



2 August 2018

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

Unexplained Wealth Legislation Amendment Bill 2018

1. I would like to make a responsive submission, to a submission that has already been lodged in relation to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) Inquiry into the *Unexplained Wealth Legislation Amendment Bill 2018* (**the Bill**).
2. The inquiry home page indicates that submissions closed on 13 July 2018. I therefore ask that the Committee accept my submission notwithstanding that it is late. The reasons for it being late are explained: My submission responds to a submission from the Department of Home Affairs (submission number 6) undated but I believe lodged on or about 20 July 2018 (ie itself after the closing date).
3. I make this submission in a personal capacity. I consent to its publication on the inquiry homepage.

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My background

4. From 2008 to 2012 I was a Principal Legal Officer with the Commonwealth DPP with responsibility for *Proceeds of Crime Act 2002 (POC Act)* matters in Western Australia. From 2012 to 2014 I was Deputy Counsel with the Australian Federal Police with a similar role and with supervisory responsibility for POC Act matters in Western Australia, South Australia and the Northern Territory. Since 2014 I have been practicing at the independent bar, predominantly in confiscation matters including matters under the POC Act. I have been briefed both by and against the Commissioner of the AFP.

The Department's submission

5. I wish to specifically respond to contentions advanced by the Department of Home Affairs on page 9 of its submission to the Committee. The Department argued:

The POC Act contains a number of protections which ensure that unexplained wealth orders do not unfairly impact upon petty offenders. These protections include the following:

- (i) ...
- (ii) *The court may refuse to make an unexplained wealth restraining order or unexplained wealth order if satisfied that doing so is not in the public interest (ss 20A(4)(b) and 179E(6)(b) of the POC Act).*
- (iii) *The court may exclude property from the scope of some of these orders or revoke these orders in a range of situations, including (for some orders) where it is in the public interest or the interests of justice to do so (ss 24A, 29A, 42 and 179C).*
(emphasis added)

6. In my submission the Committee should not adopt the Department's submission quoted above. The protections (so described) in the POC Act not only do not protect "petty offenders" but more fundamentally they fail to protect people who have not committed (and are not so much as alleged even in the civil proceedings under the POC Act to have committed) any offence at all. One might safely call such people "innocent".

7. I would like to draw the Committee's attention to the fact that in *Commissioner of the AFP v Fernandez* [2017] NSWSC 1197, Justice Simpson held that a particular forfeiture was not in the "*public interest*". There are complicated questions around whether s 49(4) of the POC Act (which contained the relevant public interest test) was even engaged in that matter. I need not trouble the Committee with those issues. What is of present interest is how her Honour dealt with the public interest test, and just as importantly how the Commissioner of the AFP has responded since.
8. Specifically, the Commissioner has appealed *Fernandez*. The appeal was heard on 22 and 23 March 2018 and the NSW Court of Appeal remains reserved. The Commissioner argued on appeal (appeal grounds 3 to 6) that Simpson J's approach to the public interest test in s 49(4) miscarried in numerous respects. No doubt the Commissioner could supply the Committee with his appeal grounds and his submissions in support of his appeal. I would encourage the Committee to call upon the Commissioner to do so. In summary the Commissioner argued that the public interest test is far narrower than Simpson J found it to be.
9. I would also invite the Committee to consider the facts in *Fernandez's* case. Due to the need to finalise this submission promptly I regret I cannot summarise them in this submission. They relate to a methodology of money laundering known as 'cuckoo-smurfing'. I explain the concept on my own website:
<https://egreaves.com.au/cuckoo-smurfing/>
10. The facts in *Fernandez* bear a remarkable similarity to the facts in:
 - a. *Commissioner of the AFP v Ganesh Kalimuthu* [2017] WASC 108 (a case of mine),
 - b. *Commissioner of the AFP v Lordianto* [2017] NSWSC 1196 (published by Simpson J at the same time as *Fernandez*),
 - c. *Commissioner of the AFP v Tjonsutiono* [2018] NSWSC 48, and
 - d. *Commissioner of the AFP v Gwe* [2018] NSWSC 992.

11. *Tjongsutiono* is particularly interesting, as it considers at [208]ff the related concept of ‘*the interests of justice*’ (also described by the Department in its submission to the Committee as a “*protection*”). Adams J arguably construed that concept quite narrowly. In making that remark I should not be taken to be criticising her Honour’s conclusions, merely observing that words such as “*interests of justice*” and “*public interest*” may prove to be less than adequate “*protection*” for anyone.
12. A more meaningful protection would be to give Judges “*unfettered discretion*” to make all orders under the POC Act. In sentencing criminal offenders Judges almost always have a discretion. The Commonwealth Parliament has seldom seen fit to impose mandatory sentencing. Rhetorically, why can the same Judges hearing cases under the POC Act not be afforded similar discretion?
13. A review of the facts in the above cases will, in my respectful submission cause the Committee to doubt the underlying implicit and at times explicit submissions not only by the Department but also by the Police Federation of Australia (submission number 4) that the POC Act is (and the new provisions to be introduced by the Bill will be) used by the AFP to target ‘serious and organised crime’.
14. It might be more accurate to describe the above targets, as Police sometimes call them (ie the defendants in the above cases) as “innocent victims”. The following extracts from the above judgments will suffice to make good that proposition:
 - a. *Ganesh Kalimuthu* at [137] *Finally, there is no evidence to support a finding that Mr Ganesh was aware that structuring deposits in this way was linked to criminal activity, either in Australia or Malaysia. He might have inquired further into why the funds were being deposited in small amounts. But I am satisfied that his failure to inquire further was not because he knew that deposits being structured in this way was in some way indicative of money laundering.*
 - b. *Tjongsutiono* at [141] *The Commissioner did not suggest that the defendant was in any way involved in any illegality and accepted that the defendant was an innocent victim of a sophisticated criminal organisation.*

- c. *Fernandez at [48] The Commissioner did not suggest that the defendant made the deposits himself, nor that he was in any way involved in the transactions. The Commissioner appeared to accept that the defendant was an innocent victim of a sophisticated criminal organisation.*
- d. *Gwe at [139] The evidence is uncontroverted and unchallenged that the defendants did not know that the property had been transferred in a manner which resulted in the funds being the proceeds or an instrument of an offence.*

15. In my submission further protections are needed in all streams of the POC Act (including unexplained wealth) to protect the property rights of people whom it has not been established (even on the balance of probabilities) have committed or been involved in an offence. As the Committee is only considering the Bill, and not the POC Act, I have limited the submissions I have made. I will conclude by expressing the view that a wholesale review of the POC Act (focused upon the use that the Commissioner of the AFP makes of it) is warranted.

Yours sincerely

Edward Greaves

CC: Senator Louise Pratt

Senator Nick McKim