Australian Federal Police Association
Police Federation of Australia

Submission to the Senate Legal and Constitutional Affairs Committee

Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*

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Senator Trish Crossin
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31 July 2009

Dear Madam Chair,

RE: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Serious Organised Crime) Bill 2009.

It is with pleasure that we present this submission to this Committee's Inquiry on behalf of the Police Federation of Australia (PFA) and the Australian Federal Police Association (AFPA). The PFA has an obligation to our 50,000 members and the Australian people to ensure that all Australian police jurisdictions can effectively protect the public from criminal attack, especially by organised crime groups.

The Australian Federal Police Association Branch (AFPA) of the Police Federation of Australia (PFA) strives to enhance the operational capability of the Australian Federal Police (AFP) through representing its people, the law enforcement professionals themselves. Although the AFPA has industrial coverage of all AFP employees, our role is greater than mere industrial representation. The AFPA has an obligation to ensure that the AFP operates to the best of its capabilities.

Over the past two years, the PFA and AFPA have been active in the Parliamentary Joint Committee on the Australian Crime Commission in arguing for stand alone organised crime legislation including unexplained wealth provisions (see Attachments 3A and 3C).[1] The outcome of the PJC Inquiry into the legislative arrangements to outlaw serious and organised crime groups has been pre-empted by the tabling of this Bill by the Government.

While this Bill presents significant reform to combat organised crime, the PFA and AFPA cannot support the Bill in its current form. In summary, supported by the attached material, the PFA and AFPA:

- Oppose Schedules 1 & 2 that are intended to strengthen criminal asset confiscation, including introducing unexplained wealth provisions.
- Support Schedule 3 that enhances police powers to investigate organised crime by implementing model laws for controlled operations, assumed identities and witness identify protection
- Oppose Schedule 4, Part 1 that is attended to address the joint commission of criminal offences; and
- Supports Schedule 4, Part 2 that facilitates greater access to telecommunications interception for criminal organisation offences.

PFA & AFPA opposition to Schedule 1 &2

Although it is titled as such, the Government has not introduced unexplained wealth legislation as it is defined, or exists, in other Australian and international jurisdictions. Indeed, because the provisions are linked to a crime they are directly contrary to the provisions recommended by the PFA and AFPA to the Parliamentary Joint Committee on the ACC.

[1] Submissions 3A and 3C, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*.

The provision should enable the AFP to investigate whether a person, company, trust etc has wealth in excess of its known lawful income and impose an unexplained wealth declaration accordingly without the need to link it to an offence. The current provisions do not enable the AFP to proactively investigate and recover assets involved in the 'layering' and 'integration' stage of money laundering (See attachment 3C) The PFA and AFPA seek additional amendments within schedule 1&2 which may make the legislation more operationally effective.

PFA & AFPA opposition to Schedule 4, Part 1

The joint commission of criminal offences provision is directly contrary to the recommendations made by the PFA and AFPA to the Parliamentary Joint Committee on the ACC in relation to the organised crime inquiry. The current provisions do not enhance the operational capacity of the AFP in the fight against organised crime.
The PFA and AFPA seek additional amendments within schedule 4, Part 1 which may make the legislation more operationally effective.

Yours sincerely,

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SCHEDULE 1

The power of the Commonwealth to enact unexplained wealth legislation

The AFPA is cognisant that the Commonwealth Parliament does not have plenary power and must enact laws with respect to, or incidental to the heads of power provided in s51 of the Australian Constitution.

The AFPA recommends that the Constitutional issues limiting the drafting of this Bill, particularly Schedule 1, be evaluated by the Parliamentary Joint Committee on the Australian Crime Commission.[2] This should include an assessment of the scope of the external affairs power (s51 (xxix)) with respect to legislation on the content of international treaties on organised crime to which Australia is a signatory.

It could be argued that these measures flow from treaty provisions in the Merida Convention including those relating to the illicit enrichment of public officials[3], asset seizure and the freezing of funds (and proceeds of crime more generally. Article 21 refers to combating bribery in the private sector and Article 22 the embezzlement of private sector property.

Based on the Merida Convention provisions 'Illicit Enrichment' Commonwealth Government employee, contractor or member of parliament or staff employed by a member of parliament could be targeted. Given the extent of Commonwealth power then perhaps that might include registered employee organisations under the *Fair Work Act 2009 (Cth)*, the bribery of Foreign Officials, bribery involving Australian companies operating offshore for example.

The AML/CTF Act 2006 and supporting framework is based on the adoption by the Commonwealth of the Merida Convention, Palermo Convention and Strasbourg Convention. A similar position could be taken in relation to the UEW provisions. (Please see this Act in Attachment A).

In some ways, the unexplained wealth provisions are just a reversal of the burden of proof. There is no Australian or other case law that the AFPA is aware of that has explored the constitutionality and scope of the proceeds of crime provisions in international law.

The Attorney General could prescribe situations where unexplained wealth should apply based on other international conventions as they arise. This will ensure that an international approach is taken to combat serious and organised crime by encompassing any new Conventions.

The Committee may also assess whether a referral of state powers is necessary to enable the enactment of Commonwealth organised crime legislation and particularly unexplained wealth provisions. There is recent precedent for this in the cross border investigative powers on controlled operations and the counter terrorism legislation. An intergovernmental agreement could be concluded between the Commonwealth and the States and Territories to provide for mechanisms and criteria for the sharing of proceeds of crime between jurisdictions; and to provide for payment of revenue due to each jurisdiction.

Recommendation:

The Constitutional issues limiting the provisions drafted in this Bill should be further evaluated by the Parliamentary Joint Committee on the Australian Crime Commission with a view to enacting true unexplained wealth legislation at the Commonwealth level.

[2] The AFPA expects the Bill enacting the Joint Parliamentary Committee for Law Enforcement to be passed through the Commonwealth Parliament this year.
[3] Article 20, *UN Convention Against Corruption* (Merida Convention).

Issue 1 – Unexplained Wealth restraining order requires suspicion of a Commonwealth offence (S20A)

This section prescribes that an Authorised Officer must show Reasonable Grounds to Suspect a Commonwealth Offence when applying for a Restraining Order [see s20A(1)(g) & (3)(c)]

Recommendation:

The link to an offence in s20A(1)(g) and s20A(3)(c) should be excised from the Bill.

If, inclusive of this recommendation, the Bill is not within the scope of the Commonwealth's power, the AFPA proposes a two tiered structure of reform set out below.

Rationale:

The primary provision Section 20A is predicated on an evidential link to a Commonwealth indictable offence, foreign indictable offence or a State offence that has a federal aspect being established. This is often very difficult to do and the requirement to establish this link is one of the reasons why the AFPA sought unexplained wealth provisions (UWP) in the first place. In its current form, the proposed Section 20A would be used reactively and part of an overall strategy to pursue civil forfeiture action against a suspect (for example, a PoCA investigation and a criminal investigation are on foot and the requisite evidential standard to ground the restraining order (reasonable grounds to suspect – though the DPP in practice require a higher standard) has been established.

The primary purpose of adding to the suite of legislative tools within the *Proceeds of Crime Act 2002* (PoCA) with UWP should be to specifically deal with those criminals who successfully distance themselves from the criminal activity from which they aggregate so much of their wealth. Thus, UWP are required to combat higher order criminals.

UWP should be designed to enable law enforcement agencies to commence a civil forfeiture recovery from a 'cold start'. That is, there is no criminal investigation being conducted, which might (but not always) provide the necessary evidence linking a person to an offence. In its current form, the proposed UWP would not enable the AFP to combat even simple money laundering techniques for example one involving the use of a nominee to own an asset (third party ownership).

Example 1.1: A is involved in criminal activity. He knows B who is an old friend or a relative or a professional (for example an accountant). He asks B to acquire assets in B's name or in the name of B's wife, another of his/her relatives or in the name of Company B controls or in the name of a Trust of which B is the Trustee. B will do this either because he is a friend and he trusts A, or he is a close relative (common with organised crime groups) or for a fee (as a professional). Provided B does not get involved in crime (and he usually does not, hence why he was chosen) then the current proposed provision would not allow the AFP to proactively target B and force him to account for the assets he controls.

It might be argued that by showing that A has effective control over the assets through B, section 20A would operate. This is not always valid, however. Provided A has used effective laundering techniques to disguise the money used by B to acquire the assets, and B does not cooperate with the police, the scheme is very difficult to break.

This is just one example. Other examples involving nominees include companies (onshore but frequently offshore) and trusts.

In the course of financial investigations there is recent history in the AFP where persons have been investigated, such as for suspected money laundering, and the outcome was one where a predicate Commonwealth offence could not be substantiated, to the criminal burden of proof. Inadmissible evidence and intelligence support the fact that police had targeted the correct persons. Such outcomes arose simply

because the suspected persons seemed familiar with police capabilities and limitations and adhered to well disciplined practices by remaining at arms-length to traditional police evidence gathering methods.

Example 1.2: A suspect, person X, was found holding a cash pile which was roughly equivalent to three years worth of total annual salary before tax for an average Australian worker. A Money Laundering charge per s400 Criminal Code was not advanced because of an insufficient evidencial link with a predicate Commonwealth offence from which the cash could be said to have been derived. Consideration to restrain the cash pursuant to s19 PoCA was not pursued for similar reasons.

Consideration was then given to applying s400.9(2)(c) of the Criminal Code which is a form of UWP within the money laundering provisions of the Code. It effectively 'deems' money or property to be reasonably suspected of a Commonwealth indictable offence where:

> *the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure.*

For specific reasons this approach was not pursued however, the financial evidence package that could have been produced would have been far more conducive to a run before civil jurisdiction if the trigger had existed to get it there. That trigger could have been via UWP, had it existed at the time, and especially so if any such unexplained wealth amount was deemed to be a benefit from unlawful activity until the contrary was shown.

In contrast the proposed Bill retains the test at s20A(1)(g) and s20A(3)(c), that an Authorised Officer show upon reasonable grounds that the suspect has committed some offence against the Commonwealth and in s20A(1)(g). In this example where suspicion of a particular Commonwealth offence cannot be shown, some doubt emerges as to the ability to satisfy this test and therefore restrain the monies.

The retention of this test (to show upon reasonable grounds that the suspect has committed some offence against the Commonwealth) seems contrary to the very definition of what an unexplained wealth provision should be. If there were reasonable grounds to suspect any Commonwealth offence/s from where the cash may have originated then property restraint could be pursued using the existing mechanisms at s18 and s19 of the PoCA and thus UWP would not be required.

Unexplained wealth therefore should mean exactly that. It should be the tool brought to bear where the other tools fail to deal with money launderer type suspects, who by general definition apply a modus operandi to specifically separate money from the criminal conduct. On this basis the proposed UWP seems unnecessarily restrained and in practice we believe that it may show itself to be largely redundant as presented.

Assuming that the Constitution provides a head of power for the legislation of UWP only where it is linked to a Commonwealth criminal offence, the AFPA proposes a two tiered structure of reform, which will enhance the current provisions and ensure that they are suitable for use by practitioners. They are as follows:

Tier 1 – 'Suspected of committing an offence' is given a broad meaning [Re s20A(1)(g) and(3)(c)]

Recommendation:

s20A (1)(g) and 3(c) should be amended respectively with a paragraph similar to s129 of the *Proceeds of Crime Act 2002 (Cth)* where 'suspected of committing an offence means a person':

(i) has committed, or is about to commit, a .... offence; or

(ii) was involved in the commission, or is about to be involved in the commission, of such offence; or

(iii) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such offence;

Rationale:

If it is constitutionally necessary to link a restraining order under s20A under (1)(g) and 3(c), then the legislation should be amended to provide practitioners with a broader approach to those persons committing an offence, to include the persons involved and persons benefiting from the commission of offences.

There is a precedent for this type of provision with regard to monitoring orders in s129 of the *Proceeds of Crime Act 2002 (Cth)*.

Tier 2 – Links to Commonwealth Offences are deemed [Re s20A(1)(g) and(3)(c)]

Recommendation:

s20A should be amended by the insertion of two new paragraphs, namely (1)(h) and (3)(d), providing express examples of what may be required by preceding paragraphs (1)(g) and 3(c), with similar description to s400.9(2) of the *Criminal Code 1995 (Cth)*.

Rationale:

If it is Constitutionally necessary to link a restraining order under s20A under (1)(g) and 3(c), then the legislation should be amended to provide practitioners with the simplest means to make these connections within the constraints of the Commonwealth's powers.

The deeming provisions with respect to money laundering in the *Criminal Code 1995 (Cth)* would provide clear examples of what conduct would amounts to 'reasonable grounds to suspect' so that a practitioner may be able to apply the UWP s20A more effectively and without ambiguity. The deeming provision would be focused on Commonwealth criminal legislation in relation to combating serious organised criminal activity.

Example of new paragraph (1)(h) and (3)(d)[4]:

Without limiting paragraph (1)(g) and (3)(c), that paragraph is taken to be satisfied if:

(a) the conduct referred to in paragraph (1(1)(g)/(3)(c), involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Financial Transaction Reports Act 1988* that would otherwise apply to the transactions; or

(aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Anti Money Laundering and Counter Terrorism Financing Act 2006* that would otherwise apply to the transactions; or

(b) the conduct involves using one or more accounts held with ADIs in false names; or

(ba) the conduct amounts to an offence against section 139, 140 or 141 of the *Anti Money Laundering and Counter Terrorism Financing Act 2006* ; or

(c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure; or

(d) the conduct involves a significant cash transaction within the meaning of the *Financial Transaction Reports Act 1988* , and a person or entity:

(i) has contravened his or her or its obligations under that Act relating to reporting the transaction; or

(ii) has given false or misleading information in purported compliance with those obligations; or

(da) the conduct involves a threshold transaction (within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*) and a person or entity:

(i) has contravened his or her or its obligations under that Act relating to reporting the transaction; or

(ii) has given false or misleading information in purported compliance with those obligations; or

(e) a person or entity:

(i) has stated that the conduct was engaged in on behalf of or at the request of another person; and

(ii) has not provided information enabling the other person to be identified and located.

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

[4] This is a simplistic literal adaption of s400.9(2) of the *Criminal Code 1995 (Cth)*.

Issue 2 – AFP Commissioner does not have the power to apply for a restraining order [s20A(1)(c)]

Recommendation:

s20A(1)(c) should be amended to enable the AFP Commissioner to make an application for a restraining order, similar to s243E of the *Customs Act 1901 (Cth)*.

Rationale:

There is precedent for the AFP Commissioner, as well as the DPP, to grant a restraining order under s243E of the *Customs Act 1901 (Cth)* for prescribed narcotic dealings. Such a provision would enable required flexibility in the restraining order process.

Issue 3 – Preliminary Unexplained Wealth Order – Affidavit Requirements by Authorised Officer (s179B(2)(c)(i))

Recommendation:

s179B(2)(c)(i) should be amended to support a recommended change to the definition of unexplained wealth.

Rationale:

The affidavit requirement for an authorised officer at s179B(2)(c)(i), also similar to s20A(1)(d) & (3)(a) of the proposed Bill, would appear to have the practical effect of compelling an authorised officer to be able to say with some specificity what proportion of each specific property item comprising a person's total wealth could be separately explainable from either lawful or unlawful sources.

The Bill uses the phrase 'the property the authorised officer knows or reasonably suspects was lawfully acquired by the person' and in this context the approach in application would seem to be one of first determining all property currently owned, and then for each item of property, further investigate to trace its lawful derivation.

Assuming this to be the case then this provision appears to be invoking a property directed approach to restraint similar to that already existing currently at s19 of the Act. Presently, under s19 of the Act a Court may restrain property based on the affidavit of an authorised officer where it is suspected that the property is proceeds of an offence. It is often referred to as asset directed forfeiture, that is, suspicion attaches to the specific asset.

This being the case, the process of applying UWP would appear to be more cumbersome than applying s19 to achieve ostensibly the same outcome. The benefit of the UWP provision in such case could be taken as largely redundant.

It is contended that one solution, and our recommended solution, would be to depart from the Bill's current definition for unexplained wealth by moving to a definition with less of a property specific bias, as suggested in this submission where the calculation for unexplained wealth is specifically commented upon. Also see issue 6.

Issue 4 – Value of property on the day that an application for an unexplained wealth order is made (s179G(4))

The general concern at this section is simply the practicality to abide by the proposed Act when completing the calculation for 'Unexplained Wealth'. The Bill states that the value for any property is that at the day an 'order' is made. Applying the literal interpretation, does that imply that where it is required, that professional valuations will have to be signed-off on the actual day the application is made conversely, will the courts adopt a more pragmatic approach, such as accepting a valuation obtained within a reasonable time-frame preceding the making of the order?

Recommendation:

Amend s179G(4) to expressly eliminate any inference that the literal rule be applied.

Rationale:

The application of the concept of 'current value' is fundamental to the calculation for unexplained wealth in the current Bill. The financial evidence sought in the ordinary course of financial investigation is that required to confirm a transaction and invariably presents itself in a form which conveys value imparted at the time of the transaction. In accounting the convention for valuing something at the date of acquisition is referred to as the 'Historical Cost' convention. For example, a house purchased five years ago for the consideration of $500,000, that would be said to have a value of $500,000 when measured at historical cost.

It is clear from the Explanatory Memorandum accompanying the Bill however, that the intention is to not only deprive criminals from their illicitly acquired assets but to also deprive them of any capital gains that may accrue upon such assets. It stands then that to capture any such capital gains in the making of an UWP order that current valuations will need to be obtained.

Circumstances will arise therefore where the AFP or DPP will have to engage the services of someone to provide a professional valuation. If a valuation was required on the day of the application, I think it can be appreciated what an organisational nightmare this could become. First, the CDPP would book a hearing date at the Court and with sufficient advance notice to ensure that a valuer is available to sign-off on their report that same day.

The accountant or preparer of the UWP report would then have to sight the valuer's report in order to apply those opinions into the UWP report. This would seem to be an awkward way of proceeding and made particularly more complicated with larger UWP calculations, where many assets in need of valuation are involved or where the services of multiple valuers are required for different asset classes.

In summary, the concern here only applies if it is the legislator's intent to apply the literal rule to interpretation of the Bill.

Issue 5 – The definition of 'Property' may not capture and allow for calculation of expenses in any UWP calculation (s338 existing Act & relates to s179G(3) of the Bill)

The proposed Bill appears not to add to the existing definition of *property* under the Act. In calculating any Unexplained Wealth amount monies or value applied for which no tangible property was obtained in exchange, typically expenses, may escape inclusion in the calculation, having the effect of reducing the quantum of unexplained wealth that may otherwise be calculated.

Recommendation:

Redraft the definition of *property* or amend proposed s179G(3) in the Bill so as to make certain that expense type transactions do not escape inclusion when calculating unexplained wealth.

Rationale:

The definition for Unexplained Wealth is expressed at s179E(2) of the Bill to be a person's *total wealth* (itself defined at 179G(2) to be the sum of all the values of the property that constitutes a person's wealth), less the value of property which could be said to be lawfully derived.

The existing definition of *property* per s338 of the Act states that:

> *property* means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property.

The question is whether an expense transaction would be captured by this definition. Take the example of a criminal who devotes cash to expend plying themselves with alcohol partying in clubs, gambling, staying in lavish hotels, seeking the comfort of prostitutes, and who regularly partakes with the mandatory overseas holiday. Can it be said each of these past transactions meets the definition of either tangible or intangible property?

If these expense type events could be said to be property with confidence per s338, then total wealth as referred to at s179G(3) would take into consideration such expense items as s179G(2) the *value of property* is stated to include the value of any property that has been disposed of, or consumed, or for whatever reason is otherwise no longer available.

If these expense type events cannot be said to be property as defined by s338 of the Act then they may not be able to be brought to account for the purpose of calculating the quantum estimate of total unexplained wealth. Should this be the case the unintended consequence could be to cause a favour to criminals who apply their legitimate income to acquire tangible assets, and their unlawful income to expenses so as to reduce the quantum of any unexplained wealth calculation.

Irrespective, as a general suggestion it would be useful for any such definitions to employ greater use of terms more commonly understood in everyday English, for example, the definition for property could include the terms such as 'services' and 'benefits' to capture *expense* type events. At the investigative and analytical level practitioner's generally financially class things four basic ways – something is either an asset, a liability, income or an expense.

Issue 6 – The calculation of Unexplained Wealth appears to be limited by an inherent asset or property directed focus (s179E(2))

Also see Issue 3.

The proposed Bill determines unexplained wealth at s179E(2) to be the difference between a person's total wealth and the sum of the values of the property of a person not derived from a Commonwealth offence, or a foreign indictable offence, or finally, a State offence with a federal aspect. This treatment would appear to have the effect of focussing attention to the legitimate funding to each of the specific assets comprising a person's total wealth rather than taking a position as to the overall view of a person's unexplained wealth accrued between two points in time.

Recommendation:

Change the definition for the calculation of Unexplained Wealth to remove the current property specific bias to a less prescriptive definition, which would allow practitioners to apply professional judgement, to apply other methods that may be more appropriate given the circumstances.

Rationale:

The first step in applying the proposed Bill requires that all property currently owned by a person be identified and valued. The collective current value of all such property can secondly be said to represent a person's total wealth. Third, for each item of property, further financial investigation is required to trace its lawful derivation to determine the quantum of each property item that can be said to be lawfully derived. Finally, the collective total of all parts of property said to be lawfully derived is then subtracted from total wealth to arrive at an estimate for a person's unexplained wealth.

Ostensibly the calculation resembles more of a property ownership justification exercise (asset tracing exercise) which by being prescribed this way could exclude application of other contemporary Unexplained Wealth methods, which depending on the facts of the case, could prove more effective and practical to apply in order to estimate a person's unexplained wealth.

By way of example generally, two other commonly accepted approaches to calculating unexplained wealth include the 'Asset Betterment Method' and the 'Source and Application of Funds Method'. The preference with these and similar methods is that unexplained wealth is measured between two distinct points in time.

Taking the betterment method first, the calculation for unexplained wealth is effectively the difference between a person's wealth increase, measured as the increase to a person's net assets, then adding the quantum value of expenses incurred for the period, then subtracting from this the quantum of known income received by the person over the same period. The premise being that wealth cannot increase disproportionately to income available. In this context income is not restricted to the taxation law definitions of assessable income. Gifts from relatives, gambling proceeds and so forth would be treated as income for the purposes of such an analysis provided it can be substantiated.

Alternatively, the source and application of funds method simply quantifies all fund sources available to a person over a period, and then compares that result to the quantum of all funds known to have been applied by that person over the same period. The premise is that a person cannot apply more funds than the quantum of source funds available to them over the same given period. So where the total of applied funds exceeds the total of source funds it must be balanced off by some other source of funds, that which stands unknown or unexplained.

One key point of distinction to be emphasised then between these other methods compared to the method prescribed by the Bill is that with these other methods, the aim is to calculate an overall estimate for the quantum of unexplained wealth without becoming pre-occupied about how that total quantum is attributed to respective property items.

To try to illustrate this difference, the method proposed under the Bill and the betterment approach is compared by way of the following simple example, Example 6.1 for imaginary person Y.

Example 6.1 – Financial Data in Respect of Person X:

Let's assume that a suspect, person X, was under investigation for suspicion of narcotic importation and that investigation commenced say around January X2. For convenience, let's say the investigation closed with execution of search warrants on 01 July X2 (matches end of financial year which doesn't neatly happen in practice).

The investigation resulted in charges and indications were that the criminal activity may have extended back a couple years prior to commencement of the investigation. Unfortunately, not much wealth was evident for person X because X effectively launders wealth to person Y.

This is a classic case where in order to target person Y, the Bill's s20A requirement to also suspect the commission of some Commonwealth offence committed by person Y could prove to be a showstopper. Efforts to seek a restraining order on the back of an unexplained wealth calculation in respect of person Y could amount to nought without suspicion of an underlying offence.

However let's assume a credible witness comes forward to lift the veil exposing the relationship between X and Y so the suspicion requirements can now be comprehensively satisfied.

Now to keep things simple let's assume the following assets and liabilities for person Y appearing in the table were identified and measured at historical cost as at each of the following dates 01/07/X0, 01/07/X1 and 01/07/X2. For 01/07/X2 professional current valuations were also obtained and these are shown in the most right hand column of the table.

Example Data Person X	Assets & Liabilities as at 01/07/X0 (Historical cost)	Assets & Liabilities as at 01/07/X1 (Historical cost)	Assets & Liabilities as at 01/07/X2 (Historical cost)	Assets & Liabilities as at 01/07/X2 (Current value)
Assets				
House 1	1,000,000	0		
House 2		2,000,000		
House 3	0	0	3,000,000	3,300,000
Liabilities				
Nil	0	0	0	0
Expenses				
Lifestyle		100,000	100,000	
Income				
Cash income		100,000	100,000	

For the purpose of the example, the following is also known:

- A section 3E Taxation Administration Act request to the ATO confirms that person Y has not lodged income tax returns in the last 5 years, so known legitimate income is unknown and for the purposes of the exercise assumed to be zero however, Y received from their parents $100,000 legitimate cash for each of the FY ending 30/06/X1 and 30/06/X2
- Land title checks confirm that house 1 was sold 01/12/X0 for 1.1M
- Land title checks confirm that house 2 was acquired 31/12/X0 for 2M
- Land title checks confirm that house 2 was sold 01/12/X1 for 2.2M
- Land title checks confirm that house 3 was acquired 31/12/X1 for 3M
- Person Y spends much time at casinos, the races and other various wager and gambling establishments to enhance the image of being a regular gambler to account for cash

Other information, which is not known by police for which the unexplained wealth calculation hopes to

estimate is that:

- For the FY 01/07/X0 – 30/06/X1 person Y received $900,000 cash from person X
- For the FY 01/07/X1 – 30/06/X2 person Y received $800,000 cash from person X
- There was no system to what cash was deployed where with legitimate mixed with illegitimate and applied variously sometimes to support lifestyle and sometimes towards acquiring real property.

In respect of the quantum of unexplained wealth that police might now be able to estimate coming in cold without knowing the full truth as outlined, a quick comparison follows being an estimate applying the Bill's proposed method (Calculation A), and an estimate applying the Asset Betterment Method (Calculation B).

Calculation A - Unexplained Wealth applying the Bill definition

Person Y's unexplained wealth amount is the difference between person Y's *total wealth* and the sum of the values of the property that the court is satisfied was not derived from an offence of the Commonwealth, a foreign indictable offence or a State offence with a federal aspect (s179E(2)).

Total wealth is defined at s179G(2) to be the sum of all the values of the property that constitutes person Y's wealth.

The issue now is whether the expense items in the calculation of person Y's Total Wealth, raised previously at Issue 5 can be treated as *property* which has been *disposed* or *consumed* per s179G(3). If property is not sufficiently defined to include expense type transactions then person Y's total wealth is $3,300,000 however it is assumed in this case that expenses can be brought to account and so total wealth is calculated to be $3,500,000 as shown below.

Person Y	Property as at 01/07/X2 (Historical cost)	Property as at 01/07/X2 (Current value)	Property as at 01/07/X2 (Greater of Historical cost or current value)
Assets			
House 3	3,000,000	3,300,000	3,300,000*
S179G(3) Property			
Lifestyle expenses	Total for the period 01/07/X0 to 30/06/X2		200,000
Total Wealth			**3,500,000**

***** House 3 was acquired for $3,000,000 but has increased in value to $3,300,000. s179G(4) states that the value to be taken is the higher of historical cost or current value, so current value adopted.

What must now be deducted from this figure is the sum of the values of the property not derived from the list of specified offences at s179E(2)(b)(i)–(iii).

Starting with house 3 the current value is known to be $3,300,000.

Its acquisition was traced which shows its derivation to be proceeds from the sale from house 2 of $2,200,000 and cash of $800,000. With the cash we cannot say how much of that may have been a contribution from the legitimately sourced $100,000 provided by the parents that year. To be conservative we could assume the full sum was contributed. Therefore at this point it could be said $100,000 was legitimately acquired.

With respect to the $2,200,000 sale proceeds from house 2 the assumption is that the derivation of this property can be analysed to determine its legitimate origins. However, other views suggest that the Bill's wording may apply to deem the $2,200,000 as being from a legitimate source and so the analysis could not proceed past this point. Assuming this not to be the case, when taken further it is found that the value for house 2 was itself explained by way of sale proceeds from sale of house 1 for $1,100,000 with the balance a cash contribution of $900,000 and realisation of a $200,000 capital gain. Again it is not known if the cash was

entirely legitimate or not. Again we assume $100,000 from the parents was the known legitimate source. Turning to house 1, it is known it was acquired for $1,000,000 but nothing else is known about it. Presumably this house like the others could itself be subject to tracing to see where that takes things, but where that leads to other assets the point arrives where the legitimate question is asked where the line should be drawn. For the purpose of this exercise the judgement call is made that the origin of house 1 will not be contested. The resulting summary then is that unexplained wealth could be estimated to be the difference between current value for house 3 of $3,300,000 less the $1,000,000 acquisition for house 1 representing a sum of $2,300,000. From this we deduct assumed legitimate source cash of $200,000 resulting in the progressive sum of $2,100,000. Add to this now the value of property said to be consumed, being the $200,000 worth of lifestyle expenses for which legitimate income cannot be offset against because that has already been applied to the cash applied to purchase the houses. Finally, the capital gain on the first house could be said to be legitimately derived so deducting $100,000 and the final estimate for unexplained wealth arrives at the sum of $2,200,000. This reconciles with the total actual illegitimate cash proceeds of $1,700,000 and $500,000 in capital gains arising (being gain on house 2 and 3).

Calculation B - Applying the Betterment Approach

Person Y – Unexplained Wealth 01/07/X0 – 30/06/X2 (Per Betterment)				
Example Data Person Y	Assets & Liabilities as at 01/07/X0 (Historical cost) (Col 1)	Assets & Liabilities as at 01/07/X1 (Historical cost) (Col 2)	Assets & Liabilities as at 01/07/X2 (Historical cost) (Col 3)	Change in Value 01/07/X0 to 01/07/X2 (Col 3 less Col 1)
Assets				
House 1	1,000,000	0	0	(1,000,000)
House 2	0	2,000,000	0	0
House 3	0	0	3,000,000	3,000,000
Liabilities				
Nil	0	0	0	0
			Increase in change in wealth 01/07/X0 - 01/07/X2	**2,000,000**
Lifestyle expenses		Add total expenses in the period 01/07/X0 – 30/06/X2		200,000
Capital gains		Less capital gains arising in the period 01/07/X0 – 30/06/X2		(300,000)
Income		Less income arising in the period 01/07/X0 – 30/06/X2		(200,000)
			Estimated unexplained wealth at historical cost	**$1,700,000**

In application the betterment approach is much simpler. First the change in the increase to person Y's wealth is calculated as the difference between the value the person's total assets at the end of the period less the value of the person's assets as at the beginning of the period. The judgement call made is to set the begin date for analysis as 01/07/X0 and the end date as 30/06/X2. The periods were selected to match the financial year should income tax records be available to match the same period, and the two period of analysis was considered representative for the suspected period of offending.

As is seen the increase in the change in wealth reduces to the value of house 3 (at historical cost) less the value of house 1 (at historical cost). Properties in-between the *begin* and *end* dates are disregarded because they were acquired after the begin date and disposed of before the end date. Their impact would be absorbed into the final value of assets on-hand as at the end date although they may also have an income effect at the next stage.

The next stage is to add to the increase in the change in wealth expenses observed in the period because they represent additional consumption which has to be explained, and to deduct known income or capital gains as these latter events represent the legitimate sources of wealth against which the overall increase to wealth is compared against. If a positive number arises then this number is the quantum estimate of that proportion of the total increase in wealth which cannot be explained. In this example that sum is determined to be $1,700,000 which has correctly estimated the true sum of illegitimate cash known to have been applied.

It can be seen that the betterment approach is based on the accounting convention of historical cost. Measurement using historical cost will not capture that additional benefit a person may have captured by way of capital gain. However, there are ways to give effect to this.

For example it could be argued that measured at historical cost, house 3 was acquired for $3,000,000 but unexplained wealth was calculated as $1,700,000 implying house 3 could be said to be 17/30ths tainted or unexplained. This proportion applied to house 3's current value could then proportionately be considered to be 17/30ths of $3,300,000 or approximately, $1,870,000.

Alternatively, the *but for* test could be applied, that is, but for the advantage conferred by access to illegitimate cash, house 2 could not have been acquired, nor in-turn house 3, so the collective capital gains of $500,000 should be deprived from the person and added to the unexplained wealth sum calculated at historical cost. This would result in the final unexplained wealth sum to become $2,200,000.

As can be seen, using either method one of the possible outcomes leads to an estimate which is the same irrespective of which method is applied. However, it is contended that the betterment approach is an example of a method which could be construed as cleaner and less problematic to apply, especially where many property items are involved. The betterment adopted an overview or englobo approach avoiding the need to become bogged down in individual asset analysis.

Importantly however it is how the estimate for unexplained wealth is applied which is important. Ideally, the unexplained sum when calculated should be applied in full for the purposes of raising the judgement debt against the person. All the property of that person should then be eligible for restraint so as to quarantine property sufficient to extinguish the debt. Our concern is that the mere presence of the asset directed approach as prescribed seems poised to render ineligible for restraint any property where it can be shown to be lawfully derived. If this interpretation holds true in any way our position is that this renders the UWP ineffective and a departure from how true unexplained wealth should operate. Calculation of unexplained wealth is one exercise and the existence of property upon which to consider restraint to satisfy a judgement debt is a separate exercise.

In summary, the Bill's approach appears property directed in application. It takes the total wealth position being all current property on-hand for a person from which it is determined by working backwards to distinguish the proportion for each property item funded from legitimate or illicit sources. Arguably, the financial exercise can become protracted as there is no limit in time in relation to how far back a tracing exercise may go. The salient point to be made therefore is that the Bill's methodology appears geared to determining the proportionate quantum of crime derived funding in each and every asset or property item.

The AFPA's preference is for the Bill to be revised such that the current method is not prescribed in its current form. Preference would be for a less prescribed definition which would allow for the application of professional judgement by practitioners to apply other methods as appropriate to the problem to be resolved.

Issue 7 – s336A does not provide for a simple formula to apportion unlawful and lawful property, and there is no provision for the 'flow through' of 'tainted proceeds'.

Recommendation:

i. The Act should provide clear formulae for the apportionment of unlawful and lawful wealth in a property, or properties.
ii. The provisions under 336A should be broader. Rather than, under s336A(b) 'any consideration given for property or wealth that was lawfully acquired', the definition should go one further step back from the acquisition of the consideration to ensure the previous disposals or transactions (if any) are lawful.
iii. Moreover, the Act should make it clear that funds for which tax has been avoided or evaded are unlawful funds.

Rationale:

i. Section 336A does not seem to reflect the intent of the explanatory memorandum. The EM gives an example that if property is purchased for $100,000 comprising $50,000 lawfully acquired wealth and $50,000 unlawfully acquired wealth, and the property's value increases to $200,000, then it is to be considered comprising only $50,000 lawfully acquired wealth and $150,000 unlawfully acquired wealth.

   The section states that the wealth is lawfully acquired only if it entirely consists of lawfully acquired consideration. That is, in the EM example, the entire $200,000 increased value of the property is considered to be not lawfully acquired - there is no provision for proportionate allocation of wealth in making up the value of property.

ii. Furthermore, consider a scenario where unlawfully acquired wealth is used to buy a house. This house has been lawfully acquired using unlawfully acquired consideration (therefore it is not lawfully acquired per 336A). The house is sold and the proceeds banked. The consideration for the banked proceeds (being the house) was lawfully acquired as is the property, being cash at bank (therefore the cash has been lawfully acquired per 336A). This cash is then used as lawfully acquired consideration to lawfully acquire another house. This would therefore be considered to be lawfully acquired property by Sec 336A because the property (house) and the consideration (cash) are lawfully acquired. There seems to be is no provision for flow-through of the "tainting" of property.

iii. The definition of lawfully acquired should make it clear that funds for which tax has been avoided or evaded are unlawful funds. Therefore any assets acquired from tax avoided funds are unlawfully acquired. This is in keeping with *Jeffery case*[5] where the NSW Court of Criminal Appeal held (under the former POC Act 1987) that evasion of income tax fell within the definition of unlawful activity. Under the former *Proceeds of Crime Act 1987 (Cth)* (and current *Proceeds of Crime Act 2002 (Cth)*) a person could have their assets released from restraint if they are able to show that the asset is either not the proceeds of an offence or an instrument of an offence. An offence includes an offence against Commonwealth, State, Territory or Foreign law. The suspect had not paid his tax and the court held that non payment of tax was a Commonwealth offence and therefore unlawful activity. He had failed to meet the test and his property was automatically forfeited to the crown. Specific inclusion of tax evasion in the definition significantly increases the possibly of the AFP being able to establish a nexus between a person and their unexplained wealth.

[5] *Jeffrey v DPP* (1995) 79 A Crim R 514.

Issue 8 – Inclusion of a non-disclosure provision in PoCA.

Recommendation:

Amend s225 of the *Proceeds of Crime Act 2002 (Cth)* to include a non disclosure provision.

Rationale:

Sections 213 and 202 of the *Proceeds of Crime Act 2002 (Cth)* include non-disclosure provisions to prevent parties under investigation being informed of asset tracing inquiries so as to prevent the disposal of assets prior to restraint. It currently makes no sense why a search warrant issued for the same purpose should not also contain a non disclosure provision to prevent disclosure to an accused. The example is where a professional advisor has acted on behalf of an accused. A production order may be used to obtain the records using the available non-disclosure provisions but the order has a 14 day time frame for the supply of records unless the applicant can demonstrate to a magistrate that it is not impracticable for the person receiving the order to supply the records sought in a shorter timeframe. This requirement has practical difficulties as it is not clear how to convince a magistrate without having first spoken to the person receiving the order. A more prudent approach in this instance is for the use of a search warrant to enable records to be obtained immediately but there is currently no protection under the PoCA Act to prevent the professional advisor informing the client that the warrant has been served. This inconsistent with the existing non-disclosure clauses present in the Act which are designed to prevent the disposal of assets during tracing.

Issue 9 – Freezing order provisions

Recommendation:

Amend proposed Freezing Order provision so that they are issued in the same manner as a notice under s 213 of the *Proceeds of Crime Act 2002 (Cth)* i.e. by authorised delegates of the Commissioner of the AFP.

Rationale:

The proposed Freezing Order provisions should be redrafted so that the intention is removed that an application be made to a Magistrate. The point of having a Freezing Notice provision is to enable a quick and effective means of preventing an account balance being dissipated. The notice should be authorised to be issued in the same manner as a Section 213 notice to a financial institution under the *Proceeds of Crime Act 2002 (Cth)* - i.e. by authorised delegates of the Commissioner of the AFP. The Freezing Notice legislation should enable a 7 day time frame or similar to enable the matter to be brought before a court with proceeds jurisdiction. The matter could then be dealt with by way of an extension before a Magistrate to enable sufficient time to progress a restraining order application, or before a judge to hear the restraining order application.

There is little incentive for investigators to apply to a Magistrate to hear an application for a freezing notice in the proposed form as it would often be easier to schedule an application with a written affidavit before a judge - and in doing so apply for a restraining order (subject of course to the involvement of the CDPP). The freezing notice provision should be a short term means of holding funds pending further action under the Act with appropriate judicial review where neccessary.

Issue 10 – Definition of suspect and person

Recommendation:

The definition of a person/suspect should be expressly provided in the Act to ensure companies, trusts and foundations are included.

Rationale:

A common laundering technique is for assets to be controlled by companies, trusts and foundations. Many of which are based offshore, primarily in tax havens. This is not a new technique and it has been around since the 1930's. As discussed above, usually it is difficult to link a suspect involved in criminal activity to those structures. This could be due to the evidence not being available to establish that link, or a false identity has been used, or a nominee is used. Frequently that nominee is based offshore in a tax haven or a country with bank secrecy laws. Organised crime groups based in Australia and offshore frequently use professional money launderers to control assets for them (in much the same way that a trustee of a small superannuation fund or property trust holds assets on behalf of a lawful citizen, an investor – the concept is the same). The issue is that these entities control assets on behalf of criminals. The funds to buy the assets are laundered offshore with the intention to disguise their origin. Under such arrangements, the owner of the funds is hidden and it is impossible to trace and/or link the suspect to the asset and/or to the person who controls it for them.

The definition of a person/suspect needs to be clarified to include a company, a trust and a foundation. The *Acts Interpretation Act 1901 (Cth)* currently defines a person to include a company but to remove any doubt it needs to be clearly stated in the legislation. This is important as the proposed legislation has been modeled on the current PoCA laws. In that it follows established PoCA investigative techniques where assets are controlled by corporate entities or trusts – that is to, break down the corporate and trust structures to establish that a person (the suspect) has effective control over them and the asset(s) owned by them. This is not easy to do and is a historical method of investigating proceeds of crime matters.

Example 10.1:

Company A (a $1 company with a single shareholder and single director – who is not the suspect) owns property worth $2m. It has an account(s) which was opened shortly after incorporation, into which large amounts of money were transferred into it (either in cash, or telegraphic transfer from overseas etc). Inquiries reveal that the property is unencumbered. There is no loan arrangement in place either between the shareholder/director and the company to establish a possible lawful acquisition of the funds by the company. There is only 1 share issued which is worth $1. In the absence of a loan agreement between the shareholder/director and the company the only other source of the funds would be a loan by the company or the company issued for least 2,000,000 x $1 shares. It didn't so where did the money come from? This is a classic laundering scheme involving a company. The company is involved in no crime. The shareholder/directors are not involved in crime. There is no link between the suspect and the company and/or the property. Proposed section 20A would not operate. With PROACTIVE unexplained wealth provisions (modeled on the WA provisions) an unexplained wealth order could be levied on the company, not on any particular person. The company would have to account for how it acquired the funds to acquire the assets it owns (effectively the director would have to speak on behalf of the company and usually this person is knowingly hiding the assets for the suspect). If the company is being used as a vehicle to hide assets then it should be made to account for how it got its money to acquire them. Often the assets acquired by such companies are not occupied or used by the primary suspect (which might give rise to a claim that he/she has effective control over them). They are investment properties or income earning assets which the suspect does not have to possess or use. They are taken care of for him by a nominee.

The proposed legislation needs to include a note that UWP can be utilized against corporate entities and other structures such as trusts and foundations without the need to establish that a particular suspect has effective control over them.

Issue 11 – Inadequate Information Gathering Provisions (s180)

Recommendation:

S 180 of the Proceeds of Crime Act 2002 should be amended to enable the use of examination orders without having to first obtain a restraining order over property. The Bill should also include the powers as contained at s76 and s77 of the *Criminal Property Confiscation Act 2000 (WA)* CPCA (WA) to assist police in their duties when executing search warrants.

Rationale:

Existing Chapter 3 provisions of the PoCA prescribe the various information gathering powers available to the Commonwealth such as, Examination Hearings, Production Orders, Search Warrants, Notices to Financial Institutions and Monitoring Orders. The existing PoCA however is silent with respect to additional police powers which would aid the financial information gathering process when executing search warrants.

In the 2006 *Sherman Report* into PoCA, it was recommended that, prior to the hearing of applications for restraining orders, the CDPP be given an opportunity to conduct an examination not only of the applicant, but also of any other person capable of providing relevant information.[6]

The current PoCA is silent on valuable powers which would assist police and therefore the Commonwealth gather important information which could expedite the consideration process for the making of restraining orders.

Currently when police execute PoCA search warrants persons in attendance at search premises are not obliged to offer any information which may be relevant to locating or confirming the existence of property or property tracking documents to assist in determining whether property may be eligible for restraint.

In contrast, the CPCA (WA) appears to have provided police such a valuable provision. For example, s76(1)(d) & (e) of the CPCA requires a person when demanded by police, to provide any information within the person's knowledge or control which is relevant to firstly locating any property, and secondly, any information relevant to determining whether such property should be liable for confiscation.

It seems under the CPCA a person, be it the suspect, or the person suspected to have effective control of property are compelled to tell police about property identified and this seems to extend to explaining how property came to be in possession and how the acquisition was funded or sourced.

This power is valuable in that it commits the suspect or a related person to a story before they have the opportunity to consult others to perhaps devise a sanitised version of events. Under s76 CPCA it is an offence punishable by 5 years imprisonment or penalty of $100,000 to not comply without lawful excuse to any such demand by police. Further the person is not excused from complying even if to comply may incriminate that person.

The current limitation with the PoCA is that the best opportunity to really challenge the integrity of a suspected person is via the examination hearing process at s180 of the Act. However, s180 cannot be invoked to assist the beginning of the restraining order process because s180 can only be invoked once a restraining order over property has first been obtained.

Under the present Act, therefore, there is no mechanism to compel the evidence of spontaneous response from persons when property is found, or when documents suggestive of other property ownership or control is found during the execution of search warrants.

[6] Recommendation D6, Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth) (July 2006) 72.

A long held maxim expressed within the sphere of financial investigation is that the person best able to explain the derivation of one's assets is usually the person themselves. So some power of compulsion to explain at an early stage should not prove too much of an onus upon the person. For example, if the test was put to the average Australian they would be competent enough to explain in general, how their wealth came to be – perhaps not a precise dollar for dollar explanation, but certainly a reasonable picture such that if investigators were to seek substantiating records, and then analyse them, the stated picture would generally be found to hold true.

Returning to the Person X example above, this power may have helped the AFP draft an affidavit if investigators were able to put important questions to Person X such as: who owns the cash? Why is so much cash here? Why has the cash been secreted or bundled in a particular and consistent way? What is the source of the cash? Who are the people who can attest to the source of the cash? Over what period of time was the cash compiled? What work do you do? What has been the quantum of your income derived over the relevant period? How are you paid? Who paid you? How much is banked? What banking relationships do you have? Has anyone lent money to you? Do you gamble? Have you derived winnings from gambling? With respect to gambling tell me when, where, how much and who else was there with you? Do you retain receipts, if so, where are they? If you have any documents in relation to any of this I require you to produce them to me (this being an additional power conferred under s77 CPCA which provides for receipt of later-produced documents).

The information gathering powers afforded to the AFP under the existing PoCA, pre restraining order affidavit stage, are too limited. Information gathering and the integrity testing of such information can only be invoked via legal process and at a stage much later than what could be considered ideal. This only serves to reduce the effectiveness and efficiency of the PoCA regime.

Issue 12 – Inclusion of a cash seizure provision.

Recommendation:

A cash seizure provision similar to the United Kingdom's *Proceeds of Crime Act 2002 (UK)* should be introduced into this Bill to supplement unexplained wealth.

Rationale:

There are presently very weak provisions to seize and investigate cash that is suspected to be the proceeds of crime. The UK provisions place an obligation upon a suspect or person laying a claim of ownership over cash seized by police to account for their lawful acquisition of the cash. By doing so the Act also provides for investigation periods to be available to law enforcement agencies to investigate the origin and source of funds of a minimum of £1000 in the light of the claim made by the person owning the cash. Periods of investigation and orders to retain cash under s 295(2) are subject to review by magistrates to enable more efficient operation of the Act. It would follow that a restraint under existing provisions would follow the investigation framework that might be introduced.

If it suits the Committee, the AFPA can provide in-camera evidence on the usefulness of a cash seizure provision at the Commonwealth level in relation to operational situations dealt with by the AFP.

Issue 13 – Inclusion of powers to stop, search and detain a person [ss 73 to 76 *Criminal Property Confiscation Act 2000 (WA)*]

Recommendation:

Introduce powers to stop, search and detain a person where reasonable grounds to suspect exist that the person has confiscable property or property tracking documents in their possession similar to ss 73 to 76 *Criminal Property Confiscation Act 2000 (WA)*.

Rationale:

In Western Australia, Police have the power to stop, search and detain a person where reasonable grounds to suspect exist that the person has confiscable property or property tracking documents in their possession (Section 73).

Currently under PoCA the AFP can only search a person under the authority of a s225 Search Warrant in relation to premises, where the warrant authorizes the search of the person. The AFP cannot search a person without warrant and we cannot under the PoCA get a search warrant for a person.

The AFP has to rely on Section 3E of the *Crimes Act 1914 (Cth)* and that provision is not suitable in time critical situations, especially in circumstances where money couriers are carrying large sums of cash around in major cities (an everyday occurrence) and Police want to intercept them.

Under s76 of the *Criminal Property Confiscation Act 2000 (WA)*, a person is required (with or without warrant) to give a police officer any information within the person's knowledge or control that is relevant to locating property that is reasonably suspected of being confiscable or any information relevant to determining whether or not property is confiscable and any information (codes, passwords, etc) to interpret or understand any property tracking document.

Issue 14 – Inclusion of an illicit enrichment offence

Recommendation:

An 'illicit enrichment' offence for public officials should be included in the Bill as encouraged in Art. 20 of the *United Nations Convention Against Corruption*.

Rationale:

Article 20 of the *United Nations Convention Against Corruption* encourages participating parties to the Convention to consider creating an 'illicit enrichment' offence for public officials.[7] This would enable an 'unexplained wealth offence' to be used in relation to identifying corrupt public officials in accordance with this Convention.

[7] Article 20

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

General Amendments to PoCA

There is a huge potential for unexplained wealth declarations to provide large proceeds of crime revenue streams, however the initial cost of such investigations will require additional budget funding.

In its recent report to the Federal Audit of Policing Capabilities, the AFPA recommended that that the AFP/ACC budget could be directly supplemented with funds lawfully confiscated by the Courts using unexplained wealth legislation rather than the funds going into general revenue and/or the Confiscated Assets Trust Fund.[8] In particular, the extra revenue could directly supplement the teams investigating unexplained wealth.

There is long standing supplementary funding precedence for this within the US federal law enforcement agencies and has recently been established by the Western Australian Parliament for the Western Australian Police Force.

The Government should consider such a proposal. This would ensure that there is not only an effective legislative response to Serious Organised Crime (in this Bill) but an ongoing source of income to effectively pursue the policy. The AFPA fears that without this link, the unexplained wealth provisions may be left dormant.

[8] Jon Hunt-Sharman and Chris Steel, (eds) 'Enforcing against risk: Report to the Federal Audit of Policing Capabilities', *Australian Federal Police Association* (Canberra: AFPA, 2009) 114.

SCHEDULE 2

Issue 1 – Enhancing information sharing with the ATO to prove wealth

Recommendation:

The Australian Taxation Office (ATO) should be required to provide information in accordance with the release provisions of s3E of the *Taxation Administration Act 1953 (Cth)* to assist police in establishing the wealth of an individual.

Rationale:

Presently there is no release provision for the use of income tax information held by the ATO to be used in evidence in criminal proceedings to enable the calculation of a defendant's income as referred to in Section 400.9 of the *Criminal Code Act 1995* (Cth).

The release provisions only enable the release of information to be used in evidence in furtherance of a tax related prosecution, for use with the making of an order under the *Proceeds of Crime Act 2002* (Cth) or as intelligence in connection with the investigation of an indictable offence. The lack of an ATO release provision will inhibit the establishment of unexplained wealth.

SCHEDULE 4

Schedule 4, Part 1, Crimes legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth)

Issue 1: Joint Commission

Schedule 1, Part 4 Crimes legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) proposes to insert a new section 11.2A into the Criminal Code (Cth) to extend liability for 'joint commission' of offences. This is modelled on joint criminal enterprises under common law.

The Explanatory Memorandum views this amendment as enhancing current Commonwealth offences such as 11.1 Attempt; 11.2 complicity & common purpose; 11.3 Innocent agency; 11.4 incitement; and 11.5 Conspiracy.

Recommendation:

That 11.2A is amended to remove the requirement that the accused is a party to the agreement and that at least one of the parties to the agreement is required to commit an overt act.

Rationale:

The AFPA believes that this amendment is still very restrictive and will not adequately address organised crime groups and transnational criminal enterprises. This amendment still requires an accused to be party to the agreement and secondly that at least one of the parties to the agreement is required to commit an overt act, that is that they are involved in the physical execution of the offence. This is identical to the Commonwealth offence of conspiracy ss11.5(2)(c) of the Criminal Code (Cth).

Although a conspiracy offence is often used by the AFP it has a low success rate as it requires that at least one of the parties to the agreement commit an overt criminal act. This is not the case in other jurisdictions. Legislation in Canada, New Zealand, Queensland, Victoria, Western Australia and Tasmania does not require one of the parties to the agreement having to commit an overt act pursuant to the agreement.

The proposed amendment focuses on predicate offences and the involvement of the persons committing those offences. It does not adequately cover all levels of involvement in organised crime.

Issue 2: The need for a specific organised crime provision to declare a known transnational organised criminal organisation as a 'prohibited organisation' on the basis of Australian and International police intelligence.

Recommendation:

Consistent with the First National Security Statement which identifies transnational and organised crime organisations, as a threat to national security, Division 102 of the Criminal Code (Cth) should be replicated for transnational and organised crime organisations.

Rationale:

The Commonwealth is signatory to various international conventions relating to organised crime, including the Convention Against Transnational Crime (CATC) which was ratified on 27 May 2004.
The Parliament of Australia can legislate on any criminal law issue arising out of international treaties signed by the Commonwealth Government.'[9]

Importantly, on 04 December 2008 in the First National Security Statement to the Parliament, the Prime Minister of Australia The Hon. Kevin Rudd MP stated:

> The list of non-traditional threats or new security challenges is also growing.
> Transnational crime – such as trafficking in persons, drugs and arms; people smuggling and the illegal exploitation of resources – will remain a continuing challenge.
> These activities can undermine political and social institutions, inflict economic and personal harm or contribute to other forms of violence…
> The Government is committed to deploying all necessary resources to prosecute those criminals who seek to undermine Australia's border security…
> Organised crime more broadly is a growing concern for Australia, one the Government is determined to combat. The Australian Crime Commission has estimated that organised crime costs Australia over $10 billion every year.[10]

Despite Treaty obligations and the First National Security Statement by Prime Minister Rudd, this Bill does not effectively deal with the transnational and organised crime operational environment.[11]

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[9] Dr Andreas Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serous and organised crime groups* (4 April 2008) 80:

'The Commonwealth Government, however, has the power to make criminal law in those areas that are assigned to the Federal Parliament. These include the subject matters enumerated by s 51 *Constitution* and the incidental power' as provided for in s 51(xxxix) *Constitution,* for example customs, trade, external affairs, fisheries, quarantine et cetera.427 The Commonwealth's external affairs power authorises the Federal Government to enter into international treaties. Australia has signed the *Convention against Transnational Organised Crime...*

In the past, especially in *Commonwealth v Tasmania* (1983) 46 CLR 625, the High Court applied a very broad reading of the Commonwealth's external affairs powers, suggesting that the Federal Parliament can legislate on any criminal law issue arising out of international treaties signed by the Federal Government.428 To date, federal criminal law, however, contains no specific offences relating to participation in criminal organisations'

[10] The Hon. Kevin Rudd MP Prime Minister of Australia, First National Security Statement address to the Parliament (4 December 2008)

[11] Dr Andreas Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serous and organised crime groups* (4 April 2008) 74 – 'Organised crime poses significant challenges to the criminal justice system. The criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. The structure and modi operandi of criminal associations, however, do not fit well into the usual concept of criminal liability. Moreover, it is difficult to hold directors and financiers of organised crime responsible if they have no physical involvement in the execution of the organisation's criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of accessorial liability.'

Schedule 4, Part 1, like other Commonwealth legislation, traditionally focuses on predicate offences and the involvement of the persons committing those offences. Schedule 4, Part 1, does not adequately cover all levels of involvement in organised crime. Commonwealth Conspiracy and other accessorial type of offences are difficult to prove compared to State & Territory legislation yet this only expands on those provisions.

Although transnational crime and organised crime is now considered a national security threat there is no definitive law to outlaw the activity or indeed provide higher penalties for existing offences when transnational criminal groups or organized criminal enterprises are involved.

Specific Commonwealth organised crime provisions are required to enable police to effectively prevent, disrupt, investigate and prosecute organised crime activities.

It is important that Commonwealth organised crime provisions addresses foreign organised crime organisations as well as domestic organised criminal groups.

Federal investigations identify members of known transnational organised crime criminal organisations declared 'prohibited organisations' within various countries operating within Australian borders. They include members from 14K, Wo Shing Wo and Sun Yee On and other Chinese triad societies, specific Columbian cartels, specific Russian Organised crime syndicates, the Japanese Yamaguchi-gumi, Italian Mafia, Middle East syndicates and Vietnamese organised crime, transnational Outlaw Motor Cycle Gangs (OMCGs) etc.

For example, a recent AFP investigation has identified a family that is believed to be the leaders of a known Colombian Drug cartel. The family is suspected to be involved in numerous drug importations, the last known importation being 300 kilos of cocaine.

There is strong merit in Commonwealth legislation that can allow the Governor General, on advice from the Prime Minister, to 'declare a known transnational organised criminal organisation as a 'prohibited organisation' on the basis of Australian and International police intelligence.

Division 102 of the Criminal Code (Cth) has effectively used against known terrorist organisations. The procedures for declaring a terrorist organisation has significant safeguards built into it including Parliamentary Joint Committee oversight of the legislation and its application by the AFP. Also there is independent oversight of the AFP by the Commonwealth Ombudsman and the Australian Commission on Law Enforcement Integrity (ACLEI).

Division 102 of the Criminal Code (Cth) could easily be replicated to address known transnational organised criminal organisations.

Issue 3: The need for a specific organised crime provision consistent with the Commonwealths obligations under the Convention Against Transnational Crime (CATC) ratified on 12 May 2004 in relation to participation in criminal groups.

Recommendation:

The Criminal Code(Cth) be immediately amended to create harmonisation of legislation between Canada, New Zealand, NSW and the Commonwealth by mirroring ss 93S and 93T of the Crimes Act 1900 (NSW) in relation to Participation in criminal groups.[12]

Rationale:

There also needs to be a provision to address the organised crime groups that adapt, diversify, and have flexible non hierarchical structures. These organised crime groups have 'sub contract' type arrangements.

These organised crime groups can be transient in nature with some members not even being aware of the existence of other persons. This allows the higher level members of the activity to distance themselves from the overt elements of the crime thus creating difficulties for investigating officers to charge the leaders of the crime groups.

Compartmentalisation remains one of the distinguishing characteristics of these organised crime groups. For example, several levels may be used during an importation of illegal drugs, with members sent from overseas to clear a shipment through Customs or to receive a courier parcel. The illegal drugs will sometimes be passed to another person who will store them before delivery to a further party responsible for distribution. Often, participants in the various levels are insulated from one another, making it difficult for law enforcement to gain meaningful assistance from those arrested. The group could be controlled from Australia or overseas.

The AFP is aware of transnational and organised crime organisations utilising these less structured crime groups to expand their activities in a collaborative approach.

[12] Dr Andreas Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serous and organised crime groups* (4 April 2008) 7.

These organised crime groups can be addressed through a provision that mirrors ss 93S and 93T of the Crimes Act 1900 (NSW) in relation to Participation in criminal groups[13].

NSW has also legislated to criminalise participation in criminal groups. The offence defines "criminal group" as a group of 3 or more people who have as their objective or one of their objectives:

- Obtaining material benefits from conduct that constitutes a serious indictable offence; or
- Obtaining material benefits from conduct engaged in outside NSW (including outside Australia) that, if it occurred in NSW, would constitute a serious offence, or
- Committing serious violence offences, or
- Engaged in conduct outside NSW (including outside Australia) that, if it occurred in NSW, would constitute a serious violence offence.

"Serious violence offence" is defined as one attracting a maximum penalty of 10 years gaol or more, involving loss or serious risk of loss of life, serious injury or serious risk of serious injury to a person, serious damage to property in circumstances endangering the safety of any person and perverting the course of justice if the conduct involved meets the above risk, injury, loss or damage.

The offence requires a mental element on behalf of the offender of either knowledge that the group is a criminal group, and knowledge, or being reckless as to whether, his or her participation in that group contributes to the occurrence of any criminal activity.

The basic offence carries a maximum penalty of 5 years gaol. NSW provides aggravated offences based on the above with penalties ranging from 10 – 14 years gaol.

A current example of a more common loosely knit organised crime group identified by the AFP within Australia involves an Australian based member of an ethnic organised crime group. The individual has been investigated by Australian law enforcement agencies on numerous occasions. Criminal Intelligence indicates this person is the 'principle' Australian element of the group with the criminal activity being 'approved' by him.

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[13] 93S and 93T of crimes Act 1900 (NSW)

93S Definitions

(1) In this Division:

"criminal group" means a group of 3 or more people who have as their objective or one of their objectives:

(a) obtaining material benefits from conduct that constitutes a serious indictable offence, or

(b) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence, or

(c) committing serious violence offences, or

(d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence…

(2) A group of people is capable of being a criminal group for the purposes of this Division whether or not:

(a) any of them are subordinates or employees of others, or

(b) only some of the people involved in the group are involved in planning, organising or carrying out any particular activity, or

(c) its membership changes from time to time.

93T Participation in criminal groups

(1) A person who participates in a criminal group:

(a) knowing that it is a criminal group, and

(b) knowing, or being reckless as to whether, his or her participation in that group contributes to the occurrence of any criminal activity,

is guilty of an offence. Maximum penalty: Imprisonment for 5 years…

Members of the Organised Crime group visit/interact with Australia from South America, China and S/E Asia. They are responsible for organising the importation of the illicit drugs. They recruit persons in Australia to undertake high risk elements of the offence, including the facilitation of the importation (during and post importation).

The Australian based member is involved in facilitating meetings and provides infrastructure support (vehicles, organising accommodation etc). Financial benefits are provided to the Australian based member of the syndicate however he has no or limited connection to the substantive offence.

This Australian based member could be prosecuted for Participation in criminal groups if the provision existed under Commonwealth legislation.

In the June 2009 Government Report to the ACT Legislative Assembly, authorised by the ACT Attorney General Simon Corbell MLA, the authors considered whether the NSW participation in criminal groups offence would prima facie limit an individuals rights under s15(1) of the ACT Human Rights Act (HRA). Importantly, it found:

> The NSW offence of participation in criminal groups requires that the defendant knew the group they were associating with had criminal objectives, and that the defendant knew or was reckless as to whether their participation in that group contributes to the commission of an offence. Arguably, if enacted in the ACT, this offence would be found to impose reasonable and proportionate limitations on section 15(1). This cannot be said of some of the other forms of consorting provisions existing in other jurisdictions.
>
> Although aggravated offences are not consistent with the principles entrenched in the ACT Criminal Code, the Territory would benefit from consideration of the inclusion of a legislative amendment to criminalise both participation in criminal groups and recruiting people to carry out, or assist in carrying out, criminal activities.[14]

The AFPA submits that it is essential that the Commonwealth introduces an offence for ' participating in a criminal organisation' based on the model set out in the Convention against Transnational Orgnanised Crime, which has been adopted in various forms by Canada, New Zealand and NSW.

[14] Department of Justice and Community Safety, *Government Report to the ACT Legislative Assembly: serious organised crime groups and activities* (ACT Government: Canberra 2009) 44.

Issue 4: Inadequacy of the Bill in relation to recruitment of persons to engage in criminal activity

Recommendation:

The Criminal Code (Cth) should be immediately amended to include a provision for Recruiting persons to engage in criminal activity based on Section 351A of Crimes Act 1900 (NSW)[15].

Rationale:

There is no specific higher level offence for recruiting people to engage in criminal activity such as the recruitment of the Bali 9 teenagers. Commonwealth legislation is grossly inadequate in addressing this insidious behaviour. This Bill could address the deficiency in the Commonwealth legislation.

In the June 2009 Government Report to the ACT Legislative Assembly, authorised by the ACT Attorney General Simon Corbell MLA, the authors considered include a provision for Recruiting persons to engage in criminal activity based on Section 351A of Crimes Act 1900 (NSW). Importantly, it found:

> Although aggravated offences are not consistent with the principles entrenched in the ACT Criminal Code, the Territory would benefit from consideration of the inclusion of a legislative amendment to criminalise both participation in criminal groups and recruiting people to carry out, or assist in carrying out, criminal activities.[16]

[15] Crimes Act 1900 (NSW) 351A Recruiting persons to engage in criminal activity

(1) A person (not being a child) who recruits another person to carry out or assist in carrying out a criminal activity is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.

(2) A person (not being a child) who recruits a child to carry out or assist in carrying out a criminal activity is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

(3) In this section:
child means a person under the age of 18 years.
criminal activity means conduct that constitutes a serious indictable offence.
recruit means counsel, procure, solicit, incite or induce.

[16] Department of Justice and Community Safety, *Government Report to the ACT Legislative Assembly: serious organised crime groups and activities* (ACT Government: Canberra 2009) 44.

ATTACHMENT A

AML/CTF ACT 2006

3 Objects

(1) The objects of this Act include:

(a) to fulfil Australia's international obligations, including:

(i) Australia's international obligations to combat money laundering; and

(ii) Australia's international obligations to combat financing of terrorism; and

(b) to address matters of international concern, including:

(i) the need to combat money laundering; and

(ii) the need to combat financing of terrorism; and

(c) by addressing those matters of international concern, to affect beneficially Australia's relations with:

(i) foreign countries; and

(ii) international organisations.

Note 1: The objects of this Act are achieved by (among other things) requiring information to be given to the AUSTRAC CEO and by allowing certain other agencies to access information collected by the AUSTRAC CEO.

Note 2: The objects mentioned in paragraphs (1)(a),(b) and (c) relate to the external affairs power. Schedule 1 (alternative constitutional basis) contains provisions designed to attract other legislative powers (including the taxation power).

(2) Relevant international obligations include obligations under the following:

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

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

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

(d) United Nations Security Council Resolution 1267 S/RES/1267 (1999);

(e) United Nations Security Council Resolution 1373 S/RES/1373 (2001);

(f) United Nations Security Council Resolution 1617 S/RES/1617 (2005).

(3) The following reflect international concern:

(a) the FATF Recommendations;

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

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

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

(e) the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999 [2002] ATS 23;

(f) United Nations General Assembly Resolution 51/210 A/RES/51/210 (1996);

(g) United Nations Security Council Resolution 1267 S/RES/1267 (1999);

(h) United Nations Security Council Resolution 1269 S/RES/1269 (1999);

(i) United Nations Security Council Resolution 1373 S/RES/1373 (2001);

(j) United Nations Security Council Resolution 1456 S/RES/1456 (2003);

(k) United Nations Security Council Resolution 1617 S/RES/1617 (2005).

Note 1: ***FATF Recommendations*** **is defined in section 5.**

1. **That a Working Group is established to consult with relevant stakeholders including DPP, Police jurisdictions, and Police employee representatives organisations to:**

    a. **Review and report on all current applicable State, Territory and Commonwealth legislative arrangements to disrupt and dismantle serious and organised crime groups and associations with these groups**

        i. **With particular emphasis on unexplained wealth;**

        ii. **International 'best practice' legislation; and**

        iii. **The South Australian Legislative Reform Model**

    b. **Based on the review the Working Group develop proposed model crime legislation to be mirrored by federal, state & territory jurisdictions**

    c. **Review applicable federal crime legislation with a view to harmonising provisions.**

2. **That the Proceeds of Crime Act (Cwth) is immediately amended consistent with the recommendations of the *Report on the independent review of the Operation of the Proceeds of Crime Act 2002 (Cth)* tabled in July 2006**

3. **That the Proceeds of Crime Act (Cwth) is immediately amended to include an Unexplained Wealth provision mirroring ss 67-72 of the Crimes (Forfeiture of Proceeds) Act 1988 (NT) consistent with Australia's obligation under1997 Interpol General Assembly Resolution.**

4. **That Commonwealth legislation is enacted consistent with Australia's obligations under the Convention Against Transnational Crime (CATC) ratified on 27 May 2004.**

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The National Voice of Policing

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30 April 2009

Secretary
Dr Jacqueline Dewar
Parliamentary Joint Committee on the
Australian Crime Commission
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dewar

RE: PJC INQUIRY INTO SERIOUS AND ORGANISED CRIME

As you know, the Police Federation of Australia (PFA) made a submission dated 1 May 2008 to your inquiry into serious and organized crime and gave formal evidence to the Committee on 6 November 2008. The PFA Executive also met in an informal sense with the Committee on 23 February 2009 where is was agreed we would provide a supplementary submission to the Inquiry.

Since that time the Australian community has seen a most worrying escalation in incidents involving Outlaw Motor Cycle Gangs (OMCG) including a murder at Sydney Airport involving OMCG members and the arrest of numerous alleged OMCG members in New South Wales, the Australian Capital Territory, and elsewhere.

These cases of serious and organized crime reinforce the need for the most effective and consistent legislation and law enforcement nation-wide to protect the Australian community.

To that end we made a number of recommendations to the Committee in our presentation on 6 November 2008. We particularly draw your attention to recommendations 3 and 4 as follows:

3. That the Proceeds of Crime Act (Cwth) is immediately amended to include an Unexplained Wealth provision mirroring ss. 67-72 of the

Crimes (Forfeiture of Proceeds) Act 1988 (NT) consistent with Australia's obligation under1997 Interpol General Assembly Resolution.

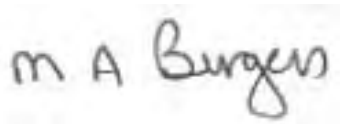
4. That Commonwealth legislation is enacted consistent with Australia's obligations under the Convention against Transnational Crime (CATC) ratified on 27 May 2004.

We, in conjunction with our colleagues of the Australian Federal Police Association (AFPA), a Branch of the PFA, wish now to provide the Committee with a supplementary submission which provides operational evidence in support of recommendations 3 and 4.

The supplementary submission is enclosed. Please note that the supplementary submission is accompanied by Attachments A and B which are provided to the Committee on a strictly confidential basis and are not for publication.

We would be happy to discuss this supplementary submission with the PJC on the ACC if that would assist the Committee.

Yours sincerely



Mark Burgess
Chief Executive Officer

Enclosure

AFPA BRANCH SUPPLEMENTARY SUBMISSION

Parliamentary Joint Committee on Australian Crime Commission
30 April 2009

The AFPA Branch of the Police Federation of Australia (AFPA) wishes to present to the Committee operational evidence to support Recommendations 3 and 4 of the submission by the Police Federation of Australia (PFA).

Attachment A and Attachment B provide detailed operational information that is being provided strictly in confidence to the Committee. We request that the Attachments A & B are not published by the Committee.

Whilst harmonisation of organised crime legislation across jurisdictions is being considered as a broader issue by the Committee, the AFPA specifically recommends immediate amendment to Commonwealth legislation in order for the Australian Federal Police (AFP) to effectively fight transnational and multi-jurisdictional organised crime.

The AFPA believes that the below proposed package of legislative reform is essential in order for police to combat organised crime impacting on Australia.

1. Role of the AFP

The AFP prevents, detects and investigates a broad range of crime types including:

- preventing, countering and investigating transnational and multi-jurisdictional organised crime, illicit drug trafficking, organised people smuggling (including sexual servitude and human exploitation), serious fraud against the Commonwealth, corporate crime, 'high tech' crime (involving information technology and communications), money laundering; terrorism; and

- the identification, restraint, seizure and confiscation of assets involved in or derived from the above activities.[1]

It is fair to say that high level transnational and multi-jurisdictional organised and serious crime comes directly under the Commonwealth jurisdiction however current Commonwealth legislation is grossly inadequate compared to State and Territory jurisdictions.
There is no specific legislation in relation to participation in an organised crime. Indeed, the current Commonwealth legislation does not even include the 'traditional' offences such as *'knowingly concerned'* or *'consorting'* and the offence of *'Conspiracy'* has limited application.

[1] AFP Assistant Commissioner Tim Morris evidence before the PJC ACC

2. Inadequacy of Commonwealth legislation

a. Inadequacy of Commonwealth legislation re accessorial liability

There is no specific offence of *'knowingly concerned'* as it was not translated into the Criminal Code (Cth) from the Crimes Act 1914 (Cth). This offence was often utilized against those criminals not committing an overt criminal act but knowingly concerned in the criminal offence.

As a minimum, the Criminal Code (Cth) s.11 should be immediately amended to include the offence of 'knowingly concerned'.

b. Inadequacy of Commonwealth legislation re Consorting

There is no specific offence of consorting within Commonwealth legislation. Consorting offences exist in NSW, Victoria, South Australia, Western Australia, Tasmania and Northern Territory. In Northern Territory and NSW the Court as part of sentencing can also make non-association orders or place-restriction orders on the offender. South Australia has recently contemporised their Consorting offences to include electronic communication.

It is essential that there is Commonwealth legislation that provides consorting or similar provision that prevents a person associating with another person who has been involved in organised criminal activity as an individual or as part of an organisation.

As a minimum, the Criminal Code (Cth) should be immediately amended to include the offence of 'consorting' to ensure harmonisation of legislation between NSW, Victoria, South Australia, Western Australia, Tasmania, Northern Territory and the Commonwealth.

c. Inadequacy of Commonwealth legislation re Conspiracy

The offence of conspiracy ss11.5(2)(c) of the Criminal Code (Cth) is often used by the AFP but it has a low success rate as it requires that at least one of the parties to the agreement commit an overt criminal act. This is not the case in other jurisdictions.

As a minimum, the Criminal Code (Cth) ss. 11.5(2) (c) Conspiracy, should be immediately amended to ensure harmonisation of legislation between Canada, New Zealand, Queensland, Victoria, Western Australia and the Commonwealth by removing the requirement for one of the parties to the agreement having to commit an overt act pursuant to the agreement.

d. Inadequacy of Commonwealth legislation re recruiting persons to engage in criminal activity

There is no specific higher level offence for recruiting people to engage in criminal activity such as the recruitment of the Bali 9 teenagers. Commonwealth legislation is grossly inadequate in addressing this insidious behaviour.

As a minimum, the Criminal Code (Cth) should be immediately amended to include a provision for Recruiting persons to engage in criminal activity based on Section 351A of Crimes Act 1900 (NSW)[2]

[2] Crimes Act 1900 (NSW) 351A Recruiting persons to engage in criminal activity

(1) A person (not being a child) who recruits another person to carry out or assist in carrying out a criminal activity is guilty of an offence.
Maximum penalty: Imprisonment for 7 years.

(2) A person (not being a child) who recruits a child to carry out or assist in carrying out a criminal activity is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

3. Further information in relation to Police Federation of Australia Recommendation 3

That the Proceeds of Crime Act (Cwth) is immediately amended to include an *'Unexplained Wealth'* provision mirroring ss. 67-72 of the Crimes (Forfeiture of Proceeds) Act 1988 (NT) consistent with Australia's obligation under 1997 Interpol General Assembly Resolution.

In the July 2006 *Report on the independent review of the Operation of the Proceeds of Crime Act 2002 (Cth),* Mr Tom Sherman AO recommended that *'unexplained wealth'* should be kept under review[3] on the basis that:

'*investigations can often be frustrated through lack of evidence against people with significant wealth and no apparent source of legitimate income. Particularly the bosses who are often far removed from the actual criminal activity'.*

The AFP Expert on Money Laundering Investigations[4] advises that:

'We have developed this fiction that following the money trail will directly lead police to the top echelons of crime in Australia. It is possible in many cases to identify persons of interest who have accumulated significant wealth which appears to be unexplained but any proof of their involvement in crime is totally absent. The money flows up but the evidence of criminality does not.'

Money laundering by organised criminal organisations/groups involves three stages – ***placement, layering*** and ***integration*****.**

The Commonwealths Anti Money Laundering legislation and Proceeds of Crime legislation are geared towards the ***placement stage***.

Establishing that money or property is derived from criminal activity (though not necessarily to a particular offence or particular person) is still an essential element of the Commonwealth money laundering provisions and the Proceeds of Crime Act.

Money entering the ***placement stage*** is usually not far removed from the crime from which it was earned and at this stage it is most vulnerable to detection and forfeiture under current Commonwealth legislation.

Current AFP operations clearly indicate that the ***layering stage*** of money laundering frequently involves the use of offshore corporate structures usually located in tax havens or countries with bank secrecy laws, or occur within Australia utilising a combination of money laundering methods namely false identities, corporate structures, family, friends or nominees to conceal criminal assets.

Once funds have reached the ***layering stage***, it is difficult, if not impossible to link them back to the predicate offence.

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(3) In this section:
child means a person under the age of 18 years.
criminal activity means conduct that constitutes a serious indictable offence.
recruit means counsel, procure, solicit, incite or induce.

[3] Attorney General's Department Submission p. 15- 'In his 'Report of the Operation of the Proceeds of Crime Act 2002 (Cth)', Mr Sherman said that the possibility of introducing unexplained wealth declarations to POCA should be kept under review. This matter is being considered, alongside a range of other issues, in the context of the Government's response to the Sherman Report'

[4] Federal Agent Christopher Douglas, wrote and delivers the Money Laundering Investigation program for the AFP.

After the ***layering stage*** is completed criminals have concealed the origin of their substantial criminal assets and wealth. Criminal assets and wealth are integrated within legitimate businesses, business ventures and property acquisition.

Once the ***integration stage*** is reached it is impossible to link the criminally derived assets and wealth back to the predicate offence. The only potential vulnerability that exists is that it is also impossible for the criminal to establish lawful acquisition of his total assets and wealth as they include funds originating from illegal activity.

Unexplained Wealth provisions are effective in attacking the ***layering*** and ***integration stage*** of money laundering by organised criminal organisations/groups.

Unexplained Wealth provisions are effective against:

- higher echelon criminals
- criminals involved in management of organised crime organisations/groups
- criminals assisting transnational organised crime organisations/groups
- Persons or corporate structures or nominees assisting domestic criminals to conceal assets and wealth
- Corrupt public officials including police who have assets that exceed their known lawful income
- Foreign criminals who control assets in Australia acquired by funds that have originated from illegal activity committed offshore but laundered in Australia
- Persons or corporate structures or nominees assisting foreign criminals to conceal or *'park'* assets and wealth in Australia.

Organised crime organisations/groups particularly use corporations as concealment of illegal profits; corporations as the legitimate supply chain for illegal products, corporations as the weapon to commit the criminal act itself.[5]

In understanding white collar organised crime, you have to picture the corporation as a vehicle for crime.

The AFP, ACC, ITSA, ASIC, AUSTRAC, CRIMTRAC and other Commonwealth agencies are all aware of those participating in organised crime or 'white collar' crime, often part of organised crime, within Australia. Employees within those agencies are also aware that the current Commonwealth legislation is inadequate to deal with organised 'white collar' crime, particularly when corporations are the weapon.

Unfortunately, there is no ability to disqualify company directors in relation to being involved in organised crime activity. For example known drug importers/traffickers are able to hold directorships under the Corporations Act 2001.

White collar organised crime bosses often use 'puppet' directors to manage their corporations on their behalf. For example 'puppet' directors are utilised by a known organised crime boss who is disqualified from being a director and is a declared bankrupt.
Often the 'puppet' directors are lower echelon criminals beholden to the organised crime boss. The corporations are asset stripped with the lower echelon criminals willing to suffer the corporate penalties and subsequent disqualification. The organised crime boss then moves on to a new corporation with new 'puppet' directors and the corporate weapon continues.

[5] Supt Bray – 3 July 2008 ACC 20 – ' We certainly did see people associated with outlaw motorcycle groups operating high-risk finance companies, but where those loans were secured perhaps against an asset, traditionally at a very high interest rates and requiring very strict compliance with the terms of their agreement. I am aware that on occasions, when a person defaulted on those loans, members of those outlaw motorcycle groups or their associates were used in an extorting or threatening manner to have people sign over their assets or to pay or collect monies.. I emphasize that my evidence relates to the finance companies that exist outside banks that provide perhaps $50, 000 to $500, 000 short term – perhaps six months or 12 months – at very high interest rates, as opposed to the traditional payday lenders.'

During the economic downturn in the late 1980s and early 1990's, Christopher Skase, and Alan Bond were some of the high flying entrepreneurs that were exposed as stripping over a billion dollars worth of assets and wealth from their companies by utilising third parties. Unfortunately, *Unexplained Wealth* provisions were not available to the AFP investigators who were assisting ASIC and ITSA at the time.

In the case of Alan Bond, he was convicted of defrauding Bell Resources of $1.2 Billion. The Judge accepted that at least $55 million was channeled through Bond's private company Dalhold. Bond's personal debts were around $600 million. Bond's family company Armoy (run by his son John) had unexplained assets of more than $30 million, including the family home, other properties and investments. No link could be established to Bond's bankruptcy in relation to these assets.

In the Christopher Skase case, he illegally transferred $13.5 million to a private company from his Quintex Corporation. Quintex later collapsed with Skase owing $700 million in personal debts. Skase even left Australia with more than $900,000 worth of antiques and furniture as no link could be established to his bankruptcy in relation to those assets. *Unexplained Wealth* Provisions would have assisted AFP investigators in relation to both these cases.

Interestingly, the current world economic crisis is exposing corporation crime within USA, UK, Europe and Australia.[6]

In December 2008 US investigators arrested Bernard Madoff for allegedly masterminding a Ponzi fraudulent scheme. In March 2009 he pleaded guilty to a staggering fraud of almost $100 billion dollars.

In February 2009 US investigators accused Allen Stanford of allegedly masterminding a $9.2 billion dollar fraud upon investors.

Both cases have only been discovered because of increased scrutiny of financial markets since the current world economic crisis began.

Currently in Australia ASIC is investigating the collapse of companies including childcare provider ABC Learning, Allco Finance Group and investment firm Storm Financial.

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[6] Professor Henry Pontel, University of California – speaking on the current world financial crisis:-
'What I look at more specifically is within a specific industry, what's is going on in that industry, criminologists have done this in the past with different types of studies, what's going on in those industries that make them criminogenic that is that provide certain opportunities, certain structures, for certain types of crimes to take place.

There is an illusion that these things may not be as dramatic, not as predatory, they may not be as intentional, or direct, when in fact a lot of these complex frauds, that you are going to find in this debacle, as well as what we found in previous debacles, are intentionally complex. That is the reason for the complexity. It is not because someone simply had a brilliant idea that no one ever thought before so they could do this very complex thing to produce wealth, it's to cover up the fraudulent intent that underlies the actual financial transaction. So if you create layers and layers of complex paperwork over what is basically a fraudulent act you end up hiding it and making it very difficult for investigators to ferret it out

"It was the root cause of crime here, the blame had to be placed on the system not on the actual individuals who were carrying out these complex frauds. Which is exactly the opposite to what conservatives would argue in the case of common crime. It's never the system, you'd sound like a bleeding-heart liberal saying 'oh, It's the system that made that person go out and burglarise or rob the 7/11 store or whatever, it's always the individuals fault. So you have this kind of strange reverse when it came to corporate crime all of a sudden it wasn't the corporate violators themselves who were to blame, it was the system.'

'To steal from the company, to steal from investors, to steal from the public, that really goes back to the work of Stanton Wheeler, a very famous criminologist and sociologist who just passed away last year who coined this term 'the organisation as weapon'. So you look at Enron as a perfect example, of, you know, Ken Lay and Jeff Skilling using that organisation as a weapon, basically to make incredible amounts of money through stock investments and then, you know, while people are throwing money at that organisation, those two guys and a few others, are selling their free shares or discounted shares out the back door as they are taking the organisation down and so they're making money while everyone else is losing. That's using the organisation as a weapon.'

As the current economic crisis exposes Australian corporate criminals who have stolen from corporations, stolen from investors and stolen from the public, the Commonwealth needs to have in place *'unexplained wealth'* provisions in order to seize assets and wealth stripped from Australian corporations and concealed through l***ayering*** and ***integration.***
It is interesting to compare asset confiscation legislation containing *Unexplained Wealth* provisions with the Proceeds of Crime Act (Cth).

Between 2003/4 through to 2007/8 Western Australian asset confiscation legislation and Northern Territory asset confiscation legislation combined, led to approximately $40 million dollars worth of assets restrained or forfeited and yet for the whole of the Commonwealth, only approx $60 million dollars worth of assets have been restrained or forfeited under the Proceeds of Crime legislation.[7]

It should be noted that Western Australian and Northern Territory DPPs have been reluctant to utilise *Unexplained Wealth* provisions, preferring the Drug Trafficking provisions of their respective legislation.

Attachment A sets out some actual AFP scenarios where *Unexplained Wealth* provisions would have assisted the AFP in seizing and confiscating multiple millions of dollars worth of assets suspected of being wholly or partly derived by funds originating from illegal activity.

[7] Total assets were worth $36,974,262m under WA & NT legislation combined and $63,500,000m under the Proceeds of Crime (Cth) for the same period of 2003/4 to 2007/8.

4. Further information in relation to Police Federation of Australia Recommendation 4

That Commonwealth Organised Crime legislation is enacted consistent with Australia's obligations under the Convention Against Transnational Crime (CATC) ratified on 27 May 2004.

The Commonwealth is signatory to various international conventions relating to organised crime, including the Convention Against Transnational Crime (CATC) which was ratified on 27 May 2004.

The Parliament of Australia can legislate on any criminal law issue arising out of international treaties signed by the Commonwealth Government.'[8]

Importantly, on 4 December 2008 in the First National Security Statement to the Parliament, the Prime Minister of Australia The Hon. Kevin Rudd MP stated:

> *The list of non-traditional threats or new security challenges is also growing.*
>
> *Transnational crime – such as trafficking in persons, drugs and arms; people smuggling and the illegal exploitation of resources – will remain a continuing challenge.*
>
> *These activities can undermine political and social institutions, inflict economic and personal harm or contribute to other forms of violence…*
>
> *The Government is committed to deploying all necessary resources to prosecute those criminals who seek to undermine Australia's border security…*
>
> *Organised crime more broadly is a growing concern for Australia, one the Government is determined to combat. The Australian Crime Commission has estimated that organised crime costs Australia over $10 billion every year."*[9]

In June 2007 the Ministerial Council for Police and Emergency Management – Police (MCPEM-P) National Senior Officers' Group (Law enforcement) reviewed the legislation proposed under the Serious and Organised Crime (control) Act 2008 (SA) for national application.

In November 2007 the MCPEM-P accepted the recommendation from the Working Group that each jurisdiction review the South Australian model of legislation and consider enacting (within their jurisdictional/constitutional responsibilities) harmonised legislative models, with mutual recognition provisions where appropriate.

Despite Treaty obligations, the First National Security Statement by Prime Minister Rudd, the acceptance of the recommendations from MCPEM-P National Senior Officers' Group (Law

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[8] Submission by Dr Andreas Schloenhardt p80 – 'The Commonwealth Government, however, has the power to make criminal law in those areas that are assigned to the Federal Parliament. These include the subject matters enumerated by s 51 *Constitution* and the _incidental power' as provided for in s 51(xxxix) *Constitution,* for example customs, trade, external affairs, fisheries, quarantine et cetera.427 The Commonwealth's external affairs power authorises the Federal Government to enter into international treaties. Australia has signed the *Convention against Transnational Organised Crime...*

In the past, especially in *Commonwealth v Tasmania* (1983) 46 CLR 625, the High Court applied a very broad reading of the Commonwealth's external affairs powers, suggesting that the Federal Parliament can legislate on any criminal law issue arising out of international treaties signed by the Federal Government.428 To date, federal criminal law, however, contains no specific offences relating to participation in criminal organisations'

[9] 04 December 2008 First National Security Statement address to the Parliament by the Prime Minister of Australia The Hon. Kevin Rudd MP

enforcement), the Commonwealth does not have in place specific legislation or effective legislation to deal with the transnational and organised crime operational environment.[10] Commonwealth legislation traditionally focuses on predicate offences and the involvement of the persons committing those offences. Commonwealth legislation does not adequately cover all levels of involvement in organised crime. Commonwealth conspiracy and other accessorial type of offences are difficult to prove. The AFP has to rely upon cobbling together various aspects of existing laws in an attempt to prosecute persons involved in this type of activity.

Although transnational organised crime is now considered a national security threat there is no definitive law to outlaw the activity.

Specific Commonwealth organised crime legislation is required to enable police to effectively prevent, disrupt, investigate and prosecute organised crime activities. The AFPA submits that there is an obligation on the Commonwealth to enact specific Organised Crime legislation.

It is important that Commonwealth organised crime legislation addresses foreign organised crime organisations as well as domestic organised criminal groups.

Federal investigations identify members of known transnational organised crime organisations operating within Australian borders. They include members from 14K, Wo Shing Wo and Sun Yee On and other Chinese triad societies, specific Columbian cartels, specific Russian Organised crime syndicates, the Japanese Yamaguchi-gumi, Italian Mafia, Middle East syndicates and Vietnamese organised crime, transnational Outlaw Motor Cycle Gangs (OMCGs) etc.

For example, a recent AFP investigation has identified a family that is believed to be the leaders of a known Colombian Drug cartel. The family is suspected to be involved in numerous drug importations, the last known importation being 300 kilos of cocaine.
There is strong merit in Commonwealth legislation that can allow the Governor General, on advice from the Prime Minister, to 'declare a known transnational organised criminal organisation as a 'prohibited organisation' on the basis of Australian and International police intelligence.

Criticisms of the Serious and Organised Crime (control) Act 2008 (SA) relate to concerns about the concentration of power being with the SA Attorney General. Division 102 of the Criminal Code (Cth) addresses these concerns. The procedures for declaring a terrorist organisation has much greater safeguards built into it including Parliamentary Joint Committee oversight of the legislation and its application by the AFP. Also there is independent oversight of the AFP by the Commonwealth Ombudsman and the Australian Commission on Law Enforcement Integrity (ACLEI). Division 102 of the Criminal Code (Cth) could easily be replicated to achieve similar outcomes to the Serious and Organised Crime (control) Act 2008 (SA) but with additional safeguards.

Recommendation:
Consistent with the First National Security Statement which identifies transnational and organised crime organisations, as a threat to national security, Division 102 of the Criminal Code (Cth) should be replicated for transnational and organised crime organisations thus ensuring harmonisation with the Serious and Organised Crime (control) Act 2008 (SA) and various international jurisdictions.

[10] Submission by Dr Andreas Schloenhardt p74 – 'Organised crime poses significant challenges to the criminal justice system. The criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. The structure and modi operandi of criminal associations, however, do not fit well into the usual concept of criminal liability. Moreover, it is difficult to hold directors and financiers of organised crime responsible if they have no physical involvement in the execution of the organisation's criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of accessorial liability.'

There also needs to be Commonwealth legislation to address the organised crime groups that adapt, diversify, and have flexible non-hierarchical structures. These organised crime groups have 'sub contract' type arrangements.

These organised crime groups can be transient in nature with some members not even being aware of the existence of other persons. This allows the higher level members of the activity to distance themselves from the overt elements of the crime thus creating difficulties for investigating officers to charge the leaders of the crime groups.

Compartmentalisation remains one of the distinguishing characteristics of these organised crime groups. For example, several levels may be used during an importation of illegal drugs, with members sent from overseas to clear a shipment through Customs or to receive a courier parcel. The illegal drugs will sometimes be passed to another person who will store them before delivery to a further party responsible for distribution. Often, participants in the various levels are insulated from one another, making it difficult for law enforcement to gain meaningful assistance from those arrested. It could be controlled from Australia or overseas.

Known transnational and organised crime organisations utilise these less structured crime groups to expand their activities in a collaborative approach.

These organised crime groups can be addressed through legislation that mirrors ss 93S and 93T of the Crimes Act 1900 (NSW) in relation to Participation in criminal groups[11].

A current example of a more common loosely knit organised crime group identified by the AFP within Australia involves an Australian based member of an ethnic organised crime group. The individual has been investigated by Australian law enforcement agencies on numerous occasions. Criminal Intelligence indicates this person is the 'principle' Australian element of the group with the criminal activity being 'approved' by him.

Members of the Organised Crime group visit/interact with Australia from South America, China and S/E Asia. They are responsible for organising the importation of the illicit drugs. They recruit persons in Australia to undertake high risk elements of the offence, including the facilitation of the importation (during and post importation).

The Australian based member is involved in facilitating meetings and provides infrastructure support (vehicles, organising accommodation etc). Financial benefits are provided to the Australian based member of the syndicate however he has no or limited connection to the substantive offence.

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[11] **93S and 93T of crimes Act 1900 (NSW)**

93S Definitions

(1) In this Division:

"criminal group" means a group of 3 or more people who have as their objective or one of their objectives:

(a) obtaining material benefits from conduct that constitutes a serious indictable offence, or

(b) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence, or

(c) committing serious violence offences, or

(d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence…

(2) A group of people is capable of being a criminal group for the purposes of this Division whether or not:

(a) any of them are subordinates or employees of others, or

(b) only some of the people involved in the group are involved in planning, organising or carrying out any particular activity, or

(c) its membership changes from time to time.

93T Participation in criminal groups

(1) A person who participates in a criminal group:

(a) knowing that it is a criminal group, and

(b) knowing, or being reckless as to whether, his or her participation in that group contributes to the occurrence of any criminal activity,

is guilty of an offence. Maximum penalty: Imprisonment for 5 years…

This Australian based member could be prosecuted for ***Participation in criminal groups*** if the provision existed under Commonwealth legislation.

Recommendation:
The Crimes Act 1914 (Cth) be immediately amended to create harmonisation of legislation between Canada, New Zealand, NSW and the Commonwealth by mirroring ss. 93S and 93T of the Crimes Act 1900 (NSW) in relation to Participation in criminal groups.[12]

Attachment B sets out some actual AFP scenarios where specific Commonwealth Organised Crime legislation would have assisted the AFP in disrupting & dismantling transnational and Australian organised crime.

5. Conclusion

In 2009 the AFPA is again calling on the Australian Parliament to:

- introduce a package of Commonwealth legislative reform in order for police to combat organised crime impacting on Australia
- enact specific Commonwealth Organised Crime legislation; and
- to amend the Proceeds of Crime legislation (Cth) to include *'Unexplained Wealth'* provisions.

The AFPA position has been echoed for many years by prominent persons and law enforcement organisations specifically established to fight organised and serious crime. To date, the experts and police practitioners have been unsuccessful in convincing Parliament. Inadequacies of Commonwealth legislation in the fight against organised crime can be best summed up by Justice Moffitt, former President of the NSW Court of Appeal, who stated:

" *Most Australians have come to realise that, despite the many inquiries, convictions, particularly of leading criminals, are few and that organised crime and corruption still flourish. The path to conviction is slow, tortuous and expensive. … The criminal justice system is not adequate to secure the conviction of many organised crime figures. …*

Those participating in organised crime or white-collar crime, often part of organised crime, are usually highly intelligent and often more intelligent that the police who deal with them. They have the best advice. They exploit every weakness and technicality of the law. When they plan their crimes they do so in a way that will prevent their guilt being proved in a court of law. They exploit the freedoms of the law, which most often are not known and availed of by poorer and less intelligent members of the community.

Crimes are planned so there will be no evidence against those who plan and, if by accident there is, it if often suppressed by murder or intimidation.

A primary target for attack, if syndicates and their power are to be destroyed, is the money and assets of organised crime. There are many reasons to support this view. The goal of organised crime is money. The financial rewards are very great, and they are the greater because the profits are tax-free. Money generates power; it allows expansion into new activities; it provides the motive for people to engage in such crime. It is used to put the leaders in positions, superior to that of others in the community, where they are able to exploit the law and its technicalities and so on. At the same time, it is the point at which organised crime is most vulnerable.

[12] Dr Andreas Schloenhardt pg 7 of submission to Parliamentary Joint Committee on the Australian Crime Commission dated 4 April 2008

It has long been accepted that tax authorities can call on taxpayers to account for assets which appear to exceed that which their income could be expected to produce. In the US this is a "net worth" investigation. It is difficult to see why in the face of serious organised crime a statute could not be drawn to provide that in prescribed circumstances the owner or custodian of money or assets may be called on to explain how he came by them…"

The AFPA eagerly awaits the Parliamentary Joint Committee's recommendations in relation to our call for effective Commonwealth organised crime fighting legislation.

Jon Hunt-Sharman
National President
Australian Federal Police Association

30 April 2009