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CHIEF EXECUTIVE

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Your Ref:

Mr Chris Hayes MP  
Chair  
Parliamentary Joint Committee on Law Enforcement  
Parliament House  
CANBERRA ACT 2600

**Parliamentary Joint Committee on Law Enforcement Inquiry into Commonwealth  
unexplained wealth legislation and arrangements**

**Australian Crime Commission Second Supplementary Submission**

Committee request for further information

This submission is provided in response to a request by the Parliamentary Joint Committee on Law Enforcement (**the Committee**) for Law Enforcement to provide further information to support the deliberations of the in the above Inquiry.

The submission is intended to set out the Australian Crime Commission's (**ACC**) views on the issues raised. It does not purport to be formal legal advice, and we understand that the Committee may choose to seek appropriate legal advice as to the constitutional legality of the options proposed.

ACC proposed legislative reform

As outlined in our second submission to the Committee<sup>1</sup>, the ACC proposes that ACC Act be amended to allow the ACC undertake special investigations into unexplained wealth irrespective of whether serious and organised crime could be identified.

The Committee sought further information on three aspects of the ACC's proposal:

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<sup>1</sup>ACC Supplementary submission, 1 February 2012

- The Constitutional validity of the proposal to vest ACC examiners with the power to make an emergency restraining order, or freezing order, for the purposes of facilitating the ACC special investigation. This power would operate separately from, and in addition to, the existing restraining order provisions in the Proceeds of Crime Act 2002 (**POC Act**).
- Whether any potential issue of contempt of court may arise if the ACC sought to use its examination powers when the Court was already vested of a matter and therefore had access to its own examination powers under the POC Act.
- The benefits of utilising ACC Act examinations as opposed to the existing examination regime under the POC Act.

Further information about each of these issues is provided as follows:

A. Constitutional Issue – Vesting Power of Restraint/Freezing with an ACC examiner.

Evidence given by the Attorney-General's Department (**the Department**) before the Committee questioned the constitutional validity of the ACC's proposal on the basis that it was "highly likely that the power to restrain assets would be seen as judicial in nature"<sup>2</sup> and therefore could not be exercised by the Executive (in this instance an ACC examiner).

Under the Constitution, Commonwealth judicial power can only be exercised by properly constituted Chapter III Courts and cannot be exercised by a member of the executive. Although this limitation directly applies only to Federal Courts, courts have held that State Courts which are capable of exercising federal jurisdiction cannot be given functions inconsistent with their status as a potential repository of federal judicial power.

The question is then whether the power to order the temporary restraint of assets, as envisaged by the ACC proposal, is judicial or non-judicial in nature. "Judicial power" involves a conclusive determination of a controversy as to existing rights. 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.

ACC has reviewed a significant body of case law and legislation covering Federal, State and international jurisdictions. While this is in no way formal legal advice, in our view there are a number of key issues which would need to be addressed in assessing the Constitutional validity of any proposed changes.

In summary, ACC research indicates 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

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<sup>2</sup> Mr Iain Anderson, p19 Proof Hansard, Parliamentary Joint Committee on Law Enforcement 10 February 2012

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 functions, 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.

The ACC acknowledges that this is a particularly complex issue but is keen to work with Committee and the Department to determine whether the proposal can be put into practice in a way which minimises any risk of a successful Constitutional challenge.

#### B. Usurpation issue – use of ACC examinations when Court vested of the matter.

Although ACC considers that vesting a temporary restraining or freezing power with an ACC examiner is the preferable option, in the event that advice shows this is beyond power, the ACC does not believe the proposal automatically fails.

We believe other elements in the ACC's previous submissions still need to be pursued. For example, mechanisms to allow for the further involvement of the ACC in unexplained wealth investigations and consideration of alibi type provisions. Instead, the ACC proposes that the model be amended to remove the power of an examiner to restrain assets from the proposal and proceed with a model that allows the ACC to be involved in the process through its examination powers.

Under this proposal, the power of restraint would remain with the Court under the POC Act. This then raises the issue of potential usurpation of the Courts powers, on the basis that

once vested of the matter the Court has access to its own examination powers, and using the ACC powers in that context is potentially contemptuous.

It is important to understand however that the issue of contempt only arises in one of two possible scenarios:

*Scenario one.*

If a POC Act restraining order was not sought (for example, or if the risk of dissipation of assets was low), the ACC could examine the person/s in appropriate circumstances and the examination material could be used in any subsequent POC Act proceedings. The issue of contempt would not arise as the Court would not be vested of the matter at the time the examination took place.

*Scenario two*

If a restraining order is made and the Court was seized of the matter, conducting an ACC examination could arguably be seen as a usurpation of the Courts power as the Court can order examinations under the POC Act. However, the issue of contempt will only arise where the Court is of the view that the use of the ACC examination power was improper and usurped its functions. If the Court is not of this view then there is no issue.

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.

We acknowledge that this proposal also carries with it a degree of risk, and note that it is important that any amendment be drafted to maintain the discretion of both the Court and the ACC examiner. The legislation would have to be framed carefully so that the discretion of the Court remained unfettered and it was clear that the Court could refuse to give the endorsement or authorisation, and was not being asked to give an advisory opinion.

Similarly, although the fact that the Court had endorsed or authorised the examination process would be relevant to the statutory test to be applied by the examiner<sup>3</sup> the independence of the examiner must remain intact, and it would need to be clear that the decision of the Court to approve the use of coercive powers in no way pre-determined the examiner's decision to issue or refuse to issue a summons.

In practice the ACC envisages that the process would operate in the following way:

1. Investigators (for example ACC investigators or AFP officers attached to the Criminal Assets Confiscation Taskforce) identify a person of interest (POI) in possession of unexplained wealth, with liquid assets which can be dispersed immediately, and

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<sup>3</sup>An examiner may issue a summons if it is reasonable in all the circumstances to do so: Australian Crime Commission Act 2002 s28(1).

there exists the necessary nexus to a commonwealth offence.

2. The AFP or CDDP makes an application to the court under the POC Act for a restraining order and an order giving approval from the Court to use the ACC examination process instead of, or in addition to, the POC Act examination process.
3. If court approval is granted, working with our partners an ACC officer makes a formal application to an examiner for the issue of a summons to examine the POI and/or other relevant people concerning unexplained wealth.
4. Evidence obtained through the examination process may be used in the existing POC Act proceedings.

C. Proposal to appoint ACC examiners as POC Act approved examiners

Finally, we understand there may be a proposal being considered to amend the POC Act to allow the Minister to appoint ACC examiners as an 'approved examiner' under the POC Act. Whilst this would be a very simple legislative change, and may appear to be a solution to some of the issues, the ACC has serious concerns about the practicality and workability of such arrangements.

These concerns are not restricted to but include:

1. The independent function of the ACC examiner

Requiring an examiner to work within the POC Act regime may call into question the examiner's ability to manage the examination process, and the ACC's ability to make use of the information, and would call into question the way the existing accountability provisions work. This would be particularly true where the ACC was also investigating the POI and the ACC intended to make use of its coercive powers for non POC Act purposes.

2. Governance issues and the responsibilities of ACC officers

Examinations conducted at ACC premises and presided over by an ACC examiner would require the involvement of a wide range of ACC staff to ensure a successful outcome. Those staff are subject to a comprehensive secrecy and accountability regime, and it is unclear how those responsibilities would translate to the POC Act environment. This would be particularly important in circumstances where the ACC was investigating other matters relevant to the witness, or proposed to use the information obtained in the examination for broader strategic intelligence purposes, in accordance with its core functions.

3. Ownership and management of restricted information

Both the POC Act and the ACC Act include restrictions as to how, to whom and for what purpose information can be communicated. In order for examinations to be conducted effectively, it is essential that there be a free flow of information, in real

time as the examination is being held, between those involved in the examination process. We do not consider that it would not be practical to maintain a “Chinese wall” between ACC information and POC information, such that the information sharing requirements of both Acts could be met.

#### 4. The scope of the POC Act examination

The scope of questioning that can be undertaken in a POC Act examination is more restrictive than examinations conducted under the ACC Act. The result being that examinations conducted under the POC Act are restricted from dedicating questions to gathering intelligence to build a broad body of information about particular conduct. ACC examinations are conducted with this dual purpose and the restrictions of the POC Act would prevent the ACC from gathering this invaluable information. It is unclear whether the proposal would operate to prevent the ACC from convening a POC Act examination, followed by an ACC Act examination of the same witness, and if so how the witness’s rights would be protected.

On our initial examination of the proposal we do not believe it to be workable.

#### D. Benefits of ACC examinations

In evidence before the Committee, questions were raised as to the benefit of using ACC examinations as opposed to the existing POC Act examination regime<sup>4</sup>.

The attached table (Annexure B) sets out a comparison between the examination provisions under the ACC Act and those under the POC Act. While the provisions are broadly similar, there are some key differences which mean that in appropriate matters there would be significant advantages to using the ACC Act process rather than POC Act examinations.

In particular we note that:

- Examinations are ACC core business. In the 2010-11 financial year more than 500 ACC examinations were held<sup>5</sup>; whereas only four POC Act examinations were held in the same period<sup>6</sup>. No POC Act examinations in relation to unexplained wealth have been held.
- ACC has developed a sophisticated examination capability, including: robust internal practices and procedures to ensure compliance with strict secrecy and other legal requirements; access to specialised professionals such as forensic psychologists, intelligence analysts, and forensic accountants; and a comprehensive body of cutting

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<sup>4</sup>Commander Ian McCartney, Australian Federal Police, p1 Proof Hansard, Parliamentary Joint Committee on Law Enforcement 10 February 2012;

Mr Iain Anderson, Attorney-General’s Department, *ibid* p19

Mr Mark Burgess, Police Federation of Australia, *ibid* p30

<sup>5</sup> Australian Crime Commission Annual Report 2010-11

<sup>6</sup> Commonwealth Director of Public Prosecutions Annual Report 2010-11, p 151

edge strategic intelligence about methodologies and techniques used by serious and organised criminals.

- ACC has facilities to conduct secret hearings in its own secure premises at any time; whereas Courts are generally public buildings and operate during limited hours
- ACC examiners, counsel assisting and intelligence officers have highly specialised skills and experience in gathering intelligence in relation to serious criminal matters and managing the conduct of secret hearings; whereas Judges & POC Act approved examiners deal with a range of matters.
- ACC hearings can be convened at short notice and with minimal risk of disclosure; whereas POC Act examinations are subject to the availability of approved examiners and suitable facilities

On behalf of the ACC, I thank you for the opportunity to make a supplementary submission to the Committee. Should you wish to discuss any aspect of the submission further please contact my office on \_\_\_\_\_ or via email at \_\_\_\_\_

Yours sincerely

John Lawler APM

Chief Executive Officer

17 February 2012

## ANNEXURE – Comparison of ACC and POC Act examinations

		<b>ACC Examination</b>	<b>POC Act examination</b>
1.	How is an examination convened / ordered?	28(1) – an examiner may summon a person to appear	Two stage process: (a) S180(1) – the court that made the restraining order may make an examination order (b) If an examination order has been made, an approved examiner may issue an examination notice
2.	Who can apply?	(Not specified but invariably ACC member of staff)	DPP/AFP
3.	When can examination be held?	During the course of an ACC special Investigation/Operation	180(1) If a POC Act restraining order is in force (the examination order lapses if the restraining or ceases to have effect)
4.	For what purpose can examination be held?	24A - For the purpose of an ACC special Investigation/ Operation	For purpose of POC proceedings
5.	Who can be examined?	28(1) – a person	180(1) – any person
6.	Who presides?	S24A – ACC examiner	S183 – approved examiner (an AAT member, current or former judge, or magistrate nominated by Minister)
7.	Who governs the process?	S25A – examiner may regulate the conduct of proceedings as he or she thinks fit	Approved examiner may give various directions (persons present, non-publication etc) S42/s186 – court may order an examination not to proceed
8.	What can the person be asked about?	Broad range of matters relevant to the special investigation	180(1) A person may be examined about the affairs of: (a) an owner (or claimed owner) of restrained property (b) a suspect <sup>7</sup> (c) the spouse of (a) or (b)
9.	Can the person be required to produce documents?	S28(1) Yes	S185(2) - yes
10	What is required of a witness	S28(5) – make oath/affirmation	S187 – make oath/affirmation
11	What protections does a witness have?	S24A(3) – examination held in private, examiner directs who may be present S25A(2) – witness may be represented by lawyer	S188 – examination held in private, approved examiner directs who may be present s 188(3), s189 – witness may be represented by lawyer

<sup>7</sup>“Suspect” in relation to a restraining order made under section 20A or an unexplained wealth order—the person whose \*total wealth is suspected of exceeding the value of \*wealth that was \*lawfully acquired.



		S25A(9) – examiner must make non-publication directions in specified circumstances	s193 – approved examiner may make NPD
What privilege / admissibility issues arise?		S30(3) - lawyer may claim LPP S30(4) – if privilege claimed, answer not admissible against person in crim proceedings except false/misleading charge or confiscation proceedings	S197 – cannot be required to answer if LPP & privilege against self incrimination apply S198 – answer not admissible against person except re false/misleading charge or proceedings under POC Act
What is the scope of judicial oversight?		General administrative law review available	S180(1) – court must make examination order S192 – approved examiner may refer question of law to court that made the restraining order
Parliamentary oversight		PJCLE, ACC Board	(PJCLE has limited oversight, not including examinations)
Offences		S30 – fail to attend, fail to answer/produce doc (5yr/200pu) S33 – give false/misleading answer (5yr/200pu) S29B – disclose summons (1yr/20pu)	S195 – fail to attend (2yr/120pu) S196 – fail to take oath, fail to answer/ produce doc (2yr/120pu) S197A – give false/misleading answer (2yr/120pu)
Other practical considerations		<ul style="list-style-type: none"> <li>• ACC has facilities to conduct secret hearings in its own secure premises at any time</li> <li>• ACC examiners and counsel are specialised in gathering intelligence in relation to serious criminal matters, and are highly experienced in the conduct of secret hearings</li> <li>• ACC hearings can be convened at short notice and with minimal risk of disclosure</li> <li>• ACC has comprehensive examination capability</li> <li>• Examinations are ACC core business: in 2010-11 more than 500 examinations were held.</li> </ul>	<ul style="list-style-type: none"> <li>• Courts are generally public &amp; operate in limited hours but may make special arrangements regarding time of day, secrecy, closed courts etc</li> <li>• Judges &amp; approved examiners deal with range of matters</li> <li>• POC Act examinations are subject to the availability of approved examiners and suitable facilities</li> <li>• Very few POC Act examinations are conducted, and no examinations in relation to unexplained wealth have been held.</li> </ul>