



11 September 2009

Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
PO Box 6100
Parliament House
CANBERRA ACT 2600

Questions on Notice to the Australian Federal Police Association branch of the Police Federation of Australia, Re: Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*.

1. Is there evidence of misuse of existing Unexplained Wealth provisions?

The AFPA is not aware of any misuse of unexplained wealth provisions as they exist in the Northern Territory or Western Australia.

The only suggestion of misuse of unexplained wealth provisions was put by Civil Liberties Australia. If it suits the Committee, we would like to clarify a section of the submission made by Civil Liberties Australia in its opening statement to the Senate Legal and Constitutional Affairs Committee on Friday 28 August.

The AFPA believes that this section has some silences which may lead to confusion, or at worst, misrepresent the law being applied in the Northern Territory in relation to the case referred to.

Mr Rowlings stated:

Will officials overzealously pursue matters and abuse their powers? Consider the current case before the Northern Territory Supreme Court where the Northern Territory DPP is pursuing a man—and he is an ordinary man; a fitter on an oil rig—who, as far as we understand, is not a bikie gang member or heavy and is not a member of the mafia or a mafia crime boss. The DPP in the Northern Territory under this type of legislation is pursuing this man for \$1.5 million for growing 18 marijuana plants under the civil provisions of this type of legislation. We have given you the case there, which has been referred by a single judge in the Supreme Court to a full bench. The particularly relevant part of that is the very last clause.¹

It is the AFPA's understanding that the person in question was never subject to an unexplained wealth declaration under the Northern Territory's *Criminal Property Forfeiture Act 2003*. See *DPP v Green* [2009] NTSC 21.

The case involved a significant hydroponic marijuana establishment which was raided, and 18 mature plants were seized, but there was evidence of large scale production in the large Mango packing shed owned by the defendant.

The person was pursued in under s81 of the Act, which pertains to the 'crime-used property substitution'. This is not part of the Northern Territory's Unexplained Wealth provisions contained in Division 3 ss 67-72.

The AFPA has never recommended, through the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups, nor through the Senate

¹ Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Melbourne, 28 August 2009, 15 (Bill Rowlings, Secretary Civil Liberties Australia)

Committee process, that the Commonwealth should adopt the 'crime-used property substitution declarations' or like provisions. Indeed, the Government has not drafted any similar provision as part of the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*.

The AFPA recommendation to the Parliamentary Joint Committee on the Australian Crime Commission was as follows:

That the Proceeds of Crime Act (Cth) is immediately amended to include an '*Unexplained Wealth*' provision mirroring ss. 67-72 of the *Criminal Property Forfeiture Act 2003 (NT)* consistent with Australia's obligation under 1997 Interpol General Assembly Resolution.

We hope that this has assisted the Committee in its endeavour to seek actual evidence of the operation of the unexplained wealth provisions in the Northern Territory.

2. What are the sources for Unexplained Wealth provisions under the Commonwealth's External Affairs Power?

The AFPA believes that the incorporation of true unexplained wealth provisions, that is unexplained wealth provisions not linked to any Commonwealth Offence, such as the Northern Territory and Western Australian provisions, can be adopted using the external affairs power of s51 of the Commonwealth Constitution.

The advice that the AFPA has received from leading academics is that it could be argued that unexplained wealth (not linked to a Commonwealth Offence) flow from treaty provisions relating to asset seizure and freezing of funds (and proceeds of crime more generally).

There is no Australian or other case law that the AFPA is aware of that has explored the constitutionality and scope of the proceeds of crime provisions in international law.

The supporting framework of international law which is relevant to the implementation of true unexplained wealth by the Commonwealth under the external affairs power.

Relevant international obligations include obligations referred to under the following Acts:

Proceeds of Crime Act 2002, s5(f)

The Proceeds of Crime Act 2002 refers to Australia's obligations under the:

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Article 2 – Confiscation measures

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

The Act also refers to 'other international agreements relating to proceeds of crime'.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) s3(2)

The AML/CTF Act 2006 also has a supporting framework of international law which is relevant to the implementation of true unexplained wealth by the Commonwealth.

The United Nations Convention Against Corruption, done at New York on 31 October 2003 [2006] ATS 2;

Article 20 of the *United Nations Convention Against Corruption* encourages participating parties to the Convention to consider creating an 'illicit enrichment' offence for public officials. This would enable an 'unexplained wealth offence' to be used in relation to identifying corrupt public officials in accordance with this Convention. Unexplained Wealth provisions under the *Proceeds of Crime Act 2002* as implemented under this Bill could flow from this offence creating provision.

Article 20. Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

the United Nations Convention Against Transnational Organized Crime, done at New York on 15 November 2000 [2004] ATS 12;

Article 12 of the Convention provides implied support for the adoption of unexplained wealth provisions. The AFPA believes that Art. 12.7 or 12.9 does not necessarily provide a bar to the incorporation of unexplained wealth provisions without a link to a Commonwealth Offence using the external affairs power of the Commonwealth Constitution.

Article 12. Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
 - (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
 - (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.
2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.
8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.
9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, done at Strasbourg on 8 November 1990 [1997] ATS 21;

(see under *Proceeds of Crime Act 2002*)

The following reflect international concern:

- (a) **the FATF Recommendations;**
- (b) **the United Nations Convention Against Corruption, done at New York on 31 October 2003 [2006] ATS 2;**

- (c) the United Nations Convention Against Transnational Organized Crime, done at New York on 15 November 2000 [2004] ATS 12;
- (d) the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, done at Strasbourg on 8 November 1990 [1997] ATS 21;
- (e) the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999 [2002] ATS 23;
- (f) United Nations General Assembly Resolution 51/210 A/RES/51/210 (1996);
- (g) United Nations Security Council Resolution 1267 S/RES/1267 (1999);
- (h) United Nations Security Council Resolution 1269 S/RES/1269 (1999);
- (i) United Nations Security Council Resolution 1373 S/RES/1373 (2001);
- (j) United Nations Security Council Resolution 1456 S/RES/1456 (2003);
- (k) United Nations Security Council Resolution 1617 S/RES/1617 (2005).

2. What is the AFPA's preferred model if unexplained wealth must be linked to a Commonwealth Offence?

As the AFPA stated in its submission to the Senate Legal and Constitutional Affairs Legislation Committee, if the Constitution provides a head of power for the legislation of UWP only where it is linked to a Commonwealth criminal offence, **the AFPA proposes a two tiered structure of reform, which will enhance the Bill's provisions using existing, and therefore Constitutionally valid, Commonwealth legislative provisions.**

Tier 1 – 'Suspected of committing an offence' is given a broad meaning [Re s20A(1)(g) and (3)(c), s179B (linked to 179E(2)(b))]

Recommendation:

These sections should be amended respectively with a paragraph identical to s219 of the *Proceeds of Crime Act 2002* (Cth) where 'suspected of committing an offence means a person':

- (i) has committed, or is about to commit, a offence; or
- (ii) was involved in the commission, or is about to be involved in the commission, of such offence; or
- (iii) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such offence;

Please note that this section is already part of the *Proceeds of Crimes Act 2002* with respect to Monitoring Orders, so it is likely that its use by replication would be valid with respect to unexplained wealth orders and restraining orders.

Tier 2 – Links to Commonwealth Offences are deemed [Re s20A(1)(g) and(3)(c), s179B (linked to 179E(2)(b))]

Recommendation:

These sections should be amended in relation to 'reasonable ground to suspect' by the insertion of two new paragraphs, providing express examples of what may be deemed to be required to satisfy 'reasonable grounds to suspect' by using deeming provisions similar to s400.9(2) of the *Criminal Code 1995* (Cth) in relation to money laundering offences.

- (a) the conduct referred to involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Financial Transaction Reports Act 1988* that would otherwise apply to the transactions; or
- (aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Anti Money Laundering and Counter Terrorism Financing Act 2006* that would otherwise apply to the transactions; or
- (b) the conduct involves using one or more accounts held with ADIs in false names; or
- (ba) the conduct amounts to an offence against section 139, 140 or 141 of the *Anti Money Laundering and Counter Terrorism Financing Act 2006* ; or
- (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure; or
- (d) the conduct involves a significant cash transaction within the meaning of the *Financial Transaction Reports Act 1988* , and a person or entity:
 - (i) has contravened his or her or its obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or
- (da) the conduct involves a threshold transaction (within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*) and a person or entity:
 - (i) has contravened his or her or its obligations under that Act relating to reporting the transaction; or
 - (ii) has given false or misleading information in purported compliance with those obligations; or
- (e) a person or entity:
 - (i) has stated that the conduct was engaged in on behalf of or at the request of another person; and
 - (ii) has not provided information enabling the other person to be identified and located.

- (3) This section applies if there are reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.

On behalf of the Australian Federal Police Association I would again like to thank the Committee for allowing us to put our submissions before it in considering this Bill.

Unexplained Wealth provisions are one of the most effective tools that can be used to combat serious and organised crime.

Yours sincerely,

A handwritten signature in black ink, reading "Jon Hunt-Sharman". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

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