CLA

Civil Liberties Australia Inc., Box 7438 Fisher ACT 2611

Submission to inquiry into the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (the 'Bill').

Thank you for the invitation to comment on this Bill.

Civil Liberties Australia is concerned that the Bill has arisen out of a 2011/12 parliamentary inquiry which was conducted at a time when there had been no proceedings for unexplained wealth orders brought under the Proceeds of Crime Act.[1]

As a number of the submissions made clear at the time, including from the Commonwealth Attorney General's Department, the effectiveness of the laws could not be measured in the absence of any cases. This is despite the fact that measuring the effectiveness of the laws was one of the explicit terms of reference.

CLA would add to these previous submissions by commenting that it is hard to adopt an evidence-based approach in the absence of evidence. Without an evidence-based approach, legislating is guesswork.

That previous inquiry made 18 recommendations, eight and a half of which this Bill proposes to act upon. In the absence of any supporting evidence, CLA recommends that:

- **no change be made and that this Bill not be supported by the Committee.**

That said, CLA would like to make a number of in-principle objections to unexplained wealth laws for you to consider as you examine the Bill.

Unexplained wealth laws reverse the onus of proof. They require an individual to prove their innocence to escape punishment, rather than have the state prove someone's wrongdoing.

As the explanatory memorandum for the Bill states:

> *'Under Commonwealth unexplained wealth legislation, if a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from one or more relevant offences. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.'*

[1] an inquiry by the Parliamentary Joint Committee on Law Enforcement was initiated on 13th of July 2011. At that time there were two investigations being conducted by the Australian Federal Police but no actual court proceedings (source – Attorney General's Department submission to inquiry)

The reversal of the onus of proof is far more than merely a technical legal distinction. Reversing the onus of proof has the very real impact of increasing the chances that an innocent person is punished or, in this case, that an innocent person has their private property seized and sold.

Undoubtedly most, if not all, people who read this submission and take part in the discussion around unexplained wealth would be able to prove their assets and wealth are legitimately obtained.

We are lawyers, and politicians, and public servants and highly engaged members of the community. But it is not only people like us who this law can challenge. Imagine if we were people who had lived through regular periods of unemployment, people who worked seasonal jobs or people who worked cash-in-hand jobs. We would then find it much harder to prove to a court that our house or our car were legitimately obtained. We simply wouldn't have the records and the ability to disprove the suspicions of the police. Guilty of poor record keeping, we shouldn't have our private assets taken away from us because of it.

One concern that CLA has seen become a reality in the States that have adopted their own unexplained wealth, and forfeiture, laws is that the laws have targeted the Mr Littles of crime, not the Mr Bigs as intended. This is despite the laws being explained – and justified – as a tool to target the criminal kingpins.

In the absence of any actual applications under the Commonwealth laws, there is no valid basis to argue their outcome will be any different federally. *(We note that claimed "wins" by the Australian Federal Police, which are still subject to legal objection through agencies and before the courts, should not be considered as successes until legal action ceases).*

For this reason we urge the Committee to recommend no change to the current laws until evidence is obtained. The Bill, generally speaking, is designed to smooth the operation of the unexplained wealth laws. It does not go as far as some of the police service submissions to the 2011/12 inquiry requested and reduce the evidentiary and work burden on police.

The Bill does however make unexplained wealth orders easier to obtain.

For example, in setting out the proposed changes, the explanatory memorandum states:

> *"Courts hearing unexplained wealth matters currently have a general discretion to decline to make a restraining order, preliminary unexplained wealth order or final unexplained wealth order, even if all relevant criteria for making the orders have been satisfied. The Bill will remove this discretion and will require courts to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once satisfied that the criteria for making these orders have been met.*
>
> *Courts will retain discretion to refuse to make unexplained wealth restraining orders and unexplained wealth orders where the amount of suspected unexplained wealth is less than $100,000 or it is not in the public interest to make the order."*

CLA is concerned that this change reduces the discretion of courts to ameliorate any injustice that might be occasioned should they make an order. To remove this discretion is not in the interests of justice. Such a change is inappropriate until such time as repeated applications have found this discretion for judges is a problem.

Civil Liberties Australia also draws to the Committee's attention that this Bill flies in the face of the clear and unequivocal direction the Attorney-General, Senator George Brandis QC, has indicated he wishes to take Australian justice and legislation. In announcing his reference[2] to the Australian Law Reform Commission in December 2013, the First Law Officer of Australia said:

> *"We will review the Commonwealth statutes to identify – and we will then, where appropriate repeal – those numerous instances were traditional procedural rights, such as the presumption of innocence, the privilege against self-incrimination, and legal professional privilege, have been attenuated or abrogated entirely."*

In listing the laws which the ALRC must examine, the Attorney-General highlighted:

…laws which:

- reverse or shift the burden of proof;
- deny procedural fairness by ministers, bureaucrats and the government;
- exclude the right to claim the privilege of self-incrimination;
- apply strict or absolute liability to all physical elements of a criminal offence;

(among a list of other provisions, which included laws which interfere with "vested property rights").

The ALRC is due to report in December 2014. Civil Liberties Australia believes this proposed Bill should not proceed until the ALRC report is considered by the government…because the Bill is contrary to government policy as announced by the Attorney-General.

Yours sincerely

Dr Kristine Klugman OAM
President

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2 April 2014

[2] The 'Freedoms Inquiry': http://www.alrc.gov.au/inquiries

ADDENDUMS:

1. Recent comment on unexplained wealth laws

In a recent (March 2014) academic article[3], academic lawyers Andrew Trotter and Harry Hobbs commented on such laws:

> *"...unexplained wealth laws, which go further than confiscation of criminal proceeds by imposing on the accused the evidentiary burden to prove his or her wealth was acquired by legal means. In reversing the onus of proof, unexplained wealth laws raise the risk of 'confiscating assets from innocent people because of their breadth'.[4] Western Australia was the first Australian jurisdiction to introduce such a law,[5] which, the High Court observed, was 'draconian in its operation'.[6]*

Further, they commented that:

> *"Unexplained wealth laws serve to further unravel the presumption of innocence, which the common law began weaving as early as 1468 and had more or less perfected by 1935."[7]*

Civil Liberties Australia believes laws like this are inspired by a bureaucratic effort to "outsmart" criminals by quasi-judicial means. Inevitably, the outcome is a "self-outsmarting" of the proponents of the laws (an "own goal") when they:

- catch bit players without touching middle-level criminals or crime bosses;
- inflict anguish and real human suffering on families, notably wives, young children and teenagers (people who are still presumed innocent – the children obviously are); and
- rebound on the laws' proponents when superior courts overturn the legislative over-reach in a blaze of publicity negative to the government.

Civil Liberties Australia asks why is that federal and state police forces have been unable to catch and convict the "Mr Bigs" of crime, when police forces throughout Australia have been given enormously greater powers (including secret surveillance), and budgets, over the past dozen years.

Rather than concentrating on "creative" law-making, bureaucrats, governments and all Australians would be better served if parliaments insisted on improved value for money spent on police and crime authority budgets. Catching criminals is the duty of the police: it is not the duty of MPs.

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[3] *"The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie",* Sydney Law Review, (Vol 36:1), p7. *(Both authors have recent research experience with and for the High Court of Australia).*

[4] Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups (2009) [5.59].

[5] Criminal Property Confiscation Act 2000 (WA).

[6] Mansfield v DPP (WA) (2006) 226 CLR 486, 503 [50] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

[7] Sydney Law Review, (Vol 36:1), p37

Adddendum 2. Real, 'live' case from the Northern Territory on "forfeiture laws', the companions of "unexplained wealth" laws: how badly-written laws can work in practice…

NOTE: Mr Green was a fly in-fly out welder who grew about 20 marijuana plants in a shipping container on land leased to start a new (legitimate) small business. There was never any suggestion, even by police or prosecutor, that he was a "Mr Big" of crime, or that he was wealthy.

EXCERPT FROM…

DPP v Green [2010] NTSC 16 (4 May 2010) Last Updated: 29 November 2010

IN THE MATTER OF THE *CRIMINAL PROPERTY FORFEITURE ACT* AND
IN THE MATTER OF LLOYD GREEN
BETWEEN:
PARTIES: DIRECTOR OF PUBLIC PROSECUTIONS
v
LLOYD GREEN

TITLE OF COURT: FULL COURT OF THE SUPREME COURT OF THE NT
JURISDICTION: FULL COURT OF THE SUPREME COURT OF THE NT EXERCISING TERRITORY JURISDICTION UPON REFERENCE PURSUANT TO S 21 OF THE *SUPREME COURT ACT*

FILE NO: No 82 of 2008 (20817720)
DELIVERED: 4 MAY 2010
HEARING DATES: 30 and 31 March 2010

JUDGMENT OF: MARTIN CJ, MILDREN & REEVES JJ

Martin CJ:
[1] For the reasons given by Mildren J, I agree that only the first question should be answered and the answer should be in the negative.

[2] I also agree with his Honour's observations as to the reach of the definition of "forfeiture offence".

Mildren J:

[21] The sheer breadth of the definition of "forfeiture offence" is breathtaking. A list of the Northern Territory offences punishable by a term of imprisonment for two years or more *(which trigger potential forfeiture – ed.)* was provided by counsel for the respondent. The list ran to 27 pages covering as it did a very wide range of offending against numerous Acts, a good many of which were triable only summarily. The list contained only Northern Territory Acts and was not in fact complete as it did not deal with, for example, the *Corporations Act*; nor did it deal with Commonwealth offences or offences made under the laws of other states or territories.

The extremely wide definition of a forfeiture offence gives rise to the real possibility that even relatively trivial offences may give rise to forfeiture of very valuable property. The wide definition of crime-used property, particularly in s 11(1)(c), gives rise to the possibility that what may be forfeited, for a relatively trivial offence, may be the offender's own home if an act or omission was done in connection with the commission of a forfeiture offence on the offender's own property.

If the offence was committed on someone else's property in which the offender had no interest, the offender may be liable for a crime-used substitution declaration under s 81 of the Act.

The consequences of such a declaration are that the Court must value the crime-used property at its full market unencumbered value, and order the offender to pay that sum to the Territory under s 81(4)(c). The amount ordered to be paid may be satisfied by forfeiture under Part 7 of the substituted property: see ss 86(1) and (3); s 101.

> In this case, the results could well be a judgment for $1.5 million and possibly forfeiture of the respondent's land worth about $310,000.00. Allowing for any mortgagees to be paid out, the resultant debt would be well in excess of $1 million. (underline and larger type added)
>
> [22] The Act has been described by both counsel as draconian in its reach. I doubt whether even Dracos himself would have conceived of a law so wide reaching. The questions of construction which we are asked to consider are therefore matters of extreme importance.
>
> (Larger type added)

[23] Reference should also be made to s 3 of the Act which provides as follows:

3. Objective

The objective of this Act is to target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities.

[24] It is clear from s 10(2) and s 10(3) that the objective of the Act goes well beyond that stated in s 3.

ENDS EXCERPT

Addendum 3: Current case illustrating the practical problems and the inequity of the law when misapplied, innocently or maliciously, by the AFP and ATO

Anthony James Dickson
B Com LL.B. (Uni NSW), LL.M.(Syd.Uni.), Chartered Accountant
(Address and contact details given, and available to committee if required)

Tuesday, 25 March 2014

Civil Liberties Australia
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Fisher ACT 2611

Dear Sir/Madam

Project Wickenby persecution of me using ALP 2011 legislative amendments

The purpose of this letter is to request a meeting with you after providing some background as to the activities of Project Wickenby relating to the NeuMedix group and me.

My brief Curriculum Vitae

I graduated high school from St Pius X College Chatswood in 1982. I was a prefect in year 12 and was the adjutant of the Army cadet unit (at the time the biggest voluntary cadet unit in Australia). I graduated Commerce (Accounting)/Law degrees from the University of New South Wales in 1989 and subsequently studied a Master of Laws at Sydney University, specialising in Australian taxation. I am a chartered accountant. I have been employed by Price Waterhouse and Ernst & Young, until 10 years ago as a principal of Ernst & Young. I have also been employed as a senior manager and controller of the tax functions within two major Australian banks.

My biotechnology experience

I have specialised my industry experience in biotechnology and specifically, human medical technology. I have provided advice on the Australian research and development syndication incentive in the 1980s and 1990s. Since that time I have been closely involved in advising on the tax and government incentives designed to encourage the Australian medical technology industry, focusing on technology which is capable of being commercialised throughout the world. I have been successful in developing financing transactions which have led to the development of significant medical technologies – not least of which was the Gardisal cancer vaccine technology developed by Dr Ian Frazer/CSL/Merc.

In 2004 I was offered a position with an international private equity medical technology group. I accepted this position. Although I was permitted to focus on the development of medical technology from anywhere in the world I decided to focus on early stage Australian medical technology. In addition to this role I was appointed a director of the Australian NeuMedix Group in 2006.

The NeuMedix Group

The NeuMedix group is an Australian group of companies focused on reducing human suffering and saving human lives through investment in new medical technologies. The NeuMedix group invested in a suite of nine technologies – some which have proved to be of great significance in the medical technology field and will generate substantial revenues for the Australian investors and taxes for the Australian government. It has been suggested that one of the inventors involved may even be eligible for a Nobel Prize in medicine. Most recently we believe we have proved a cure for dengue fever (proved successful on over 500 patients by a leading Indonesian university hospital).

Project Wickenby personnel raided NeuMedix companies and personnel in April 2012

In April 2012 AFP personnel from Project Wickenby, self labelled "The Untouchables", raided the company's premises and the premises of all directors of NeuMedix and some people associated with the company. The Project Wickenby personnel have claimed that they had a hugely successful financial year resulting from the raids of the NeuMedix company and the seizure of the company's and the directors' personal assets, under the ALP's Proceeds of Crime Act (Commonwealth) 2011 amendments.

The original allegations made by Project Wickenby personnel have now all proved to be entirely false and without any factual substance. For example, the Project Wickenby personnel alleged that the NeuMedix group did not own any medical technology. They formed this view without speaking to anyone at the NeuMedix group or any of the vendors of technology to the NeuMedix group. The Project Wickenby personnel have now spoken to the venders of the technology and understand that NeuMedix group does own the technologies. Subsequent to learning this, after charges were laid and highly published arrests were executed, the AFP amended their charges to being that of me "*causing a risk*" of defrauding the ATO in the future!

The Project Wickenby personnel notified television channels and the media of their raids and the Project Wickenby personnel invited TV channel reporters into the homes of at least two people associated with the NeuMedix group and showed many of the personal assets of the directors on the AFP website and in the general media.

The Project Wickenby personnel were granted ex-parte Proceeds of Crime Act seizure of property injunctions against many assets of NeuMedix and the directors of NeuMedix and people associated with NeuMedix. Significant portions of these assets were owned well prior to the activities of the NeuMedix group. This ability to be granted ex-parte injunctions was made possible by amendments made to the legislation by the ALP in 2011.

The AFP did not seek the advice of the Commonwealth Department of Public Prosecutions or any independent legal advice prior to their laying of the original charges against the two directors of NeuMedix and their application for ex-parte Proceeds of Crime Act seizure orders. I have had the paperwork compiled by the AFP reviewed by my criminal legal counsel and they are disgusted with the unprofessional and ignorant level of the documentation lodged with the courts.

One of the most striking things about the Project Wickenby personnel's work, in particular the AFP, is that even the most simple, mundane and common transactions are looked upon with suspicion. It was noted that no one involved in the investigation of the NeuMedix group technologies had any legal qualifications, business degrees or medical technology education or experience. Eventually, 12 months after the arrests, raids and ex-parte injunctions, the AFP did engage a solicitor from the Australian Government Solicitor's office who had purportedly had some experience in biotechnology. This solicitor did provide a letter of advice to the AFP some 12 months after the arrests, which I and several other legal advisers, have found general and uninformative.

The ATO's involvement

The ATO had been conducting an audit of the NeuMedix group since 2010. The ATO, in breach of their standards, had not interviewed the directors nor taken any action to speak to the principals of the NeuMedix business. The ATO had been offered this opportunity on many occasions. I have been involved as a tax professional for many years and I have never seen such unprofessional behavior from ATO auditors. The ATO auditors are part of the Project Wickenby team.

Normally, and without exception as far as I am aware, the ATO review a taxpayer's affairs and raise any amended assessments allowing the taxpayer due time to object and work the contested assessments through the courts. The ATO did not issue any amended assessments or provide any correspondence to the NeuMedix group for some 18 months after the raids and arrests. At no point in time did the ATO notify the directors that there was an issue with their tax returns lodged. The documentation now provided by the ATO is in my opinion, and the opinion of several independent tax advisers, based on incomplete facts, is nonsensical and technically flawed.

The impact of the Project Wickenby raids and seizure orders

The actions of Project Wickenby, in seizing all relevant assets, and in their significant media campaign to humiliate the directors of the NeuMedix group, have paralysed the NeuMedix group. We have produced calculations that demonstrate that this has caused a significant loss of human life due to real cures not being made available to suffering people. It can be demonstrated that the Project Wickenby personnel have "blood on their hands". The Project Wickenby personnel have dissuaded others from doing business with the NeuMedix group, they have dissuaded an imminent listing on the Australian stock exchange, and they have annihilated any chance of raising £70 million in United Kingdom which was well progressed by labelling the directors of NeuMedix "fraudsters" in the media. We can demonstrate that the actions of Project Wickenby have jeopardized many future Australian jobs, Australian businesses, international patents owned by Australians and significant future Australian income tax revenue.

The AFP has been bragging to Parliament about its "good financial year" in 2012 when it seized significant assets under the Proceeds of Crime Act, the vast majority from seizing assets from innocent people associated with the NeuMedix group. In the prior year the total value of assets seized under the Proceeds of Crime Act was stated to be $14 million. In 2012, after the seizure of the NeuMedix group assets, worth some $60 million or more, the AFP was proud to announce that it had a bumper year and raised over $100 million using the newly amended Proceeds of Crime Act – more than 90% of which related to situations when no crime had been proved – a case of opportunistic counting one's chickens before they hatch. (It is understood that the ALP extrapolated this economic position and reduced the forecasted ALP Federal budget deficits – "calculating" that an extra $5 billion of tax would be raised from the "reduction in tax avoidance involving international transactions "similar to the "NeuMedix transactions" in the May 2012 Federal budget).

The AFP have engaged in threatening behavior to people associated with the NeuMedix group. I believe that the more you look into this situation the more you will be shocked by their un-Australian behaviour. I can understand why Paul Hogan called Project Wickenby personnel "bullies and boofheads".

State of the law – "money laundering"

The AFP continually apply the "money laundering" provisions of the Crimes Act to situations where they allege income tax fraud. These money laundering rules when introduced through Parliament were never intended to be applied as a second criminal charge to a tax fraud charge. I believe that the AFP has abused the money laundering criminal provisions in the Commonwealth Crimes Act.

The High Court of Australia in the *Milne decision* in February 2014 unanimously struck down the AFP's use of the money laundering offence to the now imprisoned defendant, who was found guilty of tax fraud. Many legal commentators had evaluated the incorrect application of the money laundering provisions as a duplicate criminal charge in the situation of tax fraud and have strongly opined on its illegality. Broadly the High Court in the *Milne decision* held that money needed to be used as an instrument of crime, for example to buy drugs or buy weapons or drugs to be used by terrorists, for the money laundering crime to exist. This is as it should be and as was intended when initially legislated by the Howard Government. The AFP had used a nefarious argument that the money laundering provisions should always be used in the situation of tax fraud as a further criminal offence. The AFP's application of the money laundering crime has now proved to be wrong by the High Court.

State of the Law - Proceeds of Crime Act (Commonwealth)

I believe the AFP inappropriately seized and restrained the assets of the NeuMedix group and the directors of the NeuMedix group. The Proceeds of Crime Act provisions have been described as the most "Draconian legislation on the Australian statute books" and was made considerably more unfair by the ALP's amendments in 2011. Assets are seized and placed in the hands of inexperienced and incompetent administrators who are able to dissipate the value of assets often selling the assets in a "fire sale". This has happened to assets associated with the NeuMedix group causing a loss of some $5 million already and potentially causing a loss in the next few months of some $80 million. The onus of proof is reversed under the Proceeds of Crime Act. Assets are seized and can be liquidated prior to any criminal charge being proven by the AFP.

It has been admitted by AFP officers that the Proceeds of Crime Act legislation is used as an implement to paralyse the financial resources of defendants so that they are unable to defend themselves with top-quality legal counsel, counsel the same level as used by the AFP and paid for by the Australian Government. This technique has been used against the NeuMedix group and is a disgrace.

I look forward to hearing from you.

Yours faithfully

Anthony Dickson
(Contact details given, and available to Committee if required)

ENDS LETTER FROM MR DICKSON

Addendum 4: Specific additional information provided by Mr Dickson for the Unexplained Wealth committee hearing at the request of Civil Liberties Australia

Assets betterment test – ATO

The ATO already has the ability to apply the "assets betterment" test to individuals in Australia. Broadly, this enables the ATO to look at the improvement in a person's wealth and a consideration of whether this can be supported by the income tax returns lodged by the individual. Where the ATO is not satisfied that the change in a person's wealth is consistent with their lodged tax returns the ATO issues amended tax assessments to the individual requiring extra income tax to be paid. Added to this the ATO will charge interest and penalties so that it is likely that any undisclosed income/wealth increments will need to be entirely paid to the ATO as tax, interest and penalties.

AFP applications are ex-parte

It should be remembered that the AFP historically have lodged ex-parte applications with the courts under the Proceeds of Crime Act. This technique gives the individual no chance whatsoever to respond to the AFP's often uninformed allegations before the restraining orders and seizure orders are granted by the courts.

Inability to finance one's own legal defence

Once an individual's assets have been restrained they are not able to finance his own legal defence, with the same level of legal experience as is used by the AFP – commonly using senior counsel and supporting legal personnel, fully funded by the Australian government. So effectively, once the AFP have seized the individual's assets the individual is paralysed and completely unable to defend themselves. (It is noted that legal aid is currently not available in Proceeds of Crime Act situations). There is the ability to make an application to the court for funds to be released to defend a Proceeds of Crime Act order, but this is too late as the court order will have already been granted to the AFP and no funds are available to make this application.

Dissipation in the value of seized assets

A consequence of seizure orders is a dissipation of the value of the property seized. Seized property comprising active business assets will normally be passed to a disinterested ITSA. In the case of AFP v. Dickson and Issakidis many millions of dollars of value in assets have been lost by virtue of the mismanagement of the assets by the AFP and ITSA and the decision made by the AFP not to release funds to support the businesses.

Requirement for AFP officers to make honest statements

There needs to be serious criminal sanctions on AFP officers for making statements in their ex-parte applications which are factually untrue. This should not be whether the AFP officer honestly believes the statements are true. The statements on which there are such serious consequences must be true. And if the statements made by the AFP officer to the court are later proven to be untrue there should be serious criminal sanctions placed on that particular officer including imprisonment.

Prohibition on using POCA in the situation of income tax disputes with the ATO

The AFP must be prohibited from using the POCA legislation in the situation where the alleged crime is tax fraud. There is a detailed process through which the ATO must prove whether the taxpayer has paid sufficient tax. The AFP should be prohibited from running a parallel system to the Tax Administration Act which allows for the collection of taxes from Australian taxpayers.

ENDS submission and addendums from Civil Liberties Australia

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2 April 2014