

Victoria Police response to  
Inquiry into Commonwealth unexplained wealth legislation and  
arrangements

- (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;**

Unable to comment

- (b) **the likely effectiveness of proposed Commonwealth unexpected wealth legislation;**

Unable to comment

- (c) **the effectiveness of and potential changes to unexplained wealth legislation and associated administrative arrangements in other countries.**

The effectiveness of the measures introduced by various countries varies significantly, depending on how strong a link is required between the unexplained wealth and the criminal act from which such wealth originated. Some countries (including Australia) allow the confiscation without a criminal conviction with the criteria being the disproportion between the assets and the known source of income. Other countries require a conviction, thus creating a link between the criminal act and the assets to be confiscated. Another approach is the property penalty. This provision imposes a pecuniary penalty rather than the confiscation of property. A further approach is that of administrative sanctions such as the loss of office, the loss of licenses and procurement contracts and exclusion from certain professions.

The United Kingdom has a set of offences under the Proceeds of Crime Act which enable the confiscation of assets obtained from a 'criminal lifestyle'. Under section 75 of that Act, a person is said to have a criminal lifestyle if they have been convicted of a number of serious offences, mainly drug trafficking offences, if they have been convicted of an offence over a period of at least six months from which they have obtained at least £5000, or if they 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 which are before the court of at least four offences from which they have benefited or a conviction in the current proceedings of one offence from which they have benefited, in addition to a least two other convictions on at least two separate occasions in the past six years.

Where a court has decided that a defendant has a criminal lifestyle, the Act contains provisions which enable an assessment to be made as to the financial benefit that 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. Under the United Kingdom legislation, the amount recoverable is an amount equal to the defendant's total benefit from criminal conduct.

Officers from the Proceeds of Crime Office within the Serious Organised Crime Agency have advised 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.

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.

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.

The Italian Central Directorate for Antidrug Services believes that this process has been very effective in confiscating criminal assets and preventing organised crime in Italy.

It should be noted that 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 in Australia.

More recently, Bulgarian authorities are likely to have the right to seize unexplained wealth, worth more than BGN 150,000, without a conviction as of January 1, 2012.

The Council of Europe's Venice Commission, after approving the draft law, made the recommendation for Bulgaria to introduce the legislation. The European Commission sees the legislation as a powerful weapon in the country's fight against corruption.

The law will allow the State Commission for Establishing of Property Acquired from Criminal Activity to probe the property and bank account of members of the families of people who cannot explain their sources of income in court and their partners.

The threat from organised crime demands the pursuit of constant innovation in law enforcement capabilities and adaptation to the changing criminal environment. The effectiveness of international approaches will continue to be monitored as there needs to be a global approach as well as an effective regional and national approach.

**(d) the extent and effectiveness of international agreements and arrangements for law enforcement activities in relation to unexplained wealth;**

The notion of confiscation of unexplained wealth can be traced back as far as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention, 1988). Article 5 paragraph 7 recommended 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".

These recommendations were re-enforced at the United Nations Convention Against Transnational Organized Crime (the Palermo Convention, 2000) and the United Nations Convention Against Corruption (2003).

In 1996, the Financial Action Task Force on Money Laundering (FATF) made 40 recommendations regarding an international response to money laundering. These were updated in 2003 with the FATF recommending that countries adopt measures similar to those set forth in the Vienna and Palermo Conventions, including confiscation without conviction and requiring persons to demonstrate the lawful origins of property.

The obligation for parties to these conventions is, however, subject to each State party's constitution and the fundamental principles of its legal system. This effectively recognizes that the definitional framework for illicit enrichment may in some jurisdictions be considered

as contrary to the right to be presumed innocent until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges upon presuming that the accumulated wealth is corruptly acquired, unless the contrary is proved. Because States may have constitutional or other constraints on such shifting of the burden of proof, States parties are only required to consider implementing this measure to the extent that it is consistent with the fundamental principles of their law.

Differences in legal systems and among confiscation systems create enormous challenges and frustrate the cooperation of foreign jurisdictions. Legal terminology tends to be different as are the court procedures, evidentiary burdens, and time required to obtain assistance.

The existence of certain barriers of general, legal, operational or other nature hinders efforts to render asset recovery mechanisms more efficient and effective. General barriers and overriding issues include, the lack of political will, the lack of trust between cooperating States, resource issues and differences between legal traditions.

It is difficult to have a unified response as each jurisdiction has its own cultural, historical, social and legal backgrounds. Experience has shown that recovering proceeds of crime can only be successful if there exists time-sensitive mutual collaboration between jurisdictions. Therefore, prosecution services need to be flexible and cooperate for international recovery of assets to be successful. Prosecution services must consider adopting flexible confiscation frameworks including unexplained wealth orders with reverse onus provisions.

As a practical example, Victoria Police (through the Purana Taskforce) had a yacht forfeited that was located in Greece. The Commonwealth Attorney-General's office has been liaising with the Greek Ministry of Justice to have the yacht sold and the funds remitted back to the Commonwealth under the terms of the Treaty between Australia and the Hellenic Republic on Mutual Assistance in Criminal Matters.

There have been Mutual Assistance Requests which have had to be translated into Greek before being forwarded to authorities in Greece. Problems with translation have led to misunderstandings about the process. Some 18 months after the yacht was forfeited by the Victorian Supreme Court, the yacht is still awaiting sale in Greece. It is very difficult to facilitate this arrangement by correspondence.

**(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**

The call for a consistent national approach to criminal asset confiscation has been an on-going issue for many years. At a Premier's Conference on Drugs in 1985, it was proposed that uniform legislation throughout Australia be introduced to confiscate the proceeds of drug dealing.

Unfortunately, uniform legislation has never been enacted with the States and the Commonwealth introducing their own legislation. Since the 1990's, a spate of new State and Commonwealth legislation has been enacted designed to introduce notions of forfeiture as part of the armoury of the State in responding to particular criminal offences.

Currently, there is a divergence in legislation with some States having a wholly civil-based scheme and other States, such as Victoria, retaining both conviction-based and civil confiscation legislation.

Western Australia introduced unexplained wealth provisions in 2000 in Division 1 of Part 3 of the Criminal Property Confiscation Act 2000 (WA), and the Northern Territory followed in 2003 with the Criminal Property Forfeiture Act 2002(NT).

The WA provisions do not appear to have been used extensively, with no declarations made between 2004 and 2007. This period coincided with public criticism of the DPP and government over the application of the laws. However, more recently, unexplained wealth declarations have begun to be used successfully again, especially as a tool against OMCG's. It would appear that the Northern Territory legislation has been very successful in utilising its unexplained wealth laws to seize assets from suspected organised criminals.

The recent report (August 2009) of the Parliamentary Joint Committee on the Australian Crime Commission on the legislative arrangements to outlaw serious and organised crime groups inquired into the status of unexplained wealth provisions throughout Australia. Evidence was given to the inquiry that one of the impacts of this legislation has been the movement of some criminals out of jurisdictions that have introduced unexplained wealth provisions to jurisdictions that have not.

This indicates that while the legislation may be effective in those jurisdictions that have it, due to the federated nature of the Australian justice system, strong laws in one jurisdiction can cause problems to relocate to another jurisdiction. Whatever approach to assets confiscation is taken, it is critical that Australian governments work together to ensure that there are no 'weak points'.

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.

**(f) the need for any further unexplained wealth legislative or administrative reform.**

In their report dated August 2009, the Parliamentary Joint Committee on the ACC in their "Inquiry Into Legislative Arrangements To Outlaw Serious And Organised Crime Groups" examined the arguments for and against the introduction of unexplained wealth legislation. They concluded as follows:-

*However, in 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 organized 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.*

In more recent times, evidence uncovered by the Victoria Police Purana Taskforce has re-affirmed that there are serious organised crime networks that have made millions and millions of dollars from dealing in drugs and other illicit activities. Whilst some of those responsible will be brought to justice, there remains large numbers of people who have established lavish lifestyles without having any apparent source of legitimate income. Investigators believe that such persons would find it extremely difficult to establish that their wealth was legitimate if unexplained wealth legislation existed.

There has been a fundamental shift in the way law enforcement tackles organized crime, with the focus on the money trail. Criminal members are prepared to spend time in prison,

but to take their assets is to really harm these individuals. It is now well accepted that if we can take away the profit benefit of organised crime, then we are having more impact than we would through any number of criminal charges.