



OFFICE OF THE
CHIEF EXECUTIVE

1 February 2012

Our ref: 12/9388

Mr Jon Bell
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
Department of Prime Minister and Cabinet
National Circuit
BARTON ACT 2600

Dear Mr Bell

Inquiry into Commonwealth Unexplained Wealth legislation and arrangements

Australian Crime Commission Submission

1. The Australian Crime Commission (ACC) welcomes the opportunity to make a subsequent submission to the Parliamentary Joint Committee on Law Enforcement with regard to the inquiry into Commonwealth Unexplained Wealth (UW) legislation and arrangements.
2. This submission is unclassified. The ACC will provide an in camera classified case study for the committee at the hearing on 10 February 2012.
3. This submission is in addition to the ACC submission dated 23 August 2011.

ACC Position

4. As articulated in the Parliamentary Joint Committee on Law Enforcement's Discussion Paper, there is a need to better focus existing legislation on the ability for law enforcement to be able to respond to unexplained wealth, which is often derived from serious and organised crime.
5. The ACC recognises that the current UW provisions do not lend themselves to successfully confiscating assets of people in Australia who have accumulated significant wealth from serious crime.

6. Broadly, there are two key issues that the ACC submits should be addressed:
 - a. First, current legislative provisions and practices constrain the ability to respond in a timely and effective fashion to the restraint and confiscation of assets. This is particularly evident in a world where wealth can disappear to untraceable jurisdictions with the click of a mouse, but is equally relevant across the entire scope of UW proceedings.
 - b. Second, there is a requirement to establish a constitutional head of power. At present this is satisfied through the requirement of a nexus to a criminal offence within the jurisdiction of the Commonwealth and restricts the areas where UW action can be taken.
7. There are other lesser order yet important issues that could be amended to improve the effectiveness of the UW provisions.

Proposed ACC Act amendment to give ACC jurisdiction to tackle UW

8. A key limitation with the current UW provisions is the need to provide detailed financial analysis and undertake extensive investigation before proceedings are commenced, limiting the ability of the CDPP and AFP to respond in a timely fashion and ensure that assets are not disposed of. This has proven fatal for the success of the current UW legislation to date.
9. To address this issue in part, the ACC proposes amendments to the *Australian Crime Commission Act 2002* (ACC Act) to allow the ACC to take a greater part in the investigative process, using the ACC's coercive powers where appropriate.
10. The ACC proposes a scheme whereby an ACC Examiner would be empowered, in appropriate circumstances and with appropriate safeguards, to use the ACCs coercive powers for the purpose of an UW investigation and to order temporary freezing of assets (restraining orders). This proposal would work in conjunction with the current provision in the *Proceeds of Crime Act 1987* (POC ACT) and any amendments to the Act.
11. 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 'relevant crime' being established. The ACC Act currently requires that Board Determinations, and thus the authority to use the ACCs coercive powers, can only be made in relation to a 'relevant crime', defined as either 'serious and organised crime' or 'indigenous violence or child abuse'¹. Limiting the scope of the use of coercive powers to only those UW

¹ Section 4 *Australian Crime Commission Act 2002* (ACC Act)

matters involving serious and organised crime unduly restricts the breadth of matters that the ACC can be involved in. This is not because the ACC wishes to use its coercive powers in relation to minor indiscretions but because in UW matters a demonstrated link to serious and organised crime may not always be evident at the initial investigative stage. For example, it is not uncommon for persons of interest (POI) 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 be established.

12. As defined by the ACC Act, 'serious and organised crime' requires evidence of 2 or more offenders and substantial planning and organisation.² Because of the nature of UW investigations this aspect may not be able to be readily established. The crime equally may only involve one person but be extraordinarily serious. Under the proposal, the ACC Board could approve a special investigation (a Determination) to empower the ACC to use its coercive powers in relation to UW irrespective of whether there is evidence of an apparent connection to serious and organised crime. The Board approved determination would not relate to each individual UW investigation but would approve a body of work. As with current ACC special investigations, the requirement for Board approval would ensure that coercive powers could only be used in serious, significant matters in which the use of ordinary police powers would not be effective. The ACC Board also receives regular briefings in relation to ACC Board Determinations and they can vary or revoke a Determination if necessary. In addition, the ACC Board could determine certain thresholds that would need to be met before coercive powers could be used in relation to UW. Further governance is afforded through the Inter-Governmental Committee (IGC) who also has the power to revoke determinations. The ACC is also subject to additional oversight mechanisms including ACLEI, the ANAO, the Commonwealth Ombudsman and the PJC on Law Enforcement.
13. The existing safeguards in the ACC Act would continue to apply to any Board Determination and use of coercive powers in relation to UW. These include:
 - a. Coercive powers may only be exercised in relation to a Board approved determination
 - b. Coercive powers may only be used in specific circumstances where an independent ACC Examiner is satisfied that it is reasonable in all the circumstances, and

² Section 4 ACC Act

- c. The Examiner's decision to issue a summons or notice can be challenged in the courts either through injunction or judicial review.
14. In addition, the full POC Act court process must be ultimately completed before anything is forfeited. To that end, the powers of the ACC would be working with the POC Act court process and not in isolation.
15. In practice, the ACC Process would operate as follows:

- a. Step One – ACC Board approves a Special investigation in relation to unexplained wealth

As detailed above, if satisfied, the Board could approve an ACC special investigation in relation to unexplained wealth. This would allow the ACC to investigate UW and use coercive powers in necessary circumstances.

- b. Step Two – Identification of possible UW

During the course of an investigation the ACC or its partner agencies may obtain intelligence that a POI has UW that is potentially derived from a criminal offence within the jurisdiction of the Commonwealth. This could be as a result of suspected specific criminal activity but could also involve a person who is suspected of benefiting from a life of crime or from offences committed by others.

- c. Step Three – Application to an ACC Examiner for the use of coercive powers and restraining order

Once suspected UW is identified, an application could be made to an independent ACC Examiner for the use of the ACCs coercive powers for the purpose of the Board approved UW special investigation. This would include both the use of coercive examinations and notices. If satisfied to the requisite standard³ the Examiner could issue a summons requiring a person to attend for examination, or a notice requiring the production of documents. The ACC Act requires the Examiner to record reasons for issuing the summons or notice as well as including on the face of the summons the general nature of the matters in relation to which a person is to be questioned.⁴ Recipients of summonses or notices also have the option to obtain legal advice and representation. The proceedings are also covered by strict secrecy provisions.

³ The ACC Act provides that an Examiner may only issue a summons or notice if satisfied that it is reasonable to do so in all the circumstances and only for the purposes of the special ACC operation or investigation.

⁴ Inclusion of the general nature of the matters in relation to which a person is to be questioned does not have to be included if the effectiveness of the ACC special operation or investigation would be prejudiced. (s28(3))

As part of this process, in appropriate circumstances, the Examiner could make an ACC Act restraining order temporarily seizing the assets for a defined period. The ACC suggests that the Examiners' power be expanded in this area to address current delays and difficulty in obtaining restraining orders under the POC Act. In certain circumstances, examining a POI in relation to their suspected UW without an order restraining the assets will simply act to alert the POI to the investigation and is likely to result in the assets being disposed of. Unless there is a sufficient mechanism to restrain the assets at this early stage in the investigation (whether through a restraining order made by an Examiner or through the POC Act) the effectiveness of using the ACC coercive powers would be significantly diminished, particularly in cases where the assets are liquid.

d. Step Four – Use of ACC Coercive powers.

A person (the POI or related person, e.g. the POI's spouse or financial advisor) would be examined pursuant to the summons, and/or documents would be produced pursuant to a notice, with the following possible outcomes:

- Wealth is satisfactorily explained

The ACC Examination or documents produced may satisfy the Examiner that there is a legitimate explanation for an individual's wealth. The Examiner would then immediately lift any restraining order. Given the time limits that the ACC would be working to, the ACC does not envisage any significant damages or costs to be incurred. However, in some circumstances it may be appropriate for the ACC to bear costs.

- Wealth cannot be legitimately explained

The evidence may suggest that the person's wealth was in fact derived from criminal activity, or cannot otherwise be legitimately explained. For example, the POI may admit they had obtained wealth illegitimately through a criminal act or obtained income without paying appropriate taxation, or documents may show the use of false name bank accounts. As is currently the case, any evidence provided by an individual would only be used in proceeds of crime or UW proceedings and could not be used against them in criminal proceedings⁵.

⁵ This is assuming that the witness claims an immunity against self incrimination pursuant to s30(4) of the ACC Act. It is highly unusual for witnesses not to make this claim and the option is always explained to the witness before the Examination commences.

In this case, the matter would be referred to the Criminal Assets Confiscation Taskforce (CACT) to determine whether or not to commence proceedings under the POC Act. Evidence given in the ACC Examination could be used in the POC Act proceedings. If assets were not already restrained, an ACC Act restraining order could then be made and in either case the restraining order would remain in place until the Court determined the AFP's application for a restraining order under the POC Act, or would lapse within a set period of time, such as 21 days, if the AFP did not commence POC Act proceedings.

- Individual commits an ACC Act offence / contempt

A witness summonsed to appear before an ACC Act Examination commits an offence if they refuse to answer or give false or misleading evidence. Other provisions allow for a person to be held in contempt of an Examiner. In such cases, the POC Act could be amended to allow the offence or contemptuous conduct, in relevant cases, to be admissible as *prima facie* evidence in POC Act proceedings for the restraint of assets or in applications for final forfeiture to prove that the wealth was not legitimately obtained.

As in 2, in such cases the matter would be referred to CACT for consideration of POC Act action and the same provisions would apply.

Related amendments

16. In addition to the core scheme proposed above, ACC suggests three related amendments be considered:
 - a. Permissible use of ACC Examination material in POC Act proceedings.

Despite recent court decisions, there remains some limited uncertainty as to the scope of permitted use of ACC Examination material in the context of proceeds of crime proceedings. This is particularly relevant in the context of a Court holding its own powers to examine and obtain evidence in POC Act matters. Regardless of whether the ACC's proposed scheme is adopted, the ACC believes that the ACC and POC Acts should be amended to make it abundantly clear, firstly that ACC Examination evidence is admissible in POC Act proceedings, and secondly that, even after POC Act proceedings have commenced, ACC may continue to conduct coercive hearings, and may provide information to relevant agencies and to be available to use as an alternative to the Court's own powers.

b. Alibi-type provisions

The ACC understands that it is not uncommon for the Respondent in a POC Act proceeding to assert a legitimate source for restrained property at a very late stage in the case. While there are notice provisions, and the Applicant is given the opportunity to conduct POC Act examinations, the claim inevitably results in the need for additional investigation and financial analysis, and there is nothing that provides that evidence of a late claim may be used against the person in the proceedings. Alternatively, in order to preempt and rebut such assertions it has become necessary for an extensive and expensive investigations to be undertaken, effectively tracing an individuals financial history over a long period of time and often extending to a history of a person's entire working life.⁶

In order to address these difficulties the ACC suggests that consideration be given to introducing such provisions, akin to existing alibi notice provisions, in the POC Act. These provisions would give the POI an opportunity to provide an explanation as to the legitimacy of their wealth after the forfeiture application had been made, but prior the Court determining the matter. A POI could only place a different version before the Court with leave, and then with a sufficient adjournment of the matter to allow the Crown to investigate the assertion.

If the ACC's proposals above are adopted, the POI would be given the opportunity to provide an explanation in the ACC examination. If he or she chose not to do so, that could also be used as evidence that the explanation may not be credible, or as *prima facie* evidence of an illegitimate source of funds.

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.

⁶ Mrs Karen Harfield, ACC Committee Hansard, 4 November 2011, p.11.

- c. Provision of telecommunication material to the Australian Taxation office.

As the AFP noted in the initial hearings⁷, a practical difficulty in fully utilising all the proceeds recovery options available to CACT is information obtained through the telephone interception cannot be referred to the Australian Taxation Office for the purpose of tax assessments. This is because the Telecommunications (Interception and Access) Act 1979 (TIA Act) does not treat the ATO as a law enforcement agency, even in the context of its work in relation to Serious Non-Compliance. The ACC considers that changes to the TIA Act to allow free exchange of information between the CACT agencies would greatly assist in the effective recovery of unpaid tax, in cases where proceeds of crime action or UW provisions are not the best option.

Constitutional issues

17. The following comments are made on the understanding that ACC is not qualified to provide advice on the Constitution, and does not purport to do so. These are merely areas which we would recommend be considered.
18. The ACC accepts that, for the Commonwealth UW laws to be constitutionally valid, it is necessary for some connection to a criminal offence within the jurisdiction of the Commonwealth. However, the ACC believes that it may be possible to relax this nexus, or alternatively explore referral of powers from the States or reference to the external affairs power.
19. There appear to be two ways a valid Commonwealth UW law can be made: either (a) the law must fall within a head of Commonwealth power set out in section 51 of the Constitution; or (b) power to address UW generally could be referred to the Commonwealth by the States under Section 51(xxxvii). There is no head of power which specifically covers criminal law as a whole: valid Commonwealth laws require a nexus to criminal activity within the jurisdiction of the Commonwealth.
20. UW legislation currently relies on a nexus with a criminal offence within the jurisdiction of the Commonwealth to give constitutional validity. Because of the difficulty associated with proving the sufficient nexus to the relevant criminal offence, alternative heads of power should be explored. For example, we note that in appropriate cases, the Commonwealth relies on the external affairs power (s51(xxix)) where legislation is required to give effect to treaty obligations. Australia is party to a number of treaties that give rise to obligations to legislate for the seizure of proceeds of crime and to minimise the benefit to serious and organised crime groups in laundering or dealing in the proceeds of

⁷ Cmdr Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, pg 7

crime. These treaties include the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds of Crime, the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the UN Convention against Transnational Organised Crime. Consideration should be given to whether these treaties provide a sufficient obligation to address UW so that the external affairs power could be relied upon as an appropriate head of power.

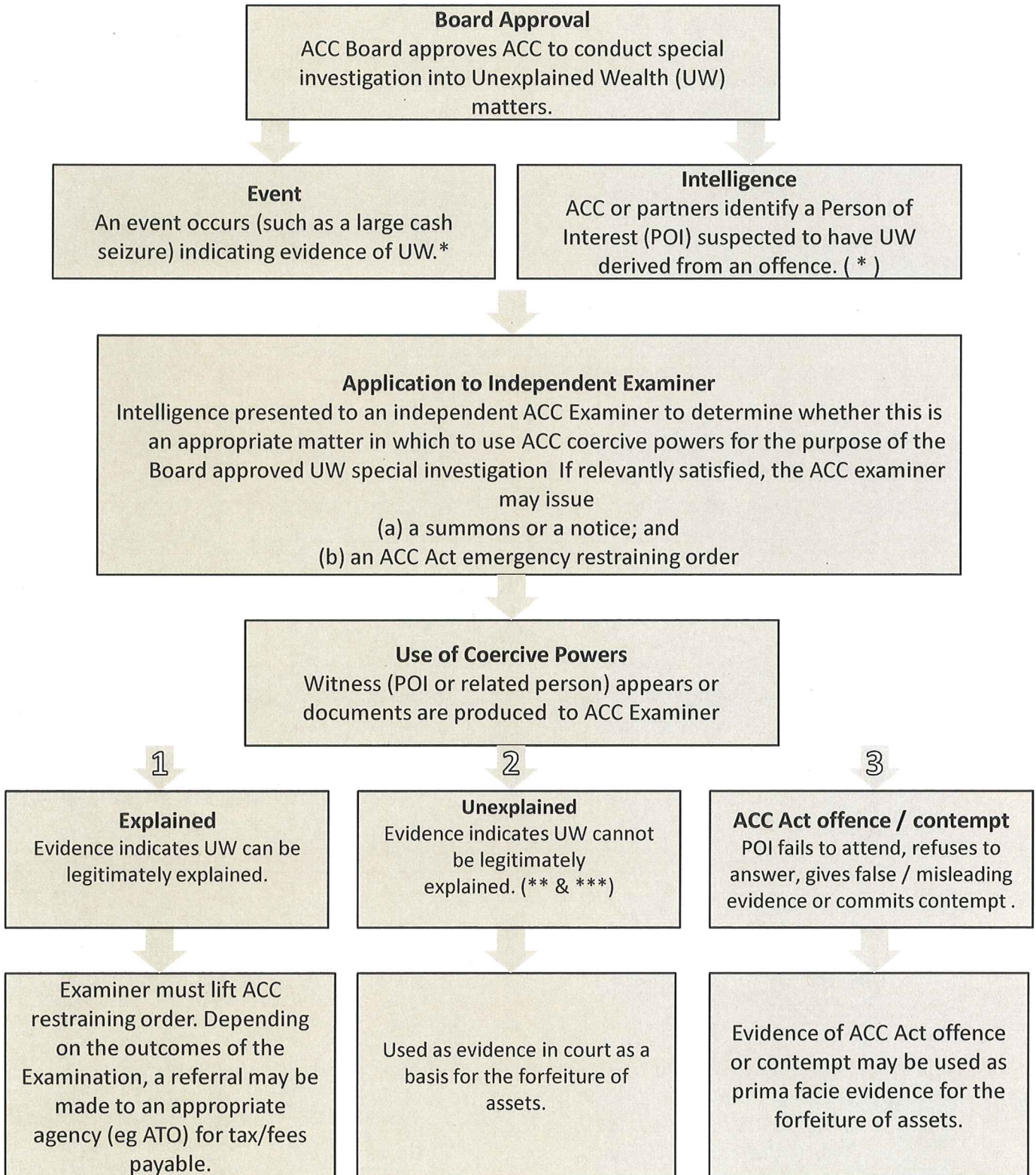
21. However, the ACC is of the view that the preferable solution to this issue would be to progress a referral from the States. This would remove the necessity for a criminal offence within the jurisdiction of the Commonwealth to be identified and extend the scope of the current regime. It may also have strong attraction to the jurisdictions to utilise the Commonwealth regime as outlined.

ACC Contact

22. On behalf of the ACC, I thank you for this opportunity to make a supplementary submission to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Commonwealth UW legislation and arrangements. Should you wish to discuss any aspect of this submission further, my office on

John Lawler APM
Chief Executive Officer
February 2012

Unexplained Wealth – Use of ACC Coercive Powers



* Subject to referral of powers from the states and territories, this would need to be a Commonwealth offence.

** Legislation needs to consider explanations and their subsequent use in court proceedings.

*** A suspect matter could be referred to the CACT as an example.