

## 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.<sup>1</sup> 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.<sup>2</sup>

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.'<sup>3</sup> Similar recommendations appear in the United Nations Convention Against Transnational Organised Crime (2000) and the United Nations Convention Against Corruption (2003).<sup>4</sup> 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.<sup>5</sup>

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

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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.<sup>6</sup>

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.<sup>7</sup>

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

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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.

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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.<sup>8</sup>

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.<sup>9</sup>

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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.<sup>10</sup>

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.<sup>11</sup>

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.

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

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

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