CHAPTER 3

Issues with Commonwealth unexplained wealth provisions

Overview

3.1 This chapter examines a number of issues and suggested enhancements relating to unexplained wealth provisions in the *Proceeds of Crime Act 2002* (PoCA). Many of these issues were included in the committee's discussion paper in order to attract further evidence. The issues and suggested enhancements have been grouped under four main headings:

- ensuring that unexplained wealth laws are used against serious and organised crime networks and their leadership;
- Constitutional requirements and the link to an offence;
- enhancing unexplained wealth investigations; and
- improving the effectiveness and efficiency of unexplained wealth proceedings.

Targeting the beneficiaries of serious and organised crime

3.2 While unexplained wealth laws have the potential to be highly effective against serious and organised crime, they may also represent a significant intrusion into the affairs of citizens. As such, the committee recognises that a careful balance must be achieved in delivering workable laws that are acceptable to the public and appropriate to Australia's democratic system.

3.3 In order to achieve this fundamental balance, the committee considered means by which unexplained wealth provisions would remain targeted at the beneficiaries of serious and organised crime: specifically, senior members of criminal networks who receive a large share of criminal proceeds while distancing themselves from the actual commission of criminal acts.

3.4 The committee received evidence noting the potential effectiveness of unexplained wealth in its previous inquiry into legislative arrangements to outlaw serious and organised crime groups.[1] During the current inquiry, the committee received further evidence supporting these views. For example, Western Australia Police informed the committee that the establishment of a nationally consistent unexplained wealth regime would enable them to penetrate the high or upper echelons

1 See for example, Parliamentary Joint Committee on the Australian Crime Commission, *Legislative arrangements to outlaw serious and organised crime groups*, Final Report, Chapter 5.

of organised crime.[2] As Assistant Commissioner Nick Anticich, Western Australia Police noted:

> It will send a clear message to those involved in organised crime at the upper levels that they are not untouchable and that, in fact, law enforcement has the capacity to engage them.[3]

3.5 While there was generally agreement amongst law enforcement agencies that unexplained wealth laws would be used against high level organised crime figures, organisations including the Law Council of Australia (Law Council) and Civil Liberties Australia (CLA) expressed concern about the potential for abuse.

3.6 The Law Council objected to the reversal of the onus of proof within the unexplained wealth regimes, arguing that it ran contrary to established common law principles and runs counter to the presumption of innocence, a point discussed further in Chapter 2.[4]

3.7 The Law Council submitted that unexplained wealth provisions remove the safeguards that have evolved to protect innocent parties form the wrongful forfeiture of their property, providing some possible scenarios were this may occur:

> As the Law Council has stated in previous submissions, the reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained. The respondent may be unable to show that assets were lawfully obtained because of a lack of capacity to explain how they acquired particular assets due to age, cultural and linguistic background or physical or mental incapacity, or a lack of skills in record keeping.[5]

3.8 Dr David Neal SC, Law Council, was concerned about the discretionary use of far-reaching powers by law enforcement agencies, particularly if such measures were delinked from the need to prove an offence, stating:

> Every day they do make decisions but when we see them in the courts—and there is a particularly bad example going on in Victoria at the moment—it turns out they are making mistakes. It is a quality control issue. You said earlier that these will be persons of interest because we know that they are Mr Bigs. If it is in fact known that these are the people and then there can be a connection made between their criminal activity and this wealth, I feel a lot more comfortable with that because there is a good deal more precision. The evil we are talking about here is simply that they have got

2 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

3 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

4 Law Council of Australia, *Submission 3 (supplementary submission)*, p. 16.

5 Law Council, *Submission 3 (supplementary submission)*, p. 16.

> wealth that they cannot explain. If it is that in connection with criminal activity then it makes more sense and it is less prone to error.[6]

3.9 CLA gave in principle support to unexplained wealth legislation, on the grounds that serious and organised crime itself significantly harmed civil liberties. As Mr Bill Rowlings, CLA, observed in most cases, criminal profit is derived from removing or interfering with the civil liberties of normal citizens.[7]

3.10 Nevertheless, CLA was particularly concerned about the potential for individuals who should not be considered serious or organised criminals to be targeted by such laws. Mr Rowlings used the example of a proceeds of crime case from the Northern Territory where a man was caught growing 20 cannabis plants in a shipping container and pursued under proceeds of crime legislation.[8]

3.11 To ensure that unexplained wealth provisions were not used in such a manner, one of CLA's recommendations was that they be limited to addressing serious and organised crime:

> [W]hatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.

3.12 The committee considers that unexplained wealth laws represent a powerful and intrusive tool, and are most appropriately targeted towards serious and organised crime. The committee was informed by the AFP that, in practice, this would already occur as resource constraints were likely to ensure that Commonwealth unexplained wealth provisions would only be used in serious cases.[9] As Commander McCartney observed:

> I think the issue of the AFP utilising this legislation on the wrong people has been raised before. When I say the wrong people, I mean mothers and fathers who have cash under the bed. I think it is important to say that we have finite resources to deal with the serious and organised crime problem in Australia at the minute. To be quite frank, we are not going to waste the resources on those cases; we want to direct our resources to the serious and organised crime targets.[10]

3.13 While the committee accepts that, in practice, resource constraints mean that unexplained wealth proceedings are only likely to be commenced in serious cases, it is

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6 Dr David Neal, Law Council, *Committee Hansard,* 10 February 2012, p. 48.

7 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard,* 4 November 2011, p. 44.

8 Mr Bill Rowlings, CLA, *Committee Hansard,* 4 November 2011, p. 39.

9 AFP, *Submission 9 (Supplementary Submission),* p. 4.

10 Commander Ian McCartney, AFP, *Committee Hansard,* 4 November 2011, p. 5.

not comfortable basing significant public policy on this assurance. The committee is of the view that serious and intrusive law enforcement provisions should be accompanied by legislative, rather than administrative safeguards.

3.14 A more compelling argument, therefore, is that the AFP (and other officers of the Criminal Assets Confiscation Taskforce) is already subject to a suite of significant oversight and accountability mechanisms which act as checks and balances on the use of all law enforcement tools, including unexplained wealth provisions. These include:

- the AFP Core Values and Code of Conduct and associated arrangements;
- statutory provisions for a framework for the internal management of AFP professional conduct issues;
- in cases of PoCA proceedings, scrutiny of the court; and
- oversight by the Commonwealth Ombudsman, Law Enforcement Integrity Commissioner and Parliamentary committees.

3.15 The AFP considered these to be adequate controls to ensure unexplained wealth provisions were used appropriately.[11]

3.16 Nevertheless, the committee was cognisant of the need to consider mechanisms by which the public might be assured that effective unexplained wealth laws were accompanied by appropriate safeguards. Three particular methods, intended to ensure that unexplained wealth provisions were targeted against serious and organised criminal enterprise, were canvassed by the committee:

- amending the objects of unexplained wealth provisions;
- establishing a monetary threshold for unexplained wealth amounts; and
- separating unexplained wealth provisions from PoCA in favour of stand-alone legislation.

Further defining the objects of unexplained wealth provisions in PoCA

3.17 The *Proceeds of Crime 2002 Act* includes eight principal objects, including depriving persons of the proceeds of or benefits derived from offences, and preventing the reinvestment of these funds into further criminal activity. It does not, however, contain a clear statement of what the committee has nominated as a primary object: to undermine the business model of serious and organised crime through eliminating criminal profit.

3.18 The ACC recommended providing a statement of clear and unambiguous objectives in the PoCA to remove doubt regarding Parliament's intention as to the

11 AFP, *Submission 9 (Supplementary Submission)*, p. 5.

operation of the unexplained wealth provisions and to provide clarity as to the basis on which judicial discretion is exercised, in line with those objectives.[12]

3.19 The Law Council disagreed, submitting that the inclusion of an additional objects clause was unnecessary given existing objects and the existence of clear statements of legislative intent in the explanatory memorandum, second reading speech and parliamentary debate.[13]

3.20 The Attorney-General's Department (AGD) warned that a specific objective relating to serious and organised crime may unintentionally limit the use of unexplained wealth provisions, stating:

> It is important that the objectives are framed broadly in a way that reflects that the unexplained wealth provisions are not confined only to serious and organised crime, and that does not restrict the circumstances in which the laws may need to be used in the future. For example, narrowly defining 'serious and organised crime' may make it more difficult for unexplained wealth provisions to be used in relation to emerging crime threats that may not always be linked to criminal groups, such as cyber crime or large scale fraud. Additionally, linking the application of unexplained wealth provisions to serious and organised crime could suggest that evidence of specific serious and organised crime offences is required.[14]

3.21 While noting comments by the Law Council and the AGD, the committee considers that amending the objectives of PoCA is desirable. In particular, the committee is of the view that a new object stating that unexplained wealth provisions are intended to be used to undermine the profitability of criminal enterprise should be included. The committee recognises that such a statement should be drafted so as not to unduly limit the use of unexplained wealth provisions.

Recommendation 1

3.22 The committee recommends that the objects of the *Proceeds of Crime Act 2002* be amended so as to include a statement about undermining the profitability of criminal enterprise, including but not limited to serious and organised crime. Such a statement should be drafted in such a way to avoid causing unnecessary complication of unexplained wealth proceedings.

12 ACC, *Submission 8*, p. 5.

13 Law Council, *Submission 3 (supplementary submission)*, p. 16.

14 Attorney-General's Department, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 1.

Establishment of a threshold below which unexplained wealth matters cannot proceed

3.23 A related suggestion put to the committee was the focussing of unexplained wealth provisions on serious and organised crime by means of threshold amounts relating to unexplained wealth, below which unexplained wealth measures could not proceed. For example the *Proceeds of Crime Act 1996* (Ireland) set a threshold of 10,000 pounds initially,[15] which has later been changed to 13,000 euros.[16]

3.24 In the committee's discussion paper on unexplained wealth, issued as part of this inquiry, the committee asked for comment on the introduction of a threshold amount, using the amount in the Irish legislation for comparison.

3.25 The Queensland Law Society (QLS) expressed support for the proposal, submitting that it could help to ensure that applications are limited and focus on the most serious instances of unexplained wealth. QLS was of the opinion that, for example, subjecting drug traffickers, who traffick small amounts of cannabis, to unexplained wealth orders would be a wholly disproportionate reaction. QLS warned that perceived abuse of the provisions risked significant public backlash.[17]

3.26 AGD noted that the establishment of a threshold could further complicate proceedings as it would require a greater emphasis on law enforcement agencies having a comprehensive understanding of a person's financial affairs prior to proceedings being commenced. Additionally, the legislation would have to include provisions to deal with situations in which a matter commences in relation to an amount of wealth that is above the threshold, but that amount is subsequently reduced so that the unexplained portion of a person's wealth falls below the threshold.[18]

3.27 The AFP was similarly concerned that a threshold provision could cause further investigatory burden, for example leading to a greater emphasis on litigating the value of property rather than leaving the focus on the respondent establishing that his or her property was not unlawfully obtained.[19] As Commander McCartney noted:

> Our resources are finite and we are not going to focus on these sorts of targets. In the cases that we do we are talking about millions of dollars, not thousands of dollars. If the committee and the parliament saw the need to bring in a threshold, then one issue we have been discussing is the link to 'may' versus 'must' in the discretion of the court. An option we have been considering, if the value of the property is less than $25,000, is that the

15 *Proceeds of Crime Act* 1996 (Ireland), ss. 2(b).

16 Mr Chris Hayes, Report on Parliamentary study leave visit to Europe, 23 September – 10 October 2011, tabled 21 November 2011, p. 31.

17 Queensland Law Society, *Submission 12*, p. 2.

18 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

19 AFP, *Submission 9 (Supplementary Submission)*, p. 7.

court continues to have this discretion that it may issue a restraining order in relation to unexplained wealth.[20]

3.28 Furthermore, the AFP argued that if a threshold were to be introduced, it should be clear that the threshold applied to total accumulated wealth rather than to the individual value of each item of property.[21]

3.29 The committee understands that there are arguments for and against the introduction of a monetary threshold to limit the applicability of unexplained wealth provisions. On balance, however, it is the committee's view that the introduction of a threshold would provide increased public assurance that unexplained wealth provisions are intended for use against serious and organised criminal targets.

3.30 The committee discusses the issue of the discretion given to the courts to make an unexplained wealth order later in this chapter. The committee supports the introduction of a monetary threshold to limit the use of this court discretion, so that in unexplained wealth cases above $100 000, judicial discretion is removed. Recommendations 10 and 11 later in this chapter give effect to this intention.

Separating unexplained wealth provisions from PoCA and placing them in stand-alone legislation

3.31 A further proposal aimed at better targeting the use of unexplained wealth provisions at serious and organised criminal figures was the separation of the measures from PoCA, in favour of a stand-alone unexplained wealth act. The committee considered whether a purpose-built act could further clarify the unique nature of unexplained wealth provisions and how they were intended to be used. For example, South Australia created a separate act for its unexplained wealth provisions, although it is the only jurisdiction to have done so.[22]

3.32 There was little support, however, for creating separate Commonwealth unexplained wealth legislation. The Attorney-General's Department informed the committee that it was not clear what the benefit of placing unexplained wealth provisions in stand-alone legislation would bring, while there were a number of benefits to keeping unexplained wealth provisions within PoCA.[23]

3.33 Firstly, evidence for proceedings under the PoCA framework can be obtained from a broad range of sources due to connections with existing legislation, including information held by other domestic and international law enforcement agencies. Secondly, the PoCA contains a number of provisions which make it relatively simple to change between orders under the PoCA during the course of proceedings. Finally,

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20 Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, p. 4.

21 AFP, *Submission 9 (Supplementary Submission)*, p. 7.

22 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 13.

23 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

AGD noted that unexplained wealth orders share a common goal with other proceeds of crime orders —to confiscate wealth that has been, or is suspected to be, unlawfully obtained.[24]

3.34 The Law Council also argued that the creation of stand-alone unexplained wealth legislation was not supported by relevant overseas practice and did not support the proposal.[25]

Constitutional requirements and the link to an offence

3.35 In order for the Commonwealth to have the Constitutional authority to legislate for a particular matter, there must be a link to a head of power under Section 51 of the Constitution.

3.36 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 offence or a State offence with a federal aspect, or that a part of a person's wealth was derived from such an offence. In their submission to the inquiry, the AFP explained how this Constitutional requirement related to unexplained wealth proceedings:

> Firstly, depending on the type of unexplained wealth order that is sought, there must be a link between the person and a criminal offence, or a link between the wealth and a criminal offence. Secondly, the criminal offence must be a Commonwealth offence, foreign indictable offence or State offence with a federal aspect (which includes all Territory offences). The jurisdictional nexus requirements create two key challenges for unexplained wealth cases.
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> The first challenge is that the need to demonstrate a link between the person/wealth and a crime may effectively impose an onus of having to make out a predicate offence (that is, the crime from which money was originally derived) before unexplained wealth action can be taken. This could be particularly problematic where there is a disconnect between the illicit wealth and the criminal activity from which that wealth has been derived. This is often the case in money laundering offences, in which the facilitators involved may have no knowledge or involvement in the predicate offence (such as drug trafficking).
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> The second challenge is that the need to demonstrate a link between the person/wealth and a crime within the Commonwealth's legislative power means that wealth derived from State offences that do not have a federal aspect (such as murder, theft of property etc) will not be captured by the Commonwealth scheme.[26]

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24 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

25 Law Council, *Submission 3(Supplementary Submission)*, p. 14.

26 AFP, *Submission 9*, pp 5–6.

3.37 Similarly, in the final stage of an unexplained wealth proceeding, 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.[27] The inclusion within the Commonwealth unexplained wealth provisions of links to offences within Commonwealth constitutional power is a key difference compared to the operation of state and territory unexplained wealth regimes.[28]

3.38 The need to prove a link to such an offence limits one of the key aims of unexplained wealth provisions, discussed in Chapter 2, which is to target the assets of senior members of organised crime groups, who may distance themselves from the actual commission of criminal offences, yet receive the subsequent profits. As the AFP submitted:

> The AFP accepts that unexplained wealth provisions are currently expressed to operate to the fullest extent constitutionally possible. Nevertheless, the AFP notes that the jurisdictional nexus requirements described above operate as an inherent limitation on Commonwealth unexplained wealth provisions. That is, if the unexplained wealth is not linked to an offence that is an offence within Commonwealth power, the unexplained wealth proceeding will fail.[29]

3.39 For example, the AFP highlighted the increased prevalence of 'professional' money-laundering syndicates. As Commander Ian McCartney explained:

> The challenge for us in terms of the money-laundering legislation and the proceeds of crime legislation is the ability to show a nexus between what they are doing and their knowledge of the predicate offence. The problem that exists is that they will always be removed from that predicate offence; they will know it is bad but they will not know what particular criminal activity the money related to. This is a significant problem.[30]

3.40 The Northern Territory Police reported that one strength of unexplained wealth laws that did not require a predicate offence, was the ability to focus on particular criminal assets rather than just the individual. Northern Territory Police noted that the pursuit of third parties and receivers of crime derived assets had been effective under the Northern Territory laws, undermining asset dissipation strategies adopted by criminals.[31]

3.41 In their submission to the inquiry, the AFP further argued:

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27 AGD, *Submission 6*, p. 4.

28 AGD, *Submission 6*, p. 6.

29 AFP, *Submission 9*, p. 6.

30 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 6.

31 Northern Territory Police, *Submission 10*, p. 1.

> If we are serious about providing law enforcement with an effective tool to target those in the upper echelons of organised crime groups – who profit from crime at an arm's length – then action needs to be taken to address the gap in the Commonwealth's unexplained wealth regime.[32]

3.42 In order to improve the operation of unexplained wealth provisions in light of constitutional requirements, there were several suggestions. These include the use of money-laundering provisions, international treaties and seeking a referral of powers from the states.

Use of Section 400.9 of the Criminal Code

3.43 Section 400.9 of the Commonwealth Criminal Code creates the offence of dealing with money or property that is reasonably suspected to be the proceeds of crime.[33] This offence may therefore be of use in cases of unexplained wealth, if it can be proved that there was reasonable suspicion that the wealth was the proceeds of crime. The AFP noted that this could be used to target money launderers, although not without its own difficulties:

> Particularly with these issues where they have no knowledge of the predicate offence, we have to rely on section 400.9 of the Commonwealth money laundering legislation, when in fact you have to show reasonable grounds to suspect it could be linked into a criminal offence.[34]

3.44 The CDPP agreed that because section 400.9 does not make specific reference to Commonwealth offences, but has other constitutional foundations, it may be a provision that could be used in certain circumstances.[35]

Use of external affairs powers

3.45 Section 51 of the Constitution grants the Commonwealth legislative powers in matters relating to external affairs.[36] The ACC noted that this could possibly provide a head of power by linking unexplained wealth provisions to international treaty obligations.[37] For example, the committee heard that the offence created in section 400.9, discussed above, is supported in its entirety through the external affairs power, by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, to which Australia is a party.[38]

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32 AFP, *Submission 9*, p. 6.

33 *Criminal Code Act 1995*, s. 400.9.

34 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 9.

35 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 27.

36 Australian Constitution, ss. 51(xxix).

37 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

38 Replacement explanatory memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, item 19, p. 160.

3.46 The unique nature of unexplained wealth provisions, however, may not be supported by any relevant treaties. The Attorney-General's Department previously advised the Senate Legal and Constitutional Affairs Legislation Committee that existing international conventions relating to organised crime, corruption and money laundering would not support a comprehensive unexplained wealth regime.[39]

3.47 AGD informed the committee that it remains unaware of any international treaties established since that time that could support reliance in the external affairs power in relation to this issue.[40]

Referral of powers from the states

3.48 The committee heard that a far more effective way to establish an unexplained wealth regime that was not linked to a predicate offence would be to seek a referral of power in this area from the states, as the states are subject to different Constitutional requirements. Subsection 51(xxxvii) grants the Commonwealth legislative power to make laws with respect to:

> matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.[41]

3.49 In addition to providing a mechanism by which the Commonwealth could create a comprehensive unexplained wealth regime, a referral of powers may also assist in achieving national consistency in the approach taken to serious and organised crime and unexplained wealth.

3.50 The potential for a referral of powers in discussed further in Chapter 4 which deals with harmonisation of unexplained wealth laws across Australia.

Enhancing unexplained wealth investigations

3.51 Unexplained wealth investigations can be complex and time consuming, not least due to the intricacies of unravelling an individual's personal finances which may include accounts, equities, real estate, physical assets and legitimate business interests. Unexplained wealth investigations, which may commence as an offshoot of a criminal investigation or as the result of specific intelligence, generally begin as a covert investigation, which at some stage becomes an overt investigation potentially necessitating freezing or restraining orders to prevent liquid and other wealth dissipating prior to the resolution of the investigation.

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39 AGD, *Submission 6*, p. 2.

40 AGD, *Submission 6*, p. 2.

41 Australian Constitution, ss. 51(xxxvii).

3.52 The committee was informed by Commonwealth law enforcement agencies that, in practice, the nature of current unexplained wealth provisions necessitated an overly burdensome investigation, limiting the use of those provisions.

3.53 The ACC submitted that existing unexplained wealth provisions impose an excessive burden of proof on law enforcement agencies while allowing too much flexibility in the application of the proceedings by courts.[42]

> Obtaining any unexplained wealth order, including the preliminary unexplained wealth order, inevitably requires investigators to build a comprehensive financial picture of all the property a person owns or has owned, effectively controls or has controlled and their sources of income. It is usually necessary to investigate the whole of the person's working life. This means that in many cases it is simply not practicable to embark on proceedings.
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> As ACC predicted in 2009, the work required to satisfy the court and do the complex financial analysis to distinguish legitimate from co-mingled illegitimate funds has meant that other proceeds of crime recovery options are generally preferred (including traditional proceeds of crime action, taxation and debt recovery methods).[43]

3.54 The committee was provided with a number of suggestions for improving the ability of law enforcement agencies to successfully conduct investigations into unexplained wealth, including:

- revising definitions of total wealth within PoCA;
- using ACC coercive powers in unexplained wealth investigations;
- amending search warrant powers in PoCA;
- improving information sharing with the Australian Taxation Office;
- deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity; and
- further developing international and domestic cooperation in this area through mutual assistance treaties and arrangements.

Definitions of total wealth

3.55 The ACC informed the committee that one of the major drawbacks of the existing unexplained wealth provisions was the requirement for the investigating agency to conduct a complete analysis of all of a person's financial circumstances over a long period. While unexplained wealth provisions are intended to reverse the onus of proof onto the accused, in practice, this is a very easy onus to discharge, and may

42 ACC, *Submission 8*, p. 1.

43 ACC, *Submission 8*, p. 2.

require nothing more than a credible denial on oath.[44] As Mrs Karen Harfield, ACC, explained:

> It is usually necessary to investigate the whole of a person's working life, and this results in significant resource impediments for law enforcement to find and analyse this amount of financial documentation often where the individual themselves is the only person who has access to it.[45]

3.56 The ACC referred the committee to a case study taken from New South Wales, where NSW Police arrested two people at a train station carrying over $2.5 million in suitcases. The arrests were made under NSW's unexplained wealth provisions, based on the 'unexplainability' of why somebody would have that enormous amount of money, yet not have a reasonable explanation as to where it came from. The money was later forfeited to the NSW Crime Commission.[46]

3.57 The ACC noted that under the Commonwealth provisions:

> [I]t is unlikely that unexplained wealth proceedings would have commenced in relation to these people without extensive investigative research into their whole life earnings and the ability of prosecutors to demonstrate a direct linkage of the money to a Commonwealth offence.[47]

3.58 The CDPP provided further evidence, drawing the committee's attention to the definitions of wealth within PoCA:

> [I]t goes back to the definitions of total wealth and wealth in, section 179G of the Proceeds of Crime Act. If I can paraphrase that, the total wealth of a person is the sum of all the values of the property that constitutes the person's wealth. Wealth is defined to mean property owned by the person at any time, property that has been under the effective control of the person at any time and property that the person has disposed of, whether by sale, gift or otherwise, or consumed at any time.[48]

3.59 The committee notes that it may be possible to alter the provisions so that unexplained wealth orders could apply to the change in a person's wealth in a specified period, for example, if a person's wealth increased dramatically within a period of a few years.

3.60 The ACC submission indicated that if the provisions were altered in this way, cases like the following scenario presented in its submission could be more effectively dealt with:

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44 ACC, *Submission 8*, p. 2.

45 Mrs Karen Harfield, ACC, *Committee Hansard*, 4 November 2011, p. 11.

46 ACC, *Submission 8*, p. 4.

47 ACC, *Submission 8*, p. 2.

48 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 30.

> In June 2010, ACC met with CDPP to brief them on a matter in which a significant amount of information was held to indicate that a person had accumulated large amounts of unexplained wealth over several years, with asset holdings being disproportionate with declared income. Intelligence indicated the person had been involved in criminal activity, but there was insufficient evidence to charge, and the person has never been convicted of an offence.
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> Between January and June 2011, all relevant financial and banking records were sourced and a detailed financial analysis prepared to support the unexplained wealth case. This analysis has shown that the person has unsourced income of approximately $2.7 million. The complexity of the matter, and the extent of the information required to satisfy the unexplained wealth provisions, is such that the case requires very careful consideration, and no decision has yet been made as to whether action will be taken, and if so whether unexplained wealth is the appropriate course.[49]

3.61 The committee notes that revising the definition of total wealth within the unexplained wealth provisions may be desirable, but that it remains to be seen how the courts will choose to interpret the existing definition and other provisions. In principle, the committee considers that the provisions should be able to be used to effectively address situations where it can be proven that a large amount of unexplained wealth has been obtained over a specific timeframe. The committee will therefore remain seized of the matter.

Using ACC coercive powers in unexplained wealth investigations

3.62 The ACC proposed a significant new measure to contribute to unexplained wealth investigations through the use of its coercive powers to obtain information about unexplained wealth. The ACC proposal, as outlined in its submission, would involve an ACC examiner being empowered, in appropriate circumstances and with existing safeguards, to use the ACC's coercive powers for the purpose of an unexplained wealth investigation and to order temporary freezing of assets.[50]

3.63 The ACC proposal would work in conjunction with the PoCA measures currently in existence, and involves four steps.

3.64 Firstly, the ACC Board would approve a special investigation in relation to unexplained wealth, in order to give the ACC authority to use its coercive powers. This may require amendment of the ACC Act, as a Board determination currently requires a link to a relevant offence, which may not be present in an unexplained wealth investigation.[51]

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49 ACC, *Submission 8*, p. 3.

50 ACC, *Submission 8 (Supplementary Submission)*, p. 2.

51 ACC, *Submission 8 (Supplementary Submission)*, p. 2.

3.65 Secondly, the ACC would need to identify possible unexplained wealth. During the course of an investigation, the ACC or its partner agencies may obtain intelligence that a person of interest has unexplained wealth that is potentially subject to Commonwealth unexplained wealth provisions. The ACC notes that this could be as the result of suspected criminal activity, or could involve a person who is suspected of benefiting from a life of crime or from offences committed by others.[52]

3.66 The third step would be to apply to an ACC examiner for the use of coercive powers and a restraining order. Obtaining a restraining order is considered critical, as once a person of interest is notified of the requirement to produce documents or attend an examination, they may seek to dissipate their assets to prevent seizure. An ACC examiner does not currently have the power to issue an asset restraining order, necessitating amendment of the ACC Act if this were to occur.

3.67 The final stage of the ACC proposal would be to use the ACC coercive powers, including demanding the production of documents and undertaking examinations. The ACC foresees three possible outcomes from this process:

(a) the wealth is satisfactorily explained, with any appropriate costs incurred by the person of interest to be borne by the ACC;

(b) the wealth cannot be legitimately explained, with the evidence being used in proceeds of crime or unexplained wealth proceedings, but not in criminal proceedings.

(c) the individual commits an ACC Act offence/contempt, for example by lying to an examiner. The act of contempt could potentially be used as evidence in a PoCA proceeding.[53]

3.68 A flowchart depicting this process is reproduced at Appendix 3.

Related amendments

3.69 The ACC proposed two measures complementary to the proposal: ensuring that ACC examination material could be used in PoCA proceedings and alibi-style provisions.

3.70 The ACC informed the committee that despite recent court decisions, uncertainty remained over the scope of permitted use of ACC examination material in the context of proceeds of crime proceedings. The ACC proposed that, regardless of whether the measure discussed above was adopted, the ACC Act and PoCA be amended to make it clear that examination material could be used as evidence in PoCA proceedings, and that the ACC could continue conduct coercive hearings even after PoCA proceedings had commenced.[54]

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52 ACC, *Submission 8 (Supplementary Submission)*, p. 3.

53 ACC, *Submission 8 (Supplementary Submission)*, p. 5.

54 ACC, *Submission 8 (Supplementary Submission)*, p. 6.

3.71 Secondly, the ACC recommended the introduction of provisions, similar in nature to existing alibi notice provisions, within PoCA. The intent of these provisions would be to reduce the scope for a respondent to assert a legitimate source for restrained property at a late stage in the case, despite having provided different evidence up until that point. As the ACC explained:

> The use of alibi-type notice provisions do not significantly diminish the rights of the respondent as their right to explain the source of the wealth still exists. Instead, such provisions would ensure that the resources of law enforcement are targeted and the investigation can be appropriately limited. Further, these provisions would not remove the need for law enforcement to prepare a brief satisfying the court to the necessary standard and to undertake an initial investigation before commencing applications under the PoCA, but would simply act to narrow the scope of additional investigation to those issues defined by the respondent.[55]

3.72 The ACC also raised the issue of the ATO receiving telecommunications intercepts, which is discussed below.

Issues with the ACC proposal

3.73 While the committee considers that the ACC proposal could provide great value in assisting unexplained wealth investigations, it received evidence suggesting that a number of legal issues would need to be resolved before it could go ahead.

3.74 Firstly, there may be Constitutional issues arising from the proposal to allow the ACC Board to grant a determination in relation to unexplained wealth without a link to a relevant offence, for the same reason that the unexplained wealth orders currently require a link to a federally relevant offence. In both cases, the link is necessary to obtain a Commonwealth head of power.[56] In the ACC's case, however, each State and Territory has enacted its own ACC legislation which enables the Board to authorise operations and investigations into State criminal activity, and confers coercive powers on the ACC in respect of those operations and investigations.[57]

3.75 Currently, Board determinations can only be made in relation to a relevant crime, defined as either 'serious and organised crime' or 'indigenous violence or child abuse'. The ACC noted that limiting the scope of the use of coercive powers to only those unexplained wealth matters involving serious and organised crime unduly restricts the breadth of matters that the ACC can be involved in. As the ACC submitted:

> This is not because the ACC wishes to use its coercive powers in relation to minor indiscretions but because in unexplained wealth matters a demonstrated link to serious and organised crime may not always be

55 ACC, *Submission 8 (Supplementary Submission)*, p. 7.

56 Ms Sarah Chidgey, AGD, Committee Hansard, 10 February 2011, p. 22.

57 AGD, Answer to question on notice, 10 February 2012 (received 29 February 2012), p. 3.

> evident at the initial investigation phase. For example, it is not uncommon for persons of interest who have accumulated vast wealth from serious crime to be so well insulated from the commission of those crimes so as to prevent the ACC investigating the matter, because the connection to serious and organised crime can not be readily and initially established.[58]

3.76 The ACC explained that the proposal would require amendments to the ACC Act to allow the ACC to use its coercive powers specifically in relation to unexplained wealth, independent of a link to a 'relevant crime' being established.[59] Given the need for a link to Commonwealth power if the Commonwealth act was used, the committee notes that this may also require amendment of the state and territory enabling legislation.

3.77 The committee agrees that, in principle, the use of ACC examination powers in support of unexplained wealth proceedings could be very effective, and recommends that the Commonwealth Government pursue an expansion of the ACC's remit to include support of unexplained wealth investigations.

Recommendation 2

3.78 The committee recommends that Commonwealth Government explore the possibility of amending legislation to allow the Australian Crime Commission Board to issue a determination on unexplained wealth, so as to enable the Australian Crime Commission to use its coercive powers to provide evidence in support of unexplained wealth proceedings.

3.79 Furthermore, the committee agrees with Australian Crime Commission's suggestion that, regardless of whether other recommendations relating to the proposal to use the ACC's powers to support unexplained wealth proceedings are adopted by the government, the PoCA and ACC Act should be amended to make clear that examination material could be used as evidence in PoCA proceedings.

Recommendation 3

3.80 The committee recommends that the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002* be amended as necessary to make clear that the Australian Crime Commission's examination material can be used as evidence in proceedings under the *Proceeds of Crime Act 2002*.

3.81 Secondly, and perhaps more importantly, granting an ACC examiner the authority to restrain a person's assets may be considered a breach of the separation of powers, in that it may be considered to be giving a judicial power to an executive agency. As Mr Iain Anderson, AGD, explained:

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58 ACC, *Submission 8 (Supplementary Submission)*, p. 3.

59 ACC, *Submission 8 (Supplementary Submission)*, pp 2–3.

> It is one thing for them to use their coercive powers for the hearing. But if it was envisaged that they would somehow make orders that would affect the assets of the person of interest, that may well be a judicial power that could not be bestowed upon a part of the executive.[60]

3.82 The ACC responded to this evidence, noting that, 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.[61] Furthermore, the ACC observed 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 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.[62]

3.83 A further issue arising is the potential for contempt of a court. In the event that the ACC was unable to issue restraining orders, and instead had to rely on the court-based provisions within PoCA, the use of ACC coercive powers after PoCA proceedings have commenced could be considered a contempt of court. This may be

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60 Mr Iain Anderson, AGD, *Committee Hansard*, 10 February 2010, p. 19.

61 ACC, *Submission 8 (Second Supplementary Submission)*, p. 2.

62 ACC, *Submission 8 (Second Supplementary Submission)*, pp 2–3.

the case, given that the information gathering powers provided by PoCA include enabling the court to conduct its own examination process. Mr Anderson gave a scenario where:

> … you have got proceeds of crime proceedings in a court going on and the ACC examiner is at the same time seeking to coercively examine someone about the subject of the proceeds of crime proceedings. In that situation, that might constitute a contempt of court by the examiner. If the ACC does it prior to matters being commenced in the court, the issue would not arise.[63]

3.84 The combination of these issues resulted in a chicken-and-egg type dilemma. Under the ACC's proposal, it would issue its own restraining order prior to an examination to prevent asset dissipation by the person of interest upon notification of the ACC's interest. If this was not Constitutionally possible, however, and the ACC sought a restraining order through PoCA prior to an examination, then its examination could constitute a contempt of the court. The timing of the restraint of assets and the use of the ACC's examination powers is of critical importance.

3.85 The ACC informed the committee that, in the event that a freezing or restraining order could not be issued by the ACC, provision should be made within PoCA to ensure that the ACC's examination powers could be used to complement the PoCA processes. The ACC observed that it may be possible to give a court the option to authorise the ACC to conduct examinations, submitting:

> 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.[64]

3.86 Such an amendment would need to be carefully drafted to ensure that the discretion and independence of both the court and the ACC examiners remained. The ACC informed the committee that the legislation would need to clearly state that the court could refuse to authorise the use of the ACC's examination powers. Similarly, the independence of the ACC examiner would have to be preserved, with a court authorisation not predetermining whether the ACC examiner would in fact conduct an examination.[65]

3.87 In practice, it may be possible for the ACC proposal to be revised along these lines, so that the AFP or CDPP, upon making an application for a PoCA restraining

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63 Mr Iain Anderson, AGD, *Committee Hansard*, 10 February 2010, p. 23.

64 ACC, *Submission 8 (Second Supplementary Submission)*, p. 4.

65 ACC, *Submission 8 (Second Supplementary Submission)*, p. 4.

order, could also apply for an order giving approval from the Court to use the ACC examination process instead of, or in addition to the PoCA examination process.

3.88 The Attorney-General's Department suggested a similar variation of the ACC's original proposal, noting that an alternative could be to amend the Proceeds of Crime Regulations 2002 to specify ACC Examiners as approved examiners for the purposes of PoCA.[66]

3.89 In AGD's view, this would enable the expertise of ACC examiners to be employed in conducting POCA examinations. ACC examiners serving in this capacity, however, would be exercising powers under the POCA, not the ACC Act, and would be subject to the provisions of that Act in conducting examinations. AGD noted that it would nevertheless be possible to use ACC facilities, capabilities and information in conducting the examinations.[67]

3.90 Coopting an ACC examiner into the PoCA examination process in this way would limit the broader use of the information gained in the examination. Under the existing POCA provisions, information obtained from these examinations would only be able to be disclosed to other ACC investigators if the examiner believed it would assist in the investigation or prosecution of an offence punishable by over 3 years imprisonment. To allow the information to be used for broader ACC purposes, the PoCA would need further amendment.[68]

3.91 The ACC informed the committee that placing the ACC Examiner within the PoCA examination framework could cause other problems, including interfering with the independent function of the ACC Examiner, confusing the governance and responsibilities of ACC officers, and limiting the scope of what could be asked in such examinations.[69]

3.92 In general, the committee notes that there may be considerable merit in using the ACC examination process rather than that provided for under PoCA, for several reasons described by the ACC, including:

- the ACC has far more experience in conducting examinations involving serious and organised crime, holding over 500 such examinations in 2010–11, compared to four conducted under the auspices of PoCA;
- the ACC examination process is more developed, featuring robust practices and procedures to ensure legal compliance, access to specialised professionals such as forensic psychologists, intelligence analysts and forensic accountants; and

66 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), p. 4.

67 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), p. 4.

68 AGD, answer to question on notice, 10 February 2012 (received 29 February 2012), pp 4–5.

69 ACC, *Submission 8 (Second Supplementary Submission)*, pp 5–6.

- the ACC is used to conducting secret hearings that protect the identity of those involved using secure facilities at short notice.[70]

3.93 The committee notes that, under the PoCA examination provisions, a court appointed examiner could also conduct confidential examinations.[71] In practice, however, the ACC handles a larger volume of such examinations and therefore is likely to have greater experience in such matters. A more detailed comparison of the PoCA and ACC examination processes has been included at Appendix 4.

Committee view

3.94 While the proposal to give ACC examiners the power to temporarily restrain assets could be highly effective from a law enforcement perspective, the committee remains conscious of the Constitutional arguments raised by AGD. The committee is not in a position to make a determination on whether the proposal is appropriate under the circumstances and is therefore hesitant to recommend amendments along these lines.

3.95 The committee is, however, supportive of amending PoCA so as to allow for ACC examinations to be conducted after a restraining order has been made by a court, in such a way that the evidence could be used in an unexplained wealth proceeding. Such a provision would have to be carefully drafted so as to ensure that both the court and ACC examiners retained appropriate discretion and independence.

Recommendation 4

3.96 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.

3.97 The committee's preference would be for the establishment of a court-approval mechanism whereby the AFP or CDPP could apply to the court seeking authorisation for the ACC to conduct examinations after a restraining order had been made by the court. Examinations would be conducted under the terms of the ACC Act rather than the PoCA, as discussed above. An alternative would be for the PoCA to be amended to allow the court to appoint an ACC examiner to conduct a PoCA examination with the consent of the ACC examiner. In all cases, the court would maintain the ability to conduct examinations under existing PoCA provisions if it so chose.

70 ACC, *Submission 8 (Second Supplementary Submission)*, pp 6–7.

71 Ms Sarah Chidgey, AGD, *Committee Hansard*, 10 February 2012, p. 26.

Amending search warrant powers

3.98 Part 3-5 of PoCA establishes a mechanism by which an authorised officer of a law enforcement agency can apply to a magistrate for a warrant to search a premises, or persons in the vicinity of the premises, for 'tainted property' or 'evidential material'. These search warrants are one of a number of information gathering measures provided for under PoCA.

3.99 Tainted property is defined as proceeds of certain indictable offences or an instrument of an indictable offence (such as vessels used to import narcotics or computers used to transmit child exploitation material). Evidential material means evidence relating to: property in respect of which PoCA action has or could be taken; benefits derived from the commission of certain offences; or literary proceeds.[72]

3.100 The AFP informed the committee that while these search powers are a valuable investigative tool, they may not be able to be used for unexplained wealth proceedings. Specifically, the AFP notes that the definition of evidential material does not appear to extend to evidence of unlawful activities from which a person has derived wealth. The AFP therefore argued in favour of amending Part 3-5 to ensure that evidence relevant to unexplained wealth proceedings can be obtained.[73]

3.101 AGD provided further clarification of the issue, agreeing that while the current search and seizure provisions would allow collection of some evidence in relation to property relating to unexplained wealth proceedings, significant limitations remained. For example, AGD was of the view that it was not clear whether existing provisions would cover property relevant to ascertaining the total wealth of the person (e.g. evidence of a person's income or legitimately acquired property) or evidence of unlawful activities from which a person has derived wealth. Furthermore, officers would not be able to collect evidence relating to summary offences, despite the fact that restraint action in unexplained wealth matters can be based on the commission of either a summary or indictable Commonwealth offence.[74]

3.102 AGD raised two possible remedies by which the search warrant provisions could be amended. One method would be to expand the definition of 'evidential material' to include evidence relevant to unexplained wealth proceedings. However, AGD warned that doing so may result in powers of very broad application:

> For example, amending this definition to include evidence relevant to ascertaining the total wealth of a person would allow for a warrant to be issued in relation to any premises where a person keeps evidence of their financial affairs (i.e. most homes and businesses).[75]

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72 AFP, *Submission 9*, p. 15.

73 AFP, *Submission 9*, p. 15.

74 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 3.

75 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 3.

3.103 A second option would be to amend subsection 228(1) of the POCA to enable material that is relevant to an unexplained wealth proceeding to be seized during the execution of a search warrant. Subparagraph 228(1)(d)(iii) could also be amended to remove the requirement that the evidential material relate to an indictable offence. This would allow for the collection of evidence in relation to summary offences and for that material to be used in an application for an unexplained wealth restraining order under section 20A.

3.104 The committee considers that the investigation framework within PoCA in relation to unexplained wealth would be greatly enhanced through improvement of the search warrant regime to allow necessary evidence to be collected. Of the two proposals put forward by AGD, the committee considers the second to be the superior of the two.

Recommendation 5

3.105 The committee recommends that search warrant provisions of the *Proceeds of Crime Act 2002* be amended so as to allow for the collection of evidence that is relevant to unexplained wealth provisions. The committee's preferred means of amending the provisions would be to amend:

- **subsection 228(1) to enable material that is relevant to an unexplained wealth proceeding to be seized during the execution of a search warrant; and**
- **subparagraph 228(1)(d)(iii) to remove the requirement that the evidential material relate to an indictable offence.**

Improving information sharing with the Australian Taxation Office

3.106 Given the key role that financial data plays in unexplained wealth proceedings, information held by the ATO is likely to be of great importance in unexplained wealth investigations. The mission, powers and abilities of the ATO are closely aligned with the aim of unexplained wealth provisions. Indeed, so much so that the Crime and Misconduct Commission (CMC) of Queensland preferred the use of taxation laws to unexplained wealth laws, submitting:

> 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.[76]

3.107 The committee considered means by which the ATO could better coordinate its efforts with those of law enforcement agencies, thereby contributing to both serious and organised crime investigations and to the integrity of the national taxation system.

76 Crime and Misconduct Commission, *Submission 1*, pp 2–3.

Prescription of taskforces under the Taxation Administration Regulations 1976

3.108 In December 2010, the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* amended the provisions in the *Taxation Administration Act 1953* (Tax Administration Act) governing disclosure of taxpayer information to law enforcement agencies. The amendments in conjunction with other Commonwealth organised crime related legislative reforms:

- removed limitations on the use of taxpayer information enabling use of this information for the prosecution of serious offences; and
- allow for the disclosure of taxpayer information to law enforcement agencies and courts for the investigation of unexplained wealth matters.[77]

3.109 The committee supports such initiatives as information sharing and increased coordination significantly enhance the Commonwealth's approach to tackling serious and organised crime.

3.110 The AFP informed the committee of a further reform for consideration. Under the Tax Administration Act, the ATO can disclose taxpayer information to an officer of a prescribed taskforce for or in connection with a purpose of the prescribed taskforce. A taskforce can be prescribed if a major purpose of the relevant taskforce must be the protection of public finances.[78]

3.111 For this reason, the AFP suggested that the Criminal Assets Confiscation Taskforce be prescribed, enabling the ATO to disclose taxpayer information for the broader purposes of the Taskforce. Specifically, the AFP identified as benefits the ability to better identify assets for seizure and pursue wealth collected by criminals at the expense of the community.[79]

3.112 The ATO also supported taskforce prescription, stating that:

> Success in tackling organised crime depends largely on sufficient information sharing powers for law enforcement agencies. It is expected that further taskforces will be established both at the Commonwealth and State levels to address serious and organised crime. Prescription of a taskforce allows the ATO to disclose information to an officer of an agency in any prescribed taskforce for a purpose of that taskforce. The ATO considers the prescription of taskforces as imperative for effective information sharing with law enforcement agencies.[80]

3.113 The committee supports the prescription of the CACT as information held by the ATO is likely to be essential to its activities.

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77 AFP, *Submission 9*, p. 15.

78 AFP, *Submission 9*, p. 15.

79 AFP, *Submission 9*, p. 16.

80 ATO, *Submission 5*, p. 2.

Recommendation 6

3.114 The committee recommends that the Criminal Assets Confiscation Taskforce be prescribed as a taskforce under the *Taxation Administration Act 1953* and associated regulations.

Enabling the ATO to receive intercept information

3.115 The committee heard that the ATO is currently only able to make limited use of information collected by law enforcement agencies through telecommunication intercepts. Commander Ian McCartney, head of the Criminal Assets Confiscation Taskforce, highlighted the benefit that could arise if intercept information could be used more widely by the ATO:

> [W]here we have identified a matter, a key operational strategy for us, particularly in terms of organised crime, is the use of telephone intercepts on special projects. If we identify through our investigation a tax mischief that we believe would be relevant to the tax office, we cannot refer telephone intercept material to the tax office; we are precluded under the legislation. So there are some barriers there.[81]

3.116 Section 67 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) currently enables an interception agency (such as AFP or ACC) to communicate information to the ATO to assist in the interception agency's investigations, for example, in joint operations into serious tax fraud.[82] The receiving agency is only able to use the information for the purposes for which it received that information, meaning that the ATO would be prevented from using the information for their own investigations or tax assessments.

3.117 The TIA Act does not currently allow for the communication of intercepted information to the Australian Taxation Office (ATO) for the ATO's own purposes.[83] In practice, this means the ATO cannot receive such information for the purpose of raising tax assessments, which would be useful both in disrupting organised crime and collecting unpaid tax.

3.118 The ATO submitted that it could play a greater role in assisting law enforcement agencies to combat serious and organised crime if it more freely access telephone intercept information, stating:

> Enabling the ATO to receive and use intercept information that law enforcement agencies have obtained under telecommunication laws for the purposes of raising taxation assessment would enhance the Commonwealth's ability to address unexplained wealth associated with organised crime. It would also enable the ATO to better support law

81 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 7.

82 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 4.

83 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 4.

> enforcement agencies in their activities through being able to analyse intercept material relating to financial transactions and structures so as to provide insights back to the referring agency.[84]

3.119 The committee is of the view that the ATO and the enforcement of Australian tax law should form a key part of the response to serious and organised crime. The committee has previously recommended, in the course of its review of the *Australian Crime Commission Act 2002,* the inclusion of the Tax Commissioner on the Board of the Australian Crime Commission; a recommendation since accepted and implemented by the Government.[85] The committee observes that this is part of the rationale for the inclusion of officers from the ATO in the Criminal Assets Confiscation Taskforce, and involvement in serious tax fraud investigations such as Project Wickenby.

3.120 The committee notes that obtaining an interception warrant is currently subject to significant control, and given the highly intrusive nature of this measure, does not propose that this be altered. However, the committee recommends that serious consideration be given to enabling the ATO to use information obtained by law enforcement agencies through telephone intercepts in the course of investigations into unexplained wealth and serious and organised crime for the purpose of raising tax assessments. To limit the use of the intercept information appropriately, the committee considers that such a practice could be restricted, for example to taskforces prescribed under the *Taxation Administration Act 1953*.

Recommendation 7

3.121 The committee recommends amending the *Telecommunications (Interception and Access) Act 1979* so as to allow the Australian Taxation Office to use information gained through telecommunications interception, in the course of joint investigations by taskforces prescribed under the *Taxation Administration Act 1953*, for the purpose of the protection of public finances.

Access to financial information

3.122 The committee heard that there can be limitations arising from the timeframes to access financial information. For example WA Police noted:

> One of the major issues we have with our act is that, whilst we can request information from financial institutions, there are no time frames for when information comes to us. It is very important in any investigation, whether criminal or civil based, that there be timeliness with the information coming to us. Sometimes we can wait up to three months for financial information to come back from a bank, for example.

84 ATO, *Submission 5*, p. 2.

85 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, Final report, p. 56.

> They have other agencies and organisations which request information from them. Some of those organisations have time frames within their legislation, so our requests just go to the bottom of the pile. That is just the way it is. I certainly do not begrudge the financial institutions. They obviously have to prioritise their work. [86]

3.123 At the Commonwealth level, access to financial information did not appear to be a major issue. The ATO indicated that they generally had sufficient access to information from banks[87] and the ACC did not see any serious problems, but noted the amount of information can be challenging:

> The financial institutions are dealing with a huge amount of requests for law enforcement. I think that as the criminals move more and more into hiding their assets and using various trusts there will be more and more requests from law enforcement for information from the financial institutions. I think it is a struggle sometimes for the banks or financial institutions to cope with that. My sense is that we have quite good relations with those financial institutions and, where there is something required to be done urgently, by and large that is achieved. It would be nice to have a service level agreement where we could put a request in that there would be a turnaround in a particular time, but there is an impost on the financial institutions to do that. But by and large the relationships we have with the financial institutions are such that, if we need something done urgently, it will be done.[88]

3.124 The committee observes that the concentration of specialised officers in the CACT should assist in effectively accessing and analysing financial information. The committee is aware that financial investigation is increasingly important in modern crime-fighting and will continue to monitor developments in this field.

Deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity

3.125 The ACC proposed the introduction of express provisions to deem amounts in relation to which an individual has no explanation, or which are inconsistent with levels of income declared in taxation returns, or obtained in years for which no taxation return was filed, to be illegally obtained. The ACC informed the committee that it had historical examples where such provisions would have been valuable.[89]

3.126 Ms Kate Deakin, ACC, elaborated further, stating:

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86 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard,* 9 September 2011, p. 5.

87 Mr John Ford, ATO, *Committee Hansard,* 4 November 2011, p. 22.

88 Mr Richard Grant, ACC, *Committee Hansard,* 4 November 2011, p. 14.

89 ACC, *Submission 8,* p. 4.

> We are suggesting—and it might be a reasonable middle ground—deeming provisions or presumptions, so that if, for example, you have assets far in excess of your tax-declared wealth, or significant assets acquired in years for which no tax returns were filed, or if assets were purchased with large amounts of cash—that sort of thing—if we can put in place presumptions that say, 'Unless you can prove otherwise, we are going to assume that those amounts were illegitimately obtained'.[90]

3.127 In a similar vein, the ACC also suggested introducing laws which, in appropriate circumstances, treat cash as a criminal commodity, by creating a rebuttable presumption that possession of large amounts of cash without adequate explanation is connected to criminality.[91]

3.128 The Attorney-General's Department advised that this would extend the current unexplained wealth laws and would place an additional burden on people to prove their wealth was lawfully obtained citing examples where this may be undesirable:

> This is especially true if money is deemed to be illegally obtained if it does not accord with the level of income declared in a person's tax returns. For example, money that has been legitimately obtained (e.g. through an inheritance, gift, scholarship or certain overseas sources) may not necessarily appear in a person's tax returns.[92]

3.129 AGD further advised that if these measures were adopted, the inclusion of safeguards would be desirable, while consideration would also need to be given to constitutional validity.[93]

3.130 The Law Council of Australia and the Queensland Law Society were against the proposals. The Law Council argued that they increased the risk of capturing the behaviour of individuals who lack capacity to explain how they acquired particular amounts of money perhaps due to age, cultural and linguistic background or physical or mental incapacity. Additionally, they may also capture the behaviour of people who have simply failed to keep receipts or records, have made errors in tax returns or have not filed tax returns for legitimate reasons, such as illness.[94]

Improving the efficiency of unexplained wealth proceedings

3.131 The committee received evidence suggesting the need for a number of reforms associated with unexplained wealth proceedings under PoCA. These included:

- removing the requirement to meet an evidence threshold twice;

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90 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 13.

91 ACC, *Submission 8*, p. 4.

92 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

93 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 12.

94 Law Council, *Submission 3(Supplementary Submission)*, p. 14; see also Queensland Law Society, *Submission 12*, pp 2–3.

- options for dispute resolution;
- extending the time limit for notices of preliminary unexplained wealth orders;
- setting up special courts or judges;
- preventing legal expenses being met from restrained property; and
- granting the ability to create and register a charge over restrained property.

Removing the requirement to meet an evidence threshold twice

3.132 Unexplained wealth proceedings can commence either with an application for a restraining order (and then an application for a preliminary unexplained wealth order), or with an application for a preliminary unexplained wealth order. Applications for unexplained wealth restraining orders and preliminary unexplained wealth orders must be accompanied by an affidavit made by an authorised officer. The court may then make a restraining order or preliminary unexplained wealth order if it is satisfied of the matters dealt with in the affidavit. In this way, the affidavit requirements form the basis for the threshold test which must be met before the court may make an order.[95]

3.133 The AFP informed the committee that there is an overlap between the matters required to be addressed in the affidavit for a restraining order, and the affidavit required for a preliminary unexplained wealth restraining order. Specifically, both affidavits must state that the authorised officer suspects (on reasonable grounds) that the person's total wealth exceeds the value of the person's lawfully acquired wealth.[96]

3.134 The practical effect of this requirement appears to be that where a restraining order is sought before an application for a preliminary unexplained wealth order is made, the Commonwealth will need to meet the same threshold test twice. As orders may be sought from different judges, the result may be that two different judges are required to be satisfied of the same threshold.[97]

3.135 In order to eliminate this duplication of effort, the AFP proposed to the committee that the process could be streamlined by amending the relevant provisions to provide that where an unexplained wealth restraining order has been made (and the court is satisfied that the authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's lawfully acquired wealth), the affidavit for a preliminary unexplained wealth order does not have to address the same matter.[98]

95 AFP, *Submission 9*, p. 13.

96 AFP, *Submission 9*, p. 13.

97 AFP, *Submission 9*, p. 13.

98 AFP, *Submission 9*, p. 13.

3.136 AGD supported the AFP's view, noting that removing this duplication would have a beneficial impact on efficiency and resourcing for law enforcement agencies and for the courts.

3.137 AGD cautioned that the option to provide or otherwise update an affidavit at stages subsequent to a restraining order should remain as it is possible that further evidence would be uncovered and should therefore be included in a revised affidavit. Furthermore, in cases where a restraining order was not sought prior to a preliminary unexplained wealth order, an affidavit should be required in applying of the preliminary unexplained wealth order.[99] The committee agrees that any amendments should be mindful of these issues.

3.138 The committee agrees that the duplication of the evidence threshold test is unnecessary and notes that AGD has proposed one method by which this might be achieved:

> [T]he PoCA could be amended to include a presumption that, where a restraining order has been made under section 20A, there is a reasonable suspicion that the person's total wealth exceeds their lawfully acquired wealth. This would ensure that there is consistency between judicial decisions made at restraining order stage and preliminary unexplained wealth order stage, and would enable any additional evidence that is uncovered to be included in the affidavit.[100]

3.139 The committee therefore recommends that the duplication of the evidence threshold test be eliminated.

Recommendation 8

3.140 The committee recommends that the *Proceeds of Crime Act 2002* be amended so as to eliminate the requirement for authorised officers to meet an evidence threshold test for a preliminary unexplained wealth order where the evidence threshold test for a restraining order has already been met. Any amendment should recognise the need to be able to update an affidavit to reflect new evidence as appropriate.

Options for dispute resolution and administrative forfeiture

3.141 In its submission the ACC recommended strengthening options to alternative dispute resolution and administrative forfeiture.[101] During the hearing, the ACC elaborated further, stating:

> That is not an option that we have explored in any great detail, but it simply would go to reducing the costs and risks which are inherently involved in

99 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 9.

100 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 9.

101 ACC, *Submission 8*, p. 5.

> litigation. If there were ways to achieve the objectives without dragging matters through court unnecessarily, we would see that as a benefit, but that is not a matter that we can give any further detailed advice on.[102]

3.142 The Attorney-General's Department informed the committee that under section 316 of the PoCA, it is possible for the court to make orders by consent, without necessarily having to consider the matters that the court would otherwise consider in the proceeding. It is this provision that is used by prosecuting authorities to 'settle' matters.[103] The committee understands that settlement is, in this case, subject to court oversight.

3.143 The Commonwealth Director of Public Prosecutions indicated the benefit of being able to settle proceeds of crime cases in some circumstances, stating:

> To date our experience is that we will settle matters where we have applied for proceeds orders and, having regard to a number of factors such as the risk of litigation, the prospect of recovery and evidential concerns, we might agree with a defendant that certain orders should be made which would pay certain moneys to the Commonwealth and sometimes that will not include all the moneys that might have been restrained. There are provisions in the Proceeds of Crime Act for such orders to be entered into and made by the court without determination of the merits.[104]

3.144 AGD noted that introducing alternative dispute resolution into the PoCA for unexplained wealth cases could raise the following concerns:

- it may imply that there is a middle ground where a 'deal' can be done allowing criminals to avoid forfeiting all of the proceeds of their offences;
- in some cases, there will be a public interest in litigating matters to ensure that all proceeds and instruments of crime are confiscated; and
- alternative dispute resolution may be used as a delaying tactic by litigants. [105]

3.145 AGD also noted that administrative forfeiture was not common in Commonwealth legislation and generally limited to narrow classes of items that are easy to identify, whereas proceeds of crimes cases were relatively complex.[106]

3.146 In the committee's view, dispute resolution of unexplained wealth proceedings risks creating a perception that the government is negotiating deals with serious and organised criminal networks. It is the committee's preference, therefore, that unexplained wealth cases are litigated using the full process outlined in the PoCA.

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102 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 14.

103 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

104 Mr Graeme Davidson,CDPP, *Committee Hansard*, 10 February 2012, p. 35.

105 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

106 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 5.

Extending the time limit for notices of preliminary unexplained wealth orders

3.147 The AFP drew the committee's attention to an issue arising from the requirement that the Commonwealth give a person notice of a preliminary unexplained wealth order, including providing a copy of the application and accompanying affidavit within seven days.[107]

3.148 The AFP informed the committee that, in some situations, there may be difficulty or delays in locating the individual or facilitating the giving of notice. The AFP therefore proposed that the court be given the ability to extend the time limit for notice, on application of the Commonwealth, to accommodate extraordinary circumstances.[108]

3.149 AGD provided evidence in support of this proposal, stating that extending the time limit for giving notice of an application for a preliminary unexplained wealth order would make the provisions more flexible in circumstances where it is not feasible for notice to be given within 7 days of an application being made. AGD further noted that if, as is the case in the AFP's proposal, extensions are made upon application by the Commonwealth, there would be court oversight to ensure that extensions are granted appropriately.

3.150 The Queensland Law Society suggested that the Commonwealth should be able to apply to the court for an extension of time for service to accommodate extraordinary circumstances.[109]

Recommendation 9

3.151 The committee recommends that provision be made for extending the time limit for serving notice of a preliminary unexplained wealth order to accommodate extraordinary circumstances.

Setting up special courts or judges

3.152 Proceeds of crime proceedings are inherently complex and unexplained wealth proceedings are likely to involve an added layer of complexity. For this reason, the ACC suggested establishing a specialist proceeds of crime court or tribunal to deal with proceeds of crime matters, submitting:

> Given the specialist and complex nature of both the legislation and the financial and criminal evidence, and the need for swift response times in cases where funds can be transferred overseas within hours, a specialist

107 AFP, *Submission 9*, p. 14.

108 AFP, *Submission 9*, p. 14.

109 Queensland Law Society, *Submission 12*, p. 3.

> court would allow for the development of both judicial expertise and tailor-made procedures.[110]

3.153 The committee sought evidence on whether there would be value in having special courts or prescribed judges for proceeds of crime matters, as there are in some other countries. The AFP referred to the Irish model, explaining:

> It is a model that is adopted in Ireland with their structure. There are a couple of issues at play. One is the size of the jurisdiction in Ireland—it is a lot smaller. It is something we have considered but we do not see as an organisation significant impediments in how the current system works. The ability to bring the system into Australia will require a policy change, a legislation change and a funding change, but it is something we would consider in future discussion.[111]

3.154 The Queensland Law Society supported the introduction of nominated judicial officers, noting that specialised judges will be better equipped to appreciate the complexities involved with proceeds of crime matters.[112]

3.155 Representatives from the CDPP provided evidence to the committee on how proceeds of crime proceedings are currently litigated, stating:

> At the moment basically we litigate our matters in the state courts. So, depending on which state we are in and which court has the appropriate jurisdiction, we will litigate in those and nor would we attempt to select who might be the adjudicator of those matters. I suppose it might be said that any court with experience in these sorts of matters is going to provide a more consistent type of outcome on that, but it is not really a matter that we as DPP should be commenting on as to its desirability. The general approach in Commonwealth criminal matters and proceeds of crime matters is that we litigate in the state courts with the appropriate jurisdiction. Like any litigant we accept whatever bench is given to us.[113]

3.156 The Attorney-General's Department advised the committee of some of the disadvantage of special courts and judges:

> [C]reating specific courts is a step that can be fraught with dangers, as well. There are issues in creating a specialist court if you have judiciary who only sit in that court—whether they have sufficient workload to keep them fully occupied, particularly if you create judges who then stay there until they are aged 70. There is an expense involved in creating separate judges.
>
> Just looking at other scenarios, there have been questions raised as to whether the federal court, for example, should have specialist divisions, particularly with judges only hearing certain types of matters. Generally,

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110 ACC, *Submission 8,* p. 5.

111 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 8.

112 Queensland Law Society, *Submission 12*, p. 4.

113 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 31.

> the Commonwealth has refrained from doing that because the view is that judges bring a range of experiences to hearing matters and that it is better that they have a broad experience rather than only practicing in a single area, where people can become too narrow over time. There are arguments against creating new courts for that reason.[114]

3.157 AGD provided subsequent evidence noting the following:

- new courts are costly, requiring new administration and resourcing;
- where overlap between proceeds of crime proceedings and other matters exist, non-specialist courts provide flexibility to hear both matters at once; and
- State and Territory courts with jurisdiction for indictable criminal offences have extensive experience with criminal law and bring this expertise to proceeds of crime matters.[115]

3.158 The committee acknowledges the difficulty and cost of setting up a special court or tribunal, but is also concerned to see that proceeds of crime matters can be effectively dealt with, particularly with future adjudication of as-yet unused unexplained wealth provisions.

3.159 The committee considers that there would be value in ensuring that courts and judges have appropriate training and experience and that proceeds of crime matters can be given attention in a timely way to prevent the dispersal or disposal of assets overseas and through other means.

Preventing legal expenses being met from restrained property

3.160 In the original iteration of the *Proceeds of Crime Act 1987*, restrained assets could be used by the defendant to meet legal expenses incurred in relation to proceedings under that act. However, in 1999 the Australian Law Reform Commission reported that this practice was contrary to the principles of PoCA, which were that property liable to forfeiture should be preserved for that purpose.[116] Commander Ian McCartney, AFP elaborated further, explaining:

> When the proceeds of crime legislation was brought in in 1987 there was an ability for suspects to access assets that had been restrained, for legal costs. We believe that that system was abused. It was used by suspects to frustrate the system and, basically, siphon off the assets that had been restrained.[117]

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114 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 37.

115 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 8.

116 AFP, *Submission 9*, p. 14.

117 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 4.

3.161 Accordingly, in 2002, the legislation was changed to preclude the use of restrained property to meet legal expenses incurred in connection with PoCA or criminal proceedings.[118]

3.162 However, this prohibition on using restrained assets to meet legal expenses was not applied to unexplained wealth provisions when they were subsequently introduced.

3.163 The stated purpose was to ensure that persons subject to unexplained wealth proceedings could fund an appropriate and sufficient defence against such proceedings as they differed from ordinary PoCA proceedings, with no specific crime needing to be alleged. This difference therefore justified a different policy approach to whether legal expenses could be met from restrained property.[119]

3.164 The committee notes that the court can engage a costs assessor to certify that legal expenses in defending unexplained wealth proceedings have been properly incurred, as a safeguard against abuse of this provision.[120]

3.165 Currently, a court does not consider the amount paid for a person's legal expenses in calculating the proportion of a person's wealth that is unexplained. For example, if the court determined that a person had $200 000 in unexplained wealth, they could make an order requiring the person to pay the Commonwealth $200 000 (as a civil debt owing to the Commonwealth).

3.166 If, for example, the person used $20 000 of that restrained amount to fund legal expenses, the person would still be liable to pay the Commonwealth the full $200 000 amount, though the order may ultimately be enforced against the remaining $180 000 of restrained funds. The remainder of the amount due to the Commonwealth under the unexplained wealth order would still be a civil debt due by the person to the Commonwealth, but, in practice, could be difficult to recover if there were no other restrained assets.[121]

3.167 Both the AFP and the ACC continue to have concerns about the potential use of restrained assets to meet legal expenses in unexplained wealth cases. As the AFP submitted:

> The AFP's experience under PoCA 1987 was that the provisions allowing legal expenses to be paid for out of restrained property were exploited to deliberately frustrate the objectives of the scheme and dissipate property through protracted litigation.

118 AFP, *Submission 9*, p. 14.

119 AFP, *Submission 9*, p. 14.

120 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 1.

121 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), pp 5–6.

> The AFP is concerned that this will happen under the unexplained wealth provisions. The AFP is not convinced that provisions which require a costs assessor to certify that legal expenses have been properly incurred will act as a sufficient safeguard to prevent the inappropriate dissipation of assets.[122]

3.168 For this reason, the AFP proposed that PoCA be amended so that legal expenses cannot be met from property restrained as part of unexplained wealth proceeding, in a manner consistent with other elements of that act.[123]

3.169 Currently, people who are subject to orders under the POCA, including unexplained wealth orders, are entitled to legal aid. Legal aid costs are then met from the Confiscated Assets Account — the account into which the value of confiscated proceeds and instruments of crime is paid.[124] In the last two years, a total of $1.1 million has been paid from the Confiscated Assets Account to legal aid commissions in this manner.[125]

3.170 Under paragraph 330(4)(c) of PoCA, if a suspect uses proceeds of crime to pay a lawyer for reasonable legal expenses incurred in connection with an application under PoCA or defending a criminal charge, the money paid to the legal practitioner would cease to be the proceeds of crime. This protects lawyers from being found to be in possession of proceeds of crime.[126]

3.171 The Law Council of Australia was against the AFP proposal, arguing that respondents should continue to exercise a degree of control over their choice of legal representative as a fundamental aspect of the right to fair trial. Furthermore, the Law Council was concerned about the burden on legal aid commissions arising from complex PoCA proceedings.[127]

3.172 Whilst the Law Council would like to see the PoCA amended so that respondents are able to access restrained assets for the purposes of funding their legal costs for all proceeds of crime proceedings under the PoCA, the Law Council submits that it is particularly important that such a provision is retained in relation to unexplained wealth matters, which involve a reverse onus of proof. Similar arguments were made by the Queensland Law Society.[128]

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122 AFP, *Submission 9*, p. 14–15. See also ACC, *Submission 8*, p.3.

123 AFP, *Submission 9*, p. 14.

124 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 6.

125 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 7.

126 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 5.

127 Law Council, *Submission 3 (supplementary submission)*, p. 13.

128 Law Council, *Submission 3 (supplementary submission)*, p. 13; Queensland Law Society, *Submission 1*2, p. 4.

3.173 The committee was concerned about the potential for further burden to be placed on the legal aid system and sought supplementary evidence from AGD. The committee notes that Part 4-2 of PoCA allows a legal aid commission to recover legal costs for:

- representing a person whose property was, at the time of the representation, covered by a restraining order, and
- representing a person who was a suspect at the time of the representation and whose property was at that time covered by a restraining order, in proceedings for defending any criminal charge against the person.[129]

3.174 To recover their legal costs, legal aid commissions must give the Official Trustee a bill for their costs. The process through which the reimbursement is provided appears to be relatively swift.[130] Given that legal aid commissions are recompensed in this way for PoCA work, the committee is of the view that the budget of legal aid commissions would not be significantly affected if the same system applied to unexplained wealth proceedings.

3.175 In response to the view that a respondent should be entitled to exercise a degree of control over their choice of legal representative as a fundamental aspect of the right to a fair trial, AGD noted that the right to fair trial only applies in criminal proceedings.[131] Article 14 of the International Covenant on Civil and Political Rights states, in part, that in the determination of a criminal charge against a person, he is entitled to defend himself in person or through legal assistance of his own choosing.[132]

3.176 The committee agrees with AGD's view that it is nevertheless important to ensure that people who are subject to proceedings under the PoCA have access to legal advice and representation, which in this case can be achieved through the provision of legal aid in PoCA matters.[133]

3.177 On balance, the committee is of view that the provisions relating to legal expenses should be harmonised so that unexplained wealth provisions and other types of proceedings within PoCA are treated in a similar manner.

Recommendation 10

3.178 The committee recommends that legal expense and legal aid provisions for unexplained wealth cases be harmonised with those for other *Proceeds of Crime Act 2002* proceedings so as to prevent restrained assets being used to meet legal expenses.

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129 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 3.

130 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 3.

131 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 4.

132 *International Covenant on Civil and Political Rights*, Article 14.3(d).

133 AGD, answer to question on notice, 2 March 2012 (received 9 March 2012), p. 4.

Granting the ability to create and register a charge over restrained property

3.179 Under sections 142 and 169 of the PoCA, a charge can be created over restrained property to secure the payment to the Commonwealth of either a pecuniary penalty order or a literary proceeds order. However, a charge on the property is only possible where the restraining order over the property relates to the offence that led to the pecuniary penalty order or literary proceeds order being made, or a related offence. This ensures that property is available to satisfy a pecuniary penalty order or a literary proceeds order if a person does not pay the amount specified in the order.[134]

3.180 The AFP was concerned that provisions within PoCA may complicate the enforcement of unexplained wealth orders. Specifically, the AFP noted while the process for enforcing an unexplained wealth order is substantially similar to that for pecuniary penalty orders, it does not include any equivalent provisions which deal with the creation and registration of charges over property restrained to satisfy an unexplained wealth order. As the AFP submitted:

> This creates the potential for a situation in which, following the making of an unexplained wealth order, the Commonwealth cannot effectively enforce the order because its interests over property cannot be secured.[135]

3.181 For this reason, the AFP proposed that provisions similar to sections 142 and 143 be inserted into Division 4 of Part 2-6 of PoCA. This would ensure that the Commonwealth could create and register a charge over property that has been restrained by the court to satisfy an unexplained wealth order.[136] AGD also saw an advantage in this proposal.[137]

Recommendation 11

3.182 The committee recommends that the enforcement provisions for unexplained wealth orders include an ability to create and register a charge over property that has been restrained by the court to secure the payment of an unexplained wealth order.

Judicial discretion

3.183 In the making of final orders for most proceedings under the PoCA, if the appropriate conditions and tests are satisfied, then the court must make that final order. In the case of unexplained wealth orders, however, the court retains a discretion and may, rather than must, make the order, even though the CDPP or the agency bringing the application meets all of the requirements. As the ACC informed the

134 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 11.

135 AFP, *Submission 9*, p. 16.

136 AFP, *Submission 9*, p. 16.

137 AGD, answer to question on notice, 16 December 2011 (received 1 February 2012), p. 11.

committee, there is no information within the legislation that guides that discretion or explains why the order might be refused.[138]

3.184 When the original bill for an unexplained wealth scheme, the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, was first introduced to Parliament, the provisions in the bill did not include judicial discretion of the type now in place. Under the original terms, when appropriate conditions and tests were satisfied, the courts must make unexplained wealth orders, relating to: restraint (section 20A); a preliminary order to appear (section 179B); and payment of an amount of unexplained wealth to the Commonwealth (section 179E).[139]

3.185 The Senate Legal and Constitutional Affairs Legislation Committee recommended that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so. The committee cited concerns about a range of matters including:

- the potential for the provisions to be used where it has proved too difficult or time consuming to meet the exacting requirements of criminal prosecution of offences;
- that the provisions are not limited to the targeting of major criminal figures; and
- the potential inability of respondents to proceedings to produce records that may have been accidentally destroyed. [140]

3.186 Amendments made in the Senate adopted the recommendation to create judicial discretion for orders to pay an amount of unexplained wealth to the Commonwealth under section 179E. The amendments made in the Senate also went further and created a judicial discretion for restraining orders (Section 20A) and preliminary orders to appear (section 179B).

3.187 Civil Liberties Australia was keen for the discretion to remain, stating:

> Our No. 2 recommendation is that, whatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.[141]

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138 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, pp 12, 15–16.

139 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, first reading.

140 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, pp 57–59.

141 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 40.

3.188 Similarly, the Law Council highlighted the need for judicial discretion to remain due to the unique nature of unexplained wealth provisions.[142]

3.189 The Queensland Law Society objected to the removal of judicial discretion in these provisions, as it allows courts to be responsive and flexible to the individual circumstances of a case. It argued that this is particularly important in the case of unexplained wealth provisions as they reverse the onus of proof. It also pointed out that no cases have come before the courts as yet, and are therefore untested.[143]

3.190 The ACC informed the committee that there were three levels of discretion in place, in the form of 'may versus must', a general public interest test and an interests of justice test. As the ACC explained:

> The interests of justice provision was inserted to meet the High Court international finance case that arose out of the New South Wales Crime Commission's legislation. Clearly, there is a sensible constitutional reason to put that level of discretion in, but it seems to us that we cannot see a policy reason for the inconsistency between the broad scope of the discretion under unexplained wealth as opposed to the other provisions...

3.191 The ACC noted that there may be an opportunity to guide the judicial discretion, which has informed other recommendations in this report, including amending the objects of PoCA to include undermining criminal enterprise.[144]

3.192 Representatives from the CDPP noted that particular concerns may emerge if the case was based on criminal intelligence and judicial discretion was removed, stating:

> To basically have a system whereby a court did not have a discretion not to restrain a person's assets based on material that might be of an intelligence nature only might be something that would create an issue for the courts. I would need to consider it a bit more carefully.[145]

3.193 The Attorney-General's Department indicated that its preference for the unexplained wealth provisions would be for consistency between the various measures of PoCA, including unexplained wealth orders, meaning if the necessary tests were satisfied, the court would be obliged to make the order. As Mr Iain Anderson, AGD explained:

> I am not suggesting that the judiciary should not have a discretion as to whether they make orders at all. They will always have the ability to refuse to make an order [brought] by the party. Obviously, if we remove that discretion completely, then that would be constitutionally invalid in itself

142 Law Council, *Submission 3 (supplementary submission)*, p. 12.

143 Queensland Law Society, *Submission 12*, p. 3.

144 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, pp 12, 15–16.

145 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 29.

> under chapter 3. So the court will always have to be satisfied by the Commonwealth that an order should be made and that there is sufficient case for the onus to be put on to the other person to justify why their assets should not be forfeited or restrained. So, if the person can provide an explanation of the sources of their wealth that is credible, then they have nothing to worry about. [146]

3.194 The committee is of the view that there does not seem to be a strong case for a specific unexplained wealth judicial discretion relating to restraining orders and preliminary orders to appear, given there is limited impact on an individual subject to those types of orders and that there are already significant safeguards in place, such as:

- the requirement for a court to be satisfied that the tests for the orders have been met;
- the judicial discretions of general public interest and the interests of justice tests that need to be satisfied;
- the standard powers courts have to order costs; and
- oversight by this committee.

3.195 The committee also notes that the Senate Legal and Constitutional Affairs Legislation Committee did not make any recommendations regarding the orders under PoCA section 20A and 179B.

3.196 For this reason, the committee recommends that the judicial discretion in relation to unexplained wealth restraining orders and preliminary unexplained wealth orders be removed in cases where the amount of unexplained wealth is greater than $100 000. The discretion, and hence extra safeguard, would remain in place for cases where the amount of unexplained wealth was below this amount.

Recommendation 12

3.197 The committee recommends that the court's discretion to make a restraining or preliminary unexplained wealth order under subsections 20A(1) and 179B(1) of the *Proceeds of Crime Act 2002* be removed in cases where the amount of unexplained wealth is more than $100 000, so that the court must make the order in cases over $100 000.

3.198 The committee is aware that orders to pay an amount of unexplained wealth under section 179E of the PoCA to the Commonwealth, may have a significant impact on the individuals concerned. The committee notes however, that the test to be satisfied is substantial. Paragraph 179E(1)(b) requires that an unexplained wealth order **may** be made if:

146 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, pp 37–38.

(a) the court is not satisfied that the whole or any part of the person's wealth was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;

(ii) a foreign indictable offence;

(iii) a State offence that has a federal aspect.[147]

3.199 The committee observes that judicial discretion relating to orders to pay an amount of unexplained wealth to the Commonwealth under section 179E of the PoCA may limit the effective use of the unexplained wealth laws, and recommends its removal where the amount of unexplained wealth is above $100 000.

Recommendation 13

3.200 The committee recommends the court's discretion to make an unexplained wealth order under subsection 179E(1) of the *Proceeds of Crime Act 2002* be removed where the amount of unexplained wealth is above $100 000, so that the court must make the order in cases over $100 000, and that the following additional statutory oversight arrangements be made:

- **law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations;**
- **the Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that Ombudsman does for controlled operations; and**
- **the oversight by the Parliamentary Joint Committee on Law Enforcement be enhanced so that in addition to appearing when required, that the ACC, AFP, DPP and any other federal agency or authority must brief the committee on their use of unexplained wealth provisions as part of the committee's annual examination of annual reports of the ACC and AFP.**

147 *Proceeds of Crime Act* 2002, ss. 179E(1)(b).