and commit to a plan for the development of national unexplained wealth scheme including the following elements:

- **identification and implementation of short-term measures including cooperation with states with existing unexplained wealth legislation;**
- **negotiation with States and Territories to create or improve supporting mechanisms such as equitable sharing programs and mutual assistance agreements;**
- **development of agreed guiding principles around unexplained wealth; and**
- **a final objective of achieving a referral of powers from States and Territories to enable the Commonwealth to legislate for an effective and nationally consistent unexplained wealth scheme.**

4.97 The committee recognises that the Standing Committee on Law and Justice (formerly the Standing Committee of Attorneys-General) will play a key part in these developments. The committee therefore recommends that the Commonwealth Attorney-General immediately place the issue of harmonisation of unexplained wealth laws on the agenda of the Standing Committee on Law and Justice, in order to commence discussion of this subject in a timely fashion.

Recommendation 18

4.98 The committee recommends that the Commonwealth Attorney-General immediately place the issue of harmonisation of unexplained wealth laws on the agenda of the Standing Committee on Law and Justice.

Conclusion

4.99 Unexplained wealth laws are a relatively new way to protect the community from the debilitating effects of serious and organised crime, through disruption of its underlying business model. Effective unexplained wealth provisions have the potential to fill a gap in traditional law enforcement models. In cases where it is not possible to catch the ringleaders of organised crime through traditional techniques, unexplained wealth provisions offer a way to remove the incentive to participate in criminal activity, to the benefit of the wider community.

4.100 Nationally consistent unexplained wealth provisions would be a powerful new tool supporting the national response to serious and organised crime. The committee encourages all Australian jurisdictions to work together to deliver the tools needed to ensure that crime does not pay.

Mr Chris Hayes MP
Chair

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Crime and Misconduct Commission
2	Police Federation of Australia Supplementary Submission
3	Law Council of Australia Supplementary Submission
4	Victoria Police
5	Australian Taxation Office
6	Attorney-General's Department
7	South Australia Police
8	Australian Crime Commission Supplementary Submission
9	Australian Federal Police Supplementary Submission
10	Northern Territory Police Supplementary Submission
11	Confidential
12	Queensland Law Society

Additional Information Received

- 1 *Proceeds of Crime Act 1996 (Ireland)*
- 2 *Proceeds of Crime (Amendment) Act 2005 (Ireland)*
- 3 *Criminal Assets Bureau Act 1996 (Ireland)*

Answers to Questions on Notice

- 1 Answer to Question on Notice from the Attorney-General's Department for a public hearing on 4 November 2011 (received 1 February 2012)
- 2 Answer to Question on Notice from the Attorney-General's Department at a public hearing on 4 November 2011 (received 1 February 2012)
- 3 Answer to Question on Notice from the Australian Taxation Office at a public hearing on 4 November 2011 (received 5 January 2012)
- 4 Answer to Question on Notice from the Australian Taxation Office at a public hearing on 4 November 2011 (received 5 January 2012)
- 5 Answer to Question on Notice from the Australian Taxation Office at a public hearing on 4 November 2011 (received 5 January 2012)
- 6 Answer to Question on Notice from the Attorney-General's Department about the ACC proposal (received 29 February 2012)
- 7 Answer to Questions on Notice from Mr Chris Hayes MP to the Attorney-General's Department on 6 March 2012 (received 9 March 2012)
- 8 Answer to Questions on Notice from Senator Wright to the Attorney-General's Department on 2 March 2012 (received 9 March 2012)

APPENDIX 2

Witnesses who appeared before the committee

Friday, 9 September 2011 – Perth WA

Western Australia Police

Assistant Commissioner Nicholas Anticich, Specialist Crime Portfolio

Detective Superintendent Charles Carver, Serious and Organised Crime Branch

Acting Detective Inspector Hamish McKenzie, Officer in Charge, Proceeds of Crime Squad

Corruption and Crime Commission of WA

Mr Mark Herron, Acting Commissioner

Mr Robert Sutton, Acting Director, Operations

Mr Paul White, Senior Financial Investigator

Friday, 4 November 2011 – Canberra ACT

Australian Federal Police

Commander Ian McCartney, Manager Criminal Assets

Mr Peter Whowell, Manager Government Relations

Mrs Elsa Sengstock, Coordinator, Legislation Program

Ms Sylvia Grono, Coordinator, Criminal Assets

Australian Crime Commission

Mrs Karen Harfield, Executive Director Fusion, Target Development and Performance

Mr Richard Grant, National Manager, Target Development

Ms Philippa de Veau, National Manager Legal Services

Ms Kate Deakin, Regional Legal Manager, Sydney

Australian Tax Office

Mr Michael Cranston, Deputy Commissioner

Mr William Day, Assistant Commissioner, Serious Non-Compliance

Mr John Ford, Assistant Commissioner, Serious Non-Compliance

Commonwealth Director of Public Prosecutions

Mr Graeme Davidson, Deputy Director

Ms Rebecca Ashcroft, National Coordinator, Criminal Assets

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary

Ms Brooke Hartigan, Principal Legal Officer

Civil Liberties Australia

Mr Bill Rowlings, Chief Executive Officer

Friday, 10 February 2012 – Canberra ACT

Australian Federal Police

Commander Ian McCartney, Manager, Criminal Assets

Mr David Gray, Manager, Proceeds of Crime Litigation

Mrs Elsa Sengstock, Coordinator, Legislation Program

Ms Sylvia Grono, Coordinator, Proceeds of Crime

Australian Crime Commission

Mr John Lawler, Chief Executive Officer

Ms Kate Deakin, Regional Legal Manager, Sydney

Mrs Karen Harfield, Executive Director

Ms Philippa de Veau, National Manager, Legal Services

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division

Ms Sarah Chidgey, Assistant Secretary, Criminal Justice Division

Police Federation of Australia

Mr Mark Burgess, Chief Executive Officer

Mr Angus Skinner, Research Officer

Commonwealth Director of Public Prosecutions

Mr Graeme Davidson, Deputy Director

Ms Rebecca Ashcroft, Acting National Coordinator of Criminal Assets

Law Council of Australia (via teleconference)

Mr Tim Game SC, Co-chair, National Criminal Law Committee

Ms Rosemary Budavari, Co-director, Criminal Law and Human Rights

Dr David Neal SC, Member, National Criminal Law Committee

ARC Centre for Excellence in Policing and Security

Professor Roderic Broadhurst

Wednesday, 7 March 2012 – Canberra ACT

Commissioner Tony Negus, Australian Federal Police

Mr Michael Carmody, Chief Executive Officer, Australian Customs and Border Protection Service

Commissioner Michael D'Ascenzo, Australian Taxation Office

Mr John Lawler APM, Chief Executive Officer, Australian Crime Commission

Mr Greg Medcraft, Chairman, Australian Securities and Investments Commission

Mr Iain Anderson, First Assistant Secretary, Attorney-General's Department

Mr Roman Quaedvlieg, Chief Police Officer, ACT Policing

Commissioner John McRoberts, Northern Territory Police, Fire and Emergency Services

Ms Kathryn Gleeson, Lawyer, Solicitor for the Northern Territory

Mr Robert Atkinson, Commissioner of Police, Queensland Police Service

Mr Darren Hine, Commissioner of Police, Tasmania Police

Mr Malcolm Hyde, Commissioner of Police, South Australia Police

Mr Kenneth Lay, Chief Commissioner, Victoria Police

Deputy Commissioner Graham Ashton AM, Crime and Operations Support, Victoria Police

The Hon Greg Smith SC MP, NSW Attorney General and Minister for Justice
(by teleconference)

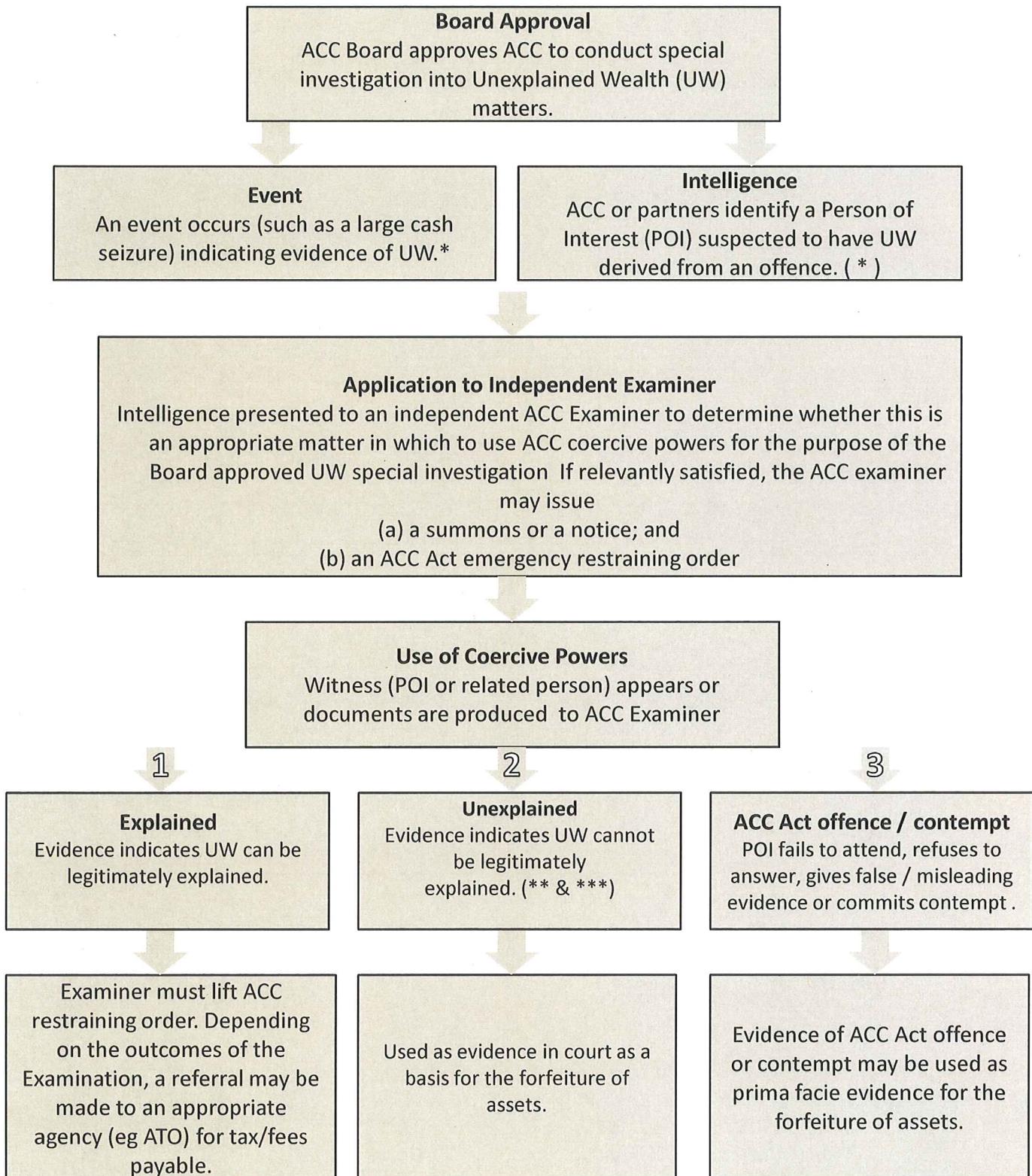
APPENDIX 3

ACC Proposal Flowchart

See overleaf

UNCLASSIFIED

Unexplained Wealth – Use of ACC Coercive Powers



* Subject to referral of powers from the states and territories, this would need to be a Commonwealth offence.

** Legislation needs to consider explanations and their subsequent use in court proceedings.

*** A suspect matter could be referred to the CACT as an example.

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Appendix 4

Comparison table – ACC Act and Proceeds of Crime Act examinations

See overleaf

Comparison table – ACC Act and Proceeds of Crime Act examinations

	ACC Act examinations	Proceeds of Crime Act examinations
Who can be an examiner?	<p>ACC examiners are appointed by the Governor-General, in consultation with an Inter-Governmental Committee.</p> <p>ACC examiners must be legal practitioners of at least 5 years experience. They are appointed on a full-time basis for periods of up to 5 years and may only serve for 10 years total (ACC Act, s 46B).</p>	<p>Approved examiners under POCA are any persons who hold an office, or fall within a class of people, specified in the <i>Proceeds of Crime Regulations 2002</i> (POCA, s 183).</p> <p>Approved examiners can be drawn from any of the office holders or classes of people specified, depending on who is available for a particular examination at a given time.</p> <p>The following office holders and classes of people are specified by regulation 12 of the Proceeds of Crime Regulations:</p> <ul style="list-style-type: none">• presidential members of the Administrative Appeals Tribunal (AAT)• non-presidential AAT members who are legal practitioners with at least 5 years experience• ex-State or Territory Supreme Court, District Court and County Court judges who agree in writing to be examiners, and• ex-magistrates who agree in writing to be examiners.

What can examinations be conducted in relation to?

ACC examinations can be conducted in relation to special operations or investigations (s 24A).

The ACC Board determines which operations are special operations and which investigations are special investigations. These determinations are subject to oversight by the Inter-Governmental Committee.

Under Part 3-1, Division 1 of POCA, a court may order that an examination be conducted following an application by a proceeds of crime authority.

Examinations can be conducted in relation to the affairs of persons who have an interest in property subject to POCA orders, suspects (in the case of restraining orders) and the spouse or de facto of either of these categories of person.

Examinations can be conducted in the following circumstances:

- where a restraining order is in force
- where an application for an order to exclude property from a forfeiture order under sections 73 or 94 has been made
- where an application for an order for compensation for forfeited property under sections 77 or 94A has been made
- where a person has applied under section 102 for an interest in forfeited property to be transferred to them
- where a confiscation order has been made but has not been satisfied
- where a restraining order has been revoked under section 44, and
- where an application relating to the quashing of a person's conviction is made as mentioned in sections 81, 107, 146 and 173.

What powers do examiners have?

ACC examiners may:

- summon a person to appear before an examination to give evidence and to produce documents or other things if it is reasonable to do so
- require a person appearing at the examination to produce a document or thing, and
- require a person appearing at the examination to give evidence either to take an oath or to make an affirmation (ss 28, 29).

ACC examiners may also request information from a range of Commonwealth and State agencies, subject to certain limitations (s 19A).

If a person being examined claims that answering a question or producing a document may incriminate them or expose them to some penalty, that information is not admissible against the person in criminal proceedings or proceedings to impose a penalty, with the exception of:

- confiscation proceedings, and
- proceedings in respect of the falsity of an answer or information stated in a document (s 30).

A POCA examiner may:

- require a person either to take an oath or to make an affirmation, and
- require a person to answer questions about the affairs of any person whose affairs are able to be examined.
- require a person being examined to produce certain documents at the examination.

An examination notice may require a person being examined to produce certain documents at the examination.

A person is not entitled to refuse to answer or a question or produce a document on the grounds that it may incriminate them, expose them to a penalty, or may be subject to legal professional privilege or other privileges (s 197).

How can information obtained from examinations be used?

The ACC's CEO, Board, staff members and examiners may divulge, or provide to a court, information obtained in performance of their duties, if it is for the purpose of giving effect to one of the following:

- the ACC Act
 - a State or Territory law under which the ACC performs its duties
 - the *Law Enforcement Integrity Commissioner Act 2006* and related regulations, and
 - the *Parliamentary Joint Committee on Law Enforcement Act 2010*.
- Information may also be divulged for the purposes of prosecutions initiated as a result of an ACC operation or investigation (see s 51).
- Under section 266A, information obtained from a POCA examination may be disclosed to:
- an authority performing functions under POCA, to facilitate its performance of that function
 - Commonwealth, State and Territory investigation or prosecution authorities, to assist in the investigation or prosecution of offences punishable by 3 or more years imprisonment
 - Foreign investigation or prosecution authorities, to assist in the investigation or prosecution of offences that would be punishable by 3 or more years imprisonment if they occurred in Australia, and
 - the Australian Taxation Office, to protect public revenue.
- Answers given or documents produced in a POCA examination are only admissible as evidence in the following civil or criminal proceedings:
- POCA proceedings and ancillary proceedings
 - proceedings to enforce a confiscation order
 - criminal proceedings for giving false or misleading information, and
 - civil proceedings in relation to a right or liability which a disclosed document confers or imposes.

Secrecy

Under section 25A, ACC examinations must be held in private. An examiner may give directions as to the persons who may be present during the examination or a part of the examination. A person giving evidence may be represented by a lawyer.

An examiner may direct that the following must not be published, or must be published subject to restrictions imposed by the examiner:

- any evidence given before the examiner
- the contents of any document, or a description of any thing, produced to the examiner
- any information that might enable a person who has given evidence before the examiner to be identified, and
- the fact that any person has given or may be about to give evidence at an examination.

Examiners are required to give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

An examiner has the general power to regulate the conduct of proceedings at an examination as he or she thinks fit.

POCA examinations take place at the time and place specified by the examination order, or at such time and place as the examiner sees fit (s 186).

Examinations must take place in private and may only be attended by the examiner, the person being examined, the person's lawyer, the proceeds of crime authority and anyone else the examiner declares can attend (s 188).

A person can be examined by video link if an examiner is satisfied that the necessary facilities are available, that it would not cause unreasonable expense or inconvenience for the person to attend, and that it is in the interests of justice (s 190).

Records must be kept of statements made at the examination if they are requested by the proceeds of crime authority or the person being examined. The examiner otherwise has the discretion to decide whether records are kept (s 191).

A person being examined must be given a copy of the written records if they request it, but the examiner can impose conditions on its disclosure (s 191).

An examiner must restrict public disclosure of answers given or documents produced in examinations if requested to do so by the person being examined or the proceeds of crime authority. Examiners may also restrict public disclosure on their own initiative (s 193).

Offences relating to examinations	<p>Under Part II, Division 2 of the Act, it is an offence for a person to:</p> <ul style="list-style-type: none"> • attend an examination without the examiner's permission • disclose that they have been summoned to an examination • disclose any information about official matters related to the summons, such as the existence of an ACC operation, investigation or examination • fail to attend an examination as required • fail to answer questions or produced documents as required • give false or misleading evidence, and • obstruct or hinder an ACC examiner. <p>Under section 34A, a person can be in contempt of the ACC if they:</p> <ul style="list-style-type: none"> • refuse or fail to take an oath or affirmation • refuse or fail to answer a question put to them by an examiner • refuse or fail to produce a document which they are required to produce • give false or misleading answers.
Under Part 3-1, Division 4 of the Act, it is an offence for a person to:	<p>Under Part 3-1, Division 4 of the Act, it is an offence for a person to:</p> <ul style="list-style-type: none"> • attend an examination without being entitled to attend • fail to attend an examination as required • refuse or fail to swear an oath or make an affirmation • refuse or fail to answer a question put to them by an examiner • refuse or fail to produce a document which they are required to produce • breach a requirement imposed on records of an examination • breach a direction preventing or restricting disclosure of information, and • give false or misleading answers.

- obstruct or hinder an examiner in performance of their functions
- disrupt an examination, or
- threaten an examiner.

Contempt of the ACC is dealt with by the Federal Court or a Supreme Court.