

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

Question on Notice – Australian Crime Commission (ACC) proposal to enable ACC examiners to freeze assets

The ACC's supplementary submission to the Parliamentary Joint Committee on Law Enforcement inquiry into Commonwealth unexplained wealth proposes that, for the purposes of unexplained wealth investigations, ACC examiners be empowered to temporarily freeze assets and summon people for examination. These orders could be made on application to an examiner by a member of the ACC or its partner agencies. An examiner could make an order if he or she is satisfied that there are sufficient grounds to believe that a person has unexplained wealth as a result of serious organised crime activities.

The Committee has requested that the Attorney-General's Department provide further information on issues relating to this proposal discussed in the Department's evidence to the Committee on 10 February 2012.

Overview of current examination and restraint powers

Both the *Australian Crime Commission Act 2002* (ACC Act) and the *Proceeds of Crime Act 2002* (POCA) allow examinations to be conducted for evidence-gathering purposes. ACC Act examinations are administrative, not court-ordered, and ACC examiners are not currently able to issue orders restraining property. POCA examinations are court-ordered and cannot be conducted until a restraining order has been made by a court.

Examination powers

For the ACC to conduct an examination, the ACC Board must designate a particular operation or investigation as a special operation or investigation. ACC examiners are then empowered to summon people to appear before an examination in relation to that special operation or investigation. Evidence-gathering powers (including the power to compel a person to attend an examination, answer questions and produce documents) are used to obtain information, which may then be used for the purposes of prosecutions initiated as a result of the ACC's investigation, as well as the other purposes outlined in the table at **Attachment A**. ACC examiners do not have the power to restrain assets that are the subject of an ACC examination.

The POCA examination process begins when a proceeds of crime authority (either the Director of Public Prosecutions or the Commissioner of the Australian Federal Police) applies for a restraining order. If the order is granted, the authority may then apply to the court for an

examination order. If the examination order is made, an approved examiner may issue an examination notice summoning people to appear before an examination. An examiner is not limited to summoning only people whose assets are the subject of the relevant restraining order—they could also summon, for example, an accountant who is able to answer questions about the financial affairs of such a person.

The examiner may compel people to answer questions or produce documents relevant to the affairs of a suspect, a person who claims an interest in property that is the subject of a restraining order, and/or the spouse or de facto partner of the aforementioned people. Evidence gathered from the examination may be used as evidence when seeking a subsequent order under the POCA.

A detailed table comparing the examination regimes under the ACC Act and the POCA is at **Attachment A**.

There are a few key differences between the ACC Act and POCA regimes:

- ACC examinations are administrative, whereas POCA examinations are court-ordered (although they do not occur in a court)
- ACC examinations are conducted to support special ACC operations or investigations, whereas POCA examinations are conducted to support the potential making of confiscation orders or other POCA orders, and
- the two regimes specify different ways in which information obtained during an examination can be used, as discussed above and in Attachment A.

However, both regimes give examiners the power to compel a person to attend an examination and answer questions. They also both require that examinations be held in private, with limits on who can attend, and allow examiners to restrict the disclosure of information turned up by an examination. Both regimes subject people to criminal penalties if they do not submit to examinations as required, or if they disobey disclosure restrictions.

Restraint powers

ACC examiners do not currently have the power to restrain assets.

Under the POCA, a proceeds of crime authority can apply for restraining orders in relation to unexplained wealth. A restraining order must be in place before a court is able to issue an examination order. Restraining orders are subject to the following requirements:

- a court must be satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of wealth that they have lawfully acquired, and
- a court must be satisfied that there are reasonable grounds to suspect that:

- the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, and/or
- the whole or any part of the person’s wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

These requirements provide a link to a head of Commonwealth power.

Under section 26 of the POCA, unexplained wealth restraining orders can be made *ex parte* and there is no need to show that there is a risk that the property would be disposed of or dealt with if an order is not made. Once an order has been made, the court may also order that the giving of notice of a restraining order be delayed, if a proceeds of crime authority has requested that notice be delayed and the court considers it appropriate to protect an investigation or prosecution.

Legal issues

If the Government decided to consider implementation of the ACC’s proposal, there are several legal and constitutional issues which would need to be considered prior to implementation. Legal advice would need to be sought before any decision is made to proceed.

Connections to an offence within Commonwealth power

At the Committee’s hearing on 10 February 2012, the Committee questioned whether it would be possible for the ACC to use its examination powers in circumstances where there is no link to an offence within Commonwealth power.

The constitutional basis of any extension of powers is a matter on which the Commonwealth would need to take appropriate advice. The ACC’s proposed restraint and examination powers could only be exercised in situations where there is a connection to a head of Commonwealth power.

The ACC is only able to use its coercive powers in relation to special operations or investigations authorised by the ACC Board. Under the ACC Act, the ACC Board can authorise a special operation or investigation into federally relevant criminal activity. To be considered ‘federally’ relevant, the criminal activity must involve a Commonwealth offence or a State offence with a federal aspect.

The ACC Act does not allow the Board to authorise an operation into criminal activity involving only State offences with no federal aspect. To address this, each State and Territory has enacted its own ACC legislation which enables the Board to authorise operations and investigations into State criminal activity, and confers coercive powers on the ACC in respect of these operations and investigations.

Conferring judicial power on non-judicial officers

The Constitution requires that certain functions and powers only be exercised by the judiciary. ACC examiners are not judicial officers. The Commonwealth would need to take appropriate advice on whether the power to issue restraining orders can be validly conferred on ACC examiners.

Contempt of court

The Federal Court has previously found that conducting an ACC examination in relation to the subject matter of pending charges constitutes contempt of court, unless the examiner makes directions to prevent evidence from being disclosed to investigators or prosecutors while the matter is underway.

As examination orders under the POCA are ordered by a court, there is a possibility that the use of the ACC's administrative examination powers in relation to a POCA matter that is underway could be viewed by the court as seeking to obtain an advantage for the ACC that the ACC would not otherwise be entitled to obtain through the processes of the court. An example of an 'advantage' could be obtaining evidence using ACC examination powers that the Commonwealth would not be able to obtain under the POCA examination powers. This could potentially lead to the ACC being found in contempt of court.

It may not be possible to remedy these issues through legislation, as this could be viewed as unconstitutional interference with the judicature's performance of its role.

Possible use of existing POCA provisions by ACC examiners

The POCA examination regime currently operates successfully where a restraining order under the POCA is in place. It is not clear that the proposed expansion of the ACC's powers in relation to unexplained wealth would yield more information than existing POCA examinations.

An alternative to the ACC's proposal could be to enable ACC examiners to conduct examinations under the POCA. This could be achieved by amending the *Proceeds of Crime Regulations 2002* to specify ACC examiners as approved examiners for the purposes of POCA.

This would enable the expertise of ACC examiners to be employed in conducting POCA examinations. ACC examiners serving in this capacity would be exercising powers under the POCA, not the ACC Act, and would be subject to the provisions of that Act in conducting examinations. It would nevertheless be possible to use ACC facilities, capabilities and information in conducting the examinations.

Under the existing POCA provisions, information obtained from these examinations would only be able to be disclosed to other ACC investigators if the examiner believed it would

assist in the investigation or prosecution of an offence punishable by over 3 years imprisonment. The POCA could be amended to allow information obtained in examinations to be disclosed to the ACC for broader purposes.

Comparison table – ACC Act and Proceeds of Crime Act examinations

	ACC Act examinations	Proceeds of Crime Act examinations
Who can be an examiner?	<p>ACC examiners are appointed by the Governor-General, in consultation with an Inter-Governmental Committee.</p> <p>ACC examiners must be legal practitioners of at least 5 years experience. They are appointed on a full-time basis for periods of up to 5 years and may only serve for 10 years total (ACC Act, s 46B).</p>	<p>Approved examiners under POCA are any persons who hold an office, or fall within a class of people, specified in the <i>Proceeds of Crime Regulations 2002</i> (POCA, s 183).</p> <p>Approved examiners can be drawn from any of the office holders or classes of people specified, depending on who is available for a particular examination at a given time.</p> <p>The following office holders and classes of people are specified by regulation 12 of the Proceeds of Crime Regulations:</p> <ul style="list-style-type: none"> • presidential members of the Administrative Appeals Tribunal (AAT) • non-presidential AAT members who are legal practitioners with at least 5 years experience • ex-State or Territory Supreme Court, District Court and County Court judges who agree in writing to be examiners, and • ex-magistrates who agree in writing to be examiners.

What can examinations be conducted in relation to?

ACC examinations can be conducted in relation to special operations or investigations (s 24A).

The ACC Board determines which operations are special operations and which investigations are special investigations. These determinations are subject to oversight by the Inter-Governmental Committee.

Under Part 3-1, Division 1 of POCA, a court may order that an examination be conducted following an application by a proceeds of crime authority.

Examinations can be conducted in relation to the affairs of persons who have an interest in property subject to POCA orders, suspects (in the case of restraining orders) and the spouse or de facto of either of these categories of person.

Examinations can be conducted in the following circumstances:

- where a restraining order is in force
- where an application for an order to exclude property from a forfeiture order under sections 73 or 94 has been made
- where an application for an order for compensation for forfeited property under sections 77 or 94A has been made
- where a person has applied under section 102 for an interest in forfeited property to be transferred to them
- where a confiscation order has been made but has not been satisfied
- where a restraining order has been revoked under section 44, and
- where an application relating to the quashing of a person's conviction is made as mentioned in sections 81, 107, 146 and 173.

What powers do examiners have?

ACC examiners may:

- summon a person to appear before an examination to give evidence and to produce documents or other things if it is reasonable to do so
- require a person appearing at the examination to produce a document or thing, and
- require a person appearing at the examination to give evidence either to take an oath or to make an affirmation (ss 28, 29).

ACC examiners may also request information from a range of Commonwealth and State agencies, subject to certain limitations (s 19A).

If a person being examined claims that answering a question or producing a document may incriminate them or expose them to some penalty, that information is not admissible against the person in criminal proceedings or proceedings to impose a penalty, with the exception of:

- confiscation proceedings, and
- proceedings in respect of the falsity of an answer or information stated in a document (s 30).

A POCA examiner may:

- require a person either to take an oath or to make an affirmation, and
- require a person to answer questions about the affairs of any person whose affairs are able to be examined.

An examination notice may require a person being examined to produce certain documents at the examination.

A person is not entitled to refuse to answer or a question or produce a document on the grounds that it may incriminate them, expose them to a penalty, or may be subject to legal professional privilege or other privileges (s 197).

How can information obtained from examinations be used?

The ACC's CEO, Board, staff members and examiners may divulge, or provide to a court, information obtained in performance of their duties, if it is for the purpose of giving effect to one of the following:

- the ACC Act
- a State or Territory law under which the ACC performs its duties
- the *Law Enforcement Integrity Commissioner Act 2006* and related regulations, and
- the *Parliamentary Joint Committee on Law Enforcement Act 2010*.

Information may also be divulged for the purposes of prosecutions initiated as a result of an ACC operation or investigation (see s 51).

Under section 266A, information obtained from a POCA examination may be disclosed to:

- an authority performing functions under POCA, to facilitate its performance of that function
- Commonwealth, State and Territory investigation or prosecution authorities, to assist in the investigation or prosecution of offences punishable by 3 or more years imprisonment
- Foreign investigation or prosecution authorities, to assist in the investigation or prosecution of offences that would be punishable by 3 or more years imprisonment if they occurred in Australia, and
- the Australian Taxation Office, to protect public revenue.

Answers given or documents produced in a POCA examination are only admissible as evidence in the following civil or criminal proceedings:

- POCA proceedings and ancillary proceedings
- proceedings to enforce a confiscation order
- criminal proceedings for giving false or misleading information, and
- civil proceedings in relation to a right or liability which a disclosed document confers or imposes.

Secrecy

Under section 25A, ACC examinations must be held in private. An examiner may give directions as to the persons who may be present during the examination or a part of the examination. A person giving evidence may be represented by a lawyer.

An examiner may direct that the following must not be published, or must be published subject to restrictions imposed by the examiner:

- any evidence given before the examiner
- the contents of any document, or a description of any thing, produced to the examiner
- any information that might enable a person who has given evidence before the examiner to be identified, and
- the fact that any person has given or may be about to give evidence at an examination.

Examiners are required to give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

An examiner has the general power to regulate the conduct of proceedings at an examination as he or she thinks fit.

POCA examinations take place at the time and place specified by the examination order, or at such time and place as the examiner sees fit (s 186).

Examinations must take place in private and may only be attended by the examiner, the person being examined, the person's lawyer, the proceeds of crime authority and anyone else the examiner declares can attend (s 188).

A person can be examined by video link if an examiner is satisfied that the necessary facilities are available, that it would not cause unreasonable expense or inconvenience for the person to attend, and that it is in the interests of justice (s 190).

Records must be kept of statements made at the examination if they are requested by the proceeds of crime authority or the person being examined. The examiner otherwise has the discretion to decide whether records are kept (s 191).

A person being examined must be given a copy of the written records if they request it, but the examiner can impose conditions on its disclosure (s 191).

An examiner must restrict public disclosure of answers given or documents produced in examinations if requested to do so by the person being examined or the proceeds of crime authority. Examiners may also restrict public disclosure on their own initiative (s 193).

Offences relating to examinations

Under Part II, Division 2 of the Act, it is an offence for a person to:

- attend an examination without the examiner's permission
- disclose that they have been summoned to an examination
- disclose any information about official matters related to the summons, such as the existence of an ACC operation, investigation or examination
- fail to attend an examination as required
- fail to answer questions or produced documents as required
- give false or misleading evidence, and
- obstruct or hinder an ACC examiner.

Under section 34A, a person can be in contempt of the ACC if they:

- refuse or fail to take an oath or affirmation
- refuse or fail to answer a question put to them by an examiner
- refuse or fail to produce a document which they are required to produce
- give evidence which they know to be false or misleading

Under Part 3-1, Division 4 of the Act, it is an offence for a person to:

- attend an examination without being entitled to attend
- fail to attend an examination as required
- refuse or fail to swear an oath or make an affirmation
- refuse or fail to answer a question put to them by an examiner
- refuse or fail to produce a document which they are required to produce
- breach a requirement imposed on records of an examination
- breach a direction preventing or restricting disclosure of information, and
- give false or misleading answers.

- obstruct or hinder an examiner in performance of their functions
- disrupt an examination, or
- threaten an examiner.

Contempt of the ACC is dealt with by the Federal Court or a Supreme Court.