



MEMORANDUM

REPORT

RE: PARLIAMENTARY JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION – HEARING 2 MARCH 2009 – SUPPLEMENTARY SUBMISSION – DEPARTMENT OF JUSTICE – SOLICITOR FOR THE NORTHERN TERRITORY.

The following supplementary submission is provided at the request of the Parliamentary Joint Committee on the Australian Crime Commission (the “Committee”).

At the time of the Committee’s hearing on 2 March 2009 the Director of Public Prosecutions of the Northern Territory (the “DPP”) had “*unexplained wealth*” and “*criminal benefit*” applications pending before the Supreme Court, brought pursuant to his statutory powers under the *Criminal Property Forfeiture Act NT* (the “Act”). The Territory was asked to identify any resulting deficiencies within the “*unexplained wealth*” and “*criminal benefit*” provisions on finalisation of these cases and to outline proposed legislative amendments (if any) to enhance the workings of the Act. These matters were finalised in May 2009.

Background - *Criminal Property Forfeiture Act*

1. In accordance with Part 6 of the Act, the DPP is entitled to seek declarations for unexplained wealth and/or a criminal benefit when a person has acquired unjust enrichment through criminal activity. As the Act itself is an *in rem* enactment, rather than *in personam*, the physical target of that unjust enrichment will be the property (real or personal) of a person taken to be involved in criminal activity.
2. The Act sets up a regime which allows the DPP to make application for restraining orders on specified grounds, including that of unexplained wealth and/or a criminal benefit, pending the outcome of an application for final orders and/or declarations. A restraining order may be granted over specified items of property (s43) and/or over property of a named person (s44). The purpose of the restraining order is to preserve property from dissipation pending the final outcome of the case.

3. The definitions of *unexplained wealth* and *criminal benefit* pursuant to the Act are set out below.

Unexplained Wealth

4. A person has unexplained wealth if the value of person's total wealth exceeds the value of the person's lawfully acquired wealth (s68(1)). A respondent's unexplained wealth is the difference between the respondent's total wealth and the lawfully acquired wealth (s69(1)). For the purposes of calculating a respondent's wealth, the constituents of wealth are inclusive of 'any property (both real and personal), service, advantage or benefit' (s70).
5. An application for unexplained wealth is not dependent upon proof, nor even suspicion of criminality attaching to either the respondent personally, or to his acquired wealth. The burden of proof rests with the respondent to show that his wealth has been lawfully acquired, and unless the respondent establishes the contrary, any constituent of the wealth is presumed to have been unlawfully acquired (s71(2)). The Act provides that where it is "*more likely than not*" that the respondent has unexplained wealth, the Court must make a declaration to that effect (s71(1)). The Court is also required to assess the value of the unexplained wealth and nominate that value in the declaration (s71(4)). Once the declaration is made, the respondent must pay the specified amount to the Territory (s72).

Criminal Benefit

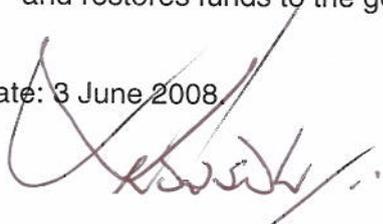
6. A person acquires a criminal benefit if any property, service, advantage or benefit that is a constituent of the person's wealth was acquired either lawfully or unlawfully, as a result of the person's involvement in the commission of a forfeiture offence (s74(a) and (b)), unless the respondent establishes the contrary (s75(1)) and regardless of when the property (etc) was acquired and when the forfeiture offence was committed (s74(2)). The Act provides that where it is "*more likely than not*" that the respondent has acquired a criminal benefit, the Court must make a declaration to that effect (s75(1)). The Court is also required to assess the value of the criminal benefit and nominate that value in the declaration (s78(1)). Once the declaration is made, the respondent must pay the specified amount to the Territory (s80).
7. The main difference between presenting an unexplained wealth or criminal benefit case is the absence of any 'attachment of criminality' as an element of proof, to unexplained wealth applications. The absence of this element in unexplained wealth stands in stark

contrast to other provisions of the Act, including that of a criminal benefit (ie; see drug trafficking, crime-used, crime-derived, property substitution declarations).

8. In a criminal benefit application, the DPP must be able to identify some form of criminal activity which the respondent has been involved in, sufficient to ground a “*forfeiture offence*” (as defined s6). The respondent’s involvement in the forfeiture offence (criminal activity) may be direct or indirect. Once the respondent’s involvement in the forfeiture offence has been established, the property (etc) is presumed to have been acquired as a result of that involvement (unless the respondent establishes the contrary; s75(1)). It is this aspect of the provision which may present the DPP with significant evidentiary difficulties, particularly if the respondent has never been convicted of a criminal offence. To date, this difficulty has been overcome in cases where the respondent has made admissions as to his criminality to the Australian Crime Commission, or in a police record of interview.
9. In May 2009, the DPP concluded a number of significant *Criminal Property Forfeiture Act* proceedings, reliant on the “unexplained wealth” and “criminal benefit” provisions. These proceedings were predicated on respondents’ involvement in the illicit drug trade and consequent acquisition of illegally acquired assets and proceeds of crime as a result.
10. However, the unexplained wealth proceedings were not contested by the respondents and resulted in ‘consent forfeiture’ to the Territory of restrained assets. Similarly, the criminal benefit proceedings were also uncontested (the respondent choosing not to participate in the proceedings), with the Court declaring significant criminal benefit amounts in favour of the Territory.
11. Therefore at the time of writing, the DPP is yet to have an unexplained wealth case determined by the Supreme Court. As a consequence, it is difficult to identify any legislative deficiency requiring amendment.
12. However, what can be said is that, in its present terms, the Act gives an impression that application of the unexplained wealth provisions is a relatively straightforward, simple, mathematical exercise, based on documentary evidence of proof (or otherwise) of lawful acquisition of a respondent’s assets. The assumption is that where a respondent is unable to provide an explanation as to how he came by his wealth, then the unexplained portion is presumed to not have been lawfully acquired and that the Court will simply assess the monetary value of the unexplained wealth and make the declaration.

13. In reality, however, a respondent may have no documentary evidence and merely provide a Court with a 'lip service' explanation as to his wealth (such as, unsubstantiated wins from gambling). Absent evidence to the contrary, it is difficult to envisage a situation where a Court will exercise its discretion in favour of the DPP, particularly where there is no real evidence of criminality and the DPP has not, by way of rebuttal evidence, countered the respondent's 'explanation'. Further, given the 'draconian' nature of the legislation, the Courts are likely to strictly construe any oversight or ambiguity in favour of the respondent. Thus, the fact that the provision stands silent, or does not specifically exclude criminality as an element of proof, creates uncertainty, leaving it open to a judicial requirement of evidence of criminality to creep in through the back door.
14. Therefore, at the time of writing, the only significant amendment the DPP recommends the legislature consider is a clarification to the unexplained wealth provision, specifically excluding criminality as an element of proof in the relevant section.
15. The DPP is of the view that, although the Act in its present form requires many minor legislative amendments, the scheme of the Act successfully achieves its objectives. That is, it deprives persons engaged in criminal activities from the benefits of their crimes by preventing unjust enrichment of persons involved in criminal activities. The Act has a dual flow on effect of limiting funds available to criminals in furtherance of criminal enterprise and restores funds to the general community.

Date: 3 June 2008.



Per KATHRYN GLEESON
SOLICITOR FOR THE NORTHERN TERRITORY