



OFFICE OF THE
CHIEF EXECUTIVE

Our ref: 11/138497

Mr Jon Bell
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
Department of Prime Minister and Cabinet
National Circuit
BARTON ACT 2600

Dear Mr Bell

Inquiry into Commonwealth unexplained wealth legislation and arrangements

Australian Crime Commission Submission

1. The Australian Crime Commission (ACC) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement with regard to the inquiry into Commonwealth unexplained wealth legislation and arrangements.
2. This submission is unclassified. The ACC is willing to provide further information should the Committee require it.

ACC Position

3. The ACC has always supported unexplained wealth provisions.
4. The ACC does not believe that existing or proposed legislation will provide effective solutions to address the unexplained wealth of serious and organised crime.
5. The key objective of unexplained wealth provision should be to undermine the profit motive for those criminals who acquire significant wealth over a lifetime of criminal activity, but who are sophisticated and powerful enough to distance themselves from the actual commission of crimes.
6. Existing and proposed unexplained wealth provisions impose an excessive burden of proof on law enforcement agencies and allow too much flexibility in the application of the provisions.

7. At the time the laws were progressing through Parliament, ACC expressed concern that proposed amendments would create disincentives for law enforcement agencies and the CDPP to utilise the unexplained wealth provisions in the Act, as compared to the existing confiscation provisions. Notwithstanding the efforts of law enforcement and prosecution agencies, this has proved to be the case.

8. 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.

9. As ACC predicted in 2009¹, 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).

10. The ACC believes that the fundamental flaws in the existing legislation include:

- a. In practice, the investigating agency is generally required to conduct a complete analysis of all a person's financial circumstances over a long period, and provide a significant amount of evidence to persuade the court, despite the fact that most of the available information may be held by the person. Although the onus is on the applicant to prove that their property was not derived from a Commonwealth offence, in practice this is a very easy onus to discharge, and may require nothing more than a credible denial on oath.
- b. There is significant scope for judicial discretion in the operation of the unexplained wealth provisions. The Act provides that the Court "may" make unexplained wealth orders, as opposed to other forms of restraining and forfeiture orders which "must" be made if certain conditions are satisfied. This means that notwithstanding the CDPP providing compelling evidence on the merits of a restraining order being issued, the judge can decide to refuse to make the order. This is not consistent with other restraining order provisions in the Proceeds of Crime Act and in state legislation.
- c. For a restraining order to be issued the prosecution is required to prove that a Commonwealth offence has been committed and is connected directly to the property or the owner of the property. The evidence to support this can be difficult, if not impossible to obtain.
- d. The definition of 'wealth' is extremely complex and requires excessive levels of evidentiary information gathering about the financial position of persons of interest.

¹ Australian Crime Commission submission to the Senate Legal and Constitutional Affairs Inquiry into *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009*, 13 October 2009.

- e. The court can refuse to make orders if it is not in the interests of justice. The interests of justice are not defined, and allow broad scope to refuse to make orders.
- f. The court has an express power to award costs, including indemnity costs, in any case where it refuses to make a restraining order, a preliminary unexplained wealth order, or an unexplained wealth order. This means commencing unexplained wealth proceedings involves taking on significant financial risk. Under the current legislative regime that risk is borne by CDPP alone, meaning that, understandably, CDPP require detailed evidence from investigating agencies to mitigate the risk before proceeding.
- g. If the court makes a preliminary unexplained wealth order, the CDPP must give the person written notice of the preliminary unexplained wealth order and a copy of the affidavit within 7 days. This is a particularly short time frame, and often means the whole case must be prepared by investigating agencies before the initial restraining order is sought.
- h. Unlike other types of restraining orders in the Proceeds of Crime Act (and unlike equivalent State provisions) the court has a discretion to permit the disposal of restrained property for the purpose of meeting a suspect's reasonable legal expenses. This means there is a real financial incentive for applicants to extend and delay proceedings, whittling away the available restrained property. In other provisions this incentive is overcome by having the payment of legal expenses managed under legal aid (which can later be recovered from forfeited property).
- i. Unlike laws in some state jurisdictions, there is no presumption that funds in relation to which no explanation is given are to be treated as unlawfully obtained.

Case Study

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.

11. The key policy objective of unexplained wealth provisions must be to attack the criminal economy by reducing the profit motive. This can only be achieved if the unexplained wealth laws create a genuine disincentive to those who conduct their financial affairs outside the legitimate economy.

Case Study

In March 2011, NSW Police arrested two people at Sydney Central Station carrying over \$2.5 million in suitcases. At the time, the NSW representative indicated that the arrests were made under their State unexplained wealth provisions, and *"...The police case will hinge 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."*

In June 2011, that money was forfeited to the NSW Crime Commission.

Under the existing Commonwealth provisions it is unlikely that unexplained wealth proceedings would have been commenced in relation to these people without extensive investigative research into their whole of life earnings and the ability of prosecutors to demonstrate a direct linkage of the money to a Commonwealth offence.

Inter-jurisdictional issues

An aspect of Commonwealth/State interaction which remains of concern is the fact that while the Commonwealth has provision for asset sharing arrangements with States, this is not universally reciprocated. Standard national provisions for the sharing of access to forfeited funds in a streamlined and equitable way has the potential to minimise disputes, increase efficiency and improve overall recovery rates.

Suggested Changes to Provisions

12. The ACC believes that changes to improve the unexplained wealth provisions could include:

- a. Introducing express provisions to deem amounts in relation to which 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. ACC has examples which clearly demonstrate cases where such provisions would be valuable. Further details can be provided in confidential submissions.
- b. 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.

- c. Providing a statement of clear and unambiguous objectives in the Proceeds of Crime Act to remove doubt as to Parliament's intention as to the operation of the unexplained wealth provisions and provide clarity as to the basis on which judicial discretion is exercised, in line with those objectives.
- d. Minimising (to the extent constitutionally possible) the need to prove a Commonwealth offence.
- e. Strengthening options for alternative dispute resolution and administrative forfeiture.
- f. Removing barriers to national operation of proceeds of crime laws, including streamlining information exchange, introducing asset sharing provisions, and moving towards more uniform laws for unexplained wealth.
- g. Establishing a specialist proceeds of crime court or tribunal to deal with proceeds of crime matters. 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 court would allow for the development of both judicial expertise and tailor-made procedures.

ACC Background

The Role and Function of the ACC

13. As Australia's national criminal intelligence agency, the ACC provides law enforcement and related Commonwealth, state and territory government agencies with a unique and valuable understanding of serious and organised crime. The ACC's primary objective is to support and complement Australian law enforcement efforts to reduce the threat and impact of serious and organised crime.

14. The ACC has developed an extensive understanding of the vulnerabilities, methodologies and enablers of crime used by serious and organised crime syndicates. Organised crime generates billions of dollars of illicit proceeds which need to be 'cleaned' for use in legitimate economy.

Australia's Illicit Markets and Organised Crime

15. Organised crime has proven itself to be sophisticated, resilient, highly diversified and pervasive. Organised crime groups are entrepreneurial and infiltrate a wide range of industries and markets. They are strategic and continually scan the marketplace for vulnerabilities, new opportunities and emerging technologies in order to make the greatest profit. Organised crime is motivated by money and power.

16. Organised crime operates within and alongside legitimate businesses, spanning multiple sectors to maximise return and minimise risk. Increasingly, organised crime uses logistics planning and aggressive marketing, buys in expertise and specialist facilitators, invests in research and development and implements risk mitigation strategies.

17. Illicit markets operate in the same way as markets for legitimate commodities – the primary motivator is financial gain and the markets are governed by supply and demand, price and the perceived quality of the goods. The largest illicit market in Australia continues to be the illicit drug market which is well entrenched and lucrative. Money laundering and identity crime also pose a critical risk to the Australia community.

18. Money laundering is an extremely diverse activity carried out in Australia at many levels of sophistication by most, if not all, organised crime groups to legitimise the proceeds and instruments of crime.

Criminal Intelligence Fusion Centre

19. The ACC National Criminal Intelligence Fusion Centre brings together people from a range of Government agencies, with a range of expertise and unique skills, and access to their own agencies' information holdings; who work collaboratively to provide a more comprehensive picture of the targets, risks, threats and vulnerabilities associated with criminal activity.

20. Creating a co-located, multi-agency team is a practical and cost-effective solution to ensure that information and intelligence is shared lawfully and in a timely manner. It means that data can be fused in near real-time, the results analysed and fed back to agencies to act upon.

21. Since the launch of Fusion in July 2010, the ACC is already seeing results. For example:

- a. Fusion has identified more than 53 previously unknown targets; all are now subject to monitoring or investigation.
- b. In February 2011, two women appeared in Sydney Central Court for their alleged involvement in a money laundering syndicate. Their arrest was as a result a referral from the Financial Intelligence Assessment Team (FIAT), part of the National Criminal Intelligence Fusion Centre.

22. Fusion will also provide support to the new multi-agency Criminal Asset Confiscation Taskforce (CACT), launched on 10 March 2011 which is targeting criminals and seizing the wealth and assets they have acquired as a result of their illegal activities

23. The CACT is an AFP-led activity that was launched in early 2011 and continues the fight against organised crime through more intensive targeting of criminals, and seizing the wealth and assets they acquire as a result of their illegal activities.

24. The ACC, in collaboration with the AFP, the Australian Taxation Office (ATO) and the Commonwealth Director of Public Prosecutions (CDPP) will provide a focused and committed effort to identify and remove the profits derived from criminal activity.

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25. The ACC has co-located officers within the taskforce and also provides ongoing support through its special operations and investigations, including the Targeting Criminal Wealth special investigation, and through the National Criminal Intelligence Fusion Centre. Through Fusion intelligence gathering, the ACC identifies targets and provides the taskforce with strategic advice on money flows that impact on Australia.

ACC Contact

26. On behalf of the ACC, I thank you for this opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Commonwealth unexplained wealth legislation and arrangements. Should you wish to discuss any aspect of this submission further, please contact Richard Grant, National Manager, Target Development , on _____

Yours sincerely

John Lawler APM
Chief Executive Officer
23 August 2011