

Chapter 5

Confiscating the Proceeds of Crime

Introduction

5.1 Although this inquiry initially focussed on the effectiveness of association-type offences to prevent organised crime groups from committing criminal offences, the committee heard repeatedly, from almost every law enforcement agency with which it met, that one of the most effective ways of preventing organised crime is by 'following the money trail'.

...organised crime is for the most part about profit. They are not generally about a better quality of firearm or a better quality of drug. Perhaps there is something of that in there but by and large it is about the balance sheet for them. Our focus then is not necessarily about the predicate activities or even some of the individuals involved in it, but recognising that, wherever the criminal activity takes place and whatever crimes are involved in it, if we can take away the profit benefit then we are having more impact than we would through any number of—and I hesitate to use this term— minor charges. If we drive at what is the profit motive here, I think we will be more successful in unpicking and deterring—and perhaps even in the crime prevention area.¹

5.2 This chapter discusses various existing legislation which provides for the confiscation of assets derived from criminal activity, and considers the benefits and disadvantages of different legislative models. It also considers the laws and process used to support proceeds of crime laws, such as ways that law enforcement can collect financial information and monitor suspected individuals, to gain the necessary information and evidence to confiscate criminal assets.

Confiscation of criminal assets

5.3 It is a well-accepted common law principle that the Crown may confiscate assets derived from criminal action, with forfeiture laws having existed in England since at least early Anglo-Saxon times.² Modern proceeds of crime provisions generally take two forms: conviction based laws and civil confiscation laws.³ The former requires a criminal conviction before assets may be confiscated, the latter uses

1 Mr Kitson, ACC, *Committee Hansard*, 6 November 2009, p. 5.

2 For a brief discussion of the history of proceeds of crime laws see Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, Report 87, 1999, chapter 2.

3 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, p. 4.

the courts' civil jurisdiction to confiscate criminal assets, and does not require a criminal conviction.

5.4 The US was one of the first jurisdictions to introduce civil confiscation laws as a means of preventing organised crime in its RICO legislation. The reason for this extension of confiscation laws from conviction-based to civil, is due to the effectiveness of the laws in preventing organised crime from occurring. Confiscating illegally obtained assets undermines the profit motive of crime and prevents the re-investment of those assets into further criminal ventures.

5.5 The committee heard from a number of sources, including the ACC and the Italian authorities, that the confiscation of criminal assets 'hits criminals where it hurts most'. The ACC told the committee that:

The seizure of criminal proceeds is a key available means of disrupting the activities of serious and organised criminal groups. Whereas they continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities.⁴

5.6 Mr Raffaele Grassi, from the Italian National Police, highlighted the importance of 'going after the money' and depriving criminal groups of their assets. He noted that:

Mafia members are prepared to spend time in prison, but to take their assets is to really harm these individuals.⁵

5.7 Civil forfeiture laws may still be based on a criminal standard of proof – such as is the case in Canada, whereby if a person has not been convicted of a criminal offence, but the Crown can prove beyond reasonable doubt (to the 'criminal standard') that assets are the proceeds of crime, then a court may make an order that those assets be forfeited to the Crown.

5.8 However, more commonly, civil forfeiture laws are based on a lower, civil standard of proof, as is the situation under the Commonwealth's *Proceeds of Crime Act 2002*, section 18 of which provides that a court may make an order restraining assets, if 'there are reasonable grounds to suspect that' the assets are the proceeds of crime.

4 ACC, *Submission 15*, p. 11.

5 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

5.9 The Australian Law Reform Commission found in its 1999 report, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, that conviction-based forfeiture regimes are relatively ineffective,⁶ resulting in the Commonwealth adopting a civil regime. All jurisdictions in Australia, with the exception of Tasmania, now have civil forfeiture regimes in addition to conviction-based forfeiture laws.⁷ The UK and Ireland also have civil forfeiture regimes, however conviction-based forfeiture remains the norm in the rest of the world.⁸

5.10 The legislation in Western Australia and the Northern Territory goes one step further, allowing the respective Directors of Public Prosecutions to apply to the courts for a confiscation order if a person has 'unexplained wealth'. This means that in those jurisdictions it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead places the onus on an individual to prove that their wealth was acquired by legal means.

5.11 The table below summarises these positions:

	Conviction-based forfeiture	Civil forfeiture	Unexplained Wealth
Test	Beyond reasonable doubt – conviction for criminal offence	On the balance of probabilities/more likely than not	On the balance of probabilities/more likely than not
Onus of Proof	Crown	Crown	Respondent
Jurisdictions	Tasmania	Cth, ACT, NSW, Qld, SA, Vic	NT, WA

5.12 This chapter is divided into three parts: the first outlines the existing Commonwealth proceeds of crime laws and their effectiveness; the second part outlines the development of unexplained wealth laws, and discusses the benefits and concerns with unexplained wealth legislation; and the third section looks at various laws which support criminal assets confiscation legislation, particularly mechanisms for obtaining information about suspected individuals' financial affairs.

Proceeds of Crime Act 2002 (Commonwealth)

5.13 The Proceeds of Crime Act provides that the Commonwealth Director of Public Prosecutions (CDPP) may apply to a State or Territory court for:

6 Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, 1999, chapter 4.

7 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, pp. 5-6.

8 Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, 2006, p. 11.

- restraining orders prohibiting a person from disposing or dealing with the subject property;
- forfeiture orders which require a person to forfeit property to the Commonwealth;
- pecuniary penalty orders which require a person to pay money to the Commonwealth based on the proceeds they have received from crime; and
- literary proceeds orders which require a person to pay money to the Commonwealth based on literary proceeds of crime.

5.14 A court may make these orders if satisfied on the balance of probabilities that the subject property is the proceeds of crime.

5.15 The Act also provides for the use of coercive investigative techniques to assist law enforcement agencies in investigating proceeds of crime matters including compelling examination, the production of documents or information, warrants and monitoring. Further, the Act provides:

- that law enforcement may give a notice to a financial institution to provide specified information about the suspected proceeds of crime;⁹
- that the court may make a monitoring order which requires a financial institution to provide certain information about the transactions in a particular account.¹⁰ This enables law enforcement to monitor the financial affairs of suspected persons;
- directions as to how the Commonwealth must deal with confiscated property including the purposes for which payment may be made from confiscated funds (such as payment of legal aid); and
- that arrangements may be made for the equitable sharing of confiscated proceeds between international or state and territory agencies involved in an investigation.

5.16 With respect to the final point, Dr Dianne Heriot, Assistant Secretary of the Attorney-General's Department informed the committee that such arrangements are made at the discretion of the ministers involved:

If a jurisdiction has had a significant contribution to an investigation that has led to proceeds seizure, then it is put to the minister to determine the equitable distribution.¹¹

9 *Proceeds of Crime Act 2002*, section 213.

10 *Proceeds of Crime Act 2002*, section 219.

11 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 37.

Effectiveness of Commonwealth's proceeds of crime laws

5.17 The committee heard that there are a number of weaknesses in the Commonwealth's existing proceeds of crime legislation, which could be strengthened by:

- (i) reversing the onus of proof in criminal assets confiscation proceedings; and
- (ii) greater interaction and cooperation between different agencies in proceeds of crime investigations, and the appropriate responsibilities of different agencies involved in proceeds of crime matters.

5.18 These two issues are discussed in detail in the following two sections.

5.19 The committee notes that a major review of the Proceeds of Crime Act was undertaken in 2006 by Tom Sherman, to which the Government is yet to respond. Mr Sherman made a number of specific recommendations as to how the effectiveness of the Act may be improved. In its last report,¹² the committee urged the Government to implement the recommendations made by Mr Sherman.

5.20 In this inquiry, the Committee heard from a large range of agencies about the importance of assets confiscation laws in preventing organised crime. Law enforcement agencies around Australia were unanimous about the need for strong and effective laws to enable the confiscation of assets from those involved in organised crime.

5.21 The ACC agrees with the need for the government to implement the recommendations of the Sherman report:

The implementation of recommendations of the Sherman report on the operation of the Proceeds of Crime Act 2002 would strengthen the proceeds of crime regime.¹³

5.22 As in its previous report the committee urges the government to give consideration to the findings of the Sherman report.

Unexplained wealth provisions

5.23 Numerous law enforcements agencies, both within Australia and internationally, gave evidence to the committee about the benefits of unexplained wealth legislation as a means of disrupting serious and organised crime. Unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings.

12 PJC-ACC, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, p. 55.

13 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

5.24 A number of jurisdictions, including the UK, Italy, Western Australia and the Northern Territory, have already adopted legislation which reverses the onus of proof, enabling authorities to restrain assets that appear to be additional to an individual's legitimate income and requiring that individual to demonstrate that those assets were obtained legally.

The United Kingdom approach

5.25 Detective Inspector John Folan, head of the Dedicated Cheque and Plastic Crime Unit in the UK, told the committee that the historical approach to policing involving 'identifying suspects and getting prosecutions' had failed with regard to organised crime. Detective Inspector Folan argued, like his counterparts around the world, that UK law enforcement needs to focus on the motivations of criminals, and target the profits of organised crime in order to successfully dismantle criminal groups.¹⁴

5.26 The UK's *Proceeds of Crime Act 2002* provides for the confiscation and restraint of proceeds of crime. In order for a person's assets to be confiscated under the Act, the person must have been convicted. However, in order for assets to be restrained, it is only necessary that the person is being investigated and that there is reasonable cause to believe that they have committed an offence.

5.27 The UK also has a set of offences under the Proceeds of Crime Act which enable the confiscation of assets obtained from a 'criminal lifestyle'. Under section 75 of the Act, a person has a 'criminal lifestyle' if they:

- have been convicted of one of the offences listed in Schedule 2 (drug trafficking offences)
- have been convicted of any offence over a period of at least 6 months, from which they obtained at least £5000, or
- have been convicted of a combination of offences which amount to 'a course of criminal activity' which is either:
 - (a) conviction in the current proceedings of at least four offences from which they have benefited; or
 - (b) conviction in the current proceedings of one offence from which they have benefited in addition to at least two other convictions on at least two separate occasions in the past 6 years.

5.28 Where a court has decided that a defendant has a criminal lifestyle, section 10 of the Act contains provisions which enable an assessment to be made as to the

14 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 83-85,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

financial benefit they have derived from their criminal lifestyle. The court may make certain assumptions in relation to property and expenditure, which the defendant is then required to disprove, thus reversing the onus of proof in relation to the assets held by those proven to have a criminal lifestyle.

5.29 The amount recoverable by the Crown is an amount equal to the defendant's total benefit from criminal conduct, unless the defendant is able to prove that the available amount is less than the recoverable amount.

5.30 The committee was informed by Mr Ian Cruxton, from the Proceeds of Crime Office within SOCA, that the 'criminal lifestyle' provisions have been an effective tool for recovering criminal assets. However, it was also acknowledged by SOCA officers and other UK police officers that the civil recovery process in the UK is extremely lengthy, and can take up to three years to go to trial.¹⁵

The Italian approach

5.31 The committee was told that Italy has also developed laws based on a reverse onus of proof which allow law enforcement to prevent the mafia from using illegally obtained assets to reinvest in further criminal enterprises.

5.32 Officers from the Italian Central Directorate for Antidrug Services informed the Committee that Chief Police Officers and Public Prosecutors can undertake investigations into suspected illegally obtained assets without having prima facie evidence of a predicate offence. At the conclusion of such an administrative investigation, the matter can be referred to a judge who can investigate the matter further to establish the source of the assets. During the trial process, the burden of proof falls on the defendant to explain the source of their assets.¹⁶

5.33 The committee was told that this process had been very effective in confiscating criminal assets and preventing organised crime in Italy.

5.34 The committee notes that Italy is a civil law jurisdiction with an inquisitorial judicial system and in this context a judge can investigate the source of the individual's assets, and require evidence from the individual. The same system could not be applied in the same form in the Australia. However, the committee was

15 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 84,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

16 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 62-63,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

interested to learn about the successful use of reverse onus of proof investigations in a civil law jurisdiction.

Western Australia and Northern Territory approaches

5.35 Western Australia introduced unexplained wealth provisions in 2000 in Division 1 of Part 3 of the *Criminal Property Confiscation Act 2000* (WA), and the Northern Territory followed in 2003 with the *Criminal Property Forfeiture Act 2002* (NT). Given the similarities between the two acts, both are discussed together.

5.36 The laws both provide that the relevant DPP may apply to the court for an unexplained wealth declaration against a person. The court must make an order 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.¹⁷ Both Acts also reverse the onus of proof.

5.37 The key aspects of the laws are:

- The *requirement* that courts make an order if satisfied that a person's total wealth is greater than their lawfully acquired wealth.¹⁸ Courts therefore have minimal discretion regarding the making of such orders.
- The reversal of the onus of proof in favour of the Crown, providing that 'any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary'.¹⁹
- Both Acts set out how law enforcement and prosecutors can obtain information about criminal assets,²⁰ which includes:
 - The DPP or police may require a financial institution to provide information about the transactions and/or assets of a particular person²¹ (this information may also be volunteered by financial institutions);

17 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

18 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(1); *Property Confiscation Act 2000* (WA), sub section 12(1).

19 *Criminal Property Forfeiture Act 2002* (NT), subsection 71(2); *Property Confiscation Act 2000* (WA), section 12(2).

20 *Criminal Property Forfeiture Act 2002* (NT), Part 3; *Property Confiscation Act 2000* (WA), Part 5.

21 *Criminal Property Forfeiture Act*, section 14; *Property Confiscation Act 2000* (WA), section 54.

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- The DPP can apply to the courts for an order allowing the DPP to conduct an examination of a suspect individual, which can require a person to furnish the court with information and/or documents;²²
 - The DPP can also obtain documents relating to assets or property by applying for a production order;²³
 - The DPP can apply to the court for monitoring and suspension orders which require a financial institution to monitor or suspend a person's account, and provide that information to the police or DPP;²⁴ and
 - The police can detain a person if they have a reasonable suspicion that the person has in their possession property liable to forfeiture under the Act, or documents identifying or determining the value of a person's unexplained wealth.²⁵
- Provisions to ensure that property remains available for forfeiture, including:
 - Police have the power to seize property if they reasonably believe it was derived from or used in a crime;²⁶ and
 - Police and the DPP may apply to the courts for a restraining or freezing order, which prevents property or assets from being used for a period of time.²⁷ It is a criminal offence to deal with property otherwise than is permitted by a restraining or freezing order.²⁸
 - People have a right to object to their property being restrained within 28 days of being served with an order restraining the property.²⁹
 - In addition to unexplained wealth declarations, the court can make:
 - Criminal Benefit Declarations which declare that certain property is, at least in part, more likely than not to have been derived from a specific forfeiture offence committed by the suspect or that the property was more likely than not unlawfully acquired;

22 *Criminal Property Forfeiture Act*, Part 3, Division 2; *Property Confiscation Act 2000* (WA), Part 5, Division 2.

23 *Criminal Property Forfeiture Act*, Part 3, Division 3; *Property Confiscation Act 2000* (WA), Part 5, Division 3.

24 *Criminal Property Forfeiture Act*, Part 3, Division 4; *Property Confiscation Act 2000* (WA), Part 5, Division 4.

25 *Criminal Property Forfeiture Act*, section 33; *Property Confiscation Act 2000* (WA), section 73.

26 *Criminal Property Forfeiture Act*, section 39; *Property Confiscation Act 2000* (WA), section 33

27 *Criminal Property Forfeiture Act*, Part 4, Division 2; *Property Confiscation Act 2000* (WA), Part 4, Division 3

28 *Criminal Property Forfeiture Act*, Part 4, Division 3; *Property Confiscation Act 2000* (WA), section 50.

29 *Criminal Property Forfeiture Act*, Part 5; *Property Confiscation Act 2000* (WA), Part 6.

- Crime-used Property Substitution Declarations which are available when the actual property used in the crime is not available for seizure, e.g. when they are no longer in the suspect's possession. They enable the state to declare equivalent property that is in the suspect's possession as a substitute;
- The Acts also allow the same orders to be made against 'declared drug traffickers'.

Differences between WA and NT unexplained wealth laws

5.38 While the WA and NT laws are very similar, there are a few substantive differences between them. These are:

- The WA legislation does not enable confiscation to be taken into account in sentencing. The NT law allows courts to take into consideration an offender's cooperation in forfeiture proceedings when sentencing the offender. The NT laws also provide that the courts should have regard to a forfeiture order that required the forfeiture of property that was not crime-derived when sentencing a convicted offender.
- The WA laws only require that a drug trafficker has been convicted of one offence before they can be declared for the purposes of their assets being confiscated. The NT laws require that a drug trafficker be convicted of 3 offences before they can be declared a drug trafficker and have their assets confiscated.
- The WA Act is declaration-based. Once a court has declared certain assets to be 'unexplained wealth', a 'criminal benefit' or 'crime-used property substitution', those assets may be confiscated by the government.³⁰ However, because the NT is a Territory, the Constitution requires that property can only be confiscated by the government 'on just terms'. This means that a court order is required for confiscation, even after a declaration has been made that the relevant property is 'unexplained wealth' etc. Should the Commonwealth enact unexplained wealth provisions, the same constitutional restraint would apply, requiring a judicial order before assets could be confiscated.

Effectiveness of NT and WA approaches

5.39 Although the NT Act is based on the WA legislation, the committee heard that the NT Act expanded and improved on the WA Act. With regard to the effectiveness of its unexplained wealth legislation, the Northern Territory Police submitted:

Whilst traditional methods of illicit drug interventions are still employed, legislation that targets the entire criminal enterprise is extremely effective.

30 *Criminal Property Confiscation Act 2000 (WA)*, section 6.

In this respect, assets forfeiture legislation allows Police to seize the wealth created by these criminal enterprises without the need for a conviction.³¹

5.40 The Northern Territory Police gave evidence to the committee that the laws have been very successful in addressing the issues of OMCGs in the Northern Territory, as well as other criminal groups.³²

To date the Northern Territory Police has seized over \$13 million dollars in criminal property forfeiture cases with approximately \$5 million forfeited to the Crown at this time.³³

5.41 Commander Colleen Gwynne from the Northern Territory Police explained to the committee how the unexplained wealth laws work in practice to dismantle the control of key individuals over criminal groups:

I think it makes life much more difficult. They just cannot return to where they were. The problem we have had over the years is once a criminal, always a criminal, because you can just return to what you were doing. You continue to make money out of illegal activity. But that is so much more difficult if you do not have that financial support behind you to commence those activities. With a lot of the networks, if you do not have that financial support then it is very hard to gain the support of other criminal networks as well.³⁴

5.42 Assistant Commissioner McAdie further explained to the committee why the unexplained wealth approach to assets confiscation is superior to the civil confiscation regime contained in, for example, the United States' RICO laws:

Our understanding—and we are hardly what you would call experts in the RICO laws in the United States—is that, in order to be enforced, they involve very long, very complex and very sustained investigations. There is a cost-benefit ratio in everything. Our understanding is that the success ratio is not very high and the cost of each investigation is extremely high. I guess we are looking for simpler-to-administer and easier means to achieve the same ends.³⁵

5.43 However, Commander Gwynne also highlighted that one of the impacts of the new legislation has been the movement of some criminals out of the Northern Territory:

We have had a couple of cases where people have chosen to move. We had an unexplained wealth case in Alice Springs where we restrained \$2.2

31 Northern Territory Police, *Submission 20*, p. 3.

32 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 7.

33 Northern Territory Police, *Submission 20*, p. 3

34 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 7.

35 Assistant Commissioner McAdie, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 12.

million worth of assets and cash. That matter has now finalised. At the end of the day, nearly \$1 million was forfeited. In a lot of these cases, people also have to pay their debts off. If they have \$2.2 million worth of assets, they may owe a bank or a financial institution half of that, so part of the assets pays the debt off before the government sees the end amount. People involved in that couple of cases, who are quite significant in trafficking illegal drugs within Central Australia, have since moved interstate. There have been other cases that I could talk about where people have chosen to move elsewhere.³⁶

5.44 This evidence concerns the committee because it indicates that while the legislation may be effective in those jurisdictions that have it, due to the federated nature of the Australian justice system, strong laws in one jurisdiction can cause problems to relocate to another jurisdiction. For this reason, the committee's view is that, whatever approach to assets confiscation is taken, it is critical that Australian governments work together to ensure that there are no 'weak points'. This issue is discussed in further detail in chapter 6.

5.45 The Northern Territory Police agree with this assessment:

If there is a jurisdiction that does not have the type of legislation the Northern Territory has, you are creating a vulnerable area, a soft target. People will say, 'We can go to New South Wales, South Australia or elsewhere where we won't be subjected to such legislation.' It is important that it is consistent.³⁷

5.46 The committee notes that a number of jurisdictions are now considering the adoption of unexplained wealth provisions.³⁸ This is discussed in more detail later in the chapter.

Arguments in favour of unexplained wealth laws

5.47 A large number of agencies from various jurisdictions mentioned the effectiveness of unexplained wealth legislation, and suggested that it may be appropriate to adopt such laws at the Commonwealth level. The ACC, AFP, Victoria Police, Tasmania Police, Queensland Police, South Australia Police, the Northern

36 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, pp. 7-8.

37 Commander Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, p. 8.

38 Assistant Commissioner Harrison, South Australian Police, *Committee Hansard*, 3 July 2008, p. 3; ABC News, 'Reforms Proposed to Tackle Organised Crime', *ABC News Online*, <http://www.abc.net.au/news/stories/2009/06/24/2607555.htm> (accessed 3 July 2009).

Territory Police, the Police Federation of Australia and the Australian Tax Office all support the wider adoption of unexplained wealth laws.³⁹

5.48 There is some support in international law for the adoption of such provisions at a Commonwealth level with the Interpol General Assembly having resolved in 1997 that:

...unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country's domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect on unexplained wealth.⁴⁰

5.49 The primary reason given by most agencies in support of unexplained wealth laws is the fact that, if applied successfully, they remove the financial incentive to commit organised crime.

[I]f there is an evident downturn in criminal profits then it acts as a discourager, a potential preventer, of organised crime activity. It may perhaps deter those who want to get into it and it may make it more difficult for those already engaged in it, forcing them to take greater risks than they currently do and therefore exposing themselves to greater risk of detection and prosecution.⁴¹

5.50 Unexplained wealth laws do this to a greater extent than proceeds of crime laws because they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard. As such there is a greater likelihood that the assets of crime will be confiscated.

5.51 Unexplained wealth provisions are in many ways better adapted to dealing with the specific law enforcement problem, such as OMCGs. Detective Superintendent Hollowood gave evidence that, in the experience of Victoria Police, it is generally individuals within the clubs who are involved in organised crime as opposed to the whole club, or groups within the club, conspiring to commit organised criminal offences. Detective Superintendent Hollowood explained that while individuals may use their position within the club as leverage to support their organised crime activity, it is those individuals who are directly benefiting from organised crime, and not a motorcycle club as a whole. Therefore he suggested that

39 see Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8; Assistant Commissioner Morris, AFP, *Committee Hansard*, 6 November 2008, p. 29; Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11; Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, pp. 11-12; Northern Territory Police, *Submission 20*, p. 3; Mr Burgess, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 80; and Mr Barlow, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73 respectively.

40 Mr Hunt-Sharman, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 81.

41 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

unexplained wealth laws may be better adapted to preventing the criminal behaviour taking place within motorcycle clubs as they target the benefits accumulated by the individuals of greatest concern to law enforcement.⁴²

5.52 Similarly, the Police Federation of Australia explained:

Do Australian police know who is involved in organised and serious crime in Australia? Do we know who they are? The answer is yes. Can we prove beyond reasonable doubt that these criminals are involved directly in those crimes? The answer is no. Are we aware that these criminals possess or have effective control of unexplained wealth? The answer is yes. Can these criminals or those holding the assets and wealth for these criminals explain on the balance of probability that they legally obtained that wealth or assets? The answer is no. We do not have to link anything to a crime. It is about them on the balance of probability explaining that they have got legally obtained wealth...We have not got any legislation in Australia to deal with that at the Commonwealth level...Unexplained wealth is the easiest way as a crime prevention method to stop further crime, because, if the individuals who are holding onto these assets cannot explain them...the tendency is to just hand it over because they do not want to get into a debate about whether they are involved in criminality or not.⁴³

5.53 Queensland Police illustrated the same point by using an example:

You may have someone who, intelligence suggests, sits at the top of the tree in a hierarchical structure that amasses vast amounts of assets, millions of dollars, and yet, while the intelligence lends itself to that, the on-the-ground investigation would be such that the evidence convicts the underlings. Wealth creation provides an onus on them to account for that asset wealth.⁴⁴

5.54 It was also suggested that the laws may assist law enforcement agencies in investigating criminal offences:

As I understand it, on many occasions when people are brought in for questioning about unexplained wealth, rather than implicate themselves in more crime, sometimes these things are not even contested. There is no criminality attached to it, if you understand that. I think there are some great opportunities in this to use some specific pieces of legislation that can go a long way towards fighting serious and organised crime in this country.⁴⁵

42 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 3.

43 Mr Hunt-Sharman, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 81.

44 Detective Superintendent Hay, Queensland Police, *Committee Hansard*, 7 November 2008, p. 25.

45 Mr Burgess, Police Federation of Australia, *Committee Hansard*, 6 November 2008, p. 80.

5.55 Mr Barlow from the Australian Tax Office gave evidence to the committee about the assistance that unexplained wealth laws would give them in enforcing tax legislation:

From a practical perspective, we obviously do deal with unexplained wealth. That is a basis of some of our assessments. We would raise assessments on particular taxpayers on the basis that they cannot explain where their wealth has come from. That is a process which involves doing the investigation, raising an assessment and then collection after that litigation. It all takes a lot of time. As I understand it, if you had an unexplained-wealth regime within a proceeds structure then you would have the ability to have restraining orders at the start, which would secure assets, so I can see that in that sense there would be a way of securing those assets upfront, which is quite difficult to do from a tax context because we have to go through the process.⁴⁶

5.56 Agencies also noted the benefits of nationally consistent confiscation legislation. Detective Superintendent Hollowood from Victoria Police gave evidence about the difficulties that Australian law enforcement agencies have in identifying and confiscating assets which may be located in, or moved between, various jurisdictions.⁴⁷ Some of these problems, he said, would be overcome if there was nationally consistent unexplained wealth legislation.

5.57 The ACC reiterated this view, agreeing that nationally consistent unexplained wealth laws would improve the ability of law enforcement to combat serious and organised crime.

I think following the money is obviously very important from the point of view of identifying the areas of risk and the individuals who represent the greatest risk, but then it is a question of how you actually do anything about that, given the size of the criminal economy and the amount of money that is restrained and forfeited. There is a big disparity, so the performance would appear to warrant some improvement, I guess, in terms of the way we recover money.⁴⁸

Arguments against unexplained wealth laws

5.58 The committee also heard evidence against the adoption of unexplained wealth laws by the Commonwealth from a small number of organisations.

5.59 The main concern with unexplained wealth laws is the reversal of the onus of proof. A member of the motorcycling community, Mr Withnell, expressed concerns that such laws risk confiscating assets from innocent people because of their breadth:

46 Mr Barlow, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73.

47 *Committee Hansard*, 28 October 2008, p. 11.

48 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

[T]he only problem I have with [unexplained wealth laws is] I do not believe most people could actually explain everything they own.⁴⁹

5.60 The Law Council of Australia noted concern with unexplained wealth laws, submitting that they 'offend common law and human rights principles'.⁵⁰ Specifically, the Law Council is concerned that:

- a) The reverse onus of proof undermines the presumption of innocence. The Law Council's concerns regarding the presumption of innocence also apply to the Commonwealth's existing proceeds of crime legislation, but are heightened in respect of unexplained wealth laws.⁵¹
- b) The provisions infringe on the right to silence and exclude legal professional privilege. The unexplained wealth laws in WA and the NT enable the respective DPPs to use information found in the process of examining unexplained wealth to be used for criminal prosecution. The suspicion of a person having obtained wealth illegally is sufficient for the DPP to obtain an order compelling a person to answer questions on oath.⁵² The WA laws also exclude legal professional privilege by requiring lawyers and other professionals to provide information that would otherwise be privileged.⁵³
- c) There is a lack of appeal rights in respect of unexplained wealth declarations.⁵⁴ The committee notes that individuals have a right to appeal decisions of a court to make an unexplained wealth declaration and freezing order to a higher court on a matter of law, as is the case with proceeds of crime confiscation orders.
- d) The potential for arbitrary application of the laws. The Law Council expressed concern that those who fail to keep receipts or records may be

49 *Committee Hansard*, 4 July 2008, p. 38.

50 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

51 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

52 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13; see *Criminal Property Forfeiture Act 2002* (NT), section 17; *Property Confiscation Act 2000* (WA), section 57.

53 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13; see *Property Confiscation Act 2000* (WA), subsection 139(1).

54 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13.

subjected to the legislation,⁵⁵ and that use of the laws may be politically motivated.⁵⁶

5.61 Similarly, Mr O'Gorman, the President of the Australian Council for Civil Liberties said:

To those who wanted confiscation laws, from where I sit, we say that a conviction based regime was working quite well. I think the current scheme, under which people can simply have their assets frozen and taken away, even without being charged with any criminal offence, from a philosophical point of view as to where the reach of the criminal law should end, is utterly obnoxious.⁵⁷

5.62 Additionally, the unexplained wealth provisions in WA have had limited use, with only 13 declarations made between its commencement in 2000, and June 2008.⁵⁸ This supports the evidence that the committee heard from the Queensland Crime and Misconduct Commission that 'the jury is still out...on unexplained wealth.'⁵⁹

5.63 The WA Police gave evidence to the Western Australian Joint Parliamentary Standing Committee on the Corruption and Crime Commission that the DPP was reluctant to use the provisions.⁶⁰ The DPP told that Committee that it was not reluctant to use the laws, but as unexplained wealth applications are often made on the basis of information obtained in the course of another investigation in which confiscation proceedings had already commenced, the initial investigation must be completed prior to any action for unexplained wealth being commenced.⁶¹ The Law Council of Australia argued that this evidence indicates that the WA unexplained wealth laws are unnecessary.⁶²

5.64 The Northern Territory appears to have resolved this problem to a large extent by using an investigative and prosecutorial model that has a much greater level of

55 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 12.

56 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 14.

57 Mr O'Gorman, Australian Council for Civil Liberties, *Committee Hansard*, Brisbane, 7 November 2008, pp. 37-8.

58 Western Australia DPP, *Annual Report: 2007-08*, p. 30.

59 Mr Keen, CMC, *Committee Hansard*, 7 November 2008, p. 31

60 Detective Superintendent Porter, Western Australia Police, *Western Australia Joint Parliamentary Standing Committee on the Corruption and Crime Commission: Transcript of Evidence*, 1 August 2007, pp. 3-4.

61 Mr Jones, WA DPP, *Western Australia Joint Parliamentary Standing Committee on the Corruption and Crime Commission: Transcript of Evidence*, 26 September 2007, p. 8.

62 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 16.

interaction between prosecutors, police and the Department of Justice.⁶³ This issue is discussed further at paragraph 5.118.

5.65 Deputy Commissioner Kaldas of the NSW Police told the committee that the existing legislation in NSW, which like the Commonwealth legislation allows assets to be restrained or confiscated if a person is suspected of having obtained those assets through serious crime related activity, is 'working pretty well' and that there are no 'proposals or any need at the moment to revamp the legislation'.⁶⁴

Conclusions on unexplained wealth laws

5.66 The committee notes the concerns of the Law Council and others with unexplained wealth legislation. However, in the view of the committee unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime including:

- preventing crime from occurring by ensuring profits cannot be reinvested in criminal activity, as opposed to simply reacting to serious and organised crime;
- disrupting criminal enterprises;
- targeting the profit motive of organised criminal groups; and
- ensuring that those benefiting most from organised crime – i.e. those gaining profits – are the ones captured by the law, which they are often not under ordinary criminal laws, and proceeds of crime laws which require a link to a predicate offence.

5.67 The committee's view is that it may be possible to deal with the concerns of the Law Society through well-constructed legislation which incorporates safeguards such as administrative or judicial review mechanisms and evidentiary safeguards.

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Commonwealth)

5.68 The Commonwealth Attorney-General, the Hon Robert McClelland MP, introduced legislation into Parliament on 24 June 2009, which proposes to introduce unexplained wealth provisions into the *Proceeds of Crime Act 2002*.

5.69 The Attorney-General explained the purpose of the unexplained wealth amendments:

In many cases, senior organised crime figures who organise and derive profit from crime are not linked directly to the commission of the offence.

63 Commander Gwynne, Northern Territory Police, *Committee Hansard*, Darwin, 2 March 2009, p. 8.

64 Deputy Commissioner Kaldas, NSW Police, *Committee Hansard*, 29 September 2008, p. 26

They may seek to distance themselves from the offence to avoid prosecution or confiscation action.

Unlike existing confiscation orders, unexplained wealth orders will not require proof of a link to the commission of a specific offence and in that sense they represent a quantum leap in terms of law enforcement strategy.⁶⁵

5.70 This reasoning is consistent with the evidence that the committee heard from law enforcement agencies around the world.

5.71 The Bill adds 'unexplained wealth' to the existing categories of assets that may be subject to restraining or forfeiture orders under the Act. A person has 'unexplained wealth' if 'there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired.'⁶⁶

5.72 In proposed Part 2-6 to the Proceeds of Crime Act, the Bill provides for the making of 'Unexplained Wealth Orders'. In order for the Court to make an order:

- (a) a preliminary order must have been made (with an 'authorised officer' having made an affidavit under proposed section 179B(2)), and
- (b) the court must not be satisfied that the total wealth of the person was not derived from one or more of the following:
 - (i) an offence against a law of the Commonwealth;
 - (ii) a foreign indictable offence;
 - (iii) a state offence that has a federal aspect.

5.73 The additional requirement of the court not being satisfied of the unexplained wealth not being derived from an offence with a Commonwealth aspect is a result of the constitutional constraints on the Commonwealth's capacity to enact criminal laws. '[T]he Commonwealth is limited to confiscating unexplained wealth derived from offences within Commonwealth Constitutional power.'⁶⁷ Other than this additional aspect, the confiscation provision appears to operate in much the same way as the equivalent provisions under Northern Territory and Western Australian law.

Concerns with the operation of restraining orders in the Commonwealth Bill

5.74 In considering the Bill, the committee identified a potential drafting weakness. The proposed restraining orders in item 5 of the Bill appear to place a greater burden

65 The Hon Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 24 June 2009, p. 17.

66 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Schedule 1, Item 13, proposed subsection 179B(2)(b).

67 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, p. 5.

on the Crown, as the orders are not based on a reverse onus of proof. In order to make a restraining order, the Crown must satisfy the court that:

- (a) there are reasonable grounds to believe that a person has unexplained wealth; and
- (b) there are reasonable grounds to suspect either or both of the following:
 - (i) that the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect;
 - (ii) that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

5.75 Item 5 is based on the restraining order provisions for the existing proceeds of crime orders under the act, which do not carry a reverse onus of proof.

5.76 As with unexplained wealth orders, the additional requirement is based on the Commonwealth's constitutional restrictions. However, because the restraining order provisions are not based on a reverse onus of proof (like the unexplained wealth orders are), the restraining order provisions in the Commonwealth Bill appear to be narrower than those in the Northern Territory or Western Australia, as a link to a Commonwealth offence, and some level of proof thereof, will still be required. It is unclear how strong the evidence linking the unexplained wealth to an offence will need to be in order for the court to grant a restraining order.

5.77 The committee notes that it is not necessary for the CDPP to seek a restraining order prior to seeking an unexplained wealth order, as is the case with forfeiture orders in relation to those suspected of having committed a serious offence⁶⁸ or conduct constituting an indictable offence.⁶⁹

5.78 The explanatory memorandum to the Bill states that the purpose of restraining order is to 'ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.'⁷⁰ A restraining order also enables the CDPP to apply for an order to conduct an examination so that further property can be located.

5.79 In short, it appears that restraining orders may be more difficult to obtain than confiscation orders in respect to unexplained wealth in the Commonwealth Bill. Both orders require some link to a Commonwealth offence, but restraining orders require the link to be a positive burden on the Crown, whereas with unexplained wealth orders it is a negative burden.

68 *Proceeds of Crime Act 2002*, paragraph 47(1)(c).

69 *Proceeds of Crime Act 2002*, paragraph 49(1)(c).

70 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, Explanatory Memorandum, p. 6.

5.80 The committee is uncertain as to how the requirement of a link to Commonwealth offence will be interpreted by the courts as it relates to both restraining orders and confiscation orders. Although the committee understands that constitutionally, such a requirement is necessary, the committee is concerned that the Commonwealth's unexplained wealth orders should not be interpreted to require substantial evidence linking the accused to a Commonwealth offence. Such an interpretation would, in the committee's view, defeat the purpose of unexplained wealth orders.

5.81 The committee is also concerned with the complexity of both restraining order and confiscation order provisions, and notes that both sets of provisions contain double negatives, making them difficult to understand and interpret.

5.82 The committee suggests that these aspects of the Bill be given further scrutiny in order to ensure that the Commonwealth's unexplained wealth laws do not require the CDPP to demonstrate a link to a predicate commonwealth offence.

5.83 The committee notes that the Bill will be examined by the Senate Legal and Constitutional Affairs Legislation Committee, and looks forward to considering its report. The committee will continue to monitor the progress of the Bill and of the more widespread adoption of unexplained wealth laws with interest.

Conclusions on the Commonwealth's Bill

5.84 The committee commends the Commonwealth Government on proactively dealing with the problem of organised crime and in considering the evidence of this inquiry to introduce unexplained wealth provisions. In the committee's view, the unexplained wealth provisions in the Commonwealth's Bill are a reasoned and measured approach to the problem of organised crime

5.85 In particular, with regard to the concerns of the Law Council and others about unexplained wealth laws, set out above, the committee notes that the unexplained wealth provisions proposed by the Commonwealth government are civil provisions, and that no presumptions of criminal guilt or innocence are involved. Furthermore, the committee notes that existing section 198 of the Proceeds of Crime Act provides that information obtained in an examination relating to a restraining order, cannot be used as evidence in criminal proceedings against the person.

5.86 The committee notes that the unexplained wealth provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 are supported by the findings of the committee's inquiry. Therefore, the committee recommends that these provisions, in particular, be enacted.

Recommendation 3

5.87 The committee recommends that the unexplained wealth provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 be passed.

5.88 Noting the above comments of Victoria Police, the Northern Territory Police and the ACC regarding the importance of having uniform unexplained wealth provisions, the committee also urges the Commonwealth to continue to consult with the States and Territories about the adoption of uniform unexplained wealth laws.

5.89 The committee notes that the Commonwealth government is already involved in a number of consultation and negotiation processes with the States and Territories, which aim to achieve uniformity in legislation targeting serious and organised crime. These include chairing a Senior Officers Group of the Standing Committee of Attorneys-General (SCAG), and leadership of the Ministerial Council for Police and Emergency Management – Police (MCPEMP). These developments are discussed in chapter 6.

Measures supporting criminal assets confiscation

5.90 During the course of this inquiry, the committee became acutely aware of the importance not only of having strong legislative measures to prevent serious and organised crime, but also of having a suite of legislation and administrative and policy arrangements to support those measures. In particular, the need for law enforcement to have access to financial intelligence and for the development of effective investigative and prosecutorial models for criminal assets confiscation proceedings.

Financial intelligence

5.91 With the increasing law enforcement focus on 'the money trail', financial intelligence has become a crucial law enforcement tool. Mr Neil Jenson, CEO of AUSTRAC, highlighted the importance of financial intelligence:

...financial intelligence is critical to the fight against organised and serious crime. It is valuable for both operational and strategic purposes...[financial intelligence] information assists law enforcement to uncover previously undetected criminal activity and connections among crime groups as well as to identify emerging patterns and threats.⁷¹

5.92 There are a range of ways in which different jurisdictions collect financial intelligence and monitor suspicious transactions.

Australian approach

5.93 AUSTRAC's submission to the inquiry notes:

AUSTRAC plays a vital role in supporting the ACC and other law enforcement and security agencies through supplying the financial intelligence expertise needed for this approach. AUSTRAC's ability to link financial data and cross-match information assists in detecting suspicious activity as it is evolving. AUSTRAC's expertise in data mining and real

71 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 20.

time tracking allows analysts to detect criminal activity and track resources moved in preparation for planned activities.⁷²

5.94 AUSTRAC was established under the *Financial Transaction Reports Act 1988* and is continued in existence by section 209 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). AUSTRAC's purpose is to detect and counter money laundering and the financing of terrorism.⁷³

5.95 The AML/CTF Act imposes a number of obligations on organisations involved in certain industries (including financial service providers, the gambling industry and 'cash dealers'), when they provide designated services, including:

- customer identification and verification of identity;
- record keeping; and
- establishing and maintaining an AML/CTF program.

5.96 For example, reporting entities must report international funds transfers, 'suspicious transactions' and transactions of \$10 000 or more.

5.97 One of AUSTRAC's roles is to oversee compliance with these reporting requirements and collate the information. AUSTRAC then provides transaction reports and intelligence to law enforcement agencies and revenue agencies both within Australia and internationally (depending on whether an international agency has an agreement with AUSTRAC).⁷⁴

5.98 The CEO of AUSTRAC, Mr Neil Jensen, told the committee that:

Our information contributed to a record 2,698 operational matters in 2007-08, making a total of more than 15,000 such operational matters over the past 10 years. In addition, taxation revenue directly resulting from AUSTRAC's financial transaction reports amount to \$76 million in the 2007-08 financial year and approximately \$685 million over the past 10 years.⁷⁵

International approaches

5.99 A number of European countries have similar arrangements. The committee's delegation to North America, Europe and the UK was told that the European Union has developed a model approach to financial transactions and reporting, to enable law enforcement to better target the proceeds of crime. The approach involves:

- banning the use of cash payments

72 AUSTRAC, *Submission 17*, p. 3.

73 AUSTRAC, *Submission 17*, p. 2.

74 AUSTRAC website, 'About AUSTRAC', at http://www.austrac.gov.au/about_austrac.html (accessed 6 July 2009)

75 Mr Jensen, CEO, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 20.

- the identification and control of all financial operators
- the creation of common databases with the obligation for financial operators to report all suspicious transactions, and
- strong cooperation between all involved authorities.⁷⁶

5.100 Italian legislation prohibits the use of cash for transactions over €12 500 (AU\$21 800). Transactions over this amount are required to be processed through a financial institution. All transactions over €15 000 (AU\$26 000) require the collection and verification of personal details, with these records kept for ten years.

5.101 Italian banks and financial institutions are responsible for ensuring that they are not involved in money laundering. Strong punitive legislation targeted at the financial sector ensures the cooperation of banks in this area. The committee was told of a case in which €160 million (AU\$280 million) of illicit funds was deposited into a bank account in China. The bank failed to comply with the relevant reporting requirements relating to this transaction. Accordingly, the bank was required to pay a penalty of 40% of the money transferred, and bank officials involved in money laundering or in the non-compliance with financial record keeping and reporting were able to be charged under mafia association legislation.⁷⁷

5.102 The Dutch Police (KLPD) have a similar system and store information regarding unusual financial transactions on a secure database so that law enforcement are able to target 'hot spots'. The KLPD told the committee that they have identified that 85% of suspicious transactions involve international money transfers.⁷⁸

Effectiveness of existing arrangements

5.103 The ACC told the committee that the work done by AUSTRAC is critical to the confiscation of proceeds of crime, and ultimately organised crime prevention.

As you would all know, the key motivator for undertaking criminal activities is predominantly the profit which these activities bring. The underlying strategy of the ACC is to identify serious criminal targets through identification of criminal business structures and money flows. For

76 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 62,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

77 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 66-67,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

78 The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 63,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

example, the identification of suspect money transfers and repositories is a key methodology for target generation and development. This is a proactive risk-based approach to identifying high-risk money flows and it does not rely on the identification of an original offence to start an investigation.⁷⁹

5.104 AUSTRAC told the committee that there are a number of amendments that could be made to the AML/CTF laws to make them stronger, and that it is working with the Attorney-General's Department to achieve this:

As we are moving forward with the AML/CTF legislation we are finding areas that the legislation may not cover adequately, or the legislation may require further amendment. Remittance dealing is an area in which we continue to work. They have an obligation to register with AUSTRAC. We are aware that quite a number, potentially 500 or more, may not have registered with us, and we are looking at the range of activities available to move forward. We will propose to the Attorney-General's Department, which has responsibility for this legislation in the sense of amending it, issues that are arising as a result of that. We have a number of concerns at the moment about which we are talking to the Attorney-General's Department. We would be looking for some future possible amendment to assist our program in enforcing the legislation.⁸⁰

5.105 Mr Jensen went on to argue:

The major concern is how to enforce non-registration, or where entities have not registered, to be able to ensure that they register so that we can provide information. It would be some strengthening of the ability to take an action, whether it is through the courts or in some other form, to show them that they have a responsibility and they have to meet those responsibilities.⁸¹

Recommendation 4

5.106 The committee recommends that the Commonwealth Government give urgent consideration to strengthening the enforcement of registration obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

5.107 The ACC also suggested a number of models that have been successful in other jurisdictions that might be effective in strengthening Australia's legislative, administrative and policy arrangements for collecting financial intelligence. Specifically, the ACC commended the United Kingdom's system of Financial Reporting Orders as a model that might enhance Australia's existing laws. Mr Kitson from the ACC told the committee:

...financial reporting orders, FROs...[are] a useful way to monitor the activities of key persons of concern. FROs, in combination with the easily

79 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

80 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

81 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

applicable proceeds of crime legislation, may enhance our capacity to attack the criminal economy.⁸²

Financial Reporting Orders in the United Kingdom

5.108 Chapter 3 of the *Serious Organised Crime and Police Act 2005* gives SOCA the power to apply for Financial Reporting Orders (FROs), which are a civil mechanism of restraining the use of assets by convicted organised criminals. FROs may be made against persons convicted of certain specified criminal offences including money laundering, fraud and terrorism.⁸³

5.109 The orders may be for a period of up to 15 years and ordinarily require a person to provide financial statements and details to the authorities periodically.⁸⁴ Failure to do so is an offence.⁸⁵

5.110 The orders are intended to prevent known organised criminals from using their assets to fund further crime. They essentially make it much more difficult for those people to establish new criminal enterprises and to evade detection.

To verify the accuracy of information provided in a financial report, UK agencies can request information from any source without use of a production order and disclose information in the financial report to any party. Where a person's lifestyle is inconsistent with the financial position reported, there are avenues to pursue the seizure of assets.⁸⁶

5.111 The ACC told the committee that:

Financial reporting orders could simplify the ACC's push to understand high-volume money flows associated with those involved in the more serious ends of organised crime.⁸⁷

5.112 However, FROs only came into effect in the UK in 2005 and to date there is little evidence of their effectiveness. The ACC acknowledged this, but noted that they will continue to monitor the orders and discuss their effectiveness with SOCA to determine whether they may be useful in the Australian context.

I think you would be aware that the UK's laws have not been enacted long enough to give us a decent body of information on which to judge its success or otherwise. Indeed, in our dialogue with them, they also observed that it is too early to make a judgement...I suspect that that we are a year or so away from having an understanding of how that operates in their context

82 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 2.

83 *Serious and Organised Crime and Police Act 2005*, sections 76 and 79-81.

84 *Serious and Organised Crime and Police Act 2005*, section 79.

85 *Serious and Organised Crime and Police Act 2005*, subsection 79(10).

86 ACC, *Submission 15*, p. 5.

87 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3.

and, when we try to apply that across the Australian context with some of the difficulties we might have with a non-unitary law system and the different state and territory policing agencies we have here, I think there will be a fair bit of study and work to be done in that area.⁸⁸

5.113 Mr Kitson also noted the role that FROs might play if unexplained wealth laws are adopted at the federal level in Australia.

...the reason that we identified particularly financial reporting orders as something that was of interest to us is because it deals with the capacity of some of the most enduring and resilient organised crime figures to maintain their wealth regardless of the individual or concerted efforts of law enforcement across the country. If we shift the burden of proof so that people have to explain unexplained wealth then there may be some benefit to us in trying to understand how they are operating, who they are operating with and what they are doing with those assets.⁸⁹

Recommendation 5

5.114 The committee recommends that the ACC continue to monitor the effectiveness of the United Kingdom's Financial Reporting Orders, and report to both the Minister for Home Affairs and the Parliamentary Joint Committee on the Australian Crime Commission whether similar reporting orders may be of benefit in the Australian law enforcement context.

Investigative and prosecutorial arrangements for confiscating criminal assets

5.115 The ACC's submission argues that the Commonwealth's existing proceeds of crime laws are not as effective as the models used in other jurisdictions. The ACC points to the NSW and UK models as examples of laws that have been more successful than the Commonwealth's existing legislative arrangements.⁹⁰

5.116 The committee notes that the NSW laws are similar to the Commonwealth's in terms of when assets can be seized or restrained by the Crown. The UK's *Proceeds of Crime Act 2002* is not as strong as the Commonwealth and NSW legislation in that it requires that a person has been convicted before assets can be confiscated.⁹¹ However, the ACC suggests that one of the reasons for the greater success of the NSW and UK laws is the fact that the NSW Crime Commission and SOCA respectively are responsible for investigating and prosecuting criminal assets recovery matters. Accordingly, the ACC suggests that there is a:

88 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

89 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 8.

90 ACC, *Submission 15*, p. 12.

91 Although the restraint of assets under the *Proceeds of Crime Act 2002 (UK)* may be on the basis that the person is under investigation and there is reasonable cause to believe that they committed an offence.

...need for a clearer separation of responsibility for prosecution and seizure action at Commonwealth level.⁹²

5.117 The ACC elaborated on this statement:

Although a variety of models are available, there are compelling arguments for the location of responsibility with an agency at the national level with responsibility for targeting the most resilient and enduring serious and organised crime groups and equipped with the cost-effective capability offered by coercive powers. In addition, agencies being able to draw on a range of tools, including the appropriate use of coercive powers from another service agency, provides another model for consideration. While the primary purpose would be improved rates of criminal asset recovery, there would also be opportunities to improve a broader range of outcomes in terms of disrupting and dismantling criminal enterprise structures through corporations or taxation law action.⁹³

5.118 This suggestion was echoed by police forces both within Australia and internationally. The Northern Territory Police suggested that one of the key reasons for the initial success of their unexplained wealth laws is the fact that they have altered the way in which investigations and prosecutions work, to a more integrated approach with greater interaction between police, the Department of Justice and the DPP.

One of the other things that are unique to the Northern Territory legislation is the way we manage the process. We have an area in the Department of Justice that deals just with criminal property forfeiture. We have a sergeant who is an experienced prosecutor working within that area, so we have a conduit between the police and the Department of Justice, who are taking the matters before the local courts and the Supreme Court. We work very closely with the lawyers in preparing the cases and prosecuting them through the system.⁹⁴

5.119 The committee heard that this change in approach to the traditional model of prosecution has contributed substantially to the success of the Northern Territory's unexplained wealth regime.

5.120 It is not uncommon in some international jurisdictions for the 'prosecutorial' function for civil, proceeds of crime related matters to be handled by a law enforcement or assets recovery agency rather than by the public prosecution service. For example the Director of the UK's Serious and Organised Crime Agency (SOCA) has the ability to apply directly to the courts for assets confiscation orders.⁹⁵

92 ACC, *Submission 15*, p. 12.

93 ACC, *Submission 15*, p. 12.

94 Commander Colleen Gwynne, Northern Territory Police, *Committee Hansard*, Darwin, 2 March 2009, p. 8.

95 *Proceeds of Crime Act 2002* (UK), section 6.

5.121 Mr Kitson informed the committee that the NSW Crime Commission also has responsibility for bringing proceeds of crime actions under the NSW *Criminal Assets Recovery Act 1990*, and not the NSW DPP. Similarly, Assistant Commissioner Mandy Newton told the committee of the value of the NSW arrangements.⁹⁶

5.122 The committee also heard that other jurisdictions have found advantages in combining all assets recovery functions into one agency – including both taxation and criminal assets recovery. The UK has adopted this approach, and the committee was informed that SOCA have launched hybrid cases – which involve both tax recovery and criminal asset confiscation. Mr Andy Lewis, Head of Civil Tax Recovery, SOCA, informed the committee that the ability to target both aspects of criminal assets has been successful, and the use of tax investigation enables SOCA to examine records from the previous 20 years.⁹⁷

Irish model

5.123 The ACC recommended that the committee examine the Irish proceeds of crime model, as in its view, the Criminal Assets Bureau (CAB) in Dublin is 'the most successful recovery agency in Europe.'⁹⁸

5.124 The CAB is a division of the Garda Síochána that was established by Statute in 1996. It reports directly to the Minister for Justice, Equality and Law Reform. The CAB has both investigative and enforcement powers, and operates independently of other criminal prosecution agencies.⁹⁹

5.125 The CAB is comprised of officers from the Garda Síochána, Revenue Commissioners Taxes, Revenue Commissioners Customs and the Department of Social, Community and Family Affairs. Thus it takes a multi-agency approach to confiscating the assets of organised criminals. The CAB is able to apply tax legislation, proceeds of crime legislation as well as any relevant criminal laws to their investigations and prosecutions. This allows the most effective and appropriate legislation to be used in each situation in order to deny organised criminals of their

96 Assistant Commissioner Newton, AFP, *Committee Hansard*, 6 November 2008, p. 31.

97 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 84-85,
http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

98 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7. However, the committee was also informed about some difficulties with the current Irish legislation, including the fact that the existing 7-step process for assets recovery on a reverse onus of proof adds complexity to the Irish assets recovery regime.

99 An Garda Síochána, 'Criminal Assets Bureau', at www.garda.ie/Controller.aspx?Page=28 (accessed 7 July 2009).

assets. According to the ACC in around 60 or 70 per cent of cases the CAB uses tax legislation to confiscate assets suspected of being the profits of crime.¹⁰⁰

5.126 Within the Australian context, the committee heard that the ability of the Australian Tax Office and law enforcement agencies to work together was a key element of the success of the Piranha Taskforce:

One of the key aspects of our success with Piranha is having an embedded person from the Australian Taxation Office within the operation. The cooperation we have had with the ATO in tracking assets has worked extremely well for us. If we attack the wealth we attack the incentive for people to be engaged in organised crime.¹⁰¹

5.127 However, Mr Cranston from the ATO informed the committee that in some instances tax laws will not be the best adapted means of removing assets:

The tax law is looking at a particular tax liability. On balance of probabilities, looking at the facts, we can make an assessment of whether there is a tax liability. We have done well in that particular area in the past in dealing with some of these organised groups. There is a problem in relation to collection, however. Sometimes it is very difficult to collect on those particular assessments. In relation to whether it is better than the proceeds of crime legislation, I think that would depend on the particular matter and the particular circumstances. When we raise tax assessments, they have to adhere to the various taxation acts. However, the proceeds of crime is because you have to have a criminal offence and that becomes sometimes a bit difficult.¹⁰²

5.128 The Irish model allows law enforcement to take a pragmatic approach to the removal of assets by establishing permanent working relationships between officers from different areas of law enforcement, tax, customs and community affairs.

5.129 In the ACC's opinion this model of combining assets confiscation agencies into one investigative and enforcement agency also enables law enforcement to overcome some of the difficulties that result from complicated and sophisticated organised crime business structures.¹⁰³

The difficulty is that because of the complexity and sophistication of some of these business structures and the intermingling of legitimate and illegitimate sources of income, it is very, difficult for an investigator to disentangle all that to the satisfaction of a court, where you prove reasonably that that particular amount of money over there is from an illegal source that money over there is legitimate. That is the difficulty we

100 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

101 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 11.

102 Mr Cranston, Australian Tax Office, *Committee Hansard*, 6 November 2008, p. 73.

103 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

face. And, of course, acquiring people with the skills to understand money, money flows, business structures and the way businesses and markets work will be a big trick for law enforcement down the track.¹⁰⁴

5.130 The committee considers the effectiveness of multi-agency taskforce in further detail in chapter 6.

Conclusions on investigative and prosecutorial arrangements

5.131 The best model for investigating and prosecuting criminal assets confiscation matters and other assets confiscation matters was not the primary focus of this inquiry. However, the committee did hear substantial evidence and received numerous recommendations as to how the Commonwealth's approach to these issues could be strengthened, thereby improving the success of criminal assets confiscation laws in Australia.

5.132 In the committee's view, Australia may benefit from an assets recovery agency like CAB, for example by vesting the capacity to bring proceeds of crime and unexplained wealth matters in the ACC, or by the establishment of permanent multi-agency taskforces with a lead role in investigating and prosecuting criminal assets recovery matters, or from a combination of these approaches.

5.133 The committee recommends that this issue be given further consideration by the Commonwealth government.

Recommendation 6

5.134 The committee recommends that the Commonwealth government examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency, such as the ACC.

Conclusions

5.135 During this inquiry the committee examined a range of preventative law enforcement approaches to serious and organised crime. On the evidence it has received, the committee is persuaded that the most effective way of targeting and disrupting serious and organised crime is to pursue the motivation behind it – which is the financial gain.

5.136 While there are differences of opinion, both within law enforcement and the community generally, about the effectiveness and appropriateness of anti-association laws, law enforcement agencies both within Australia and internationally, are unanimous that criminal assets recovery laws are an effective way of combating organised crime at the highest level.

104 Mr Outram, ACC, *Committee Hansard*, 6 November 2008, p. 7.

5.137 The committee believes that strong criminal assets recovery laws, specifically unexplained wealth laws, are a significant way forward, as they:

- prevent crime from occurring by ensuring criminal profits cannot be reinvested in further criminal activity;
- disrupt criminal enterprises;
- target the profit motive of organised criminal groups to deprive them of this incentive; and
- ensure that those benefiting most from organised crime – i.e. those receiving financial gain – are the ones captured by the law, which they are often not under ordinary criminal laws, and proceeds of crime laws which require a link to a predicate offence.

5.138 The committee acknowledges that unexplained wealth laws are a departure from the traditional approach to proceeds of crime, which requires a person to be convicted of a predicate offence before the proceeds of that crime may be confiscated. However, the committee has heard throughout this inquiry about the increasing sophistication and transnational nature of serious and organised crime groups. The directors of modern organised crime have sophisticated and dynamic methods of avoiding the law. They are well-informed and well-resourced. The committee is therefore convinced that such a departure from traditional approaches to confiscating the proceeds of crime is necessary and defensible.

5.139 Accordingly, the committee commends the Commonwealth Government for the introduction of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, which includes unexplained wealth laws. However, the committee also notes that in order for any law which targets a national problem to have maximum effect, it is critical that all levels of government adopt harmonised approaches to unexplained wealth confiscation. The committee encourages the states and territories to give this matter due consideration.