



Submission to the Parliamentary Joint Committee on Law Enforcement inquiry into Commonwealth unexplained wealth legislation and arrangements

August 2011

1. Introduction

1.1 The Commonwealth Attorney-General's Department thanks the Parliamentary Joint Committee on Law Enforcement for the opportunity to respond to the issues raised in the Terms of Reference for the inquiry into Commonwealth unexplained wealth legislation and arrangements.

1.2 An overview of existing Commonwealth unexplained wealth legislation and a discussion of its effectiveness and operation is set out below.

2. Existing unexplained wealth legislation

2.1 In February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) introduced provisions governing the making of unexplained wealth orders into the *Proceeds of Crime Act 2002* (Cth) (the Proceeds of Crime Act).

2.2 Unexplained wealth orders are one of several confiscation mechanisms designed to help law enforcement agencies combat serious and organised crime. They are aimed at those who remain at arm's length from the commission of offences and are not always able to be directly linked to specific offences. In particular, unexplained wealth orders target senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes.

2.3 Unexplained wealth legislation has been in force in Western Australia since 2000 and in the Northern Territory since 2003.

2.4 Since the introduction of Commonwealth unexplained wealth legislation in 2010, similar laws have been enacted in Queensland, South Australia and New South Wales.

Overview of Commonwealth unexplained wealth provisions

2.5 Under Commonwealth unexplained wealth legislation, if a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court

may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.

2.6 There are three types of order which can be sought in relation to unexplained wealth:

- unexplained wealth restraining orders
- preliminary unexplained wealth orders, and
- unexplained wealth orders.

Unexplained wealth restraining orders

2.7 Unexplained wealth restraining orders are interim orders that restrict a person's ability to dispose of or otherwise deal with property. These provisions ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.

2.8 Restraining orders in relation to unexplained wealth are governed by section 20A of the Proceeds of Crime Act. They are made upon application by the Director of Public Prosecutions (DPP) and are subject to two main requirements:

- i. a court must be satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of wealth that they have lawfully acquired, and
- ii. a court must be satisfied that there are reasonable grounds to suspect that:
 - the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, and/or
 - the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

2.9 The requirement that a court must be satisfied either that a person has committed an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence that has a federal aspect, or that all or part of the person's wealth was derived from such an offence, was included to provide a link to a constitutional head of power. This issue is discussed further at paragraphs 3.2 and 3.3 below.

2.10 A court has discretion in deciding whether to make a restraining order.¹ Furthermore, a court may refuse to make such an order if it is not in the public interest to do so,² or if the Commonwealth has not given an appropriate undertaking with respect to the payment of damages.³

¹ Proceeds of Crime Act, s 20A(1).

² Proceeds of Crime Act, s 20A(4).

³ Proceeds of Crime Act, s 21.

2.11 Restraining orders can be made *ex parte*.⁴ A court may make a restraining order even if there is no risk that the property will be disposed of or dealt with.⁵

2.12 Restraining orders can cover the property of the suspect or the ‘bankruptcy property’ of the suspect. Restraining orders can also cover the specified property of another person that is subject to the effective control of the suspect, regardless of whether or not the other person’s identity is known.⁶

2.13 The restraint of property suspected of being an unexplained wealth amount is a condition precedent to the court issuing an examination order under section 180 of the Proceeds of Crime Act. An examination order is an important tool for locating further property and discovering more about the person’s affairs.

2.14 Once a restraining order has been issued by the court, an application can be made to exclude certain property from being covered by the restraining order.⁷ A court may exclude property if satisfied that an interest in the property is held by another person and is not subject to the effective control of the suspect. A court may also revoke the order entirely if satisfied that there are no grounds for making a restraining order at the time the application to revoke is made, or if it is in the interest of justice to do so.⁸

Preliminary unexplained wealth orders

2.15 A preliminary unexplained wealth order is an order requiring a person to attend court to determine whether or not an unexplained wealth order should be made. Under section 179B of the Proceeds of Crime Act, a court may make a preliminary unexplained wealth order if it is satisfied that an authorised officer has reasonable grounds to suspect that a person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired. Whether or not reasonable grounds exist will be informed by an assessment of the person’s wealth in accordance with section 179G, which defines what property constitutes a person’s wealth and the time at which certain property’s value is to be calculated.

2.16 These orders are made on application by the DPP and can be made without notice being given to the person who is the subject of the order. A court may refuse to make an order if the DPP refuses to give an undertaking with respect to the payment of damages or costs.⁹

2.17 Once a court has made a preliminary order against a person, the person may apply to the court to have the preliminary order revoked. A court may revoke a preliminary unexplained wealth order if it finds that there are no grounds for making the order at the time of considering the application to revoke, if it is in the public interest to revoke the order or if it is otherwise in the interests of justice to do so.¹⁰

⁴ Proceeds of Crime Act, s 26(4).

⁵ Proceeds of Crime Act, s 20A(5).

⁶ Proceeds of Crime Act, s 20A(2).

⁷ Proceeds of Crime Act, s 29A.

⁸ Proceeds of Crime Act, s 42.

⁹ Proceeds of Crime Act, s 179EA.

¹⁰ Proceeds of Crime Act, s 179C.

2.18 If a person is unable to demonstrate that the preliminary order should be revoked, they will be required to appear before the court and demonstrate that their wealth was derived from lawful sources.

Unexplained wealth orders

2.19 If a preliminary unexplained wealth order has been made and the court is not satisfied that the person's wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, it may make an unexplained wealth order.

2.20 The burden of showing that wealth was not derived from offences with a link to Commonwealth power falls on the person in relation to whom the preliminary order was issued. The person is required to satisfy the court on the balance of probabilities, which is a civil standard of proof.

2.21 An unexplained wealth order makes payable to the Commonwealth an amount which, in the court's opinion, constitutes the difference between the person's total wealth and the value of the person's property which the court is satisfied did *not* derive from the commission of a relevant offence. That is, the difference between their total wealth and the wealth that has been legitimately acquired.

2.22 A court making an unexplained wealth order must direct the Commonwealth to pay a specified amount to a dependant of the person, if it is satisfied that the amount is necessary to offset hardship. If the dependant is over 18 years old, they must not have been aware of the conduct that was the subject of the order.¹¹

3. Development of the provisions

3.1 Commonwealth unexplained wealth legislation is modelled on the Northern Territory's legislation, but has been adapted to comply with constitutional limitations and includes amendments made during the passage of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

Constitutional limitations

3.2 To ensure that unexplained wealth orders have a link to a constitutional head of power, the making of unexplained wealth restraining orders is contingent on a court being satisfied either that there are reasonable grounds to suspect that the person committed a Commonwealth offence, a foreign indictable offences or a State offence with a federal aspect, or that a part of a person's wealth was derived from such an offence.¹²

3.3 Similarly, an unexplained wealth order can only be made where a court is not satisfied that the whole of a person's wealth, or a part of their wealth, was not derived from an offence linked to a Commonwealth head of power. These connections to a Commonwealth head of power were included to ensure that the unexplained wealth provisions are constitutional.

¹¹ Proceeds of Crime Act, s 179L.

¹² 'Foreign indictable offence' is defined by s 337A of the Proceeds of Crime Act.

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

3.4 A number of Government amendments were made to the Bill during its passage through Parliament. These included giving the court discretion not to make an unexplained wealth order when it is not in the public interest, as well as allowing a court to revoke an unexplained wealth restraining order or a preliminary unexplained wealth order if it is in the interests of justice to do so. The former amendment was made in response to a recommendation of the Senate Legal and Constitutional Affairs Committee.¹³ The latter was made in response to the High Court of Australia's decision in *International Finance Trust Company Limited v New South Wales Crime Commission*.¹⁴

3.5 Amendments moved by the Opposition included:

- giving the court a general discretion not to make an unexplained wealth restraining order, a preliminary unexplained wealth order, or an unexplained wealth order
- permitting the court to allow certain property to be disposed of in order to meet legal costs associated with an application for an unexplained wealth order,
- permitting the court to make any costs order it considers appropriate in cases where it refuses to make an unexplained wealth restraining order, preliminary unexplained wealth order or unexplained wealth order, or in certain circumstances where a restraining order ceases to be in force,¹⁵ and
- providing for independent oversight of the operation of the unexplained wealth laws.

3.6 The Government accepted these amendments in the interest of seeing passage of the Bill. However, permitting a person's property to be disposed of to meet legal costs, permitting the court to make the costs orders outlined above and the court's general discretion not to make an order are departures from principles applied to other orders under the Proceeds of Crime Act and could affect the practical effectiveness of the provisions.

4. Amendments to unexplained wealth legislation

4.1 There have been no amendments to the unexplained wealth provisions since they were enacted.

4.2 The Crimes Legislation Amendment Bill (No. 2) 2011 currently before Parliament contains provisions that enable the Commissioner of the Australian Federal Police to exercise the powers and functions currently exercised by the Commonwealth Director of Public Prosecutions in relation to unexplained wealth orders and other orders under the Proceeds of Crime Act.

¹³ http://www.apf.gov.au/Senate/committee/legcon_ctte/organised_crime/report/b02.htm.

¹⁴ [2009] HCA 49.

¹⁵ Proceeds of Crime Act, s 45A(1) and (2).

4.3 The Bill does not seek to change the substance of the current unexplained wealth provisions, but will enable the Australian Federal Police (AFP), as well as the DPP, to apply to a court for an unexplained wealth order.

5. Effectiveness and operation of unexplained wealth legislation

5.1 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.

5.2 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.

5.3 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.

5.4 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.

5.5 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.