The Parliament of the Commonwealth of Australia

PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT

Inquiry into Commonwealth unexplained wealth legislation and arrangements

DISCUSSION PAPER

November 2011

This document was prepared by the Secretariat of the Parliamentary Joint Committee on Law Enforcement

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FOREWORD

Serious and organised crime, motivated by greed, power and money, has serious impacts, threatening the economy, national security and the wellbeing of Australians. The financial cost to the community is conservatively estimated to be around $15 billion a year.[1] In December 2008, the then Prime Minister Kevin Rudd in his National Security Statement noted the transnational nature of serious and organised crime and its relevance to national security. Mr Bill Rowlings from Civil Liberties Australia noted the impact on the liberty of Australians by serious and organised criminals, stating:

> In most cases, their profit is derived from removing or interfering with the civil liberties of normal citizens.[2]

The importance of serious and organised crime had already been recognised internationally, with a 1997 Interpol resolution recommending that member countries consider adopting effective laws, that give law enforcement officials the powers they need to combat money laundering both domestically and internationally, including reversing the burden of proof (using the concept of reverse onus) in respect of the confiscation of alleged proceeds of crime.[3]

The idea of confiscation of unexplained wealth in international agreements can be traced back as far as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Convention stated that 'each party consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation.'[4] Similar recommendations appear in the United Nations Convention Against Transnational Organised Crime (2000) and the United Nations Convention Against Corruption (2003).[5] In 2003, the Financial Action Task Force on Money Laundering recommended that countries adopt measures laid out in the conventions above, including confiscation without conviction and requiring persons to demonstrate the lawful origins of property.[6]

Several nations have introduced legislation in line with these agreements. The proceeds of crime legislation introduced by Ireland in 1996 has been particularly

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1 Australian Crime Commission, Annual report, 2010-11, p. 14.

2 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard,* 4 November 2011, p. 44.

3 Interpol Resolution No AGN/66/RES/17 October 1997, Money laundering: Investigations and international police co-operation.

4 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Article 5, Paragraph 7.

5 Victoria Police, *Submission 4*, p. 2.

6 Victoria Police, *Submission 4*, p. 2.

effective. Many other countries have adopted proceeds of crime type laws and arrangements, including the United States, the United Kingdom, and Italy.

Proceeds of crime laws include civil based unexplained wealth provisions in some cases, which can be used to target serious and organised crime bosses who arrange their affairs so that they can enjoy the proceeds of crime, without committing the actual crimes themselves. In Australia, both Western Australia and the Northern Territory have had such laws for around a decade and other jurisdictions have followed later. While the Northern Territory laws have been successful the Western Australian laws appear not to have had the desired outcome.

The committee has previously inquired into legislative arrangements to address serious and organised crime. The then Chair of the committee, Senator Steve Hutchins, noted:

> One of the things that came through time and time again from law enforcement agencies throughout the world was that they found that the best method to deal with serious and organised crime was to target the asset rather than the person.[7]

The inquiry report was tabled in August 2009, and the committee recommended the introduction of unexplained wealth provisions in Commonwealth legislation, noting that:

> [I]n 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.[8]

7 Senator Steve Hutchins, *Senate Hansard*, 17 August 2009, p. 5022.

8 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, p. 117.

At the Commonwealth level, proceeds of crime can be addressed through the *Proceeds of Crime Act* 2002 (PoCA). Unexplained wealth provisions were added to the PoCA and enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. The Attorney-General, Mr Robert McClelland MP, articulated the purpose of the Bill during its passage through Parliament:

> It is important that we put strong laws in place to combat organised crime. We need to target the profits of crime and remove the incentive for criminals to engage in organised criminal activity. We also need to empower our law enforcement agencies to defeat the sophisticated methods used by those involved in organised criminal activity to avoid detection, often with the assistance of highly skilled professionals. Appropriate access to covert investigative tools, such as controlled operations, assumed identities and telecommunications interception, will assist police to investigate and disrupt criminal activities. It is also vital to ensure offences extend to people who commit crimes as part of a group...
>
> New unexplained wealth provisions will be a key addition to the Commonwealth criminal asset confiscation regime. These provisions will target people who derive profit from crime and whose wealth exceeds the value of their lawful earnings. In many cases, senior organised crime figures who organise and derive profit from crime are not linked directly to the commission of the offence. 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.[9]

Unfortunately however, the unexplained wealth aspects of the PoCA have not worked as intended by the committee, or in the legislation as introduced to the Parliament. To date, no cases have been able to be brought before the courts under the Commonwealth legislation due to a range of limitations as noted by the Attorney-General's Department in its submission:

> No proceedings have been brought under the Proceeds of Crime Act seeking an unexplained wealth order, although the AFP are investigating two cases. Accordingly, there has not yet been an opportunity to test the effectiveness of the provisions in practice.
>
> The inclusion within the Commonwealth unexplained wealth provisions of links to offences within Commonwealth constitutional power places some limitations on the operation of those provisions as compared to similar State and Territory regimes.

9 Mr Robert McClelland, Attorney-General, *House of Representatives Hansard*, 24 June 2009, p. 6964–6965.

> The ability of a person to dispose of property to meet legal costs may weaken the effectiveness of the provisions by allowing the wealth which law enforcement agencies suspect to have been unlawfully acquired to be used to contest the proceedings. By contrast, those who are subject to other proceeds of crime orders have access to legal aid and the legal aid costs are met from the value of confiscated property.
>
> A court's power to make costs orders in relation to unexplained wealth proceedings is more onerous than is the case for other types of orders under the Proceeds of Crime Act. This may create a disincentive to seek unexplained wealth orders.
>
> In addition, a court has general discretion as to whether to make an unexplained wealth order, even when it is satisfied that the relevant criteria have been met. This is in contrast to other types of proceeds of crime order, which a court must make if it is satisfied that the criteria have been met.[10]
>
> Certainly the fact that there have been no cases suggests that there is something wrong, but whether there is something wrong with the act or whether there is something wrong with the way in which it is being approached, at this stage we cannot say. It is disappointing that there have not been the cases yet.[11]

The committee welcomes the changes in the recently passed Crimes Legislation Amendment Bill (No. 2) 2011, which will allow the AFP-led Criminal Assets Confiscation Taskforce to take responsibility for litigating all PoCA actions relevant to investigations undertaken by the Taskforce, and all non-conviction based PoCA matters (including unexplained wealth matters) referred by other agencies.[12]

For some matters (including meeting the evidence threshold twice, time limits for notices, and participation in equitable sharing) the committee considers it already has received significant evidence, and has made observations in this discussion paper. A range of suggestions, which have been put to the committee to date in briefings, hearings and submissions, are discussed in more detail in Chapter 4 and listed after the obervations page at the front of the report as areas the committee is seeking further evidence on.

At a strategic level the committee considers that the objects of the Proceeds of Crime Act need to be made much more explicit, particularly in relation to purpose of unexplained wealth laws and the definition of serious and organised crime. There is a need for greater clarity to ensure that those involved in the operation of unexplained wealth laws understand the focus on the prevention of and protection from the scourge of serious and organised crime, which is markedly different from the traditional post-crime prosecution context.

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10 AGD, *Submission 6,* p. 6.

11 Mr Iain Anderson, AGD, *Committee Hansard,* 4 November 2011, p. 37.

12 AFP, *Submission 9,* p. 4.

The committee is also of the view that harmonisation of Commonwealth and state and territory laws has the potential to dramatically improve the operation of proceeds of crime laws, and remove loopholes exploited by serious and organised criminals. In the next phase of this inquiry the committee is keen to engage stakeholders in considering options such as developing a set of guiding principles for unexplained wealth laws across jurisdictions, model legislation, referral of powers, or international linkages.

Table of Contents

LIST OF ACRONYMS AND ABBREVIATIONS

ACC	Australian Crime Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
ANZPAA	Australian New Zealand Policing Advisory Agency
ATO	Australian Tax Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAB	Criminal Assets Bureau (Ireland)
CACT	Criminal Assets Confiscation Taskforce
CCC	Corruption and Crime Commission (WA)
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
CMC	Crime and Misconduct Commission (Queensland)
Customs	Australian Customs Service
DPP	Director of Public Prosecutions
MA Act	*Mutual Assistance in Criminal Matters Act 1987*
OMCGs	Outlaw Motor Cycle Gangs
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJC-ACC	Parliamentary Joint Committee on Law Enforcement
PoCA	*Proceeds of Crime Act* 2002
RICO	Racketeer Influenced and Corrupt Organizations (US)
SOCA	Serious and Organised Crime Agency (UK)
the committee	Parliamentary Joint Committee on Law Enforcement
UK-POCA	*Proceeds of Crime Act 2002 (UK)*

OBSERVATIONS

Observation 1

4.4 The committee observes that it may be advantageous to clarify the objects of the PoCA so that it is clear that the purpose of the legislation is to address serious and organised crime by undermining the profit motive.

Observation 2

4.7 The committee observes that the use of unexplained wealth provisions could be better targeted, and limited, through the introduction of a threshold amount, and is considering whether $25 000 would be an appropriate threshold.

Observation 3

4.35 The committee observes that participation in agreed equitable sharing programs where possible to do so is likely to be a significant enabler of joint operations with state and territories.

Observation 4

4.44 The committee observes that the duplication of the threshold test appears to be unnecessary and an inefficient use of resources.

Observation 5

4.47 The committee observes that the time limit for serving notice of applications for a preliminary unexplained wealth order may not reflect an appropriate balance between a reasonable time for evidence to be gathered, and the right of individuals to manage their affairs.

Observation 6

4.63 The committee observes that there does not seem to be a strong case for a specific unexplained wealth judicial discretion relating to restraining orders and preliminary orders to appear, given there is limited impact on an individual subject to those types of orders and that there are already significant safeguards in place, such as:

- **the requirement for a court to be satisfied that the tests for the orders have been met;**
- **the judicial discretions of general public interest and the interests of justice tests that need to be satisfied;**
- **the standard powers courts have to order costs; and**

- **oversight by this committee.**

Observation 7

4.66 The committee observes that judicial discretion relating to orders to pay an amount of unexplained wealth to the Commonwealth under section 179E of the PoCA may limit the effective use of the unexplained wealth laws.

Observation 8

4.67 The committee observes that it may be possible to replace the judicial discretion with appropriate statutory oversight arrangements including that:

- **Law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations;**

- **The Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that Ombudsman does for controlled operations; and**

- **The oversight by the Parliamentary Joint Committee on Law Enforcement be enhanced so that in addition to appearing when required, that the ACC, AFP, DPP and any other federal agency or authority must brief the committee on their use of unexplained wealth provisions as part of the committee's annual examination of annual reports of the ACC and AFP.**

Observation 8

4.73 The committee observes that there may be value in identifying nominated judicial officers who could give priority to hearing proceeds of crime proceedings, and unexplained wealth proceedings in particular.

Observation 9

4.81 The committee observes that legal aid arrangements similar to those for other PoCA proceedings may be appropriate for unexplained wealth proceedings.

AREAS WHERE THE COMMITTEE IS SEEKING FURTHER EVIDENCE

The committee is seeking further evidence on the following suggestions, which have been put to the committee over the course of the inquiry so far, and are discussed further in Chapter 4:

- making the objects of the Proceeds of Crime Act more explicit, particularly in relation to purpose of unexplained wealth laws and the definition of serious and organised crime.
- minimising the need to prove a Commonwealth offence;
- amending search warrant powers;
- enabling the ATO to receive intercept information;
- options for dispute resolution;
- preventing legal expenses being met from restrained property;
- setting up special courts or judges;
- establishment of a threshold below which unexplained wealth matters must satisfy additional tests, or cannot not be prosecuted;
- removing the requirement to meet an evidence threshold twice;
- extending the time limit for notices of preliminary unexplained wealth orders;
- prescription of taskforces under the *Taxation Administration Regulations1976;*
- streamlining the implementation of taskforces*;*
- improving international cooperation in relation to unexplained wealth matters;
- granting the ability to create and register a charge over restrained property;
- deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity;
- separating unexplained wealth provisions from PoCA and placing them in stand-alone legislation;
- gaps that are being exploited in Australian jurisdictions;
- development of arrangements to enable the sharing of proceeds by non-participating States and Territories; and
- harmonisation of Commonwealth and state and territory laws, considering options such as developing a set of guiding principles for unexplained wealth laws, model legislation, referral of powers, or international linkages.

CHAPTER 1

Overview of the inquiry process

1.1 On 13 July 2011, the Parliamentary Joint Committee on Law Enforcement (the committee) initiated an inquiry into Commonwealth unexplained wealth legislation and arrangements with the terms of reference set out below

Terms of reference

1.2 Pursuant to the committee's functions set out in paragraph 7(1)(g) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*:

> (g) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC or the AFP.

1.3 The committee is examining law enforcement legislation and administrative arrangements that target unexplained wealth in connection with serious and organised crime, through bodies including the AFP, ACC and the Criminal Assets Confiscation Taskforce. In particular the committee is examining:

(a) the effectiveness and operation of current Commonwealth unexplained wealth legislation and associated administrative arrangements and whether they are working as intended in countering serious and organised crime;

(b) the likely effectiveness of proposed relevant Commonwealth legislation;

(c) the effectiveness of and potential changes to unexplained wealth legislation and associated administrative arrangements in other countries.

(d) the extent and effectiveness of international agreements and arrangements for law enforcement activities in relation to unexplained wealth;

(e) the interaction of Commonwealth, state and territory legislation and law enforcement activity in relation to the targeting of criminal assets of serious and organised criminal networks; and

(f) the need for any further unexplained wealth legislative or administrative reform.

Conduct of the inquiry to date

1.4 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website. In addition, the committee wrote to a range of organisations and individuals inviting submissions.

1.5 The committee has received 11 submissions, of which one was confidential. The 10 public submissions were published on the committee's website. A list of submissions is included at Appendix 1.

1.6 In addition, the committee has held two public hearings in Canberra and Perth and an *in-camera* hearing in Sydney. The witnesses who appeared before the committee at the public hearings are listed at Appendix 2.

Structure of discussion paper

1.7 The chapters of this discussion paper are organised around the key themes which emerged during this inquiry and therefore do not directly mirror the terms of reference.

1.8 The foreword sets out the committee's main views on the evidence it has received to date and next steps in the inquiry.

1.9 Chapter 2 provides the background to the inquiry, including approaches to confiscating criminal assets and existing legislation and arrangements in the Commonwealth, states and territories and internationally.

1.10 Chapter 3 deals with general issues relating to unexplained wealth laws.

1.11 Chapter 4 focuses on specific issues and ways forward for Commonwealth unexplained wealth legislation and arrangements and harmonisation with state and territories.

Acknowledgements

1.12 The committee wishes to express its appreciation to all parties that have contributed to the conduct of this inquiry so far, whether by making a written submission or through attendance at a hearing, or in many cases, both.

Note on references

1.13 References to the committee *Hansard* are to the proof *Hansard*: page numbers may vary between the proof and the official *Hansard*.

CHAPTER 2

Unexplained wealth laws

Background

Previous consideration by this committee

2.2 The committee has examined unexplained wealth provisions in the course of two previous inquiries. The committee reported in September 2007 on its inquiry into the future impact of serious and organised crime on Australian society, making 22 recommendations including that:

- the recommendations of the Sherman report into the 2002 POC Act, where appropriate, be implemented without delay; and
- the Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime as a matter of priority.

2.3 The committee also inquired into legislative arrangements to outlaw serious and organised crime groups. In that inquiry, tabled in August 2009, the committee collected evidence for international and state police agencies that suggested the effectiveness of combating serious and organised crime could be enhanced through the pursuit of criminal assets. The committee recommended the introduction of unexplained wealth provisions in Commonwealth legislation.

Introduction of Commonwealth unexplained wealth laws

2.4 Unexplained wealth provisions were enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. Part 2-6 of the *Proceeds of Crime Act 2002* (PoCA) sets out how unexplained wealth orders work. The unexplained wealth provisions of that Bill were considered by the Senate Legal and Constitutional Affairs Legislation Committee, which noted historical developments in this area, including:

- the 1999 Australian Law Reform Commission review of the *Proceeds of Crime Act 1987*, which recommended a non-conviction based regime be incorporated; and
- the 2006 Sherman review of the *Proceeds of Crime Act 2002*, which recommended several changes to the PoCA aimed at strengthening the federal regime for seizing the proceeds and instruments of crime.[1]

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1 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, pp 3–5.

2.5 The Senate Legal and Constitutional Affairs Legislation Committee wholeheartedly endorsed the purpose of the unexplained wealth provisions: namely targeting the people at the head of criminal networks who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences. It also made a number of recommendations including:

(a) that the court should have a discretion under proposed section 179C of the *Proceeds of Crime Act 2002* to revoke a preliminary unexplained wealth order if it is in the public interest to do so.

(b) that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so.

(c) that proposed subsection 179B(2) of the *Proceeds of Crime Act 2002* specify that an officer must state in the affidavit supporting an application for a preliminary unexplained wealth order the grounds on which he or she holds a reasonable suspicion that a person's total wealth exceeds his or her lawfully acquired wealth.

(d) that the disclosure of information acquired under the *Proceeds of Crime Act 2002* to law enforcement and prosecuting agencies should be limited to disclosure for the purpose of investigation, prosecution or prevention of an indictable offence punishable by imprisonment for three or more years; and

(e) that disclosure of information acquired under the *Proceeds of Crime Act 2002* to foreign law enforcement agencies should not be made unless the offence under investigation would be an indictable offence punishable by imprisonment for three or more years if it had occurred in Australia.[2]

2.6 Some of these recommendations were the basis of amendments made in the Senate, alongside other amendments[3] which addressed issues including disposal of property to cover legal expenses, awarding of damages, costs or indemnities, parliamentary supervision, requirements for making and revoking freezing orders, and revocation of restraining orders.

2.7 The committee has heard that some of these amendments have limited the capacity of the unexplained wealth laws to fulfil their purpose. A number of specific concerns are discussed in Chapter 4.

2 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, p. xi.

3 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, *Schedule of the amendments made by the Senate*, 4 February 2010.

Current arrangements

2.8 Under Commonwealth unexplained wealth legislation, if a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove (reversing the onus of proof), on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total and legitimate wealth.

2.9 Further detail available on unexplained wealth legislation and arrangements is set out in this chapter, including:

- the Commonwealth approach;
- the Crimes Legislation Amendment Bill (No. 2) 2011, which would change how unexplained wealth matters are brought to the courts; and
- the approaches taken by states, territories and other countries.

2.10 There are a range of general issues with unexplained wealth laws, including those set out in Chapter 3:

- reversal of the onus of proof and targeting the right people;
- limited use of existing provisions and Constitutional requirements;
- potential weaknesses in the current provisions;
- relocation of crime; and
- adaption by organised crime groups.

2.11 More recently, the government has formed a Criminal Assets Confiscation Taskforce, led by the AFP:

> The administrative arrangements to support the investigation and litigation of unexplained wealth matters are currently undergoing significant change, with the establishment of the multi-agency, AFP-led, Criminal Assets Confiscation Taskforce. The new arrangements are being put in place to boost the identification of assets that should be seized, and strengthen the pursuit of wealth collected by criminals at the expense of the community. The AFP anticipates that these new arrangements will likely have a positive flow on effect on the pursuit of unexplained wealth.[4]

2.12 The AFP indicated in its submission that significant proceeds of crime have been restrained or forfeited in recent times:

> The AFP has been the primary Commonwealth investigative agency under PoCA and has undertaken the majority of investigations for cases litigated to date. As part of its proceeds of crime operations in 2010-11, the AFP

4 AFP, *Submission 9*, p. 2.

> restrained $41.1 million in assets, while $3.7 million in assets were forfeited. Pecuniary penalty orders to the value of $17.1 million were also made. This experience provides the AFP with a significant foundation to develop capabilities to undertake conviction and non-conviction based asset confiscation action under the new taskforce arrangements.[5]

Following the money

2.13 In the course of its previous inquiry into legislative arrangements to outlaw serious and organised crime groups, 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.[6]

2.14 The committee heard from 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.[7]

2.15 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:

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5 AFP, *Submission 9,* p. 4.

6 Mr Kevin Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 5.

7 Inquiry into the legislative arrangements to outlaw serious and organised crime groups, ACC, *Submission 15,* p. 11.

> Mafia members are prepared to spend time in prison, but to take their assets is to really harm these individuals.[8]

2.16 This same point was reiterated by the AFP during the current inquiry. As Commander Ian McCartney informed the committee, targeting the business model of criminal enterprise represented a new way of attacking organised crime:

> In terms of mindset, I think that what is also important—and we have to put our hand up—is that the work that we are doing now has to be seen as traditional policing. We have to change the culture within our policing agencies on the importance of following the money to target organised crime activity, and it is still a work in progress in policing agencies around Australia, which are focused on the drug or on the predicate offence. With the importance and benefit of utilising proceeds of crime and money laundering legislation to target organised crime, I think that is traditional policing in the new environment.[9]

2.17 The AFP also noted concerns that extend beyond unexplained wealth laws:

> [T]he AFP is concerned about emerging trends in relation to money laundering with the professionalisation of money laundering activities. The AFP recommends that a watching brief be maintained to ensure that recent reforms to money laundering legislation remain effective.[10]

8 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

9 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 8.

10 AFP, *Submission 9*, p. 2.

Approaches to confiscating criminal assets

Criminal and civil regimes

2.18 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.[11] Modern proceeds of crime provisions generally take two forms: conviction based laws and civil confiscation laws.[12] The former requires a criminal conviction before assets may be confiscated, while the latter uses the courts' civil jurisdiction to confiscate criminal assets.

2.19 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.

2.20 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.

2.21 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*, 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.[13]

Unexplained wealth provisions

2.22 Unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings.

2.23 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.

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11 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.

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

13 *Proceeds of Crime Act 2002*, s. 18.

2.24 The legislation in Western Australia and the Northern Territory allows the respective Directors of Public Prosecutions to apply to the courts for a confiscation order if a person has 'unexplained wealth'.

2.25 In practice, this means that, on the basis of covert financial investigation of an individual, it is determined that they have wealth exceeding what would reasonably be expected given an individual's lifestyle. Using this financial information, a court may order that an individual prove the legitimacy of the unexplained amount of wealth. At this point, the onus of proof has been reversed.

2.26 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 their wealth was acquired legally.

Table 1: confiscation of criminal assets in Australia by type

	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	Commonwealth, ACT, NSW, Qld, SA, Vic	NT, WA

Operational options in proceeds of crime actions

2.27 The AFP provided information to the committee on how unexplained wealth proceedings are used in the context of other options, submitting:

> In assessing potential proceeds of crime action the Taskforce considers all available options, including possible unexplained wealth proceedings. Where multiple criminal asset confiscation pathways are available, the operational decision to undertake an investigation to support particular type of proceeds action, or refer the matter for other types of non PoCA treatment (such as taxation remedies), is made on a case-by-case basis. To ensure, as far as possible, consistent decision making, the Taskforce takes a range of factors into account including: the strength of the available evidence; the resources required to obtain further evidence to support a particular type of action; the total value of assets involved; and the likelihood of a successful outcome.[14]

14 AFP, *Submission 9*, p. 5.

The Value of Unexplained Wealth Legislation

2.28 The AFP summarised the value of unexplained wealth legislation:

> Unexplained wealth provisions enable the restraint and forfeiture of unlawful wealth on the basis that the total wealth of an individual exceeds their lawfully acquired wealth. These provisions can be used to target criminals who derive an income from criminal activity, but because of where they sit in a criminal enterprise and their lack of proximity to the offences committed, cannot be pursued through criminal prosecution or traditional proceeds of crime action. Unexplained wealth provisions are one of the tools law enforcement use to target the profits of serious and organised crime.[15]

2.29 The Committee also heard about the deterrence effect arising from unexplained wealth legislation:

> It will send a clear message to those involved in organised crime at the upper levels that they are not untouchable and that, in fact, law enforcement has the capacity to engage them. It will also send a message that organised crime, as it designs and forms itself in such a way that these people distance themselves from the criminality, is no longer a protection and that they will be vulnerable. I also think that, if we are able to remove assets that have been acquired through illicit activities well after the event, that sends a really powerful message. It has been my experience that incarceration, imprisonment and other forms of more legitimate punishment for offences often do not have as great an effect as the removal of assets and wealth from these particular individuals.
>
> There is also an economic benefit from this. Looking at some of the figures quoted regarding organised crime and its value, if we are able to return that money to the funds that are available for the community and for other uses, it is going to be extremely beneficial and a real, tangible measure for the community in terms of the effect. [16]

2.30 The Northern Territory Police noted the capacity under some unexplained wealth laws to pursue third parties:

> In respect to the specifics of an Unexplained Wealth Declaration, Northern Territory legislation does not have a predicate offence provision and therefore it is not necessary to convict a person prior to commencing proceedings. This simplifies the pursuit of third parties and receivers of crime derived assets. Further, it has been used successfully to target [asset] rich spouses, family members and close associates of targets where there is no apparent lawful income evident to support their wealth position.[17]

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15 AFP, *Submission 9*, p. 2.

16 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

17 Northern Territory Police, *Submission 10*, p. 1.

Criminal asset confiscation at the Commonwealth level

2.31 The submission by the Attorney-General's Department provides a good overview and summary of the status of Commonwealth unexplained wealth legislation.[18]

Proceeds of Crime Act 2002

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

- 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.

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

Introduction of unexplained wealth provisions

2.34 In February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* introduced provisions governing the making of unexplained wealth orders into the *Proceeds of Crime Act 2002* (PoCA).[19]

2.35 Since the introduction of Commonwealth unexplained wealth legislation in 2010, similar laws have been enacted in Queensland, South Australia and New South Wales.[20]

2.36 No proceedings have been brought under PoCA seeking an unexplained wealth order, although the AFP is currently investigating two cases. Accordingly, there has not yet been an opportunity to test the effectiveness of some aspects of the provisions in practice.[21]

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18 Attorney-General's Department, *Submission 6.*

19 Attorney-General's Department, *Submission 6*, p. 1.

20 Attorney-General's Department, *Submission 6*, p. 1.

21 Attorney-General's Department, *Submission 6*, p. 6.

Overview of Commonwealth unexplained wealth provisions

2.37 Under Commonwealth unexplained wealth provisions, if a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.[22]

2.38 There are three types of order which can be sought in relation to unexplained wealth:

- unexplained wealth restraining orders;
- preliminary unexplained wealth orders; and
- unexplained wealth orders.[23]

Unexplained wealth restraining orders

2.39 Unexplained wealth restraining orders are interim orders that restrict a person's ability to dispose of or otherwise deal with property. These provisions ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.[24]

2.40 Restraining orders in relation to unexplained wealth are governed by section 20A of PoCA. They are made upon application by the Director of Public Prosecutions (DPP) and are subject to two main requirements:

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

(b) a court must be satisfied that there are reasonable grounds to suspect that:

- the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, and/or
- the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.[25]

22 Attorney-General's Department, *Submission 6*, pp 1–2.

23 Attorney-General's Department, *Submission 6*, p. 2.

24 Attorney-General's Department, *Submission 6*, p. 2.

25 Attorney-General's Department, *Submission 6*, p. 2.

Preliminary unexplained wealth orders

2.41 A preliminary unexplained wealth order requires a person to attend court to determine whether or not an unexplained wealth order should be made. Under section 179B of PoCA, a court may make a preliminary unexplained wealth order if it is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired.[26]

2.42 Whether reasonable grounds exist is informed by assessment of the person's wealth in accordance with section 179G, which defines what property constitutes a person's wealth and the time at which the property's value is to be calculated.[27]

Unexplained wealth orders

2.43 If a preliminary unexplained wealth order has been made and the court is not satisfied that the person's wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, it may make an unexplained wealth order.

2.44 The burden of showing that wealth was not derived from offences with a link to Commonwealth power falls on the person in relation to whom the preliminary order was issued. The person is required to satisfy the court on the balance of probabilities, which is a civil standard of proof.

2.45 An unexplained wealth order makes payable to the Commonwealth an amount which, in the court's opinion, constitutes the difference between the person's total wealth and the value of the person's property which the court is satisfied did not derive from the commission of a relevant offence. That is, the difference between their total wealth and the wealth that has been legitimately acquired.

2.46 A court making an unexplained wealth order must direct the Commonwealth to pay a specified amount to a dependant of the person, if it is satisfied that the amount is necessary to offset hardship. If the dependant is over 18 years old, they must not have been aware of the conduct that was the subject of the order.[28]

Current oversight arrangements

2.47 The oversight arrangements applying to unexplained wealth provisions include a monitoring role by this committee. The operation of Part 2-6 (on unexplained wealth orders) and section 20A of the PoCA is subject the oversight of the committee and the committee may require the ACC, AFP, DPP or any other

26 Attorney-General's Department, *Submission 6*, p. 3.

27 Attorney-General's Department, *Submission 6*, p. 3.

28 Attorney-General's Department, *Submission 6*, p. 4.

federal agency of authority that is the recipient of any material disclosed under Part 2-6 to appear before it to give evidence.[29]

Crimes Legislation Amendment Bill (No. 2) 2011

2.48 The Crime Legislation Amendment Bill (No. 2) 2011 was introduced to Parliament in March 2011 and has now been passed by both houses of Parliament. Among other things, the Bill will change how unexplained wealth matters are brought to the courts, as the AFP indicated in their submission:

> Under the current arrangements, PoCA cases (including unexplained wealth action) are investigated and litigated by separate agencies. Subject to the passage of relevant amendments, which are currently before the Parliament, these arrangements will change. It is anticipated that from January 2012, the AFP-led Criminal Assets Confiscation Taskforce will become responsible for litigating all PoCA actions relevant to investigations undertaken by the Taskforce, and all non-conviction based PoCA matters (including unexplained wealth matters) referred by other agencies.[30]
>
> The interim Taskforce draws on the existing resources of the AFP, the Australian Crime Commission (ACC), and the Australian Taxation Office (ATO), and is supported by the Commonwealth Direct of Public Prosecutions (CDPP) which litigates matters. The permanent Taskforce arrangements will commence following the passage of the Crimes Legislation Amendment Bill (No.2), which will enable the AFP to conduct proceeds of crime litigation (including unexplained wealth action) under PoCA. If passed through both Houses of Parliament, the earliest possible commencement date for the permanent Taskforce would be January 2012.[31]
>
> Following passage of the Bill, and the Taskforce in operation, it is envisaged that the Taskforce will be responsible for litigating all proceeds of crime relevant to investigations undertaken by the Taskforce, and all non-conviction based proceeds of crime matters (including unexplained wealth matters) referred by other agencies.[32]

2.49 The Senate referred the Bill to the Legal and Constitutional Affairs Legislation Committee for inquiry. That committee made recommendations including that the Bill be passed and that the Commonwealth Director of Public Prosecutions should become a permanent member of the Criminal Assets Confiscation Taskforce.[33] The PJC-LE supports both these recommendations. The Bill was passed by the Senate on 22 November 2011.

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29 *Proceeds of Crime Act 2002*, s. 179U.

30 AFP, *Submission 9,* p. 4.

31 AFP, *Submission 9,* p. 7.

32 AFP, *Submission 9,* p. 8.

33 Senate Legal and Constitutional Affairs Committee, Inquiry into the Crimes Legislation Amendment Bill (No. 2) 2011, p. ix.

Unexplained wealth provisions overseas and interstate

2.50 Numerous law enforcements agencies, both within Australia and internationally, have previously given evidence to the committee about the benefits of unexplained wealth legislation as a means of disrupting serious and organised crime.

2.51 In September 2011, the Chair of the committee, Mr Chris Hayes MP, visited a range of law enforcement, policy and legislative organizations in the UK, Ireland, Italy and France to gain a better understanding of how relevant agencies in these countries deal with unexplained wealth and proceeds of crime matters. The visit report noted:

> While there has been a move towards requiring organised criminals to explain their wealth where this does not match their legitimate earnings, many of the agencies visited by the delegation face a range of challenges in embedding this approach. Some of the challenges include:
>
> - the need to link to a predicate offence or wait until a conviction is delivered before pursuing unexplained wealth measures;
> - the ineffective 'burden of proof' on individuals being investigated reduces the willingness of agencies to take up criminal asset and unexplained wealth actions;
> - lack of understanding of complex criminal financing and willingness by some prosecutors and magistrates to pursue proceeds of crime, criminal asset confiscation and unexplained wealth;
> - concerns about being perceived as punishing the families of organised criminals;
> - need for continued education within many law enforcement agencies of the value of financial investigations; and
> - need to co-locate and connect different agencies to comprehensively attack criminal profits.
>
> While Australia is well advanced in a number of areas, the current Commonwealth unexplained wealth legislation has not been used in court. This is a lost opportunity for law enforcement and reinforces the need to strengthen current arrangements to make them more effective.[34]

The Irish approach

2.52 Ireland's approach to the seizure of criminal assets is governed by the *Proceeds of Crime Act 1996* (Ireland) (since amended by the *Proceeds of Crime (Amendment) Act 2005)* and the *Criminal Assets Bureau Act 1996*.

34 Mr Chris Hayes, Report on Parliamentary study leave visit to Europe 23 September – 10 October 2011, tabled 21 November 2011, pp 5 & 12.

2.53 The agency responsible for the carriage of investigations into suspected proceeds of criminal conduct is the Criminal Assets Bureau (CAB). While CAB is nominally part of Ireland's national police service, An Garda Síochána, it uses a multi-agency multi-disciplinary approach in its investigations, using officers from a number of agencies including An Garda Síochána, the Office of the Revenue Commissioners, the Department of Social Protection, the Department of Justice and Law Reform and the Bureau Legal Officer.[35]

2.54 CAB identifies assets of persons which derive (or are suspected to derive) directly or indirectly from criminal conduct. It then takes appropriate action to deprive or deny those persons of the assets and the proceeds of their criminal conduct.[36]

2.55 Powers of the CAB include the ability to make an application to the High Court seeking an interim order, which prohibits dealing with property if the court is satisfied, on the civil standard of proof, that such property is the proceeds of criminal conduct and has a value of more than €13 000.[37]

2.56 To maintain the freeze on the assets, the interim order must be followed by a successful application for an Interlocutory Order. Such an order effectively freezes the property until further notice, unless the court is satisfied that all or part of the property is not the proceeds of criminal conduct.[38] An interim order is not necessary, but acts to restrain the property until the Interlocutory Order is made.

2.57 Once an order is in place, it is open to any person to seek to vary or set aside the order if that person can satisfy the court that they have a legitimate right to the property and/or the property is not the proceeds of crime.[39]

2.58 The property must remain frozen for seven years, during which time the affected individual can seek to prove the legitimacy of the property. However, after seven years the High Court may make an order transferring the assets to the Minister of Finance for the benefit of the Central Fund.[40] The 2005 amendment allowed for, under certain circumstances, the disposal of assets within the seven year period.[41]

2.59 The CAB 2009 Annual Report notes that, in that year, almost €1.5 million was paid over to the Minister of Finance.[42]

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35 Criminal Assets Bureau, Annual Report 2009, p. 10.

36 Criminal Assets Bureau, http://www.garda.ie/Controller.aspx?Page=28#

37 Criminal Assets Bureau, Annual Report 2009, p. 14.

38 Criminal Assets Bureau, Annual Report 2009, p. 14.

39 Criminal Assets Bureau, Annual Report 2009, p. 15.

40 Criminal Assets Bureau, Annual Report 2009, p. 15.

41 Criminal Assets Bureau, Annual Report 2009, p. 15.

42 Criminal Assets Bureau, Annual Report 2009, p. 16.

2.60 In addition, CAB makes use of tax powers to target the profits or gains derived from criminal conduct and suspected criminal conduct. As the CAB notes:

> The application of these powers enables the Bureau to carry out its statutory remit and is an effective means of depriving those engaged in criminal conduct, of such profits and gains.[43]

2.61 In 2009, CAB raised assessments on 21 individuals and three corporate entities. In total, over €5 million in tax and interest was collected in 2009.[44] In addition, CAB was also able to terminate a number of social welfare payments that had been claimed inappropriately.[45]

The UK approach

2.62 Detective Inspector John Folan, head of the Dedicated Cheque and Plastic Crime Unit in the UK, previously 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.[46]

2.63 The *Proceeds of Crime Act 2002* (UK) (UK-POCA) 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.

2.64 The UK also has a set of offences under the UK-POCA 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:

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43 Criminal Assets Bureau, Annual Report 2009, p. 18.

44 Criminal Assets Bureau, Annual Report 2009, p. 20.

45 Criminal Assets Bureau, Annual Report 2009, p. 22.

46 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. 86. http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

(c) conviction in the current proceedings of at least four offences from which they have benefited; or

(d) 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.

2.65 Where a court has decided that a defendant has a criminal lifestyle, section 10 of the UK-POCA contains provisions which enable an assessment to be made as to the 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.

2.66 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.

2.67 In 2009, the committee was informed by Mr Ian Cruxton, from the Proceeds of Crime Office within the Serious and Organised Crime Agency (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.[47]

The Italian approach

2.68 The committee was told in 2009 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.

2.69 Officers from the Italian Central Directorate for Antidrug Services informed the Committee in 2009 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.[48]

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47 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 86–87. http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

48 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

2.70 The committee was told in 2009 that this process had been very effective in confiscating criminal assets and preventing organised crime in Italy.

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

2.72 The AFP noted that it had considered arrangements in other countries, when putting together the Criminal Assets Confiscation Taskforce:

> The AFP is aware that other countries have legislative provisions that in some fashion target unexplained wealth. However, it is difficult to make a direct comparison with the Commonwealth unexplained wealth regime.
>
> In developing the Taskforce model, the AFP considered overseas arrangements for criminal asset confiscation. In particular, the AFP examined the Serious and Organised Crime Agency (SOCA) in the United Kingdom, and the Irish Criminal Assets Bureau (CAB). While the approach of SOCA, CAB and the Taskforce differ, they all recognise the merit in pursuing non-conviction based action to target the profits of crime.[49]

International agreements in relation to unexplained wealth

2.2 The AFP provided the following advice in relation to the extent and effectiveness of international agreements and arrangements for law enforcement activities in relation to unexplained wealth:

> The AFP is not aware of any international treaties or conventions which specifically address unexplained wealth. There are, however, conventions to which Australia is a signatory that address the importance of pursuing the proceeds of crime.[50]

2.73 Victoria Police informed the committee that the notion of confiscation of unexplained wealth in international agreements can be traced back as far as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). The Convention stated that 'each party consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation.'[51]

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49 AFP, *Submission 9*, p. 9.

50 AFP, *Submission 9*, p. 9.

51 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Article 5, Paragraph 7.

2.74 The recommendations in that convention were reinforced through the United Nations Convention Against Transnational Organised Crime (2000) and the United Nations Convention Against Corruption (2003).[52]

2.75 Similarly, in 2003, the Financial Action Task Force on Money Laundering recommended that countries adopt measures laid out in the conventions above, including confiscation without conviction and requiring persons to demonstrate the lawful origins of property.[53]

2.76 Victoria Police informed the committee that, given the differing constitutional requirements of parties to these conventions, state parties are only required to consider implementing such measures to the extent that they are consistent with the fundamental principles of their law, complicating any attempt to harmonise laws internationally.[54]

52 Victoria Police, *Submission 4*, p. 2.

53 Victoria Police, *Submission 4*, p. 2.

54 Victoria Police, *Submission 4*, p. 2.

Australian states and territories

Western Australia and Northern Territory approaches

2.77 Western Australia introduced unexplained wealth provisions in 2000 in the *Criminal Property Confiscation Act 2000* (WA), and the Northern Territory followed in 2003 with the C*riminal Property Forfeiture Act 2002* (NT).

2.78 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'.[55] Both Acts also reverse the onus of proof.

2.79 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.[56] 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';[57]
- both Acts set out how law enforcement and prosecutors can obtain information about criminal assets;[58]
- provisions to ensure that property remains available for forfeiture;[59] and
- people have a right to object to their property being restrained within 28 days of being served with an order restraining the property.[60] The Acts also allow orders to be made against 'declared drug traffickers'.

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

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

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

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

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

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

Differences between WA and NT unexplained wealth laws

2.80 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.[61] 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

2.81 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. In this respect, assets forfeiture legislation allows Police to seize the wealth created by these criminal enterprises without the need for a conviction.[62]

2.82 The Northern Territory Police previously gave evidence to the committee that the laws have been very successful in addressing the issues of Outlaw Motor Cycle Gangs (OMCGs) in the Northern Territory, as well as other criminal groups.[63]

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

62 Inquiry into legislative arrangements to outlaw serious and organised crime groups, Northern Territory Police, *Submission 20*, p. 3.

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

> 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.[64]

2.83 In 2009 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.[65]

2.84 Assistant Commissioner McAdie further explained to the committee in 2009 why the unexplained wealth approach to assets confiscation is superior to the civil confiscation regime contained in, for example, the United States' Racketeer Influenced and Corrupt Organizations (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.[66]

Other States and territories

2.85 The South Australian *Serious and Organised Crime (Unexplained Wealth) Act 2009* was proclaimed on 29 August 2010.[67] Victoria retains both conviction-based and civil confiscation legislation.[68] The ACT and Tasmania both also have some proceeds of crime laws. The Queensland Crime and Misconduct Commission (CMC) saw tax laws as a more appropriate mechanism:

> In the CMC's view, the taxation laws provide a more appropriate and effective mechanism to address the accumulation of unexplained wealth notwithstanding potential criticism of 'taxing' organised crime rather than removing the criminally derived benefits through confiscation.

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

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

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

67 South Australia Police, *Submission 7*, p. 1.

68 Victoria Police, *Submission 4*, p. 3.

> The criminal confiscation legislation in Queensland does not contain explicit unexplained wealth provisions. Instead, in Queensland, the *Criminal Proceeds Confiscation Act 2002* was amended in 2009 to create a reversal of the onus of proof such that once the State establishes that a person has engaged in serious crime related activity within the limitation period then the onus is on the respondent to establish the lawful derivation of his wealth[69]

69 CMC, *Submission 1*, pp 2-3.

CHAPTER 3

General issues with unexplained wealth laws

3.1 There are a range of general issues with unexplained wealth laws that are set out in this chapter, including those below:

- reversal of the onus of proof and targeting the right people;
- limited use of existing provisions;
- Constitutional requirements; and
- relocation of crime and adaption by organised crime groups.

3.2 Evidence provided to this inquiry raised a numerous specific issues with current unexplained wealth laws that are discussed in Chapter 4.

Reversal of the onus of proof and targeting the right people

3.3 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 or facilitate 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.[1]

3.4 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.

3.5 However, though the reversal of the onus of proof is a key element of effective unexplained wealth legislation, it is this very element that raises a number of concerns. For example, in the committee's previous inquiry, a member of the motorcycling community, Mr Withnell, expressed concerns that such laws risk confiscating assets from innocent people because of their breadth:

> [T]he only problem I have with [unexplained wealth laws is] I do not believe most people could actually explain everything they own.[2]

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

2 Mr Edward Withnell, *Committee Hansard*, 4 July 2008, p. 38.

3.6 The Law Council of Australia also noted concern with unexplained wealth laws, submitting that they 'offend common law and human rights principles'.[3] Specifically, the Law Council was 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.[4]

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.[5] The WA laws also exclude legal professional privilege by requiring lawyers and other professionals to provide information that would otherwise be privileged.[6]

c) In the Law Council's view there is a lack of appeal rights in respect of unexplained wealth declarations.[7] Under the *Proceeds of Crime Act 2002*, 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 subjected to the legislation,[8] and that use of the laws may be politically motivated.[9]

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

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

5 Law Council of Australia, answer to question on notice, 6 November 2008 (received 1 December 2008), p. 13; see C*riminal Property Forfeiture Act 2002* (NT), section 17; *Property Confiscation Act 2000* (WA), section57.

6 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).

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

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

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

3.7 Similarly, Mr Terry 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.[10]

3.8 The Western Australian Police noted a different view, stating:

> The reversal of onus of proof is often talked about. In reality...the standard of proof can be discharged at what we consider to be a very low level. For example, a person could come before a court and say, 'The unexplained funds in my bank account I received as a result of doing my job.' Then the onus is back on the prosecution to prove that that is not the case, and that is at a very high standard. So, whilst the reversal of onus within the act is talked about, in reality it is a lot harder.[11]

3.9 The committee sought evidence from several witnesses on whether there was any way that an individual could accumulate wealth without being able to explain or document how they accumulated that wealth. Several witnesses indicated that they could not think of any ways.[12] The ACC noted one possible, but rare, scenario where a legitimate reason could be offered:

> A couple examples that have been brought to our notice would be if someone were fleeing persecution, liquidated their assets and arrived in Australia claiming refugee status with those assets. That might be a possibility. There might want to be some exploration of where those assets came from.[13]

3.10 Unexplained wealth provisions are in many ways better adapted to dealing with organised crime groups, including OMCGs. 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. 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 unexplained wealth laws may be better adapted to preventing the criminal behaviour

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

11 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 5.

12 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 5, Mr Michael Cranston, ATO, *Committee Hansard*, 4 November 2011, p. 21, Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 38.

13 Mrs Karen Harfield, ACC, *Committee Hansard*, 4 November 2011, p. 15.

taking place within motorcycle clubs as they target the benefits accumulated by the individuals of greatest concern to law enforcement.[14]

3.11 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.[15]

3.12 Western Australian Police expressed similar views:

> There is empirical evidence and data to indicate that high-level organised crime engages and uses officials in various government other departments. What this [establishing a consistent regime in respect of unexplained wealth] will enable us to do is penetrate the high or upper echelons of organised crime.[16]
>
> It will send a clear message to those involved in organised crime at the upper levels that they are not untouchable and that, in fact, law enforcement has the capacity to engage them.[17]

3.13 Civil Liberties Australia were particularly concerned about the potential for proceeds of crime provisions to be used to target individuals who were not senior members of organised crime groups. For example, Mr Bill Rowlings cited a case from the Northern Territory where a man was caught growing 20 cannabis plants in a shipping container:

> The Supreme Court of the Northern Territory convicted him for a head sentence of two years suspended, with nine months home detention instead, which he served out. He was, and is, a welder by trade. Other than speeding offences and one assault about 15 years earlier he had no criminal record. He was by no means a Mr Big of crime; in fact, he would be barely described as a Mr Little of crime. But the Northern Territory DPP decided, on the basis of a suspended sentence for growing a relatively small amount of marijuana, that they would pursue the man under proceeds of crime legislation.
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> The container he grew the marijuana in was housed on a large rural block about 25 kilometres out of Darwin. He was leasing the land for a legitimate

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

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

16 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

17 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 4.

> reason—he and a few others were planning to establish a microbrewery but they had been held up by impediments in Northern Territory government departments and agencies because of the unusual nature of the business they were planning. The block was worth $1.2 million. The man owned a house in town worth about $300,000, which one of his children and their family lived in, and another small bush block worth about $30,000. So the DPP pursued him for $1.53 million for growing 20 marijuana plants.
>
> He is a welder. He has no other crime connections. He has no ongoing history of crime. This man and his wife, who had nothing whatsoever to do with the criminal offending, were put through more than two years of agony because the Northern Territory DPP was totally unreasonable. The wife, who is a very slim woman, ended up in hospital suffering stress and heart problems.
>
> Eventually, because there was absolutely no wriggle room in the law, the Supreme Court judge hearing the case found against the man, but the judge himself was so upset by what he was forced to rule that he referred the matter to a full bench. After extensive delays because the man could not get legal aid, eventually the case was heard and the full bench of the Northern Territory Supreme Court creatively found that the man was liable for the value of the lease on the rural property on which the crime was committed, not for the value of the property on which the crime was committed. The worth of the lease was a negligible amount and so effectively the case was dropped.[18]

3.14 To ensure that unexplained wealth provisions were not used in such a manner, one of Civil Liberties Australia's recommendations was that they be limited to addressing serious and organised crime:

> [W]hatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.

3.15 These and other issues are discussed further in Chapter 4.

18 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 39.

Limited use of existing provisions

3.16 The AFP noted the lack of use of the existing Commonwealth provisions:

> The unexplained wealth provisions inserted by the SOC Act commenced on 19 February 2010. To date, no unexplained wealth matters have been tested in the courts. It remains to be seen how the legislation will be interpreted by the judiciary. It will take some time and case law to determine whether or not the unexplained wealth provisions operate as intended. The application of the unexplained wealth provisions has been under active consideration by the AFP.[19]

3.17 While the Law Council of Australia suggested that the lack of proceedings indicated it was too early to review the unexplained wealth provisions,[20] the Attorney-General's Department also noted:

> Certainly the fact that there have been no cases suggests that there is something wrong, but whether there is something wrong with the act or whether there is something wrong with the way in which it is being approached, at this stage we cannot say. It is disappointing that there have not been the cases yet.[21]

3.18 The unexplained wealth provisions in WA have had limited use, with only six declarations leading to confiscation made between July 2004 and June 2011.[22] This supports the evidence that the committee heard in 2008 from the Queensland Crime and Misconduct Commission that 'the jury is still out…on unexplained wealth.'[23]

3.19 The WA Police gave evidence to the Western Australian Joint Parliamentary Standing Committee on the Corruption and Crime Commission (WA committee) that the DPP was reluctant to use the provisions.[24] The DPP told that WA 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.[25] The Law Council of Australia argued that this evidence indicates that the WA unexplained

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19 AFP, *Submission 9,* p. 5.

20 Law Council of Australia, *Submission 3,* p. 3.

21 Mr Iain Anderson, AGD, *Committee Hansard,* 4 November 2011, p. 37.

22 Western Australia DPP, *Annual Report: 2010-11*, p. 30.

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

24 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.

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

wealth laws are unnecessary.[26] WA Police provided further evidence to the committee on the limitations:

> I have been the officer in charge of the police Proceeds of Crime Squad for about three and a half years now. In that time there has been very little progress in relation to unexplained wealth for a number of matters. Some of those are in relation to legislative impediments that I believe prevent us from applying the full intent of the Criminal Property Confiscation Act, and others relate to the separate model of the police investigating and then the DPP doing the litigation as such. The criminal side of the DPP have acknowledged that they should keep the investigative side at arm's length, for obvious reasons—they do not want the prosecution to be influenced by investigators. But in relation to the civil confiscation, which is what we are working at here with the Criminal Property Confiscation Act, there needs to be that one continuous group or body that is investigating it. We find, from a police point of view, that the model of two agencies is not the best model to use for unexplained wealth. The WA Police have a number of matters at the moment that are sitting with the state DPP and that we are trying to progress, and for other reasons—legislative reasons being among them them—we have been unsuccessful.[27]
>
> Whilst we think there are legislative impediments I think there are also some philosophical differences. Where we strike the major difficulty is that we develop cases, which we forward to the DPP, that we cannot proceed on without his approval. It is at that particular point that we tend to get into the morass of being able to advance these things. We very much take the view that it is an inquisitorial process with a reverse onus on those people we seek this information from, yet we are being fundamentally driven by requirements to say that we need to answer these questions before we ask them of these individuals. That process of putting together in-depth financial profiles and answering all the questions before we ask them consumes enormous amounts of time for us. We do not believe that was the intent of the legislation. Our belief is that it was a case of being able to pull these people in to examine them and ask them to answer those questions. It is not for us to develop those answers.[28]

3.20 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 interaction between prosecutors, police and the Department of Justice. [29]

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

27 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 2.

28 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 3.

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

Constitutional requirements

3.21 To ensure that unexplained wealth orders have a link to a constitutional head of power, the making of unexplained wealth restraining orders is contingent on a court being satisfied either that there are reasonable grounds to suspect that the person committed a Commonwealth offence, a foreign indictable offences or a State offence with a federal aspect, or that a part of a person's wealth was derived from such an offence. The AFP indicated in their submission that:

> Because of constitutional requirements, Commonwealth unexplained wealth provisions include a jurisdictional nexus to criminal activity within the scope of the Commonwealth's legislative power.
>
> The constitutional limitations operate in two ways. Firstly, depending on the type of unexplained wealth order that is sought, there must be a link between the person and a criminal offence, or a link between the wealth and a criminal offence. Secondly, the criminal offence must be a Commonwealth offence, foreign indictable offence or State offence with a federal aspect (which includes all Territory offences). The jurisdictional nexus requirements create two key challenges for unexplained wealth cases.
>
> The first challenge is that the need to demonstrate a link between the person/wealth and a crime may effectively impose an onus of having to make out a predicate offence (that is, the crime from which money was originally derived) before unexplained wealth action can be taken. This could be particularly problematic where there is a disconnect between the illicit wealth and the criminal activity from which that wealth has been derived. This is often the case in money laundering offences, in which the facilitators involved may have no knowledge or involvement in the predicate offence (such as drug trafficking).
>
> The second challenge is that the need to demonstrate a link between the person/wealth and a crime within the Commonwealth's legislative power means that wealth derived from State offences that do not have a federal aspect (such as murder, theft of property etc) will not be captured by the Commonwealth scheme.[30]

3.22 Similarly, an unexplained wealth order can only be made where a court is not satisfied that the whole of a person's wealth, or a part of their wealth, was not derived from an offence linked to a Commonwealth head of power. These connections to a Commonwealth head of power were included to ensure that the unexplained wealth provisions are constitutional.[31] The inclusion within the Commonwealth unexplained wealth provisions of links to offences within Commonwealth constitutional power is a key difference compared to the operation of state and territory unexplained wealth regimes.[32]

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30 AFP, *Submission 9*, pp 5–6.

31 Attorney-General's Department, *Submission 5*, p. 4.

32 Attorney-General's Department, *Submission 5*, p. 6.

Financial information

3.23 The committee heard that there can be limitations arising from the timeframes to access financial information. For example WA police noted:

> One of the major issues we have with our act is that, whilst we can request information from financial institutions, there are no time frames for when information comes to us. It is very important in any investigation, whether criminal or civil based, that there be timeliness with the information coming to us. Sometimes we can wait up to three months for financial information to come back from a bank, for example.
>
> They have other agencies and organisations which request information from them. Some of those organisations have time frames within their legislation, so our requests just go to the bottom of the pile. That is just the way it is. I certainly do not begrudge the financial institutions. They obviously have to prioritise their work. [33]

3.24 WA Police also advised the committee of issues arising from capital appreciation of assets:

> In relation to the unexplained wealth legislation in particular, the act does not capture any benefits derived from capital appreciation. For example, say an organised crime target we are looking at purchases a house with unexplained wealth—unlawfully obtained money—and that house increases in value, for example from $100,000 to $700,000. The unexplained wealth parts of our act say that we can only take a portion of that. We cannot take the $700,000; we can only take the portion that that person put into it—the core money that went into buying that particular asset. For us, that is a huge issue with the act because then you are legitimising $600,000 worth of unexplained wealth, basically.[34]

3.25 The ATO indicated that they generally get good service from the banks[35] and the Australian Crime Commission did not see any serious problems, but noted the amount of information can be challenging:

> The financial institutions are dealing with a huge amount of requests for law enforcement. I think that as the criminals move more and more into hiding their assets and using various trusts there will be more and more requests from law enforcement for information from the financial institutions. I think it is a struggle sometimes for the banks or financial institutions to cope with that. My sense is that we have quite good relations with those financial institutions and, where there is something required to be done urgently, by and large that is achieved. It would be nice to have a

33 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 5.

34 Acting Detective Inspector Hamish McKenzie, Western Australian Police, *Committee Hansard*, 9 September 2011, p. 5.

35 Mr John Ford, ATO, *Committee Hansard*, 4 November 2011, p. 22.

> service level agreement where we could put a request in that there would be a turnaround in a particular time, but there is an impost on the financial institutions to do that. But by and large the relationships we have with the financial institutions are such that, if we need something done urgently, it will be done.[36]

Relocation and adaption by serious and organised crime groups

3.26 One problem arising from differing unexplained wealth provisions across jurisdictions is that organised crime groups tend to move to the most favourable jurisdictions. Commander Gwynne, NT Police, highlighted that one of the impacts of their legislation had 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 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.[37]

3.27 While the legislation may be effective in those jurisdictions that have it, due to the federal nature of the Australian justice system, strong laws in one jurisdiction can cause problems to relocate to another jurisdiction.

3.28 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.[38] Some of these problems, he said, would be overcome if there was nationally consistent unexplained wealth legislation.

3.29 The Northern Territory Police submitted to the committee that:

> In the Northern Territory, organised crime is becoming more aware of asset forfeiture legislation and the following trends have been identified:

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36 Mr Richard Grant, ACC, *Committee Hansard,* 4 November 2011, p. 14.

37 Commander Colleen Gwynne, Northern Territory Police, *Committee Hansard*, 2 March 2009, pp 7–8.

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

- Little or no property is actually being held in the name of the primary offender and difficulty is being encountered establishing 'effective control' of suspected crime derived assets.
- People are divesting property if they become aware that an investigation into proceeds of crime is occurring, or likely to occur.
- Businesses and trust funds are being used to launder money.
- Crime derived monies are being moved off-shore into foreign economies.
- Large amounts of cash are being kept out of financial institutions to avoid AUSTRAC reporting and monitoring.
- Caveats or registered interests by third parties are being placed over properties that are likely to be the subject of proceeds of crime proceedings.[39]

39 Northern Territory Police, *Submission 10,* p. 1.

CHAPTER 4

Specific issues with existing laws and ways forward

Suggestions put to the committee

4.1 This chapter deals with a range of suggestions for improving upon existing unexplained wealth provisions that have been put to the committee during the inquiry. The committee is keen to receive further evidence, prior to making recommendations in its final report, on the advantages and disadvantages of the following:

- making the objects of the Proceeds of Crime Act more explicit, particularly in relation to purpose of unexplained wealth laws and the definition of serious and organised crime.
- minimising the need to prove a Commonwealth offence;
- amending search warrant powers;
- enabling the ATO to receive intercept information;
- options for dispute resolution;
- preventing legal expenses being met from restrained property;
- setting up special courts or judges;
- establishment of a threshold below which unexplained wealth matters must satisfy additional tests, or cannot not be prosecuted;
- removing the requirement to meet an evidence threshold twice;
- extending the time limit for notices of preliminary unexplained wealth orders;
- prescription of taskforces under the Taxation Administration Regulations 1976;
- streamlining the implementation of taskforces*;*
- improving international cooperation in relation to unexplained wealth matters;
- granting the ability to create and register a charge over restrained property;
- deeming certain types of unexplained wealth to be unlawfully obtained or treating large amounts of unexplained cash as a criminal commodity;
- separating unexplained wealth provisions from PoCA and placing them in stand-alone legislation;
- gaps that are being exploited in Australian jurisdictions;
- development of arrangements to enable the sharing of proceeds by non-participating States and Territories; and

- harmonisation of Commonwealth and state and territory laws, considering options such as developing a set of guiding principles for unexplained wealth laws, model legislation, referral of powers, or international linkages.

Focussing unexplained wealth provisions on serious and organised crime

4.2 The committee notes that while the PoCA lists a series of principles forming the objective of the Act, this does not include the essential objective of unexplained wealth. The committee considers that the point of unexplained wealth is to undermine the business model of criminal enterprise.

4.3 The ACC recommended providing a statement of clear and unambiguous objectives in the PoCA to remove doubt regarding Parliament's intention as to the operation of the unexplained wealth provisions and to provide clarity as to the basis on which judicial discretion is exercised, in line with those objectives.[1]

Observation 1

4.4 The committee observes that it may be advantageous to clarify the objects of the PoCA so that it is clear that the purpose of the legislation is to address serious and organised crime by undermining the profit motive.

Ensuring that orders are focussed on serious and organised crime

4.5 A related suggestion put to the committee was the focussing of unexplained wealth provisions on serious and organised crime by means of threshold amounts relating to unexplained wealth. For example the *Proceeds of Crime Act 1996* (Ireland) set a threshold of 10,000 pounds initially,[2] which has later been increased to 13,000 euros.[3] The committee raised the suggestion with the AFP, which noted in response:

> That is something we would consider. I think the issue of the AFP utilising this legislation on the wrong people has been raised before. When I say the wrong people, I mean mothers and fathers who have cash under the bed. I think it is important to say that we have finite resources to deal with the serious and organised crime problem in Australia at the minute. To be quite frank, we are not going to waste the resources on those cases; we want to direct our resources to the serious and organised crime targets. In terms of how we would operate under that scheme, there is significant oversight of the AFP as an organisation internally, externally through ACLEI and through committees like this one. But, ultimately, in any action that the AFP undertakes in this environment, we are judged before the court, so we

1 ACC, *Submission 8*, p. 5.

2 *Proceeds of Crime Act* 1996 (Ireland), ss. 2(b).

3 Mr Chris Hayes, Report on Parliamentary study leave visit to Europe 23 September – 10 October 2011, tabled 21 November 2011, p. 31.

> need to ensure that any case we bring before the court is objective and not frivolous.[4]

4.6 Based on the amount used as a threshold under the Irish legislation, the committee is considering whether a threshold of approximately $25 000 would be appropriate in the Australian context and is keen to take further evidence on this point in the next stage of the inquiry.

Observation 2

4.7 The committee observes that the use of unexplained wealth provisions could be better targeted, and limited, through the introduction of a threshold amount, and is considering whether $25 000 would be an appropriate threshold.

Linking unexplained wealth to the commission of an offence

4.8 As discussed in Chapter 3, unexplained wealth provisions must meet constitutional requirements. To avoid uncertainty as to the constitutional validity of unexplained wealth provisions, it remains necessary to prove a link to a Commonwealth offence, or a state offence with a federal aspect.

4.9 The need to prove a link to such an offence limits one of the key aims of unexplained wealth provisions, which is to target the assets of senior members of organised crime groups, who may distance themselves from the actual commission of criminal offences, yet receive the subsequent profits. As the AFP submitted:

> The AFP accepts that unexplained wealth provisions are currently expressed to operate to the fullest extent constitutionally possible. Nevertheless, the AFP notes that the jurisdictional nexus requirements described above operate as an inherent limitation on Commonwealth unexplained wealth provisions. That is, if the unexplained wealth is not linked to an offence that is an offence within Commonwealth power, the unexplained wealth proceeding will fail.[5]

4.10 For example, the AFP highlighted the increased prevalence of 'professional' money-laundering syndicates. As Commander Ian McCartney explained:

> The challenge for us in terms of the money-laundering legislation and the proceeds of crime legislation is the ability to show a nexus between what they are doing and their knowledge of the predicate offence. The problem that exists is that they will always be removed from that predicate offence; they will know it is bad but they will not know what particular criminal activity the money related to. This is a significant problem. It is one of the issues we have addressed in our submission.[6]

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4 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 5.

5 AFP, *Submission 9*, p. 6.

6 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 6.

4.11 In order to improve the operation of unexplained wealth provisions in light of constitutional requirements, there were several suggestions. These include the use of section 400.9 of the criminal code, international linkages and other options relation to national harmonisation which is discussed later in this chapter.

Use of external affairs powers

4.12 The ACC also noted the potential to make use of international treaty obligations to provide a constitutional head of power for unexplained wealth provisions.[7] In relation to external affairs power, the ACC advised the committee as follows:

> That would be an option, I imagine. I do not know that it is necessary to create a treaty obligation. I would be surprised if there were not something already there. Proceeds of crime is an international problem, as you have seen. I would hesitate to make any suggestions. That is something you would have to take some very careful advice from constitutional experts on. But, from our perspective, it certainly is a real issue and a real disincentive.[8]

4.13 The Attorney-General's Department previously advised the Senate Legal and Constitutional Affairs Legislation Committee that, while the department had considered whether broader unexplained wealth provisions could be supported by relying on the external affairs power in conjunction with international conventions relating to organised crime, corruption and money laundering, these conventions would not support a comprehensive unexplained wealth regime.[9]

4.14 The committee will continue to explore these possibilities in order to maximise the extent to which unexplained wealth provisions can operate effectively under the Constitution. However, a third option could be to seek a referral of powers from the states, or other means of Commonwealth-state harmonisation. This option is explored further below.

Use of Section 400.9 of the Criminal Code

4.15 Section 400.9 of the Commonwealth Criminal Code creates the offence of dealing with money or property that is reasonably suspected to be the proceeds of crime.[10] This offence may therefore be of use in cases of unexplained wealth, if it can be proved that there was reasonable suspicion that the wealth was the proceeds of crime. The AFP noted that this could be used to target money launderers, although not without its own difficulties:

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7 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

8 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

9 Ms Sarah Chidgey, *Senate Legal and Constitutional Affairs Legislation Committee Hansard*, 28 August 2009, pp 64 & 65.

10 *Criminal Code Act 1995*, s. 400.9.

> Particularly with these issues where they have no knowledge of the predicate offence, we have to rely on section 400.9 of the Commonwealth money laundering legislation, when in fact you have to show reasonable grounds to suspect it could be linked into a criminal offence.[11]

4.16 The Commonwealth Department of Public Prosecutions (CDPP) agreed that because section 400.9 does not make specific reference to Commonwealth offences, but has other constitutional foundations, it may be a provision that could be used in certain circumstances.[12] The offence in section 400.9 is supported in its entirety under section 51(xxix) of the Constitution by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, to which Australia is a party.[13]

11 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 9.

12 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 27.

13 Replacement explanatory memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009, item 19, p. 160.

Harmonisation of Commonwealth and state and territory laws

4.17 The committee heard that the harmonisation of unexplained wealth provisions across Australia was highly desirable for several reasons. As noted above, Commonwealth unexplained wealth legislation must work within constitutional limitations. As the AFP submitted:

> If we are serious about providing law enforcement with an effective tool to target those in the upper echelons of organised crime groups – who profit from crime at an arm's length – then action needs to be taken to address the gap in the Commonwealth's unexplained wealth regime. What is needed is nationally consistent unexplained wealth laws that could address the gap that – because of constitutional limitations – the Commonwealth cannot address.[14]

4.18 The AFP noted that, in 2009, all Australian jurisdictions agreed to a nationally coordinated response to organised crime, including a coordinated national effort to target the proceeds of crime and nationally consistent criminal asset confiscation schemes.[15] As detailed in Chapter 2, however, while several states and territories have unexplained wealth laws, these laws operate in different ways.

4.19 The AFP expressed concern that, in the absence of nationally consistent unexplained wealth laws, the gap in Commonwealth legislation could be exploited by criminals, potentially creating safe havens for the accumulation of unexplained wealth. As such, the AFP stated:

> If removing the financial incentive to commit crime is to remain a national objective the AFP recommends that Australian governments take more concerted action to ensure that all jurisdictions have complementary unexplained wealth laws in place that operate to provide national coverage and adequately address the gap in the Commonwealth regime.[16]

4.20 Victoria Police similarly argued for the establishment of nationally consistent unexplained wealth legislation, submitting:

> It is a fact that in each state and territory there are peculiar challenges to law enforcement, there are different political pressures and there are different natures of criminality. However, the difficulties that Australian law enforcement agencies have in identifying and confiscating assets which may be located in, or moved between, various jurisdictions may be significantly overcome if there was nationally consistent unexplained wealth legislation.[17]

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14 AFP, *Submission 9*, p. 6.

15 AFP, *Submission 9*, p. 6.

16 AFP, *Submission 9*, p. 2.

17 Victoria Police, *Submission 4*, p. 4.

4.21 The Western Australian Police, noting the difficulties they had experienced in progressing unexplained wealth matters within their own state, expressed a desire to work closely with the AFP, using Commonwealth provisions. As Assistant Commissioner Anticich explained:

> There are a number of models that are currently operating across the states, including ours, and I suggest that all of them have strengths and weaknesses. I think it is a great opportunity for the Commonwealth and this committee to show some leadership and come up with a pragmatic model that will hopefully guide others.[18]

4.22 Civil Liberties Australia also argued for harmonisation:

> For that reason, our No. 1 recommendation to this committee is to refer part (e) of your terms of reference, 'the interaction of Commonwealth, state and territory legislation and law enforcement activity in relation to the targeting of criminal assets of serious and organised criminal networks', to the Standing Committee on Law and Justice to produce a national approach. We think that this type of legislation is crying out for national consistency. Crimes are cross-border, but the laws are patchy depending on where you live.[19]

4.23 The committee has heard much evidence in favour of the harmonisation of proceeds of crime legislation in Australia. In the next phase of its inquiry the committee will explore potential means of harmonisation including model legislation, or referral of powers between the state and federal jurisdictions.

Model legislation

4.24 In evidence so far, agencies have discussed the relative merits of methods of harmonisation in general terms. For example, the AFP described a typical model legislation process, stating:

> [T]he normal process with the model legislation ... would be for us to work at an officials level with our counterparts in the states and territories to see what the ideal elements of a particular process would be—in this case it would be unexplained wealth—and get ministerial approval for that through either the police ministers council or the Standing Committee of Attorneys-General.
>
> That is what we have done in the past but I guess one of the experiences we have learnt from in that is...that if we have consistency across the jurisdictions we can talk about models and look at [the] principles. In a sense we did some work around this when SCAG last dealt with organised crime matters. I think that was about two years ago, and that was when there was a bit of activity around proceeds generally. On the back of that

18 Assistant Commissioner Nick Anticich, Western Australian Police, *Committee Hansard*, 9 September 2011, pp 3–4.

19 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard,* 4 November 2011, p. 40.

> the Commonwealth introduced its unexplained wealth provisions. It is about talking to the states and territories and seeing whether they agree that this is the best way to deal with the problem in their jurisdictions.[20]

4.25 The Australian Crime Commission noted the option of a model criminal code:

> I see that there is a great working relationship between the AFP and all the states in terms of asset forfeiture. On each occasion you are looking for opportunities to use the best tool that you can at any particular time. Some states have quite sophisticated unexplained wealth provisions. To make it a far more workable regime...if you have a model criminal code or consistency in each of the states and territories along with the Commonwealth then you prevent the criminals from exploiting gaps in the legislation. Federation is a great thing, but when you have criminals working across the country and across the globe then you need a nationally consistent way in which you approach this. My sense is that if we had that consistency between the Commonwealth and the states, however it was achieved, that would be a great thing in tackling serious organised crime.[21]

4.26 The Attorney-General's Department noted some limitations of model legislation:

> The problem with model laws is that they do not always stay model for very long. Jurisdictions can, of course, always depart from and introduce minor nuances and wrinkles. So you might start with what appears to be a consistent model, but gradually the consistency breaks down. That is the problem with that approach. But, that said, if there were not a reference of powers then we could take the model laws approach. We would still have the difficulty at the Commonwealth stage of needing a link to a Commonwealth offence, of course.[22]

4.27 Civil Liberties Australia provided evidence on their views on which existing legislation would form a good model:

> There is very different legislation in the Northern Territory and Western Australia, which is considered the most draconian; in South Australia, which has recently introduced a [few] changes; and in Victoria. The model legislation I would suggest to you is the ACT legislation, if you want to look at one. But there are vast differences in legislation between the states, which is why one of our recommendations was that there be national legislation based on this to which all the states and territories agreed and that it be done perhaps through the standing committee on law and justice and brought together, which is a role that that body quite often plays.[23]

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20 Mr Peter Whowell, AFP, *Committee Hansard*, 4 November 2011, p. 3.

21 Mr Richard Grant, ACC, *Committee Hansard*, 4 November 2011, p. 16.

22 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 34.

23 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 43.

Referral of powers

4.28 The AFP noted that referral of powers from the States to the Commonwealth could provide a means to establish an unexplained wealth regime that did not require a link to a Commonwealth offence, stating:

> There are a number of ways of that being overcome. One is a referral of powers from the states to the Commonwealth...What we have put in our submission is the need for consistent legislation. We have legislation in Western Australia and the Northern Territory, and then we have the Commonwealth legislation. We believe there is a gap that exists because of the constitutional issue, but there is also a gap that exists because of criminals living in other states.[24]

4.29 The ACC indicated it might be possible to look at referral of powers, or possibly the expansion of the taxation or money-laundering legislation.[25] The Attorney-General's Department saw referral of powers as a preferred approach:

> Our preferred approach, if it were possible—in an ideal world—would be a reference of powers. I think a reference of powers so that there could be a single law would be the best way to have the nationally consistent approach.
>
> References of powers could be approached in a range of different ways, obviously. The intended outcome would be a situation where, by referring powers, the Commonwealth had a broader ability and would not necessarily need a connection to a Commonwealth offence in the laws. But, of course, states and territories would still be able to act themselves under that regime.
>
> That would usually be the way. I should say, just as a matter of caution, that each of the different referral of powers schemes has had some slight differences. [26]

4.30 In addition to a reference of powers to the Commonwealth from the states, it may also be possible for Commonwealth officers to instead cooperate with state jurisdictions to use state-based legislation. When put to AGD, Mr Iain Anderson responded:

> That would certainly be a reasonable way of doing it as well. An issue that would need to be addressed then would be making sure that each state had the ability to share proceeds. Not all states currently have the ability to share proceeds in their legislation. If we went down the path of having states with the legislation and the Commonwealth assisting them, say, then we would want to make sure that at least some of the proceeds could flow back.[27]

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24 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 3.

25 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 12.

26 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 34.

27 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 36.

4.31 The committee is keen to see a harmonisation of unexplained wealth laws and will explore methods of enabling state and Commonwealth cooperation in the next phase of the inquiry.

Equitable sharing program

4.32 A subsidiary issue relating to cooperation between state and federal law enforcement agencies, and international partners, is the sharing of seized assets between the jurisdictions. In its submission to the inquiry, the AFP noted the importance of international cooperation, submitting:

> The United Nations Convention Against Corruption (to which Australia is a party) obliges parties to the Convention to share profits of crime where assistance in the recovery of those profits contributes to legal enforcement cooperation. Part 4-3 of PoCA provides for the making of payments to foreign countries under the 'equitable sharing program'. The equitable sharing program refers to arrangements under which the Commonwealth shares, with a foreign country, a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister's opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.
>
> There have been a number of successful examples of sharing under the program. Countries with which equitable sharing has occurred include China, Indonesia and Singapore.[28]

4.33 Furthermore, the AFP noted that Part 4-3 of PoCA also provides for the making of payments to States and Territories under the equitable sharing program. Participating States and Territories share proceeds with the Commonwealth where Commonwealth agencies have made a significant contribution to the recovery of those proceeds. However, the AFP informed the committee that some Australian jurisdictions do not have reciprocal sharing provisions in their legislation and are currently unable to share proceeds that they recover.[29] The AFP therefore proposes some improvements to equitable sharing arrangements as follows:

> [T]he AFP considers that current equitable sharing processes could benefit from non-participating States and Territories developing legislative provisions to enable the sharing of confiscated proceeds with State, Territory, Commonwealth and international jurisdictions. Ensuring that all jurisdictions can share proceeds with each other would enhance cooperation on criminal asset confiscation matters.[30]

4.34 The committee encourages equitable sharing programs to be put in place where possible, to make joint work on proceeds of crime matters easier. The

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28 AFP, *Submission 9*, p. 11.

29 AFP, *Submission 9*, p. 12.

30 AFP, *Submission 9*, p. 16.

committee also supports the notion that where possible funds from confiscated proceeds of crime should go into general revenue of the jurisdiction and not to law enforcement agencies.

Observation 3

4.35 The committee observes that participation in agreed equitable sharing programs where possible to do so is likely to be a significant enabler of joint operations with state and territories.

Introducing deeming provisions and treating cash as a criminal commodity

4.36 The ACC recommends introducing express provisions to deem amounts in relation to which an individual has no explanation, or which are inconsistent with levels of income declared in taxation returns, or obtained in years for which no taxation return was filed, to be illegally obtained. The ACC informed the committee that it had historical examples where such provisions would have been valuable.[31]

4.37 Ms Kate Deakin, ACC, elaborated further, stating:

> We are suggesting—and it might be a reasonable middle ground—deeming provisions or presumptions, so that if, for example, you have assets far in excess of your tax-declared wealth, or significant assets acquired in years for which no tax returns were filed, or if assets were purchased with large amounts of cash—that sort of thing—if we can put in place presumptions that say, 'Unless you can prove otherwise, we are going to assume that those amounts were illegitimately obtained'.[32]

4.38 In a similar vein, the ACC also suggested introducing laws which, in appropriate circumstances, treat cash as a criminal commodity, by creating a rebuttable presumption that possession of large amounts of cash without adequate explanation is connected to criminality.[33]

4.39 The committee will seek further information of the advantages and disadvantages of this proposal during the next phase if its inquiry

31 ACC, *Submission 8*, p. 4.

32 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 13.

33 ACC, *Submission 8*, p. 4.

Evidentiary Issues

Requirement to meet threshold test twice

4.40 The AFP informed the committee that, under current provisions, law enforcement agencies were unnecessarily forced to meet certain legal tests twice. Specifically, unexplained wealth proceedings can commence either with an application for a restraining order (and then an application for a preliminary unexplained wealth order), or with an application for a preliminary unexplained wealth order. Applications for unexplained wealth restraining orders and preliminary unexplained wealth orders must be accompanied by an affidavit made by an authorised officer. The court may then make a restraining order or preliminary unexplained wealth order if it is satisfied of the matters dealt with in the affidavit. In this way, the affidavit requirements form the basis for the threshold test which must be met before the court may make an order.[34]

4.41 The AFP noted that there is an overlap between the matters required to be addressed in the affidavit for a restraining order, and the affidavit required for a preliminary unexplained wealth restraining order. Specifically, both affidavits must state that the authorised officer suspects (on reasonable grounds) that the person's total wealth exceeds the value of the person's lawfully acquired wealth.[35]

4.42 The practical effect of this requirement appears to be that where a restraining order is sought before an application for a preliminary unexplained wealth order is made, the Commonwealth will need to meet the same threshold test twice. As orders may be sought from different judges, the result may be that two different judges are required to be satisfied of the same threshold.[36]

4.43 In order to eliminate this duplication of effort, the AFP proposed to the committee that the process could be streamlined by amending the relevant provisions to provide that where an unexplained wealth restraining order has been made (and the court is satisfied that the authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's lawfully acquired wealth), the affidavit for a preliminary unexplained wealth order does not have to address the same matter.[37]

Observation 4

4.44 The committee observes that the duplication of the threshold test appears to be unnecessary and an inefficient use of resources.

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34 AFP, *Submission 9*, p. 13.

35 AFP, *Submission 9*, p. 13.

36 AFP, *Submission 9*, p. 13.

37 AFP, *Submission 9*, p. 13.

Time limit for service

4.45 The AFP also drew the committee's attention to an issue arising from the requirement that the Commonwealth give a person notice of a preliminary unexplained wealth order, including providing a copy of the application and accompanying affidavit within seven days.

4.46 The AFP informed the committee that, in some situations, there may be difficulty or delays in locating the individual or facilitating the giving of notice. The AFP therefore proposed that the court be given the ability to extend the time limit for notice, on application of the Commonwealth, to accommodate extraordinary circumstances.[38]

Observation 5

4.47 The committee observes that the time limit for serving notice of applications for a preliminary unexplained wealth order may not reflect an appropriate balance between a reasonable time for evidence to be gathered, and the right of individuals to manage their affairs.

4.48 More generally, the committee heard that the timing of court action was critical to the success of unexplained wealth proceedings. A particular concern was the potential for targeted individuals to become aware of an unexplained wealth proceeding and dispose of assets before a court order came into effect. The committee is not currently in a position to fully evaluate this point and will consider the issue further prior to the conclusion of the inquiry.

Evidentiary burden arising from wealth measured over a lifetime

4.49 The ACC informed the committee that one of the major drawbacks of the existing unexplained wealth provisions was the requirement for the investigating agency to conduct a complete analysis of all of a person's financial circumstances over a long period. While unexplained wealth provisions are intended to reverse the onus of proof onto the accused, in practice, this is a very easy onus to discharge, and may require nothing more than a credible denial on oath.[39] As Mrs Karen Harfield, ACC, explained:

> [O]btaining unexplained wealth inevitably requires investigators to build a comprehensive financial picture of all of the property a person owns or has owned, effectively controls or has controlled and their source of income. It is usually necessary to investigate the whole of a person's working life, and this results in significant resource impediments for law enforcement to find and analyse this amount of financial documentation often where the individual themselves is the only person who has access to it.[40]

38 AFP, *Submission 9*, p. 14.

39 ACC, *Submission 8*, p. 2.

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

4.50 The ACC referred the committee to a case study taken from New South Wales, where NSW Police arrested two people at a train station carrying over $2.5 million in suitcases. The arrests were made under NSW's unexplained wealth provisions, based on the 'unexplainability' of why somebody would have that enormous amount of money, yet not have a reasonable explanation as to where it came from. The money was later forfeited to the NSW Crime Commission.

4.51 The ACC noted that under the Commonwealth provisions:

> [I]t is unlikely that unexplained wealth proceedings would have commenced in relation to these people without extensive investigative research into their whole life earnings and the ability of prosecutors to demonstrate a direct linkage of the money to a Commonwealth offence.[41]

4.52 The CDPP provided further evidence, drawing the committee's attention to the definitions of wealth within PoCA:

> [I]t goes back to the definitions of total wealth and wealth in, section 179G of the Proceeds of Crime Act. If I can paraphrase that, the total wealth of a person is the sum of all the values of the property that constitutes the person's wealth. Wealth is defined to mean property owned by the person at any time, property that has been under the effective control of the person at any time and property that the person has disposed of, whether by sale, gift or otherwise, or consumed at any time.[42]

4.53 The committee is interested in whether the provisions could be altered so that unexplained wealth orders could apply to the change in a person's wealth in a specified period, for example if a person's wealth increased dramatically within a period of a few years. The committee welcome further evidence on this issue and may discuss it further in its final report.

Enforcement provisions

4.54 The AFP were concerned that provisions within PoCA may complicate the enforcement of unexplained wealth orders. Specifically, the AFP noted that:

> Division 4 of Part 2-6 of PoCA deals with the enforcement of unexplained wealth orders. The process for enforcing an unexplained wealth order is substantially similar to the process for enforcing pecuniary penalty orders under Division 4 of Part 2-4 of PoCA. However, Division 4 of Part 2-6 does not include any equivalent provisions to sections 142 and 143 which deal with the creation and registration of charges over property restrained to satisfy an unexplained wealth order.
>
> This creates the potential for a situation in which, following the making of an unexplained wealth order, the Commonwealth cannot effectively enforce the order because its interests over property cannot be secured.

41 ACC, *Submission 8*, p. 2.

42 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 30.

> Accordingly, the AFP proposes that provisions – similar to sections 142 and 143 – be inserted into Division 4 of Part 2-6 of PoCA. This would ensure that the Commonwealth could create and register a charge over property that has been restrained by the court to satisfy an unexplained wealth order.[43]

4.55 The committee will seek further information of the advantages and disadvantages of this proposal during the next phase if its inquiry.

43 AFP, *Submission 9*, p. 16.

Judicial discretion in making orders

4.56 When the unexplained wealth laws were introduced to Parliament, the provisions in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 set out that when appropriate conditions and tests were satisfied, the courts must make unexplained wealth orders, relating to: restraint (section 20A); a preliminary order to appear (section 179B); and payment of an amount of unexplained wealth to the Commonwealth (section 179E).[44]

4.57 The Senate Legal and Constitutional Affairs Legislation Committee recommended that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so. The committee cited concerns about a range of matters including:

- The potential for the provisions to be used where it has proved too difficult or time consuming to meet the exacting requirements of criminal prosecution of offences;
- That the provisions are not limited to the targeting of major criminal figures; and
- The potential inability of respondents to proceedings to produce records that may have been accidentally destroyed. [45]

4.58 Amendments made in the Senate adopted the recommendation to create judicial discretion for orders to pay an amount of unexplained wealth to the Commonwealth under section 179E. The amendments made in the Senate also went further and created a judicial discretion for restraining orders (Section 20A) and preliminary orders to appear (section 179B).

4.59 Civil Liberties Australia was keen for the discretion to remain, stating:

> Our No. 2 recommendation is that, whatever legislation or amendments come out of this process, they must address 'serious and organised crime'—the Mr Bigs—and not be able to be used to target the Mr and Mrs Littles of Australia. CLA believes judges must be able to exercise discretion based on the seriousness of the crime. Any mandatory provisions as to how judges will act should be removed, we believe.[46]

4.60 The Australian Crime Commission informed the committee that:

> As you know, there are four schemes under the Proceeds of Crime Act and only the unexplained wealth scheme provides that the courts may make

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44 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, first reading.

45 Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions], pp 57–59.

46 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 November 2011, p. 40.

> orders rather than must, so it is the case that, even though the DPP or the agency bringing the application meets all of the requirements, the court can still refuse to make an order, and there is nothing in the legislation which guides that discretion or explains why the order might be refused. There are, in effect, three levels of discretion. There is may versus must, there is general public interest and there is interests of justice. The interests of justice provision was inserted to meet the High Court international finance case that arose out of the New South Wales Crime Commission's legislation. Clearly, there is a sensible constitutional reason to put that level of discretion in, but it seems to us that we cannot see a policy reason for the inconsistency between the broad scope of the discretion under unexplained wealth as opposed to the other provisions...
>
> There might be an opportunity to guide the judicial discretion and make provision for things that can and cannot be taken into account in terms of exercising that discretion.
>
> It is the inconsistency between the unexplained wealth provisions and the rest of the act that is our main issue. It seems to me that there is not a justification for that discrepancy. [47]

4.61 Representatives from the CDPP noted that there may concerns if the case was based on intelligence:

> To basically have a system whereby a court did not have a discretion not to restrain a person's assets based on material that might be of an intelligence nature only might be something that would create an issue for the courts. I would need to consider it a bit more carefully.[48]

4.62 The Attorney-General's Department indicated that its preference for the unexplained wealth provisions would be to see a similar model where, for example, if the tests are satisfied then the order must be made rather than may be made, as there is nothing peculiar about unexplained wealth as opposed to other proceeds of crime that requires the court to have additional discretion:

> I am not suggesting that the judiciary should not have a discretion as to whether they make orders at all. They will always have the ability to refuse to make an order thought by the party. Obviously, if we remove that discretion completely, then that would be constitutionally invalid in itself under chapter 3. So the court will always have to be satisfied by the Commonwealth that an order should be made and that there is sufficient case for the onus to be put on to the other person to justify why their assets should not be forfeited or restrained. So, if the person can provide an explanation of the sources of their wealth that is credible, then they have nothing to worry about. [49]

47 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, pp 12, 15–16.

48 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 29.

49 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, pp 37–38.

Observation 6

4.63 The committee observes that there does not seem to be a strong case for a specific unexplained wealth judicial discretion relating to restraining orders and preliminary orders to appear, given there is limited impact on an individual subject to those types of orders and that there are already significant safeguards in place, such as:

- **the requirement for a court to be satisfied that the tests for the orders have been met;**
- **the judicial discretions of general public interest and the interests of justice tests that need to be satisfied;**
- **the standard powers courts have to order costs; and**
- **oversight by this committee.**

4.64 The committee also notes that the Senate Legal and Constitutional Affairs Legislation Committee did not make any recommendations regarding the orders under PoCA section 20A and 179B.

4.65 The committee is aware that orders to pay an amount of unexplained wealth under section 179E of the PoCA to the Commonwealth, may have a significant impact on the individuals concerned. The committee notes however, that the test to be satisfied is substantial:

> the court is not satisfied that the whole or any part of the person's wealth 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.[50]

Observation 7

4.66 The committee observes that judicial discretion relating to orders to pay an amount of unexplained wealth to the Commonwealth under section 179E of the PoCA may limit the effective use of the unexplained wealth laws.

Observation 8

4.67 The committee observes that it may be possible to replace the judicial discretion with appropriate statutory oversight arrangements including that:

- **Law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations;**

50 *Proceeds of Crime Act* 2002, ss. 179E(1)(b).

- **The Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that Ombudsman does for controlled operations; and**
- **The oversight by the Parliamentary Joint Committee on Law Enforcement be enhanced so that in addition to appearing when required, that the ACC, AFP, DPP and any other federal agency or authority must brief the committee on their use of unexplained wealth provisions as part of the committee's annual examination of annual reports of the ACC and AFP.**

Establishing special courts or judges

4.68 In its submission the ACC suggested establishing a specialist proceeds of crime court of tribunal to deal with proceeds of crime matters, citing:

> Given the specialist and complex nature of both the legislation and the financial and criminal evidence, and the need for swift response times in cases where funds can be transferred overseas within hours, a specialist court would allow for the development of both judicial expertise and tailor-made procedures.[51]

4.69 The committee sought evidence on whether there would be value in having special courts or prescribed judges for proceeds of crime matters, as there are in some other countries. The AFP noted that:

> [I]t is something that interests me. It is a model that is adopted in Ireland with their structure. There are a couple of issues at play. One is the size of the jurisdiction in Ireland—it is a lot smaller. It is something we have considered but we do not see as an organisation significant impediments in how the current system works. The ability to bring the system into Australia will require a policy change, a legislation change and a funding change, but it is something we would consider in future discussion.[52]

4.70 Representatives from the CDPP advised:

> At the moment basically we litigate our matters in the state courts. So, depending on which state we are in and which court has the appropriate jurisdiction, we will litigate in those and nor would we attempt to select who might be the adjudicator of those matters. I suppose it might be said that any court with experience in these sorts of matters is going to provide a more consistent type of outcome on that, but it is not really a matter that we as DPP should be commenting on as to its desirability. The general approach in Commonwealth criminal matters and proceeds of crime matters

51 ACC, *Submission 8,* p. 5.

52 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 8.

> is that we litigate in the state courts with the appropriate jurisdiction. Like any litigant we accept whatever bench is given to us.[53]

4.71 The Attorney-General's Department advised the committee of some of the disadvantage of special courts and judges:

> [C]reating specific courts is a step that can be fraught with dangers, as well. There are issues in creating a specialist court if you have judiciary who only sit in that court—whether they have sufficient workload to keep them fully occupied, particularly if you create judges who then stay there until they are aged 70. There is an expense involved in creating separate judges.
>
> Just looking at other scenarios, there have been questions raised as to whether the federal court, for example, should have specialist divisions, particularly with judges only hearing certain types of matters. Generally, the Commonwealth has refrained from doing that because the view is that judges bring a range of experiences to hearing matters and that it is better that they have a broad experience rather than only practicing in a single area, where people can become too narrow over time. There are arguments against creating new courts for that reason.[54]

4.72 The committee acknowledges the difficulty and cost of setting up a special court or tribunal, but is also concerned to see that proceeds of crime matters can be effectively dealt with. The committee considers that there would be value in ensuring that courts and judges have appropriate training and experience and that proceeds of crime matters can be given attention in a timely way to prevent the dispersal or disposal of assets overseas and through other means.

Observation 8

4.73 The committee observes that there may be value in identifying nominated judicial officers who could give priority to hearing proceeds of crime proceedings, and unexplained wealth proceedings in particular.

Other Legal issues

Use of restrained assets to meet legal expenses

4.74 In the original iteration of the Proceeds of Crime Act 1987, restrained assets could be used by the defendant to meet legal expenses incurred in relation to proceedings under that act. However, in 1999 the Australian Law Reform Commission reported that this practice was contrary to the principles of PoCA, which were that property liable to forfeiture should be preserved for that purpose.[55] Commander Ian McCartney, AFP elaborated further, explaining:

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53 Mr Graeme Davidson, CDPP, *Committee Hansard*, 4 November 2011, p. 31.

54 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 37.

55 AFP, *Submission 9*, p. 14.

> When the proceeds of crime legislation was brought in in 1987 there was an ability for suspects to access assets that had been restrained, for legal costs. We believe that that system was abused. It was used by suspects to frustrate the system and, basically, siphon off the assets that had been restrained.[56]

4.75 Accordingly, in 2002, the legislation was changed to preclude the use of restrained property to meet legal expenses incurred in connection with PoCA or criminal proceedings.[57]

4.76 However, this prohibition on using restrained assets to meet legal expenses was not applied to unexplained wealth provisions when they were subsequently introduced.

4.77 The stated purpose was to ensure that persons subject to unexplained wealth proceedings could fund an appropriate and sufficient defence against such proceedings as they differed from ordinary PoCA proceedings, with no specific crime needing to be alleged. This difference therefore justified a different policy approach to whether legal expenses could be met from restrained property.[58]

4.78 The AFP continue to have concerns about this provision, submitting:

> The AFP's experience under PoCA 1987 was that the provisions allowing legal expenses to be paid for out of restrained property were exploited to deliberately frustrate the objectives of the scheme and dissipate property through protracted litigation.
>
> The AFP is concerned that this will happen under the unexplained wealth provisions. The AFP is not convinced that provisions which require a costs assessor to certify that legal expenses have been properly incurred will act as a sufficient safeguard to prevent the inappropriate dissipation of assets.[59]

4.79 For this reason, the AFP recommends that PoCA be amended so that legal expenses cannot be met from property restrained as part of unexplained wealth proceeding, in a manner consistent with other elements of that act.

4.80 The committee observes that the provisions relating to legal expenses could be harmonised so that unexplained wealth provisions and other types of proceedings within PoCA are treated in a similar manner.

Observation 9

4.81 The committee observes that legal aid arrangements similar to those for other PoCA proceedings may be appropriate for unexplained wealth proceedings.

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56 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 4.

57 AFP, *Submission 9*, p. 14.

58 AFP, *Submission 9*, p. 14.

59 AFP, *Submission 9*, p. 14–15.

Legal expenses – costs, damages and indemnity

4.82 Currently, under the terms of PoCA, the Commonwealth is required to give an undertaking as to damages in all unexplained wealth proceedings, even where no property has been restrained. The aim of this provision is to safeguard against the Commonwealth bringing inappropriate unexplained wealth proceedings.[60]

4.83 The AFP is of the view that undertakings as to damages are an important safeguard where property rights have been interfered with pending the outcome of proceedings, and already exist in relation to all other restraint proceedings under PoCA. The requirement for an undertaking as to damages as part of an application for an unexplained wealth restraining order is supported by the AFP.[61]

4.84 However, the AFP contends that applications for a preliminary unexplained wealth order do not affect property rights, noting that a preliminary unexplained wealth order merely requires a person to attend court and answer questions about his or her wealth. Further, the AFP notes that final unexplained wealth orders are designed to affect property rights by depriving a person of their illicit wealth. As a result, the AFP submitted:

> Allowing an individual to recover damages suffered as a result of such an order would appear to defeat the purpose of the regime, namely depriving an individual of their illicit wealth. It will be important to monitor how these provisions are ultimately applied by the courts. Once there is more experience with litigating unexplained wealth proceedings, it may be useful to consider whether undertakings as to damages are appropriate where property has not been restrained.[62]

4.85 The Attorney-General's department noted the unexplained wealth provisions relating to a courts powers to make costs orders may duplicate an existing discretion of courts, creating a risk that courts may be more likely to award costs:

> In any type of proceeding involving an injunction, for example, where you are restraining someone's assets, whether it is a Mareva injunction or a proceeds of crime injunction, the court will always have the ability to order costs. It can order costs at an indemnity level or solicitor-client or party-party; those are all standard powers courts have. Similarly, there is always the ability to order damages as well. By including them in the legislation it creates the possibility that a court might feel that the will of parliament is that it be more inclined towards ordering indemnity costs or making an order of damages than it would be if it was left to the court in its exercise of its general discretion.[63]

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60 AFP, *Submission 9*, p. 17.

61 AFP, *Submission 9*, p. 17.

62 AFP, *Submission 9*, p. 17.

63 Mr Iain Anderson, AGD, *Committee Hansard*, 4 November 2011, p. 33.

4.86 The committee will seek further information of the advantages and disadvantages of this proposal during the next phase if its inquiry.

Indemnity costs

4.87 The AFP has concerns about another provision within PoCA, that provides a statutory basis for indemnity costs to be awarded in relation to unexplained wealth proceedings. The purpose of this provision is to enable the court to appropriately deal with fundamentally misconceived or abusive applications for unexplained wealth orders.[64]

4.88 The AFP argues that the ability to award indemnity costs is part of a court's inherent jurisdiction in civil matters and does not require a statutory basis. It is concerned that:

> ...the indemnity cost provisions in the unexplained wealth regime do not set out any test which must be met before indemnity costs can be awarded. The provisions do not clearly indicate the policy intention that costs only be awarded in exceptional cases and could imply that Parliament intended that costs could be awarded even where unexplained wealth applications are not fundamentally misconceived or an abuse of process. Such an approach appears to be at odds with the underlying policy intention to safeguard against misuse of unexplained wealth action.[65]

4.89 The committee has not yet formed a view on this matter and will discuss it further in the final report.

Strengthening options for dispute resolution and administrative forfeiture

4.90 In its submission the ACC recommended strengthening options to alternative dispute resolution and administrative forfeiture.[66] During the hearing, the ACC elaborated further, stating:

> That is not an option that we have explored in any great detail, but it simply would go to reducing the costs and risks which are inherently involved in litigation. If there were ways to achieve the objectives without dragging matters through court unnecessarily, we would see that as a benefit, but that is not a matter that we can give any further detailed advice on.[67]

4.91 The committee will seek further information of the advantages and disadvantages of this proposal during the next phase if its inquiry.

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64 AFP, *Submission 9*, p. 17.

65 AFP, *Submission 9*, p. 17.

66 ACC, *Submission 8*, p. 5.

67 Ms Kate Deakin, ACC, *Committee Hansard*, 4 November 2011, p. 14.

Information sharing

4.92 The financial investigation that forms the heart of unexplained wealth proceedings is complex and time-consuming. The committee has therefore received evidence relating to ways in which the provision of information could be improved. Because unexplained wealth provisions operate in a different manner to most traditional law enforcement methods, many of the information sharing mechanisms do not operate effectively due to technical impediments. It is therefore useful to consider ways in which unexplained wealth investigations can have improved access to the channels of information typically used by law enforcement agencies.

4.93 The committee understands the potential use of following suggestions, but has not had an opportunity to examine these points further. The committee will therefore reconsider this issue in its final report.

4.94 The Senate Legal and Constitutional Affairs previously raised a range of concerns about information sharing, noting risks including that activities that are legal in Australia may be illegal in other countries and vice versa. That committee also noted the extensive powers to compel the provision of information under the PoCA and made recommendation including:

> 4) The committee recommends that the disclosure of information acquired under the *Proceeds of Crime Act 2002* to law enforcement and prosecuting agencies should be limited to disclosure for the purpose of investigation prosecution or prevention of an indictable offence punishable by imprisonment for three or more years.
>
> 5) The committee recommends that disclosure of information acquired under the *Proceeds of Crime Act 2002* to foreign law enforcement agencies should not be made unless the offence under investigation would be an indictable offence punishable by imprisonment for three or more years if it had occurred in Australia.[68]

Information gathering powers

4.95 Under Part 3.5 of PoCA, a magistrate can issue a warrant to search a premises, or persons in the vicinity of the premises, for 'tainted property' or 'evidential material'. Tainted property is defined as proceeds of certain indictable offences or an instrument of an indictable offence (such as vessels used to import narcotics or computers used to transmit child exploitation material). Evidential material means evidence relating to: property in respect of which PoCA action has or could be taken; benefits derived from the commission of certain offences; or literary proceeds.[69]

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68 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, pp 27–58, 59–60.

69 AFP, *Submission 9*, p. 15.

4.96 While these search powers are a valuable investigative tool, they may not be able to be used for unexplained wealth proceedings. Specifically, the AFP notes that the definition of evidential material does not appear to extend to evidence of unlawful activities from which a person has derived wealth. The AFP therefore desires the amendment of Part 3.5 to ensure that evidence relevant to unexplained wealth proceedings can be obtained.[70]

Information sharing with the ATO

4.97 Given the key role that financial data plays in unexplained wealth proceedings, information held by the Australian Tax Office is essential. Furthermore, the mission, powers and abilities of the ATO are closely aligned with the aim of unexplained wealth provisions.

4.98 The AFP noted that recent reforms have enhanced the arrangements for the sharing of taxation information with law enforcement agencies, submitting:

> In December 2010, the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* amended the provisions in the *Taxation Administration Act 1953* governing disclosure of taxpayer information to law enforcement agencies. The amendments in conjunction with other Commonwealth organised crime related legislative reforms:
>
> - removed limitations on the use of taxpayer information enabling use of this information for the prosecution of serious offences; and
> - allow for the disclosure of taxpayer information to law enforcement agencies and courts for the investigation of unexplained wealth matters.[71]

Taskforce prescription - sharing ATO information with law enforcement

4.99 The AFP informed the committee that Under the Taxation Administration Act, the ATO can also disclose taxpayer information to an officer of a prescribed taskforce for or in connection with a purpose of the prescribed taskforce. A taskforce can be prescribed if a major purpose of the relevant taskforce must be the protection of public finances.[72]

4.100 For this reason, the AFP suggested that the Criminal Assets Confiscation Taskforce be prescribed, enabling the ATO to disclose taxpayer information for the broader purposes of the Taskforce. Specifically, the AFP identified as benefits the ability to better identify assets for seizure and pursue wealth collected by criminals at the expense of the community.

4.101 The ATO also supported taskforce prescription, stating that:

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70 AFP, *Submission 9*, p. 15.

71 AFP, *Submission 9*, p. 15.

72 AFP, *Submission 9*, p. 15.

> Success in tackling organised crime depends largely on sufficient information sharing powers for law enforcement agencies. It is expected that further taskforces will be established both at the Commonwealth and State levels to address serious and organised crime. Prescription of a taskforce allows the ATO to disclose information to an officer of an agency in any prescribed taskforce for a purpose of that taskforce. The ATO considers the prescription of taskforces as imperative for effective information sharing with law enforcement agencies.[73]

Sharing law enforcement information with the ATO

4.102 A related issue is the ability of the ATO to receive information from law enforcement agencies, specifically information collected through telecommunication intercepts:

> Another issue is that, where we have identified a matter, a key operational strategy for us, particularly in terms of organised crime, is the use of telephone intercepts on special projects. If we identify through our investigation a tax mischief that we believe would be relevant to the tax office, we cannot refer telephone intercept material to the tax office; we are precluded under the legislation. So there are some barriers there.[74]

4.103 In order for the ATO and law enforcement agencies to cooperate efficiently, it may be useful to remove this impediment, although privacy issues abound:

> It is crucial in terms of how we operate in this space that we are not abusing information or we are not obtaining information from the tax office, because a lot of the information is community information that has been provided to the ATO.[75]

Mutual assistance reforms

4.104 'Mutual assistance' describes the process by which countries provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and some criminal asset confiscation matters.[76]

4.105 The AFP informed the committee that under the *Mutual Assistance in Criminal Matters Act 1987* (MA Act), Australia can register and enforce both conviction and non-conviction based foreign forfeiture and pecuniary orders (a foreign proceeds of crime order). Once registered, a foreign proceeds of crime order can be enforced as if it were an Australian proceeds of crime order.[77]

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73 ATO, *Submission 5*, p. 2.

74 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 7.

75 Commander Ian McCartney, AFP, *Committee Hansard*, 4 November 2011, p. 7.

76 AFP, *Submission 9*, p. 10.

77 AFP, *Submission 9*, p. 10–11.

4.106 However, because unexplained wealth investigations and proceedings are non-conviction based and do not necessarily contain a link to a criminal offence, they fall outside the scope of the mutual assistance regime. The AFP may therefore find it difficult to refute a claim by an individual that their wealth was derived from legitimate overseas sources due to an inability to obtain evidence from foreign jurisdictions in relation to unexplained wealth proceedings.[78]

4.107 In order to remove this impediment, the AFP has therefore proposed to the committee that the MA Act be amended to allow Australia to request assistance of, and provide assistance to, foreign countries in relation to unexplained wealth matters.[79]

4.108 The committee will seek further information of the advantages and disadvantages of these information sharing proposals during the next phase if its inquiry.

78 AFP, *Submission 9*, p. 11.

79 AFP, *Submission 9*, p. 11.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Crime and Misconduct Commission
2	Police Federation of Australia
3	Law Council of Australia
4	Victoria Police
5	Australian Taxation Office
6	Attorney-General's Department
7	South Australia Police
8	Australian Crime Commission
9	Australian Federal Police
10	Northern Territory Police
11	Confidential

ADDITIONAL INFORMATION RECEIVED

1	*Proceeds of Crime Act* 1996 (Ireland)
2	*Proceeds of Crime (Amendment) Act* 2005 (Ireland)
3	*Criminal Assets Bureau Act* 1996 (Ireland)

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Friday, 9 September 2011 – Perth WA

Western Australia Police

Assistant Commissioner Nicholas Anticich, Specialist Crime Portfolio

Detective Superintendent Charles Carver, Serious and Organised Crime Branch

Acting Detective Inspector Hamish McKenzie, Officer in Charge, Proceeds of Crime Squad

Corruption and Crime Commission of WA

Mr Mark Herron, Acting Commissioner

Mr Robert Sutton, Acting Director, Operations

Mr Paul White, Senior Financial Investigator

Friday, 4 November 2011

Australian Federal Police

Commander Ian McCartney, Manager Criminal Assets

Mr Peter Whowell, Manager Government Relations

Mrs Elsa Sengstock, Coordinator, Legislation Program

Ms Sylvia Grono, Coordinator, Criminal Assets

Australian Crime Commission

Mrs Karen Harfield, Executive Director Fusion, Target Development and Performance

Mr Richard Grant, National Manager, Target Development

Ms Philippa de Veau, National Manager Legal Services

Ms Kate Deakin, Regional Legal Manager, Sydney

Australian Tax Office

Mr Michael Cranston, Deputy Commissioner

Mr William Day, Assistant Commissioner, Serious Non-Compliance

Mr John Ford, Assistant Commissioner, Serious Non-Compliance

Commonwealth Director of Public Prosecutions

Mr Graeme Davidson, Deputy Director

Ms Rebecca Ashcroft, National Coordinator, Criminal Assets

Attorney-General's Department

Mr Iain Anderson, First Assistant Secretary

Ms Brooke Hartigan, Principal Legal Officer

Civil Liberties Australia

Mr Bill Rowlings, Chief Executive Officer

APPENDIX 3

1997 Interpol Resolution

Resolution No AGN/66/RES/17 October 1997 Money laundering: Investigations and international police co-operation

RECOGNIZING the difficulties encountered by law enforcement authorities in their efforts to identify and prosecute all those who launder assets derived from illegal activities,

RECOGNIZING the need to confiscate the proceeds of crime,

FURTHER RECOGNIZING that unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity,

The ICPO-Interpol General Assembly, meeting in New Delhi from 15th to 21st October 1997 at its 66th Session:

RECOMMENDS that the member countries extend co-operation in investigations to other members, whenever such a request is made, in respect of money laundering activities, and that the General Secretariat compiles and distributes information submitted by the member states on good investigative practices;

RECOMMENDS that member countries consider adopting effective laws, that give law enforcement officials the powers they need to combat money laundering both domestically and internationally, by taking the measures listed below:

(1) Simplify procedures for the production of relevant financial records, overcome obstacles hindering or delaying the sharing of financial and criminal information by appropriate agencies, and improve the effectiveness of disclosure systems by increasing contacts with financial institutions in order to facilitate the gathering of intelligence;

(2) Grant law enforcement officials the authority they need to investigate such cases, waive bank secrecy rules when there are reasonable grounds for suspecting that certain transactions are connected with criminal activities, authorize law enforcement departments to use techniques such as covert (undercover) investigations, technical surveillance and controlled deliveries when dealing with cases relating to assets known or suspected to be the proceeds of crime, and provide adequate resources for law enforcement departments, in order to increase the likelihood of a successful outcome for investigations;

(3) In the context of criminal procedure, allow courts to consider circumstantial or indirect evidence of the illegal origin of assets, provide protection or ensure anonymity for witnesses who give evidence in money laundering cases, and subject to the fundamental principles of each country's domestic law, allow the appropriate authorities to consider granting immunity from prosecution, or reducing penalties, or providing protection, for accomplices who testify to illegal activities;

(4) Subject to the fundamental principles of each country's domestic law, reverse the burden of proof (use the concept of reverse onus) in respect of the confiscation of alleged proceeds of crime;