

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

Question on Notice 1

The committee's discussion paper on unexplained wealth, released in November 2011, included a series of suggestions on page xxi, based on the evidence provided to the committee so far. The committee seeks further information regarding these suggestions, including the advantages and disadvantages of the suggested policy changes.

1. Making the objects of the Proceeds of Crime Act more explicit, particularly in relation to the purpose of unexplained wealth laws and the definition of serious and organised crime

Section 5 of the Proceeds of Crime Act (POCA) sets out the principal objectives of the Act. These include: 'to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences...'

Amending the objectives to articulate the key aim of unexplained wealth laws may assist the court in exercising some of its discretions in relation to unexplained wealth orders, provided that any amendments accurately reflect the scope and purpose of the laws.

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.

2. Minimising the need to prove a Commonwealth offence

The connections to offences within Commonwealth power are required to ensure that the unexplained wealth provisions are constitutional. This places some limitations on the operation of those provisions as compared to similar State and Territory regimes. Connections are required at both restraining order and forfeiture order stage.

The Senate Legal and Constitutional Affairs Committee's inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 considered whether the external affairs power could be relied upon to broaden the application of the Commonwealth's unexplained wealth provisions. The Attorney-General's Department advised at that time that relying on the external affairs power in conjunction with international conventions relating to organised crime, corruption and money laundering would not support a comprehensive unexplained wealth regime. The Department is not aware of any international treaties established since that time that could support reliance on the external affairs power in relation to this issue.

3. Amending search warrant powers

The Department agrees that there are currently limitations to the ability to seize evidence and is open to considering reform options in this area.

Existing search warrant provisions

Under Part 3-5 of the POCA, a magistrate can issue a warrant to search a premises if there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, 'tainted property' or 'evidential material' at the premises.

The current definition of 'evidential material' includes evidence relating to:

- property in respect of which action has been or could be taken under this Act
- benefits derived from the commission of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, or
- literary proceeds.

Under section 228 of the POCA, officers executing a search warrant may search for and seize the kinds of evidential material or 'tainted property' specified in the warrant. They may also seize the following things, if they reasonably believe that it is necessary to do so to prevent their concealment, loss, destruction, or use in an offence:

- tainted property to which the warrant relates
- evidential material in relation to property to which the warrant relates, or
- evidential material, as defined by the *Crimes Act 1914*, relating to an indictable offence.

Section 3C of the Crimes Act defines ‘evidential material’ as a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.

Section 3E of the Crimes Act also allows for a court to issue a warrant where there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, evidence on the premises relevant to a Commonwealth indictable or summary offence. Consequently, it would be possible to use this provision instead of the POCA search warrant provisions where there was a suspicion that evidential material in relation to a particular offence could be found at a premises.

Use of search warrants to collect evidence in relation to unexplained wealth

Paragraph (a) of the definition of ‘evidential material’ in the POCA would allow the collection of some evidence in relation to property in respect of which unexplained wealth proceedings could be brought. However, it is not clear whether this 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.

Once a warrant under the POCA had been obtained, it would also be possible for an officer executing the warrant to collect material relevant to an indictable offence if they thought that evidence might otherwise be concealed or destroyed (under section 228). However, they would not be able to collect evidence relating to summary offences (even though restraint action in unexplained wealth matters can be based on the commission of either a summary or indictable Commonwealth offence).

Expanding the search warrant provisions to include evidence relevant to unexplained wealth proceedings

Expanding the definition of ‘evidential material’ in the POCA to include evidence relevant to unexplained wealth proceedings 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 (ie most homes and businesses).

An alternate 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.

4. Enabling the ATO to receive intercept information

The *Telecommunications (Interception and Access) Act 1979* (TIA Act) does not currently allow for the communication of intercepted information to the Australian Taxation Office (ATO) for the ATO's own purposes. The ability to use intercepted information in this way is currently limited to interception agencies (law enforcement and anti-corruption agencies) that are investigating prescribed offences.

However, the ATO does currently have extensive powers enabling it to access telecommunications data and stored communications information under the TIA Act. As an enforcement agency for the purposes of the TIA Act, the ATO is able to:

- authorise the disclosure of telecommunications data (information about a communication, such as date, time and location) to assist with the enforcement of the criminal law, laws imposing pecuniary penalties, or the protection of the public revenue, and
- apply for a warrant enabling covert access to stored communications when investigating offences that are punishable by at least 3 years imprisonment or defined penalty units. These provisions enable access to the content of the relevant communication.

In relation to intercepted information, section 67 of the TIA Act enables interception agencies, including the AFP and the Australian Crime Commission (ACC), to share information to further their investigations. While interception agencies are only able to apply for interception warrants to assist in the investigation of serious offences (generally offences subject to at least 7 years imprisonment), they are able to use that information in the investigation of prescribed offences (generally offences subject to at least 3 years imprisonment) under section 67. These agencies are also able to submit intercepted information into evidence in exempt proceedings which are defined in section 5B as including a proceeding for a prescribed offence and proceedings for the confiscation or the forfeiture of property.

Section 67 currently enables an interception agency to communicate information to the ATO to assist in the interception agency's investigations. Examples include joint operations into serious tax fraud. However, the ATO is limited in what it can do with any information it receives. Section 73 provides that 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.

The TIA Act does contain provisions which enable interception agencies to share information for the receiving agencies' purposes under section 68. In these cases, one interception agency can communicate information to another interception agency and the

receiving agency can use that information for its own purposes. However, these provisions have been limited to interception agencies only and limited to defined offences generally punishable by at least 3 years imprisonment.

The TIA Act is constantly under review to ensure its ongoing effectiveness in protecting the privacy of users of the telecommunications system and proportionate access to communications for law enforcement purposes.

5. Options for dispute resolution and administrative forfeiture

Dispute resolution

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). This provision is used by prosecuting authorities to ‘settle’ matters.

Introducing alternative dispute resolution into the POCA 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.

The inclusion of dispute resolution mechanisms in proceeds of crime proceedings was considered during the development of the *Civil Dispute Resolution Act 2011*. Proceeds of crime proceedings were ultimately exempt from the Act’s requirement that parties to civil proceedings must take genuine steps to resolve their dispute before commencing court proceedings. The Explanatory Memorandum to that Act states that undertaking genuine steps would not be appropriate in this context due to the fact that one of the POCA’s key objectives is to enable law enforcement agencies to trace proceeds of crime.

Administrative forfeiture

Section 92 of the POCA provides that property covered by a restraining order under section 17 or 18 is automatically forfeited upon a person’s conviction of a serious offence. An order of the court is not required.

Apart from this provision, all restraint and forfeiture under the POCA is overseen by a court. This serves as a safeguard by ensuring that an independent judicial officer is satisfied that the relevant legislative requirements have been met.

While there are some examples of administrative forfeiture in Commonwealth legislation, these are not common and are confined to circumstances in which there is a demonstrated need for such provisions. Administrative forfeiture within Commonwealth legislation is also generally limited to narrow classes of items that are easy to identify. For example, Part 1E of the Crimes Act was introduced to provide a more immediate mechanism for forfeiting child abuse material and child pornography, which it is a criminal offence to possess. It is relatively straightforward for an officer to determine whether it is appropriate to confiscate particular material under Part 1E. The process for determining whether a person has committed an offence, or whether property is the proceeds or instrument of a crime, is considerably more complex.

6. Preventing legal expenses being met from restrained property

The ability of a person to dispose of restrained property to meet their legal costs weakens the effectiveness of the unexplained wealth provisions by allowing the wealth suspected to have been unlawfully acquired to be used to contest proceedings. This may also lead to fewer assets ultimately being available for confiscation if an unexplained wealth order is successful and is likely to draw out proceedings. People who are subject to other proceeds of crime orders are not entitled to meet their legal costs from restrained property.

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.

The provisions allowing restrained property to be used to meet legal costs were included as a result of amendments moved by the Opposition. The Government accepted these amendments in the interest of securing passage of the Bill.

7. Setting up special courts or judges

The decision to establish a new court (either to hear unexplained wealth matters or proceeds of crime matters more generally) is ultimately a matter for Government. However, there are a number of disadvantages to establishing a new court or setting up specialist judges to hear unexplained wealth matters.

Current process for determining the court in which proceeds of crime matters are heard

Section 335 of the POCA currently sets out a number of tests for determining the court and jurisdiction in which proceeds of crime matters are heard. Most proceeds of crime matters are heard in the State or Territory in which the conduct occurred that constitutes the offence to which the proceeds of crime order relates. Matters are heard by the courts that have jurisdiction to deal with indictable criminal matters.

Impediments to setting up special courts or judges to hear proceeds of crime matters

It is generally not advisable to create separate federal courts for work which could be done by existing courts, unless there are compelling reasons to do so. The creation of any new court would be costly, requiring new administration and resourcing. This includes costs such as judicial salaries and pensions.

There is also an advantage to using existing courts where there is likely to be overlap between the jurisdiction of existing courts and the proposed jurisdiction of the specialist court. For example, in relation to conviction based forfeiture, the POCA currently allows for confiscation proceedings to be heard at the same time as the sentencing of the defendant, which saves court time.

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. While proceeds of crime matters can be complex, we are not aware of any evidence to indicate that the current processes for hearing these matters are ineffective.

Impediments to setting up special courts or judges to hear unexplained wealth matters

The courts which hear proceeds of crime matters in Australia have experience in dealing with POCA matters. As such, there is an advantage in having these courts continue to bring their experience to bear in determining unexplained wealth matters, which are closely related to other confiscation orders under the POCA.

Specialist divisions within existing courts could be created to hear unexplained wealth matters, or proceeds of crime matters generally, but it is considered preferable for judges to have broad experience across a range of different practice areas, rather than hear matters in only one area.

The hearing of unexplained wealth matters in separate courts could also hinder the prosecution's ability to move between different types of proceeds of crime orders. For example, under the POCA, property may be restrained on the basis that it is anticipated that the matter will proceed under civil confiscation provisions. However, as further evidence is obtained, it may be deemed more appropriate to bring proceedings under the unexplained wealth provisions. If these matters had to be heard in separate courts, there

could be difficulty in transitioning between the different types of orders. It would also result in inefficiencies, as the matter would have to be heard before two separate courts.

8. Establishment of a threshold below which unexplained wealth matters must satisfy additional tests, or cannot be prosecuted

As the AFP has noted previously, due to the limited resources available to investigate and prosecute unexplained wealth matters, their resources are generally directed towards serious and organised crime targets. Consequently, in practice, matters are generally only considered once the value of the unexplained wealth involved reaches a certain level.

If additional tests are created for situations where the unexplained wealth in question is below a threshold amount, this will place an even greater emphasis on law enforcement agencies having a comprehensive understanding of a person's financial affairs prior to proceedings being commenced, although the degree to which this would occur may vary depending on the nature of the additional tests introduced. This may shift the focus from a person being required to demonstrate that their wealth was legitimately obtained and place a greater burden on law enforcement.

If a threshold test were introduced, it would be necessary 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. For example, such provisions could specify that a threshold test is applied at the commencement of a matter only, or could provide that it applies at any stage of proceedings, depending on the approach chosen.

None of the existing State or Territory unexplained wealth regimes employ a threshold below which matters cannot be prosecuted or must satisfy additional tests.

9. Removing the requirement to meet an evidence threshold twice

Affidavits at both the restraining order stage and the preliminary unexplained wealth order stage are currently required to state the reasonable grounds on which an officer suspects that a person's total wealth exceeds the value of their lawfully acquired wealth. The requirement that this information be provided at the preliminary unexplained wealth order stage was incorporated in response to a recommendation of the Senate Legal and Constitutional Affairs Committee's inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009. The Committee was of the opinion that, because an authorised officer is already required to hold such a suspicion in order to

apply for a preliminary unexplained wealth order, a requirement to state the basis of that suspicion would not place any additional burden on law enforcement agencies.

The effect of this amendment is that, where a restraining order and a preliminary unexplained wealth order are sought, authorised officers are required at two separate stages to provide affidavits stating their reasonable grounds for suspicion. Removing this duplication would have a beneficial impact on efficiency and resourcing for law enforcement agencies and for the courts.

In some circumstances, evidence that is relevant to showing that a person's total wealth exceeds their lawful wealth may be discovered after a restraining order has been obtained and prior to an application for an unexplained wealth order being made. For example, examination orders are only available after a restraining order has been made and may uncover further evidence relevant to a person's sources of income. Where this occurs, it is important that there is a mechanism for this to be reflected in the affidavit of the authorised officer.

The Committee may wish to consider other mechanisms to achieve the same objective. For example, the 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.

The POCA does not require a restraining order to be in place before a preliminary unexplained wealth order is sought, although in practice a restraining order would usually be in place before any other steps were taken. As a result, the requirement to provide an affidavit stating reasonable grounds for suspicion should only be removed at the preliminary unexplained wealth order stage in cases where a restraining order has been granted under the unexplained wealth restraining order provisions.

10. Extending the time limit for notices of preliminary unexplained wealth orders

Extending the time limit for giving notice of an application for a preliminary unexplained wealth order will 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. If, as the AFP suggests in its submission, extensions are made upon application by the Commonwealth, there will be court oversight to ensure that extensions are granted appropriately.

11. Prescription of taskforces under the *Taxation Administration Regulations 1976*

The Department supports efforts to streamline procedures for prescribing taskforces under the *Taxation Administration Regulations 1976* and supports the prescription of the Criminal Assets Confiscation Taskforce under the Regulations. The sharing of taxation information through taskforces is an effective way to enhance law enforcement investigations, subject to the application of appropriate safeguards governing the use and distribution of information. Amendments to the Taxation Administration Regulations are the responsibility of the Minister for Finance and Deregulation.

12. Streamlining the implementation of taskforces

The Department supports the establishment of taskforces where there are operational benefits to bringing together different agencies to address identified law enforcement needs.

The Organised Crime Strategic Framework encourages the use of taskforces to develop a range of capabilities for responding to organised crime. These capabilities include strengthening intelligence, information sharing and interoperability capabilities to enhance the understanding of organised crime networks, as well as the formation of a complete intelligence picture drawing on the knowledge and input of different agencies involved in responding to organised crime.

Taskforces should only be created where there is an identified law enforcement need or where it would lead to increased operational efficiencies. Participation in multiple taskforces can have an impact on agency resourcing, especially for smaller agencies.

The Criminal Assets Confiscation Taskforce is an example of how a taskforce can be used to target specific law enforcement issues that require cross-agency cooperation. The Taskforce brings together agencies with a key role in the investigation and litigation of proceeds of crime matters, including the AFP, the Commonwealth Director of Public Prosecutions, the ACC and the ATO to enhance the identification of potential asset confiscation matters and strengthen their pursuit.

This Taskforce reduces duplication across participating agencies by enabling the development of a confiscation strategy best suited to maximising disruption in each individual case, whether via proceeds action, tax remedies, civil debt recovery or recovery through international cooperation with foreign law enforcement agencies.

The prescription of taskforces for the purpose of sharing taxation information is a matter for the Minister for Finance and Deregulation.

13. Improving international cooperation in relation to unexplained wealth matters

The Department is considering legislative options to amend the *Mutual Assistance in Criminal Matters Act 1987* to facilitate the making and receipt of requests for evidence to support unexplained wealth proceedings.

Australia is at the forefront of implementing and developing unexplained wealth laws, which are relatively new internationally. As a result, some countries may initially be reluctant to provide information relating to unexplained wealth proceedings, particularly in situations where there is no link to an offence.

The Department is also working to increase awareness of unexplained wealth laws in its law and justice capacity building programs in the region.

The Department is open to consideration of other options for improving international cooperation.

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

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.

There would be an advantage in inserting a provision into the POCA creating a charge over property restrained under section 20A to ensure that there is property to satisfy an unexplained wealth order if a person does not pay an unexplained wealth amount.

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

The Department is aware of comments made by law enforcement agencies indicating that it can be difficult to obtain the evidence currently required to secure an unexplained wealth order.

Creating a provision that deems certain types of wealth to have been unlawfully obtained, or treating large amounts of unexplained cash as a criminal commodity, will extend the current unexplained wealth laws and would place an additional burden on people to prove

their wealth was lawfully obtained. 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 (eg through an inheritance, gift, scholarship or certain overseas sources) may not necessarily appear in a person's tax returns.

People who deal with large amounts of unexplained cash may also be caught under the offences of dealing with property reasonably suspected of being proceeds of crime under section 400.9 of the *Criminal Code Act 1995*. There are also a range of taxation powers that can be used where people appear not to have declared all of their income.

The Department supports efforts to make unexplained wealth provisions more effective for law enforcement agencies, while ensuring that they are fair and appropriate in their operation. If the proposed approach were adopted, the inclusion of safeguards, including a threshold, would be desirable. Consideration would also need to be given to constitutional validity.

16. Separating unexplained wealth provisions from POCA and placing them in stand-alone legislation

It is not clear what the benefit of placing unexplained wealth provisions in stand-alone legislation would bring. There are a number of benefits to keeping unexplained wealth provisions in the POCA.

Firstly, due to existing connections with other legislation such as the Mutual Assistance in Criminal Matters Act and the Crimes Act, evidence for proceedings under the POCA can be obtained from a broad range of sources, including information held by other domestic and international law enforcement agencies. The POCA also contains its own evidence and information gathering powers. If unexplained wealth provisions were moved to stand-alone legislation, preserving the existing powers would require amendments to a number of existing acts and the inclusion of provisions in the new act that replicate powers that already exist for the POCA.

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. This is useful in situations where, although proceedings have commenced to seek a particular type of order, it later becomes preferable to seek a different type of order instead. For example, proceedings may commence as an application for an unexplained wealth order, but evidence emerges during the course of investigation that makes a non-conviction based forfeiture order a more appropriate option. In this situation, section 27 of the POCA expressly allows a proceeds of crime authority to change the type of restraining order

sought against property in relation to an offence. This flexibility may be reduced if the unexplained wealth provisions were moved to another Act.

Thirdly, 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. As a consequence, it is logical to include unexplained wealth laws within the same legislation as other proceeds of crime orders, even though they have slightly different features.

Western Australia, the Northern Territory, New South Wales, Queensland and the Commonwealth all include unexplained wealth provisions (or the relevant equivalent in Queensland's case) within their broader criminal assets confiscation Acts. Only South Australia has created a separate Act for unexplained wealth laws. No proceedings have been brought in South Australia at this time.

17. Gaps that are being exploited in Australian jurisdictions

This issue is discussed in the Department's response to the Committee's second Question on Notice.

18. Development of arrangements to enable the sharing of proceeds by non-participating States and Territories

Currently, New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Commonwealth have provisions that allow for the sharing of recovered assets with other jurisdictions that have made a significant contribution to the recovery of proceeds, or to the investigation or prosecution of the relevant unlawful activity. These provisions are often referred to as the 'equitable sharing program'.

As noted above, the Confiscated Assets Account is the account into which the proceeds of confiscated assets are paid. Under section 297 of the POCA, the Minister can make a payment out of the account to States, Territories and foreign countries as considered appropriate under the equitable sharing program.

The Commonwealth's equitable sharing provisions have been effectively used since their introduction. A list of payments made under the equitable sharing program can be found at:

http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/POCA_funding_for_Non-Government_Agencies.

19. Harmonisation of Commonwealth and State and Territory laws, considering options such as developing a set of guiding principles for unexplained wealth laws, model legislation, referral of powers, or international linkages

This issue is discussed in the Department's response to the Committee's second Question on Notice.