



AFP

AUSTRALIAN FEDERAL POLICE

**Parliamentary Joint Committee
on Law Enforcement**

**Inquiry into Commonwealth
unexplained wealth legislation and
arrangements – Discussion Paper**

**Submission by the
Australian Federal Police**

February 2012

Executive summary

This is the AFP's second submission to the Parliamentary Joint Committee on Law Enforcement's inquiry into Commonwealth unexplained wealth legislation and arrangements.

ii. In its first submission to the inquiry:

- The AFP stated its strong support for the concept of unexplained wealth provisions, which provide law enforcement with additional method to investigate and confiscate the profits of crime generated by organised crime networks.
- The AFP indicated that, although unexplained wealth provisions have yet to be tested by the courts, the AFP has been actively considering the use of such provisions and have identified technical improvements that could be made to the regime. The AFP appreciates the ongoing consideration that the Committee is giving to these law reform proposals.
- The AFP also highlighted the importance of addressing the fundamental constitutional limitations that operate on unexplained wealth laws, and the potential gaps that can be exploited by serious and organised crime groups. The AFP is very pleased with the focus the Committee has taken on the need to harmonise Commonwealth, State and Territory laws to ensure that no jurisdiction is a safe haven for the accumulation of unexplained wealth.

iii. This second submission responds to a range of issues raised in the Committee's Discussion Paper and the key aspects of this submission are summarised below.

- The AFP considers that the existing suite of oversight and accountability mechanisms which apply to its use of unexplained wealth legislation is more than adequate to ensure that these provisions are used appropriately. Nevertheless, this submission offers several observations on the options proposed by the Committee to improve certainty in the application of unexplained wealth provisions while ensuring that they remain focused on serious and organised crime targets.
- This submission also addresses the two legislative reform proposals under consideration by the Committee to deem income acquired in certain years as having been illegally obtained and treating large amounts of cash as a criminal commodity. The AFP supports the concepts behind these proposals; however, the AFP notes that these provisions could attract the same issues which reduce the effectiveness of the current unexplained wealth legislation.
- This submission also offers some alternative views on how the courts may approach the task of calculating a person's wealth, and the likely evidentiary burden placed on law enforcement agencies in conducting a financial analysis of the respondent. The AFP considers that the courts are likely to take a practical approach, which focuses on the respondent's wealth over a confined period of time. While the legislation would appear to already support such an approach, it would be useful to clarify the provisions to also allow the court to focus on particular assets rather than the entirety of the respondent's wealth.

Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a further submission to the Parliamentary Joint Committee on Law Enforcement's inquiry into unexplained wealth legislation and arrangements. This submission responds to some of the issues raised in the Committee's Discussion Paper, released on 30 November 2011.

2. This submission supplements the AFP's submission to the first phase of the inquiry which was provided to the Committee in September 2011, and evidence given by AFP offices before the Committee in November 2011. As the AFP has already provided information on a range of matters raised in the Committee's Discussion Paper, this submission focuses on the following matters:

- ensuring that unexplained wealth provisions are used appropriately (which addresses the three options under consideration by the Committee)
- harmonisation of Commonwealth, State and Territory laws
- additional measures to undermine the profit motives of serious and organised crime
- the evidentiary burden arising from wealth measured over a lifetime
- enhancement of enforcement provisions
- establishing special courts or judges, and
- strengthening options for dispute resolution and administrative forfeiture.

3. For ease of reference, the AFP uses the following terminology to refer to the different stages of unexplained wealth proceedings:

- *Unexplained wealth restraining orders* – orders which may be made under section 20A of the *Proceeds of Crime Act 2002* (PoCA) where the court is satisfied that an authorised officer has reasonable grounds to suspect that: the person's total wealth exceeds the value of their lawfully acquired wealth; and the person committed a relevant offence and/or the whole or part of their wealth was derived from a relevant offence. Note that "relevant offence" refers to a Commonwealth offence, a foreign indictable offence or a State offence with a federal aspect.
- *Preliminary unexplained wealth orders* – orders which may be made under section 179B of PoCA where the court is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of their lawfully acquired wealth. The person subject to the order must attend court and prove that his or her wealth was lawfully derived, or was not derived from a relevant offence.
- *Final unexplained wealth orders* – order which may be made under section 179E of PoCA where the court is not satisfied of the matters outlined above. The order requires the person to pay, to the Commonwealth, the difference between their total wealth and their legitimately acquired wealth.

Ensuring that unexplained wealth provisions are used appropriately

4. When the Commonwealth unexplained wealth regime was introduced in 2009, there was a concern that the provisions – which reverse the onus of proof – could be used against the “wrong people”. That is, instead of being used for their intended purpose (to target the “Mr Bigs” who distance themselves from the commission of crime but benefit from it), the provisions would be used against the “Mr and Mrs Littles” (who are not involved in serious and organised crime, but may not be in a position to adequately justify the acquisition of their wealth).

5. As part of this inquiry, the Committee has been considering how best to address these concerns and to ensure that unexplained wealth provisions are used appropriately. In particular, the Committee has considered several options (including alternatives to judicial discretion) to improve certainty in the application of unexplained wealth provisions while ensuring that they remain focused on serious and organised crime targets.

6. While these options are considered below, it is important to consider the broader context in which unexplained wealth provisions operate. As previously indicated to the Committee, the AFP has finite resources to deal with the serious and organised crime problem in Australia, and will direct those resources to serious and organised crime targets.

7. Further, the AFP is subject to a suite of oversight and accountability mechanisms which act as checks and balances on the use of all law enforcement tools, including unexplained wealth provisions. The AFP’s accountability framework is comprised of the following elements.

8. The AFP Core Values and AFP Code of Conduct require all AFP appointees to exercise their powers, and conduct themselves, in accordance with legal obligations, and the professional standards expected by the AFP, the Government, and the wider community. This includes the exercise of investigative powers, and litigation decisions, in relation to unexplained wealth matters.

9. Part V of the *Australian Federal Police Act 1979* (the AFP Act) provides a framework for the internal management of AFP professional conduct issues. This framework would apply to complaints about the actions of AFP appointees conducting unexplained wealth investigations or litigation.

10. Most importantly, all PoCA litigation conducted by the AFP is subject to the scrutiny of the court. Court scrutiny ensures that unexplained wealth orders will not be made unless all legislative requirements have been complied with.

11. In addition, the Commonwealth Ombudsman can also receive complaints about, or conduct own motion investigations into, the actions of AFP members or the policies, practices and procedures of the AFP. This would include any complaints in relation to the use of unexplained wealth provisions. The Commonwealth Ombudsman also maintains an oversight role in relation to all AFP professional standards matters.

12. Complaints made to the AFP about corruption matters are referred to the Australian Commission for Law Enforcement Integrity (ACLEI). ACLEI can also receive complaints directly, and conduct own motion investigations. This would include complaints about a corruption issue, or possible corruption issue in relation to the use of unexplained wealth provisions.

13. Further, the AFP is subject to public accountability through this Committee and the Senate Estimates process. In particular, as the Committee is aware, section 179U of PoCA provides for the Committee to oversight the use of unexplained wealth provisions.

14. AFP lawyers conducting unexplained wealth litigation will hold legal practising certificates and have a have a professional and ethical duty as officers of the court. AFP lawyers are also bound by the Legal Services Direction issued by the Attorney-General under the *Judiciary Act 1903*. The Legal Services Directions govern the provision of legal services and the conduct of litigation by the Commonwealth. In particular, the Legal Services Direction will require the AFP to conduct all cases as a model litigant. This means that the AFP will not commence court proceedings until it has received legal advice there are reasonable grounds for starting the proceedings.

15. The AFP considers that these arrangements are more than adequate to ensure that unexplained wealth provisions are used appropriately.

Options posed by the Committee

16. The options posed by the Committee are set against the background of the additional judicial discretion that applies in relation to unexplained wealth proceedings, which goes beyond the discretion provided for in other PoCA proceedings. The court *may* make unexplained wealth orders if it is satisfied of certain requirements. This is inconsistent with other proceedings under PoCA in which the court *must* make orders once the legislative criteria have been met. Part of the policy rationale for the additional judicial discretion for unexplained wealth orders is to ensure that the provisions are only used to target major criminal figures that acquire significant wealth over a lifetime of the criminal activity.

17. The unexplained wealth provisions have not yet been tested in the courts, and there is no specific case law to indicate how judicial discretion in relation to unexplained wealth orders will be exercised. However, it is possible that a court could refuse to make an unexplained wealth order even where the legislative requirements have been met. This creates uncertainty over when a court will make an order, and is inconsistent with the way in which other streams of PoCA action operate.

Amending the objects clause of PoCA

18. One of the options the Committee is considering to guide judicial discretion is amending the objects clause of PoCA to make it clear that the purpose of the legislation is to address serious and organised crime by undermining the profit motive (Observation 1).

19. The objects clause in an Act can assist the court to adopt a purposive approach to statutory interpretation. That is, provisions should be interpreted to operate or apply in a way that would promote the underlying purpose or object of the Act. When considering whether to exercise a discretion, the court will consider whether the making of an order will further the objects or purposes of the Act. Similarly where there is any uncertainty about way in which provisions are intended to operate, the court will look at the objects of the legislation.

20. The principal objects of PoCA are set out in section 5 and in relation to unexplained wealth include the following:

- to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences (paragraph 5(ba)), and
- to prevent the reinvestment of unexplained wealth amounts in further criminal activities (paragraph 5(d)).

21. While the AFP supports consideration of amendments to clarify the intent of the legislation, the AFP is concerned that such amendments could have unintended, negative consequences for the conduct of unexplained wealth proceedings.

22. Currently, PoCA is clear about the type of unlawful activity to which the legislation applies. Certain PoCA action can be taken in relation to certain offences which are clearly defined in the legislation itself. In each case, all that needs to be proven (to the relevant standard) is that the relevant offence was committed or that wealth was not derived from certain offences.

23. If the objects clause in PoCA was amended to refer to 'undermining the profit motives of serious and organised crime', it is possible that the court could take a narrower interpretation about the operation of the legislation and the AFP could be required to prove additional matters to secure the making of an unexplained wealth order. The court could require the AFP to prove a connection between the particular unexplained wealth proceeding and serious and organised crime. Further, the AFP would have to put evidence before the court that making an unexplained wealth order would 'undermine the profit motives' of such crime. These additional requirements could be exploited by respondents and make it even more difficult to obtain unexplained wealth orders.

24. Any expansion of the proposed reference in the objects clause to 'undermining the profit motives of serious and organised crime' to other PoCA proceedings could also be in conflict with existing objectives. For example, paragraph 5(c) of PoCA provides that an objective of the legislation is to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories.

25. Further, paragraph 5(f) of PoCA provides that an object of the legislation is to give effect to Australia's obligations under the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, and other international agreements relating to proceeds of crime. Inserting a reference to undermine the profit motive of serious and organised crime could limit the reach of PoCA action, which is intended to address those who commit or profit from crime more generally.

Introducing a threshold limit of \$25,000

26. Another alternative posed by the Committee is to better target, and limit, the use of unexplained wealth provisions through the introduction of a threshold amount, such as \$25,000 (Observation 2). The application of a threshold could be modelled on the approach taken in Ireland in relation to proceeds of crime. Under the *Proceeds of Crime Act 1996* (Ireland), a court must be satisfied (at all stages of the proceedings) that the cumulative value of property specified as the proceeds of crime must be at least £10,000.

27. The AFP considers that the existing oversight and accountability mechanisms described above operate to ensure that the use of unexplained wealth provisions is appropriately targeted. Nevertheless, the AFP offers the following observations about the Committee's proposal to set a threshold limit on the use of unexplained wealth provisions.

28. Any threshold limit should be expressed as a cumulative value. That is, that the total value of a person's unexplained wealth be at least \$25,000 rather than requiring each transaction or item of property to be \$25,000 or more in value. In the serious and organised crime context, it would not be uncommon for profits to be derived from a large number of small criminal acts. Allowing transactions to be totalled in order to meet the threshold would ensure that persons did not try and circumvent the provisions by accumulating wealth through transactions falling just below \$25,000. Where a respondent adduces evidence that lowers the value of suspected unexplained wealth identified in the proceedings, there should be no prohibition on the AFP including additional property (bringing the case back within the threshold limit).

29. It is important to also consider whether any advantage to be gained by imposing a threshold is offset by any potential negative impact on the overall effectiveness of the legislation. For example, introducing a threshold could lead to greater emphasis being placed on litigating the value of property, which could be a distraction to the case in which the focus should be on the respondent establishing that his or her property was not unlawfully obtained. Further, having to establish the value of property could place an additional burden on law enforcement and have a negative impact on the overall effectiveness of the legislation.

Alternative reporting, monitoring and oversight mechanisms

30. The Committee has observed that there did not seem to be a strong case for the additional judicial discretion applying to the making of unexplained wealth orders, and that such discretion may limit the effective use of unexplained wealth laws (Observations 6 and 7). The AFP supports a model in which the court must (rather than may) make an unexplained wealth order where the legislative criteria have been met.

31. The Committee has further observed (Observation 8) that it might be possible to replace this judicial discretion with appropriate statutory oversight arrangements including:

- law enforcement agencies notifying the Integrity Commissioner of unexplained wealth investigations

- the Commonwealth Ombudsman reviewing and reporting to Parliament on the use of unexplained wealth laws in the same way that the Ombudsman does for controlled operations, and
- oversight by the PJC LE being enhanced so that, in addition to appearing when required, the Australian Crime Commission (ACC), AFP, Commonwealth Director of Public Prosecutions (CDPP) 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 the annual reports of the ACC and the AFP.

The AFP makes the following observations about this proposal.

32. As discussed above, avenues already exist for a person to make a complaint to the Integrity Commissioner about a corruption issue or possible corrupt conduct concerning an unexplained wealth investigation or proceeding. Further, the head of an agency falling within the Integrity Commissioner's jurisdiction has a positive obligation to report any corruption issue or possible corrupt conduct concerning the use of unexplained wealth provisions.

33. The Integrity Commissioner does not, however, have a monitoring role in relation to the use of law enforcement tools more generally, and the AFP does not consider it would be appropriate for all unexplained wealth investigations to be reported to the Integrity Commissioner.

34. The Commonwealth Ombudsman currently has statutory responsibility for inspecting the records of law enforcement agencies in relation to the use of covert policing powers, namely: the interception of telecommunications, access to stored communications, the use of surveillance devices, and the conduct of controlled operations. The Commonwealth Ombudsman does not have an inspections role in relation to the use of overt police powers (such as search, seizure and arrest) or in relation to the use of court-based proceedings (such as criminal prosecutions or criminal asset confiscation action).

35. However, as discussed above the Commonwealth Ombudsman can already receive complaints about, or conduct own motion investigations into, the actions of AFP members or the policies, practices and procedures of the AFP in relation to the use of unexplained wealth provisions. The AFP does not consider that it is either necessary or appropriate for the Commonwealth Ombudsman to be required to report to Parliament on the use of unexplained wealth laws generally.

36. The AFP considers that it would be appropriate to include information about the number of unexplained wealth proceedings as part of its annual report which is tabled in Parliament, and in which the AFP already reports on its criminal asset confiscation action. Information on the use of unexplained wealth provisions could include: a statistical breakdown of applications for orders, case outcomes and amounts confiscated; and relevant and appropriate case studies where matters have been concluded.

37. The Committee could then explore this information further in conducting its examination of the AFP's annual report. Other agencies involved in unexplained wealth investigations or litigation (such as the ACC and the CDPP) could include similar information in their own annual reports.

Harmonisation of Commonwealth and State and Territory laws

38. The AFP's submission to the first phase of the inquiry highlighted the importance of addressing the fundamental constitutional limitations that operate on unexplained wealth laws, and the potential gaps that can be exploited by serious and organised crime groups. The AFP is pleased that the Committee is exploring the desirability of harmonising Commonwealth, State and Territory unexplained wealth laws to remove the financial incentive to commit crime.

39. The AFP notes that the Attorney-General's Department (AGD) has provided information on the merits of the various methods through which harmonisation could be achieved as part of its response to a Question on Notice from the Committee.

40. The AFP accepts that there are practical difficulties with the development and implementation of model unexplained wealth legislation, or legislation based on a set of general principles. The AFP notes that if a referral of legislative power to the Commonwealth is obtained, it will be important to put effective arrangements in place to guide the operational and resource implications for a national scheme. The AFP, however, defers to the views of AGD as the department for policy responsibility for PoCA.

Additional measures to undermine the profit motives of serious and organised crime

41. The Committee is also exploring two legislative proposals which would provide law enforcement with additional measures to undermine the profit motives of serious and organised crime.

42. The first proposal would be to introduce legislative provisions which deem amounts:

- in relation to which an individual has no explanation
- which are inconsistent with levels of income declared in taxation returns, or
- were obtained in years for which no taxation return was filed

to be illegally obtained.

43. The second proposal would be to introduce legislative provisions which, in appropriate circumstances, treat cash as a criminal commodity. Such laws would create a rebuttable presumption that the possession of large amounts of cash without adequate explanation is connected to criminal activity.

44. The AFP supports the concepts behind these proposals and their potential impact on serious and organised crime. The AFP notes that these proposals could attract the same constitutional issues which effectively limit the operation of Commonwealth unexplained wealth laws. Issues concerning the constitutionality of proposed legislative reforms are a matter more appropriately addressed by AGD.

45. The proposals might also face the same challenges as unexplained wealth legislation in relation to the burden of proof shifting back onto the applicant, thereby reducing the potential effectiveness of the proposed deeming/presumption provisions.

46. Until the wealth provisions have been litigated, it is not clear as to what level of evidence will be required by the court to shift the evidential burden back onto the applicant. However, it is possible that defendants will be able to similarly deflect a deeming provision or rebut the presumption that large amounts of case are connected to criminal activity. This could leave law enforcement agencies in a position which is no better off than under the current unexplained wealth provisions. The AFP would be happy to expand on this matter further during its appearance before the Committee this month.

The evidentiary burden arising from wealth measured over a lifetime

47. The Committee has also been exploring the evidentiary burden on law enforcement agencies, to the effect that courts will expect applicants to undertake a complete financial analysis of the subject of the unexplained wealth proceeding.

48. The Committee has sought views on a possible law reform proposal to address the issue, namely allowing unexplained wealth orders to relate to wealth accumulated by a person over a specified time period particular period of time. The AFP offers the following information to assist the Committee's consideration of the issue.

49. Currently under PoCA, the court is required to assess the respondent's total wealth before making a final unexplained wealth order. The definition of "wealth" in section 179G refers to property owned, disposed of, consumed or under the effective control of the person at any time.

50. As the laws have yet to be tested before the courts, there is little guidance on how a court will approach the task of calculating wealth. It is possible that the court will require that a person's wealth be measured over their entire lifetime, meaning that there will need to be an examination of everything the person has ever earned, spent or owned. The applicant is likely to be expected to assist the court in this task and provide a comprehensive financial picture of the respondent. This could be very resource intensive, and investigators may not be in a position to obtain historical information or information about wealth obtained from overseas sources.

51. Alternatively, courts may take a more practical approach in which a financial analysis of a person's wealth is conducted over a confined period of time, and parties jointly ask the court to assume that all wealth acquired prior to this time was lawfully acquired. In this way, the court could focus the unexplained wealth hearing on the difference between the person's total wealth, and lawfully acquired wealth, over that specific time period.

52. In some cases, law enforcement may only be interested in a particular asset (or group of assets) suspected to have been unlawfully acquired. It is not clear that current unexplained wealth legislation would allow the court to concentrate on a particular asset (or group of assets) suspected of having been unlawfully acquired rather than assessing the entire financial history of the respondent. Clarifying the legislation to allow this would assist in making unexplained wealth provisions more effective.

Enhancement of enforcement provisions

53. In its submission to the first phase of the inquiry, the AFP raised concerns about the potential for a situation in which, following the making of a final unexplained wealth order, the Commonwealth cannot effectively enforce it. This situation could arise because there is no express provision in PoCA granting the Commonwealth a charge over restrained property when a final unexplained wealth order is made. To address this, the AFP proposed that provisions equivalent to sections 142 and 143 of PoCA (which create a charge and allow the registration of charges over restrained property when pecuniary penalty orders are made) be inserted into Division 4 of Part 2-6 of PoCA. The AFP offers the following additional information to assist the Committee's further consideration of the issue.

54. Section 116 of PoCA provides a basis for the court to make a pecuniary penalty order in relation to the benefit derived from the commission of particular offences or other unlawful activity. Pecuniary penalty orders are a civil debt due by the person to the Commonwealth and are taken to be a judgment debt (subsections 140(1) and (4) of PoCA). Section 142 of PoCA provides that if a pecuniary penalty order has been made and property has been restrained in relation to the offences to which the pecuniary penalty order has been made, a "charge" is created over the property in order to secure the payment of the debt to the Commonwealth.

55. Section 143 of PoCA enables that charge to be registered. A debtor will not generally be able to deal with assets subject to a charge, ensuring that assets are not dissipated before an order is satisfied. Registration of the charge is important as charges which are registered will take precedence over charges that are not where there are multiple interests in the property.

56. In a similar way, a final unexplained wealth order is a civil debt due by the person to the Commonwealth, the debt is taken to be a judgment debt, and is enforceable as if it were an order made in civil proceedings instituted by the Commonwealth to recover a debt (subsections 179R(1)– (3) of PoCA). However, PoCA does not include any equivalent provisions to sections 142 and 143 and there does not appear to be any mechanism to create and register a charge in relation to property restrained to satisfy a final unexplained wealth order.

Establishing special courts or judges

57. The Committee has observed that there may be value in identifying nominated judicial officers who could give priority to hearing proceeds of crime proceedings, and unexplained wealth proceedings in particular (Observation 8). The AFP acknowledges that there are advantages and disadvantages to establishing special courts or judges to deal with PoCA proceedings, and considers that AGD may be better placed to provide advice on such issues. The AFP notes, however, that some jurisdictions such as Victoria have specialist lists set up to manage criminal asset confiscation proceedings.

58. The AFP understands that the Victorian County Court Confiscation List is presided over by a judge with proceeds of crime expertise, and lists matters under both the *Confiscation Act 1977* (Vic) and PoCA on a weekly basis. The List judge or an alternate is usually available to hear urgent applications outside of the List days, or if not List judge is available, a matter can be listed in the usual way before the Practice Court. The AFP further understands that the Supreme Court of Victoria is in the process of establishing its own Confiscation list.

59. It is important to note that the establishment of both Lists has been at the initiative of the courts, in response to a significant increase in both the volume and complexity of proceeds of crime matters being listed, particularly arising under the Confiscation Act. It is possible that courts in other jurisdictions may seek to establish specialist proceeds of crime Lists if the case load necessitates it. The Committee may wish to seek evidence on the advantages and disadvantages of this approach from practitioners familiar with the operation of the Victorian Confiscation List.

Strengthening options for dispute resolution and administrative forfeiture

60. The Committee is also exploring the advantages and disadvantages of strengthening options for alternative dispute resolution and administrative forfeiture. The AFP notes that AGD has provided further evidence to the Committee (through a response to a Question on Notice) on the appropriateness of dispute resolution mechanisms for PoCA matters and administrative forfeiture. The AFP supports the issues raised by AGD in relation to these matters.

61. The AFP offers the following information on the use of negotiated settlements and the role they can play in saving time and money and facilitating better confiscation outcomes. In this context, the AFP is only addressing the use of negotiated settlements which are still subject to the scrutiny of the court, which mitigates public concern over 'deals' being done between law enforcement agencies and criminals.

62. Section 316 of PoCA already provides for the court to make an order in a PoCA proceeding (including unexplained wealth proceedings) with the consent of the applicant, respondent and any other affected party. The AFP supports the use of negotiated settlements (which form the basis for consent orders) in PoCA action in appropriate cases.

63. The decision to settle confiscation action must be based on sound principles to ensure that the outcomes are in the best interests of the Commonwealth and the community. While the AFP is still developing its settlement policy, the following factors should be taken into account to guide decision making: the prospects of successful litigation; the risks of litigation; the costs of investigation and litigation (including at what stage the maximum benefits of settlement over litigation will be realised; and whether settlement is in the public interest. Public interest considerations will include: whether the return of assets may facilitate the commission of further offences; any precedent value that the decision may have; and the overall deterrent effect of litigation.