

## **Confiscation of Unexplained Wealth**

Unexplained wealth is broadly defined as the difference between a person's total wealth and their lawfully acquired wealth.

Explicit legislative provisions for the confiscation of unexplained wealth exist in the confiscations legislation of Western Australia<sup>1</sup>, the Northern Territory<sup>2</sup>, South Australia<sup>3</sup> and New South Wales<sup>4</sup> as well as the Commonwealth.<sup>5</sup> All of those provisions are directed towards the recovery of criminally derived wealth.

Some require the applicant authority to hold a reasonable suspicion that the unexplained wealth was not lawfully acquired or that the person engaged in serious criminal activity while in other jurisdictions the mere existence of wealth beyond apparent legitimate means is sufficient trigger to activate the provisions.

Whilst the intent of the provisions in each jurisdiction is similar, the threshold conditions upon which an agency may make application to the court and the conditions precedent to the court order or declaration are notably different and, in the CMC's view, are likely to profoundly affect the efficacy of the legislation.

A major justification for these powers is the claimed need to target those individuals who are able to distance themselves from physical involvement in criminal activity but who reap the financial benefit from it. The CMC is aware of the trend for sophisticated organised criminal groups to 'compartmentalise' their activities, in particular, the segregation of their money laundering activities from those involved in the predicate offending.

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<sup>1</sup> *Criminal Property Confiscation Act 2000*

<sup>2</sup> *Criminal Property Forfeiture Act 2002*

<sup>3</sup> *Serious and Organised Crime (Unexplained Wealth) Act 2009* (effective from 29 August 2010)

<sup>4</sup> *Criminal Assets Recovery Act 1990*

<sup>5</sup> *Proceeds of Crime Act 2002*

If these provisions are directed towards the 'Mister Bigs' of organised crime who direct criminal activities but remain remote from the actual commission of offences, then it would seem that provisions imposing a threshold of a reasonable suspicion that wealth was not lawfully acquired or that the person engaged in serious crime related activity must present an almost insurmountable hurdle for authorities targeting those who are able to distance themselves from the criminal act.

Whilst the CMC notes the intuitive appeal of an absence of any indicator of criminal involvement to trigger an application for an unexplained wealth order, such a low threshold is quite draconian and will inevitably highlight the tension that exists between individual rights and the broader interests of the community. It also heightens the potential for malicious misuse.

With the exception of the Western Australia legislation, unexplained wealth provisions are relatively recent and it is difficult at this early stage to judge their effectiveness. Even the Western Australia provisions, despite being introduced in 2000, appear to have been infrequently utilised.

In the CMC's view, unexplained wealth investigations are likely to be resource intensive with uncertain outcomes. In an environment of scarce resources and competing priorities this circumstance is likely to impact on resource allocation such that the utility of the provisions will be limited.

In the CMC's view, the taxation laws provide a more appropriate and effective mechanism to address the accumulation of unexplained wealth notwithstanding potential criticism of 'taxing' organised crime rather than removing the criminally derived benefits through confiscation.

The criminal confiscation legislation in Queensland does not contain explicit unexplained wealth provisions. Instead, in Queensland, the *Criminal Proceeds Confiscation Act 2002* was amended in 2009 to create a reversal of the onus of proof such that once the State establishes that a person has engaged in serious crime related activity within the limitation period then the onus is on the respondent to establish the lawful derivation of his wealth<sup>6</sup>.

Although these provisions have not yet been judicially considered, it is anticipated that they will produce a similar practical outcome to the unexplained wealth provisions enacted by the Commonwealth, South Australia and New South Wales.

In summary, the CMC notes the intuitive appeal of unexplained wealth provisions but cautions that:

- Unexplained wealth provisions requiring a threshold suspicion of unlawful derivation of property or engagement in serious crime related activity are unlikely to be effective in attacking those who distance themselves from the criminal act but benefit from the proceeds
- Unexplained wealth investigations are likely to be resource intensive with uncertain outcomes, factors which are likely to diminish the utility of the provisions.

In CMC's view the existing taxation laws provide an appropriate and effective mechanism for addressing unexplained wealth accumulation.

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<sup>6</sup> See s83 *Criminal Proceeds Confiscation Act 2002* (Qld)