

CHAPTER 2

Overview of Commonwealth unexplained wealth laws

What are unexplained wealth laws?

2.1 Unexplained wealth laws represent a relatively new form of criminal assets confiscation, whereby, in essence, individuals who cannot account for the wealth they hold may be liable for forfeiture of those assets to the state. In this sense, unexplained wealth laws go further than most established proceeds of crime laws.

Proceeds of crime

2.2 Modern proceeds of crime provisions generally take two forms: conviction based laws and civil confiscation laws.¹ The former requires a criminal conviction before assets may be confiscated, while the latter uses the courts' civil jurisdiction to confiscate criminal assets. Civil forfeiture laws are generally based on a civil, rather than criminal standard of proof, as is the situation under the Commonwealth's *Proceeds of Crime Act 2002* (PoCA), 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.²

2.3 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.

Unexplained wealth provisions

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

2.5 A number of jurisdictions 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.

2.6 For example, the legislation in Western Australia (WA) and the Northern Territory (NT) allows the respective Directors of Public Prosecutions to apply to the courts for a confiscation order if a person has 'unexplained wealth'.

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

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

2.7 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.

2.8 This means that in those jurisdictions, in principle, 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.

Undermining serious and organised crime networks

2.9 The value of unexplained wealth provisions lays in their potential ability to significantly undermine the business model of serious and organised crime. The incentive behind organised crime is to make money. By removing unexplained wealth from serious and organised criminal networks and associated individuals, this incentive is removed.

2.10 In the course of its previous inquiry into legislative arrangements to outlaw serious and organised crime groups, the committee collected evidence from a wide range of law enforcement agencies around Australia and overseas. The committee repeatedly heard that one of the most effective ways of preventing organised crime is by 'following the money trail'. As the Australian Crime Commission (ACC) informed the committee:

...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.³

As the ACC noted, while serious and organised criminal groups continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities.⁴

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

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

2.11 The committee has heard that while organised crime figures may be prepared to spend time in prison, taking their assets was what really constituted harm to them. For this reason, Mr Raffaele Grassi, from the Italian National Police, highlighted the importance of 'going after the money' and depriving criminal groups of their assets.⁵

2.12 This same point was reiterated by the Australian Federal Police (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.⁶

2.13 The AFP informed the committee that unexplained wealth provisions are particularly valuable as they 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. In this way, unexplained wealth provisions are a particularly effective tool for law enforcement agencies to use to target the profits of serious and organised crime.⁷ As Commander McCartney pointed out, unexplained wealth provisions worked alongside other measures, filling a specific gap in existing legislation:

We have said right from the start that we never viewed unexplained wealth as the panacea for targeting organised crime. But we view the concept as a very important tool in the toolbox. Where in dealing with serious and organised criminals we have the situation where we have sufficient evidence to prosecute and sufficient evidence to utilise the existing proceeds of crime legislation in relation to restraint and forfeiture, our focus is on utilising that. But where we have a situation where there is a significant serious and organised crime target who has disassociated himself from the criminal activity, that is where the vulnerability is. If we know he is involved in criminal activity and we know the assets he has

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

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

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

obtained are from criminal activity, without the opportunity for robust unexplained wealth legislation that is a real vulnerability for us.⁸

2.14 The Committee heard from Western Australia Police that unexplained wealth provisions can be a significant deterrent to serious and organised criminals, who would otherwise feel protected from the activities of law enforcement agencies. In addition, Assistant Commissioner Nick Anticich informed the committee:

I...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.⁹

2.15 Furthermore, unexplained wealth provisions that do not require proof of a predicate offence enable law enforcement agencies to take an assets-based rather than individual-based approach to confiscation. For example, the Northern Territory Police noted the capacity under some unexplained wealth laws to pursue assets to 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.¹⁰

2.16 The committee considers that unexplained wealth provisions of this type can therefore play a significant role in countering the techniques organised crime figures use to insulate themselves from more traditional law enforcement techniques, which are generally aimed at securing a prosecution. Mr Tony Negus, Commissioner of the AFP, commented on the growing importance of the prevention work undertaken by law enforcement agencies, stating:

Across law enforcement over the last decade or more we have realised that the arrest of offenders is one very strong deterrent, but it is only one and there needs to be a range of other treatments put in place. Prevention is very

8 Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, p. 2.

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

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

much at the forefront of the thinking of most law enforcement agencies around the world these days. If we can devise processes and systems that help to destabilise or undermine the creation of wealth across those criminal syndicates then prevention will be one of the outcomes that we will be looking for. There have to be different ways of attacking the root of serious and organised crime. These are very resourceful and sometimes very clever people who will devise methods to avoid detection and apprehension. We need to be very creative in the way that we look at dealing with the wider syndicates.¹¹

2.17 It is the committee's opinion that unexplained wealth provisions represent an important new way to protect the community from the malevolent effects of serious and organised crime, through disruption of its underlying business model. In cases where it is not possible to catch the ringleaders of organised crime through traditional techniques, unexplained wealth provisions offer a way to bring these figures down, to the benefit of the wider community.

Intrusive nature of unexplained wealth laws

2.18 Unexplained wealth laws are controversial because they reverse the longstanding legal tradition of the presumption of innocence. Under most unexplained wealth regimes, once certain tests or thresholds have been satisfied, it is the respondent who must prove that wealth has been legitimately acquired.

2.19 Unexplained wealth laws are more intrusive than proceeds of crime laws because, in their purest form, 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. Though the reversal of the onus of proof is a key element of effective unexplained wealth legislation, it is this very element that raises concern.

2.20 The Law Council of Australia, using the example of the Western Australia legislation, was concerned about unexplained wealth provisions undermining principles of common law, submitting:

The Law Council continues to be concerned that by reversing the onus of proof and enacting a presumption against the respondent, the unexplained wealth provisions remove the safeguards that have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. As a result a person may be liable to have their lawfully acquired property confiscated as unexplained wealth in WA, even though there is no evidence that the property in question has been associated with, used for or derived from criminal activity.¹²

11 Mr Tony Negus, Commissioner, AFP, *Committee Hansard*, 7 March 2012, p. 2.

12 Law Council of Australia, *Submission 3 (Supplementary Submission)*, p. 16.

2.21 Furthermore, the Law Council submitted that unexplained wealth models of the type used in WA and the NT infringe the right to silence, have the potential for arbitrary application, create prosecutorial difficulties, and are unnecessary in light of other confiscation mechanisms.¹³

2.22 Western Australia Police had a rather different view of the same legislation, reporting difficulty in succeeding in unexplained wealth cases, despite the reverse onus of proof, 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.¹⁴

2.23 The committee also notes that, in practice, it is difficult to conceive of scenarios by which an individual had significant amounts of unexplained wealth with no way of accounting for their legitimate accumulation, if that was in fact what had occurred. The committee sought evidence on whether there was any way that an individual could legitimately 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.¹⁵ 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.¹⁶

2.24 The committee is therefore of the view that, with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.

13 Law Council of Australia, *Submission 3 (Supplementary Submission)*, p. 4.

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

15 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.

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

The growth of unexplained wealth laws here and abroad

Domestic laws

2.25 Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws in 2000. The Northern Territory enacted a similar scheme in 2003. Since the introduction of Commonwealth unexplained wealth legislation in 2010, similar laws have been enacted in Queensland, South Australia and New South Wales.¹⁷

2.26 State and territory models are discussed further in Chapter 4, including details of each scheme.

International approaches

2.27 In September 2011, the Chair of the committee, Mr Chris Hayes MP, visited a range of law enforcement, policy and legislative organizations in the United Kingdom, 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.

2.28 This supplemented earlier research done by the committee during a study tour undertaken as part of the committee's inquiry into legislative arrangements to outlaw serious and organised crime groups.

2.29 The following section examines three models considered by the committee.

The Irish approach

2.30 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*.

2.31 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.¹⁸

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

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

2.32 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.¹⁹

2.33 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 €13 000.²⁰

2.34 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.²¹ An interim order is not necessary, but acts to restrain the property until the Interlocutory Order is made.

2.35 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.²²

2.36 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.²³ The 2005 amendment allowed for, under certain circumstances, the disposal of assets within the seven year period.²⁴

2.37 The CAB 2009 Annual Report notes that, in that year, almost €1.5 million was paid over to the Minister of Finance.²⁵

2.38 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.²⁶

19 Criminal Assets Bureau, An Garda Síochána website, accessed 11 November 2011 at <http://www.garda.ie/Controller.aspx?Page=28#>

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

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

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

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

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

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

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

2.39 In 2009, CAB raised assessments on 21 individuals and three corporate entities. In total, over €5 million in tax and interest was collected in 2009.²⁷ In addition, CAB was also able to terminate a number of social welfare payments that had been claimed inappropriately.²⁸

The UK approach

2.40 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.²⁹

2.41 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.

2.42 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:
 - (a) conviction in the current proceedings of at least four offences from which they have benefited; or
 - (b) conviction in the current proceedings of one offence from which they have benefited in addition to at least two other convictions on at least two separate occasions in the past 6 years.

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

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

29 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

2.43 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.

2.44 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.

2.45 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.³⁰

The Italian approach

2.46 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.

2.47 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.³¹

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

2.49 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

30 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

31 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

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.

The Commonwealth Scheme

2.50 The Commonwealth's unexplained wealth provisions were enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. The bill amended the *Proceeds of Crime Act 2002* (PoCA) to include provisions relating to the confiscation of unexplained wealth. Part 2-6 of the PoCA sets out how unexplained wealth orders work.

Parliamentary debate and amendment

2.51 During the passage of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, the proposed unexplained wealth provisions underwent significant amendment.

2.52 The bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee, which 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.³²

2.53 Some of these recommendations were the basis of amendments made in the Senate, alongside other amendments³³ 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.

2.54 The committee notes that the effect of these amendments was to change the nature of the unexplained wealth provisions from that recommended by this committee in its previous reports. Chapter 3 contains analysis of some of the issues raised as a result of these amendments, with proposals for reform.

Current Commonwealth unexplained wealth legislative provisions

2.55 Unexplained wealth provisions form one of five types of asset confiscation proceedings provided for in PoCA. 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;
- literary proceeds orders which require a person to pay money to the Commonwealth based on literary proceeds of crime; and
- unexplained wealth orders requiring payment of unexplained wealth amounts.³⁴

2.56 Unexplained wealth orders are made under Part 2-6 of the PoCA. Using these 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

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

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

34 *Proceeds of Crime Act 2002*, s. 7.

to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.³⁵

2.57 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.³⁶

Unexplained wealth restraining orders

2.58 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.³⁷

2.59 Restraining orders in relation to unexplained wealth are governed by section 20A of PoCA. They are made upon application by the Commonwealth Director of Public Prosecutions, can be made *ex parte*, 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.³⁸

Preliminary unexplained wealth orders

2.60 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

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

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

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

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

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.³⁹

2.61 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.⁴⁰

Unexplained wealth orders

2.62 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.

2.63 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.

2.64 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.

2.65 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.⁴¹

Current oversight arrangements

2.66 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, CDPP or any other federal agency of authority that is the recipient of any material disclosed under Part 2-6 to appear before it to give evidence.⁴²

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

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

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

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

The Criminal Assets Confiscation Taskforce and other administrative arrangements

2.67 In order to provide administrative support for the investigation and litigation of proceeds of crime matters, including unexplained wealth, the Commonwealth formed the Criminal Assets Confiscation Taskforce (CACT) in March 2011.

2.68 The CACT arrangements were 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.⁴³

2.69 On establishment, the CACT comprised 68 AFP members, including its Financial Investigations Teams, five tax officers from the Australian Taxation Office (ATO) and six officers of the ACC.⁴⁴

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

In particular, the AFP examined the Serious and Organised Crime Agency in the United Kingdom, and the Irish Criminal Assets Bureau. 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.⁴⁵

2.71 The AFP informed the committee that the taskforce, in addition to its in-house investigative capabilities, was able to select from a range of confiscation methods under PoCA, including unexplained wealth provisions:

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.⁴⁶

2.72 The AFP indicated that prior to the establishment of the CACT, it had 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. The AFP

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

44 AFP, ACC, CDPP and ATO, 'ACC, AFP-led taskforce targeting organised crime's deep pockets', joint agency media release, 10 March 2011.

45 AFP, *Submission 9*, p. 9.

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

informed the committee that this experience provided a foundation to develop capabilities to undertake conviction and non-conviction based asset confiscation action under the new taskforce arrangements.⁴⁷

2.73 The CACT is yet to bring any proceedings under PoCA seeking an unexplained wealth order, however, although the AFP is currently investigating potential two cases. Indeed, as discussed below, no unexplained wealth proceedings have been brought before the courts as yet.⁴⁸

Responsibility for litigation

2.74 Under the original CACT arrangements, the CDPP remained responsible for litigating PoCA cases on behalf of the taskforce. With the passage of the Crime Legislation Amendment Bill (No. 2) 2011 in late 2011, however, this responsibility has passed to the taskforce itself. It may now litigate 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.⁴⁹

Limited use of existing provisions

2.75 Despite unexplained wealth provisions having existed for two years, they are yet to be used. As the AFP observed:

The unexplained wealth provisions...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.⁵⁰

2.76 While the Law Council suggested that the lack of proceedings indicated it was too early to review the unexplained wealth provisions,⁵¹ the Attorney-General's Department (AGD) 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.⁵²

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

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

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

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

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

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

2.77 By way of comparison, the unexplained wealth provisions in WA have also had limited use, with only six declarations leading to confiscation made between July 2004 and June 2011.⁵³

2.78 The committee is concerned that the Commonwealth unexplained provisions have not been used since their introduction. In the next chapter, the committee examines issues with the existing provisions that were raised during the course of this inquiry.

53 Western Australia Director of Public Prosecutions, *Annual Report: 2010-11*, p. 30.

