



Australian Government

Australian Government Response to the Parliamentary Joint Committee on Law Enforcement Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements

February 2013

**GOVERNMENT RESPONSE TO THE PARLIAMENTARY JOINT COMMITTEE ON LAW
ENFORCEMENT'S INQUIRY INTO COMMONWEALTH UNEXPLAINED WEALTH LEGISLATION
AND ARRANGEMENTS**

In February 2010, the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) introduced provisions for the making of unexplained wealth orders into the *Proceeds of Crime Act 2002* (Cth) (the POCA).

These laws are designed to target senior organised crime figures who often derive large profits from illegal activity but distance themselves from the commission of actual offences.

On 19 March 2012, the Parliamentary Joint Committee on Law Enforcement (PJC-LE) handed down the final report on its Inquiry into Commonwealth unexplained wealth legislation and arrangements.

The Government would like to thank the PJC-LE for its comprehensive examination of the Commonwealth's unexplained wealth laws.

The Government has accepted 15 of the Committee's 18 Recommendations (either wholly or in part).

Organised crime is motivated by the huge profits that can be made through illegal activity. The Government is committed to ensuring that it has strong laws to target the criminal economy; not only removing the proceeds of crime, but also preventing its reinvestment into further criminal activity.

Recommendation 1:

That the objects of the POCA be amended so as to include a statement about undermining the profitability of criminal enterprise, including but not limited to serious and organised crime. Such a statement should be drafted in such a way to avoid causing unnecessary complication of unexplained wealth proceedings.

Noted

While the Government agrees that one of the key purposes of unexplained wealth laws is to undermine the business model of serious and organised crime by eliminating criminal profits, the Government considers that this is sufficiently captured by the objects currently listed in section 5 of the POCA.

In particular, paragraphs 5(a), (ba) and (d) provide that the purposes of the POCA include:

- depriving persons of the proceeds of offence and other benefits, the instruments of offences and benefits derived from offences
- depriving persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences, and
- preventing the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities.

The Government considers that it is important that the objectives of the POCA are framed broadly in a way that does not restrict the circumstances in which the laws may need to be used in the future.

Recommendation 2:

That the Commonwealth Government explore the possibility of amending legislation to allow the Australian Crime Commission (ACC) Board to issue a determination on unexplained wealth, so as to enable the ACC to use its coercive powers to provide evidence in support of unexplained wealth proceedings.

Agree

The Government will consider the feasibility of allowing the ACC to use its coercive powers in support of unexplained wealth proceedings, as well as whether there would be a need for the ACC Board to issue a new determination for this purpose.

Recommendation 3:

That the *Australian Crime Commission Act 2002* (ACC Act) and the POCA be amended as necessary to make clear that the ACC's examination material can be used as evidence in proceedings under the POCA.

Agree in principle

The ACC Act already enables the use of ACC examination material in proceedings under the POCA. Section 12 of the ACC Act allows for evidence that would be admissible in confiscation proceedings to be shared with a relevant law enforcement agency. Subsection 30(5) of the ACC Act also provides that an answer, document or thing given in an ACC examination can be used in confiscation proceedings.

As such, the Government does not consider that it is necessary to amend the ACC Act or the POCA.

Recommendation 4:

That the POCA be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.

Noted

While it might be possible to legislate to allow a court to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings, where the ACC examiner had discretion as to whether to conduct an examination, such a change would raise complex issues, including judicial power issues.

The Government notes that the POCA already contains extensive examination provisions which allow for the examination of any person about the affairs of

- a) a suspect
- b) a person who has an interest (or claims an interest) in property, and
- c) the spouse or defacto partner of either of the above.

A significant number of examinations have previously been conducted under the POCA. There is no evidence to suggest that the POCA examination provisions are deficient or ineffective.

In light of the above, the Government does not intend to amend the POCA at this time.

That said, the Government agrees with the PJC-LE's observations that there are advantages in the expertise and knowledge of the ACC being able to be actively utilised during proceeds of crime investigations relating to serious and organised crime. The Attorney-General's Department will work with the ACC to further explore the option of ACC examiners becoming approved examiners under the POCA.

Recommendation 5:

That search warrant provisions of the POCA be amended so as to allow for the collection of evidence that is relevant to unexplained wealth provisions. The committee's preferred means of amending the provisions would be to amend:

- Subsection 228(1) to enable material that is relevant to an unexplained wealth proceeding to be seized during execution of a search warrant; and
- Subparagraph 228(1)(d)(iii) to remove the requirement that the evidential material relate to an indictable offence.

Agree

The Government has introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 containing amendments to ensure that material relevant to unexplained wealth proceedings can be seized when searching premises under a warrant.

Recommendation 6:

That the Criminal Assets Confiscation Taskforce be prescribed as a taskforce under the *Taxation Administration Act 1953* and associated regulations.

Agree

In December 2011, the Criminal Assets Confiscation Taskforce was prescribed as a Taskforce under the *Taxation Administration Regulations 1976* to allow the disclosure of taxation information to the Taskforce for law enforcement purposes.

Recommendation 7:

Amend the *Telecommunications (Interception and Access) Act 1979* so as to allow the Australian Taxation Office (ATO) to use information gained through telecommunications interception, in the course of joint investigations by taskforces prescribed under the *Taxation Administration Act 1953*, for the purpose of the protection of public finances.

Noted

The ability to use intercepted information for an agency's own purposes is currently limited to interception agencies (law enforcement and anti-corruption agencies) that are investigating prescribed offences (generally a serious offence or an offence punishable by imprisonment

for a period of at least 3 years). Section 67 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) only allows the ATO to deal with existing intercepted information in order to assist with investigations being conducted by these agencies. Currently, the ATO cannot subsequently use this intercepted information for its own investigations or tax assessments, and cannot request interception information for the ATO's own purposes.

While the Government agrees in principle that amending the information sharing provisions in the TIA Act will allow agencies to more fully cooperate, appropriate limitations on the use of existing intercept information will also need to be assessed. To enable appropriate consideration of this recommendation, the Attorney-General's Department has sought advice from the ATO on how the ATO proposes to use existing intercepted information in its taxation assessment taskforces, including the offences the ATO wishes to investigate using intercepted information. The Department will continue to liaise with the ATO on this issue. This issue has also been raised by the ATO in its submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into potential reforms of national security legislation, which is considering reforms to the Commonwealth's telecommunications interception regime, among other issues.

Recommendation 8:

That the POCA be amended so as to eliminate the requirement for authorised officers to meet an evidence threshold test for a preliminary unexplained wealth order where the evidence threshold test for a restraining order has already been met. Any amendment should recognise the need to be able to update an affidavit to reflect new evidence as appropriate.

Agree in principle

The Government will consider options for improving the process for seeking preliminary unexplained wealth orders to reduce duplication where relevant requirements have already been met at the restraining order stage.

Any amendments will ensure that any additional information that is uncovered after the affidavit for the restraining order has been sworn is still taken into account when the preliminary unexplained wealth order is sought.

Recommendation 9:

That provision be made for extending the time limit for serving notice of a preliminary unexplained wealth order to accommodate extraordinary circumstances.

Agree

The Government has introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 containing amendments to the POCA to enable a court to extend the time limit for serving notice of a preliminary unexplained wealth order where the court considers it appropriate to do so.

Extending the time limit for giving notice of an application for a preliminary unexplained wealth order will make the provisions more flexible in circumstances where it is not possible for notice to be given within seven days of an application being made. For example, this may cover situations where a suspect is attempting to avoid service of the notice or is temporarily

absent from the jurisdiction. A court will have the discretion to extend the time limit for serving notice, which will ensure that extensions are only granted in appropriate circumstances.

Recommendation 10:

That legal expense and legal aid provisions for unexplained wealth cases be harmonised with those for other POCA proceedings so as to prevent restrained assets being used to meet legal expenses.

Agree

The Government has introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill containing amendments to the POCA to prevent restrained assets being used to meet legal expenses.

The ability of a person to dispose of restrained property to meet their legal costs weakens the effectiveness of the unexplained wealth provisions by allowing the wealth suspected to have been unlawfully acquired to be used to contest proceedings. This may lead to fewer assets being available for confiscation if an unexplained wealth order is successful.

A person who is subject to a restraining order will continue to be entitled to representation by a legal aid commission.

Recommendation 11:

That the enforcement provisions for unexplained wealth orders include an ability to create and register a charge over property that has been restrained by the court to secure the payment of an unexplained wealth order.

Agree

The Government has introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 containing amendments to the POCA to enable a charge to be registered over restrained property to secure the payment of an unexplained wealth order. This amendment will improve the enforcement of unexplained wealth orders by ensuring that restrained property can be used to satisfy an unexplained wealth order if a person does not pay an unexplained wealth amount.

Recommendation 12:

That the court's discretion to make a restraining or preliminary unexplained wealth order under subsections 20A(1) and 179B(1) of the POCA be removed in cases where the amount of unexplained wealth is more than \$100 000, so that the court must make the order in cases over \$100 000.

Agree

The Government has introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 containing amendments to the POCA to remove a court's discretion to make a restraining or preliminary unexplained wealth order where the amount of unexplained wealth is suspected to be more than \$100 000. This will provide greater

certainty to parties litigating unexplained wealth matters and is consistent with the approach to other types of POCA orders.

Recommendation 13:

That the court's discretion to make an unexplained wealth order under subsection 179E(1) of the *Proceeds of Crime Act 2002* be removed where the amount of unexplained wealth is above \$100 000, so that the court must make the order in cases over \$100 000, and that the following additional statutory oversight arrangements be made:

- 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.

Agree in part

The Government will introduce amendments to the POCA to remove the court's discretion to make an unexplained wealth order where the amount of unexplained wealth is above \$100 000. This will provide greater certainty to parties litigating unexplained wealth matters and is consistent with the approach to other types of POCA orders.

The Government agrees that oversight of unexplained wealth powers is important. The Government will put measures in place to ensure that unexplained wealth investigations and litigation is appropriately reported by enhancing the PJC-LE's oversight of agencies' use of the unexplained wealth provisions, including by requiring the ACC, AFP and any other relevant federal agencies to report annually to the Committee on the number of unexplained wealth investigations and any proceedings that they have conducted. The PJC-LE will have the power to examine relevant agencies on these reports.

The Government does not propose requiring law enforcement agencies to report unexplained wealth investigations to the Integrity Commissioner or requiring the Ombudsman to review and report to Parliament on the use of unexplained wealth laws.

The Integrity Commissioner is already empowered to review any allegations of corrupt conduct by law enforcement agencies, including in relation to unexplained wealth. However, the Integrity Commissioner does not have a monitoring role in relation to law enforcement tools more generally. As such, requiring agencies to notify the Integrity Commissioner of unexplained wealth investigations would be a significant departure from the Integrity Commissioner's current role and of limited utility unless this information was specifically linked to corruption issues.

The Commonwealth Ombudsman can also already receive complaints about, or conduct investigations by his or her own motion into, the actions of AFP members or the policies, practices and procedures of the AFP in relation to unexplained wealth provisions. Consequently, it is not considered necessary for the Commonwealth Ombudsman to be required to report to Parliament on the use of unexplained wealth laws.

Unlike controlled operations and other types of covert investigation powers, unexplained wealth proceedings are heard and determined by a court. As such, unexplained wealth proceedings are able to be contested by an affected person. This ensures that there is independent judicial oversight of how unexplained wealth proceedings are conducted.

Recommendation 14:

That the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime.

Agree

The Government supports the development of a nationally consistent unexplained wealth regime. While there are a number of ways that nationally consistent unexplained wealth laws could be achieved, the Government considers that the most effective way is through a referral of powers.

The Attorney-General raised a possible referral of powers with her State and Territory counterparts at meetings of the Standing Council on Law and Justice on 13 April 2012 and 5 October 2012.

Recommendation 15:

That the Australian Government seek a referral of powers from the states and territories for the purpose of legislating for a national unexplained wealth scheme, where unexplained wealth provisions are not limited by having to prove a predicate offence.

Agree

The Attorney-General raised a possible referral of powers from the States with her State and Territory counterparts at meetings of the Standing Council on Law and Justice on 13 April 2012 and 5 October 2012.

The Government notes that the precise scope of any national unexplained wealth scheme would need to be considered carefully having regard to constitutional limitations.

Recommendation 16:

That the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth.

Agree

The Government will explore the potential to establish international agreements on unexplained wealth with suitable partner countries, as part of its broader agenda to improve international cooperation in relation to criminal asset confiscation matters.

Recommendation 17:

That the Commonwealth Government create and commit to a plan for the development of national unexplained wealth scheme including the following elements:

- identification and implementation of short-term measures including cooperation with states with existing unexplained wealth legislation;
- negotiation with States and Territories to create or improve supporting mechanisms such as equitable sharing programs and mutual assistance agreements;
- development of agreed guiding principles around unexplained wealth; and
- a final objective of achieving a referral of powers from States and Territories to enable the Commonwealth to legislate for an effective and nationally consistent unexplained wealth scheme.

Agree

The Government supports the development of nationally consistent laws for dealing with criminal organisations and the confiscation of criminal assets, to ensure that no jurisdiction becomes a safe haven for serious and organised crime.

As noted above, the Attorney-General raised a possible referral of powers from the States with her State and Territory counterparts at meetings of the Standing Council on Law and Justice on 13 April 2012 and 5 October 2012.

The Government will work with the States and Territories on measures to improve cooperation on the confiscation of criminal assets, including the implementation of equitable sharing programs and mutual assistance provisions in all jurisdictions, as well as the development of guiding principles around unexplained wealth.

This will build on measures agreed to by the then Standing Committee of Attorneys-General in December 2010 to enhance cooperation in targeting the proceeds of organised criminal groups.

Recommendation 18:

That the Commonwealth Attorney-General immediately place the issue of harmonisation of unexplained wealth laws on the agenda of the Standing Committee on Law and Justice.

Agree

As noted above, the Attorney-General placed unexplained wealth on the agenda for the Standing Council on Law and Justice's meetings on 13 April 2012 and 5 October 2012.