

CHAPTER 4

The need for national harmonisation

Current domestic schemes and the Commonwealth compared

4.1 Unexplained wealth or similar laws currently exist in six Australian jurisdictions: Western Australia, the Northern Territory, New South Wales, Queensland, South Australia and the Commonwealth. Of these, the Western Australian and Northern Territory schemes are the longest running, having been established in 2000 and 2003 respectively. Other schemes are more recent, having been established in 2009 or later.¹

4.2 There are significant differences between the models, with these differences broadly relating to the following aspects:

- whether a link to an offence is required (through either a reasonable suspicion that an offence has occurred or that a person has obtained the proceeds of an offence);
- whether a court has a discretion to make an order;
- whether unexplained wealth provisions form part of a State's asset confiscation legislation or are in stand-alone legislation; and
- time limits on unexplained wealth orders.²

Western Australia and Northern Territory approaches

4.3 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 *Criminal Property Forfeiture Act 2002* (NT).

4.4 The laws both provide that the relevant DPP may apply to the court for an unexplained wealth declaration against a person. Under neither law is there a requirement to show reasonable grounds to suspect that a person committed an offence.³

4.5 Judicial discretion is limited, in that the court must make a declaration that a respondent has unexplained wealth 'if it is more likely than not that the total value of

1 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 1.

2 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 5.

3 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), pp 1–2.

the person's wealth is greater than the value of the person's lawfully acquired wealth'.⁴ Both Acts also reverse the onus of proof.

4.6 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.⁵ 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';⁶
- both Acts set out how law enforcement and prosecutors can obtain information about criminal assets;⁷
- provisions to ensure that property remains available for forfeiture;⁸ and
- people have a right to object to their property being restrained within 28 days of being served with an order restraining the property.⁹ The Acts also allow orders to be made against 'declared drug traffickers'.

4.7 Though the WA and NT laws are broadly similar, there are a few differences between them, including court consideration of cooperation, the process by which a person is declared a drug trafficker and have their assets confiscated, and Constitutional requirements arising from the Northern Territory's status as a territory.

South Australia

4.8 The South Australian *Serious and Organised Crime (Unexplained Wealth) Act 2009* was proclaimed on 29 August 2010.¹⁰ It provides for a scheme broadly similar to that of WA and NT. South Australia is unique, in that unexplained wealth legislation sits independently of other proceeds of crime legislation.

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

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

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

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

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

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

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

4.9 Under the South Australian legislation, the DPP may authorise the Crown Solicitor to apply to the court for an unexplained wealth order, if the DPP reasonably suspects that a person has wealth that has not been lawfully acquired. Restraining orders may be made on application by the Commissioner of Police. As with the WA and NT, there is no requirement to show reasonable grounds to suspect that a person committed an offence.

4.10 The court has final discretion as to whether an order is made, and may make an unexplained wealth order if it finds that any components of a person's wealth specified in the application have been unlawfully acquired. The onus of proof is reversed in favour of the Crown ('each component of a person's wealth specified in the application will be presumed not to have been lawfully acquired unless the person proves otherwise').

4.11 There are limitations on the investigative powers under the South Australian act, which can only be used:

- in relation to investigating or restraining the wealth of a person who has been convicted of a serious offence (or declared liable to supervision in relation to a charge of a serious offence) or is (or has been) the subject of a restraining order; or
- where the DPP reasonably suspects the person: engages or has engaged in serious criminal activity (ie the commission of serious offences); associates/has regularly associated with such persons; is or has been a member of a declared organisation; or
- has acquired property or a benefit as a gift from a person who fits these categories.¹¹

4.12 A further safeguard was included, in that the court may also exclude portions of a person's wealth from an application if satisfied that it is not reasonably possible for a person to prove that that part of their wealth was lawfully acquired.¹²

New South Wales

4.13 The New South Wales *Criminal Assets Recovery Act 1990* was amended to include unexplained wealth provisions in September 2010.¹³ The legislation is administered by the New South Wales Crime Commission.

11 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), pp 2–3.

12 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 3.

13 *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*. Assented to 10 September 2010.

4.14 Under the New South Wales provisions, the New South Wales Crime Commission may apply to the Supreme Court for an unexplained wealth order against a person. It may apply for a restraining order on the basis that an authorised officer has a reasonable suspicion that a person has engaged in serious crime related activities, a person has acquired serious crime derived property, or that property is serious crime derived property or illegally acquired property.¹⁴

4.15 The court must make an unexplained wealth order if there is a reasonable suspicion that the person has, at any time, engaged in a serious crime related activity or acquired serious crime derived property from another person's serious crime-related activity.

4.16 The New South Wales unexplained wealth provisions require a finding that a person has engaged in, or acquired property from, serious crime-related activity, but need not be based on a reasonable suspicion as to the commission of a particular offence.

4.17 While the Commissioner must satisfy the court that a person has engaged in, or acquired property from, serious crime-related activity, the onus is on the person to prove that his or her current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity. Though the provisions require a finding that a person has engaged in, or acquired property from, serious crime-related activity, this need not be based on a reasonable suspicion as to the commission of a particular offence.

4.18 The New South Wales provisions contain an additional safeguard, in that the court may refuse to make an unexplained wealth order if it finds that it is not in the public interest to do so, or may reduce the amount that would otherwise be payable.

Queensland

4.19 While Queensland does not have unexplained wealth laws along the lines of the states above, it does have laws that allow for the making of 'proceeds assessment orders', which require a person to pay to the State the value of proceeds derived from the person's illegal activity.

4.20 Under the *Criminal Proceeds Confiscation Act 2002*, the State DPP may apply to the Supreme Court for a proceeds assessment order against a person requiring a person to pay to the State the value of proceeds derived from the person's illegal activity that took place in the 6 years prior to the application for the order being made. The State must bring evidence to establish the value of property (or expenditure) over the previous 6 years.

14 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 3.

4.21 The court must make an order if satisfied that it is more probable than not that a person engaged in serious crime related activity within the last 6 years, but this does not require a finding that any particular offence has been committed.

4.22 The Queensland provisions, while not generally regarded as unexplained wealth laws, instead create a statutory presumption that the unexplained portion of a person's wealth is derived from illegal activity, subject to a finding that the person engaged in 'serious crime-related activity' and evidence being led that they have unexplained wealth. The onus then falls upon the respondent to rebut that presumption by satisfying the court that the increase in wealth was not related to illegal activity.

4.23 As with New South Wales, the court may refuse to make a proceeds assessment order if it finds that it is not in the public interest to make the order.¹⁵

Issues arising from inconsistency between jurisdictions

4.24 Even between those states that have established unexplained wealth laws, there are significant differences in the operation of the provisions. Furthermore, several states have not sought to introduce unexplained wealth laws, giving rise to a potentially uneven application of law enforcement efforts across Australia.

Targeting the weakest link

4.25 Inconsistency in Commonwealth, state and territory approaches to address serious and organised crime risks introducing vulnerability to the national organised crime strategy. As Mr Tony Negus, Commissioner of the AFP and Chair of the ACC Board observed:

It is agreed across the board of the Australian Crime Commission that criminals will exploit any weaknesses that they can identify, and that includes weaknesses in legislation across jurisdictions or the weakest link, if you like, in the way that legislative processes have been constructed.¹⁶

4.26 One concern arising from the significant differences between jurisdictions is the risk that serious and organised criminal networks may relocate some or all of their activities to states and territories with a more favourable legislative framework. For example, the committee has obtained some evidence that crime groups in the Northern Territory have relocated across the border to avoid the provisions in that jurisdiction. In evidence to the committee in an earlier inquiry, Commander Colleen Gwynne, NT Police, explained:

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

15 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 4.

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

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.¹⁷

4.27 The committee is also understands that a similar phenomenon has occurred in Ireland, where the activities of the Criminal Asset Bureau has led to the relocation of organised crime activity to foreign jurisdictions.

4.28 In an earlier inquiry by the committee, it heard from Detective Superintendent Hollowood from Victoria Police, who 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.¹⁸ Some of these problems could potentially be overcome if there was nationally consistent unexplained wealth legislation, a point discussed further below.

Enhancing a preventative culture

4.29 As described in Chapter 2, unexplained wealth legislation represents a new approach to law enforcement, adding to a developing the law enforcement crime prevention culture. Heads of law enforcement agencies that attended the committee's roundtable on unexplained wealth in March 2012 agreed that the successful use of unexplained wealth provisions required a shift in thinking from the traditional focus on prosecution.

4.30 For example, Victoria Police, which currently does not have access to state unexplained wealth provisions, noted that their introduction may require cultural development in some areas of the organisation. As Mr Graham Ashton, Deputy Commissioner, Victoria Police noted:

We have work to do around shaping our culture within the detective cohort towards tackling unexplained wealth if we get those powers or access to another scheme in Victoria. The current mindset is very much around investigating a particular criminal offence, getting it before the courts and then presenting a worthwhile prosecution...We will have to do some education on thinking about the unexplained wealth rather than the criminal

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

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

offence; but, as the Northern Territory has already shown, it is possible to do that.¹⁹

4.31 Commissioner Mal Hyde observed that this shift in thinking was already occurring in the context of adopting a proactive and preventative approach to law enforcement, stating:

I am not sure that the cultural shift is such an impediment as it might have been, say, 15 years ago, when police were primarily reactive rather than proactive. There has been a big shift in policing culture to adopt a problem-solving, preventative model. That has occurred. I think it is more about organisational design because the reality is the work to use this form of legislation will be highly specialised. It is how you design your legislation to get the outcomes you seek. Most of us around the country are prepared to change our organisations to make sure they are in line with the strategies and tactics that we employ to get outcomes for the community. So I would be more confident that the legislation could be effectively used. It is really more about how you design the focus of your resources to get the outcomes you want.²⁰

4.32 Commissioner Hyde further noted that law enforcement agencies may need to invest further in specialists such as forensic accountants and people with highly sophisticated information and communication technology skills. In practice, however, he noted that law enforcement agencies were used to adjusting in this manner to counter evolving threats such as cyber investigations or drug importation and distribution methodologies.²¹

4.33 The committee observes that, in the development of a national approach to unexplained wealth, the Commonwealth may be in a position to facilitate or provide education and training to support a nationally consistent approach to unexplained wealth.

The case for harmonisation of Commonwealth and state and territory laws

4.34 There was widespread support for harmonising unexplained wealth laws across Australia, though views diverged on which model should be adopted. Harmonisation of the laws could potentially achieve two ends: a coordinated national approach to serious and organised crime using unexplained wealth laws and enabling the Commonwealth to enact a more effective regime that did not require a predicate offence to be proven.

4.35 The Australian Federal Police argued forcefully for the creation of a national unexplained wealth scheme, submitting:

19 Deputy Commissioner Graham Ashton, Victoria Police, *Committee Hansard*, 7 March 2012, pp 5–6.

20 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 6.

21 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 6.

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.²²

4.36 The Police Federation of Australia likewise saw the establishment of a national scheme as means to facilitate cooperation and an effective regime, submitting:

The Police Federation of Australia...calls for a system to be created with a view to implement a truly national scheme, one which facilitates the cooperation of the legislature and law enforcement agencies of the Commonwealth and all States and Territories. A national scheme should provide the law enforcement agencies across Australia with an effective mechanism for information sharing and collaborative investigations and taskforces, such that there is no jurisdiction within which organised crime can hide. A national scheme is also the solution to the constitutional problem; utilising the State and Territory legislative powers to remove the requirement that unexplained wealth be linked to a predicate offence completely.²³

4.37 The Australian Crime Commission also expressed strong support for national consistency, noting 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.²⁴

4.38 South Australia Police noted that the effectiveness of the committee's inquiry may be enhanced through acknowledging and potentially addressing the existing inconsistencies of the current State and Commonwealth unexplained wealth legislation and arrangements, noting in particular the opportunity for cooperation, coordination and information sharing including the targeting of assets. South Australia

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

23 Police Federation of Australia, *Submission 2 (Supplementary Submission)*, p. 2.

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

Police submitted that the ultimate aim of these enhancements would be the development of a robust national approach.²⁵

4.39 Victoria Police informed the committee that the call for a consistent national approach to criminal asset confiscation has been an ongoing issue for many years, citing the Premier's Conference on Drugs in 1985, where it was proposed that uniform legislation throughout Australia be introduced to confiscate the proceeds of drug dealing.²⁶ Victoria Police highlighted the challenges of harmonisation, 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.²⁷

4.40 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.²⁸

4.41 Civil Liberties Australia also argued for harmonisation in principle, although it did not lend support to the removal of predicate offence requirements, stating:

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.²⁹

25 South Australia Police, *Submission 7*, p. 1–2.

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

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

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

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

4.42 The Law Council of Australia encouraged national consistency in principle, while the Queensland Law Society noted the strategic and resource benefits of harmonisation. Nevertheless, both organisations reiterated opposition to any unexplained wealth regimes involving a reverse onus of proof.³⁰

4.43 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.³¹ As detailed in Chapter 2, however, while several states and territories have unexplained wealth laws, these laws operate in different ways.

4.44 The committee agrees that the national response to serious and organised crime would benefit from consistent laws on unexplained wealth, and recommends that the Commonwealth Government take a lead role in the development of such laws.

Recommendation 14

4.45 The committee recommends that the Commonwealth Government take the lead in developing a nationally consistent unexplained wealth regime.

The way forward

4.46 In considering methods for the harmonisation of Commonwealth and state and territory laws, the committee examined three main options:

- creation of model laws for adoption by each jurisdiction;
- guiding principles; and
- a referral of power from states and territories to the Commonwealth.

4.47 In evaluating each method, the committee was mindful of the need to enable the Commonwealth to enact an effective unexplained wealth regime that was not forced to rely on proving the commission of a federal offence or state offence with a federal aspect.

Model legislation

4.48 Model laws are one possible method for achieving nationally consistent unexplained wealth laws and AGD informed the committee that they have been used extensively in a number of other areas.³²

30 Mr Tim Game SC, Law Council, *Committee Hansard*, 10 February 2012, p. 41; Queensland Law Society, *Submission 12*, p. 2.

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

32 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

4.49 However, there are drawbacks to the use of model legislation. One disadvantage of model laws is that they are susceptible to inconsistent implementation and can tend to drift apart over time. As Mr Iain Anderson, AGD, explained:

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.³³

4.50 AGD also informed the committee that the development of model laws would not remove the need for Commonwealth laws to require a link to an offence within Commonwealth power. Consequently, for the Commonwealth to adopt model laws, the model laws would need to have some connection to an offence with a link to a Commonwealth head of power, or the Commonwealth would need to include such a link when implementing them.³⁴

4.51 The AFP described a typical model legislation process, noting that some work had previously been done with the states and territories over proceeds of crime legislation:

[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 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.³⁵

4.52 The Attorney-General and Minister for Justice of New South Wales, the Hon Greg Smith, SC, was of the view that sufficient harmonisation could be achieved through a model legislation process. The Attorney-General referred to similar

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

34 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

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

processes around outlaw motorcycle gang legislation, stating that a similar harmony could be achieved in relation to unexplained wealth.³⁶

4.53 The committee notes that many national schemes have been created through model laws. In practice, model laws may be easier to negotiate, relative to obtaining a referral of powers. However, the committee is aware of criticism of the use of model legislation, such as in the establishment of the National Classification Scheme, under which significant differences remain between states and territories. While model laws may serve to improve upon the status quo, the committee notes that the Commonwealth would remain limited in its ability to enact an effective unexplained wealth regime.

Guiding principles

4.54 The Attorney-General's Department informed the committee that another option for achieving nationally consistent unexplained wealth laws could be the development of guiding principles in relation to unexplained wealth.³⁷

4.55 The development of guiding principles would be a simpler option than a referral of powers or the development of model laws, as it would not require all jurisdictions to agree on specific legislative text for referral or implementation. However, guiding principles may result in inconsistencies between jurisdictions in the detail of legislation, undermining the desired outcome of national consistency.³⁸

4.56 Furthermore, the committee notes that the development of guiding principles would not remove the need for Commonwealth laws to require a link to an offence within Commonwealth power. As a result, the use of guiding principles would not enable the establishment of the type of national unexplained wealth laws envisioned by the committee, although they may serve to inform negotiations in the pursuit of a stronger, national scheme.

Referral of powers

4.57 As described in Chapter 3 of this report, the Australian Constitution includes a means by which states can refer power to the Commonwealth to enable them to legislate in a particular area. In this case, a referral of power would involve the states and territories formally agreeing to allow the Commonwealth to legislate in relation to unexplained wealth.

36 The Hon Greg Smith, SC, Attorney-General and Minister for Justice, New South Wales Government, *Committee Hansard*, 7 March 2012, p. 11.

37 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

38 AGD, answer to second question on notice, 16 December 2011 (received 1 February 2012), p. 8.

4.58 AGD advised the committee that there are a number of different types of referrals:

- subject referrals, whereby a general subject matter is referred to the Commonwealth, without any specification as to how the Commonwealth is to deal with it;
- text referrals, whereby the Commonwealth is given the necessary power to enact the text of a particular Bill; and
- hybrid referrals, generally referring to a situation where a lead state refers power to the Commonwealth to create relevant legislation, and other states subsequently adopt the Commonwealth law and simultaneously give an amendment referral to the Commonwealth.

4.59 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.³⁹

4.60 The ACC indicated it might be possible to look at referral of powers, or possibly the expansion of the taxation or money-laundering legislation.⁴⁰ 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.⁴¹

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

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

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

4.61 The committee is of the view that a referral of power from states and territories would provide the most effective framework for establishing effective and consistent national unexplained wealth provisions.

4.62 Specifically, a referral of powers provides the best mechanism for surmounting Constitutional issues discussed in Chapter 3, whereby a head of power is not available to support unexplained wealth provisions that do not rely on proving that an a person of interest has committed an federal offence or state offence with a federal aspect.

4.63 The difficulties in securing a referral of powers should not be underestimated. The committee understands that some states and territories may fear any amendment of existing effective unexplained wealth regimes. For example, the NSW Attorney-General informed the committee that:

I do not think referral is the best way to deal with it. I am not bragging but I think our state is doing well in this area and it would be very difficult to convince us that we should refer the power when it is working well. But, just as with the outlaw bikie legislation and other laws to do with organised crime, I think there has to be as much consistency as we can possibly get together.⁴²

4.64 Similarly, achieving an agreement on the appropriate balance between law enforcement outcomes and the protection of civil rights across jurisdictions may not be easy. Despite these difficulties, the committee recognises that an effective national approach to unexplained wealth would be best achieved through a referral of powers to the Commonwealth, facilitating the development of a truly national approach.

4.65 The committee therefore recommends that the Australian Government seek a referral of powers from states and territories for the purpose of establishing a national unexplained wealth provisions that do not require a link to a predicate offence. In practice, the committee notes that the simplest course of action may be to seek a 'hybrid' referral, commencing with one state or territory. As Mr Iain Anderson, AGD, explained:

The hybrid referral is the more common way of dealing with references at the moment. One possible approach would be to have a reference of power to adopt the Northern Territory model. Then the other states and territories would join in...I indicated last time that I gave evidence to the committee that no reference of powers is straightforward. There are a number of matters of detail to work through...

On the other hand, we have a number of very successful models of references as well. The detail is not a reason not to go down that path. We believe that a reference of powers is strongly desirable. It is a fairly

42 The Hon Greg Smith, SC, Attorney-General and Minister for Justice, New South Wales Government, *Committee Hansard*, 7 March 2012, p. 11.

common model to have one jurisdiction on side at the time that the Commonwealth legislates, for example, under the hybrid model.⁴³

4.66 The committee notes that a subject referral would be the most effective form of referral, but political realities may necessitate other forms, such as a text or hybrid referral.

Recommendation 15

4.67 The committee recommends 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.

Using state legislation

4.68 In addition to a referral 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.⁴⁴

4.69 The committee notes that this could be a useful mechanism to adopt prior to the achievement of a national scheme or if the Commonwealth failed to obtain a referral of powers and instead led the establishment of model legislation.

Related issues

Equitable sharing program

4.70 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

43 Mr Iain Anderson, AGD, *Committee Hansard*, 7 March 2012, p. 3.

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

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.⁴⁵

4.71 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. Mr Tony Negus, Commissioner of the AFP, explained that the sharing of proceeds was also an issue commonly addressed in the creation of joint taskforces, stating:

The law enforcement methodology of this century is very much one of joint partnerships. At the very beginning of any of these investigations we sign a joint agency agreement in which the issues of proceeds and asset confiscation are discussed and agreed to. The appropriate sharing of those assets between Commonwealth and state regimes is also settled and agreed.⁴⁶

4.72 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.⁴⁷ 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.⁴⁸

4.73 The committee encourages equitable sharing programs to be put in place where possible, to make joint work on proceeds of crime matters easier. The development of effective sharing programs could be further negotiated in the course of establishing a national unexplained wealth regime.

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

46 Commissioner Tony Negus, AFP, *Committee Hansard*, 7 March 2012, p. 3.

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

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

Mutual assistance reforms

4.74 'Mutual assistance' describes the process by which jurisdictions provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and some criminal asset confiscation matters.⁴⁹

4.75 For example, 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.⁵⁰

4.76 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.⁵¹

4.77 Similar issues may arise in the mutual assistance agreements between Australian jurisdictions. As such agreements are based on the use of traditional conviction-based or civil offence proceedings, it is possible that information could not be shared and orders could not be enforced in the case of unexplained wealth proceedings.

4.78 Negotiations over the creation of a national unexplained wealth scheme may therefore require analysis and reform of domestic law enforcement cooperation measures.

4.79 In the case of international impediments, the AFP proposed 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.⁵²

4.80 This was a view echoed by Commissioner Mal Hyde, South Australia Police, who informed the committee that a substantial amount of criminal assets were remitted overseas stating:

...[T]he committee would be well aware of money laundering and the scale on which that occurs. So any scheme should be looking at how that can be recouped or frozen and retrieved. That, of course, is a very complex environment in which to operate. I would suggest—and this is without any detailed information—that, from a state or territory point of view, that

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

50 AFP, *Submission 9*, p. 10–11.

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

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

would be a big limitation for the capacity of the states and territories to trace the funds in that way, and it may well be that the Commonwealth would need to have some legislation because of the international treaties that would be involved and that states and territories might be able to tap into. Eventually, whatever happens on the type of scheme we get, if the states and territories still have their own schemes in place then it may well be that they can link up with a Commonwealth arrangement which is going to be able to reach out and retrieve funds that have gone offshore.⁵³

4.81 AGD informed the committee that it is considering legislative options of this nature, noting that:

- Australia is at the forefront of implementing and developing unexplained wealth laws, which are relatively new internationally. As a result, some countries may initially be reluctant to provide information relating to unexplained wealth proceedings, particularly in situations where there is no link to an offence.
- AGD is also working to increase awareness of unexplained wealth laws in its law and justice capacity building programs in the region.
- AGD is open to consideration of other options for improving international cooperation.⁵⁴

4.82 The committee 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.⁵⁵

4.83 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.'⁵⁶

4.84 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).⁵⁷

53 Commissioner Mal Hyde, South Australia Police, *Committee Hansard*, 7 March 2012, p. 7.

54 AGD, answer to first question on notice, 16 December 2011 (received 1 February 2012), p. 11.

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

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

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

4.85 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.⁵⁸

4.86 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.⁵⁹

4.87 The committee recommends that the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth, noting that crime is an increasingly globalised phenomenon requiring close international cooperation.

Recommendation 16

4.88 The committee recommends that the Commonwealth Government actively participate in efforts to establish international agreements relating to unexplained wealth.

Developing a plan for a national scheme

4.89 The committee notes that the harmonisation of unexplained wealth laws across Australia will require the investment of political effort by all concerned. The committee encourages the Commonwealth Government to develop a plan for undertaking the negotiations, drawing on the various observations and recommendations in this chapter.

4.90 The creation of a plan will provide substance to efforts to create a national scheme, promoting engagement of the states and territories and providing accountability in relation to progress. The discussion within this chapter provides a starting point for such a plan.

4.91 The committee considers that immediate steps could be taken to better coordinate unexplained wealth actions with those states that have enacted relevant legislation. For example, taskforces including state law enforcement agencies could be formed, perhaps based on the Criminal Assets Confiscation Taskforce, to secure cooperation using existing Commonwealth, state and territory laws.

4.92 Negotiations over mutual assistance and equitable sharing programs could also improve the situation prior to reform of Commonwealth unexplained wealth provisions themselves.

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

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

4.93 The development of national guiding principles on unexplained wealth could serve as a good starting point in achieving nationally consistent unexplained wealth laws.

4.94 As the committee has recommended, the goal for any plan to harmonise unexplained wealth laws should be to achieve a referral of power to the Commonwealth so that it can legislate for a truly effective, nationally consistent unexplained wealth scheme.

4.95 Though achieving this result may take time and effort, the committee encourages the government to commence this undertaking as soon as possible. Unexplained wealth laws represent a new form of policing with the potential to seriously undermine the incentive to become involved in serious and organised crime. For this reason, the committee wholeheartedly endorses the creation of an effective national scheme.

Recommendation 17

4.96 The committee recommends 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.**

4.97 The committee recognises that the Standing Committee on Law and Justice (formerly the Standing Committee of Attorneys-General) will play a key part in these developments. The committee therefore recommends 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, in order to commence discussion of this subject in a timely fashion.

Recommendation 18

4.98 The committee recommends 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.

Conclusion

4.99 Unexplained wealth laws are a relatively new way to protect the community from the debilitating effects of serious and organised crime, through disruption of its underlying business model. Effective unexplained wealth provisions have the potential to fill a gap in traditional law enforcement models. In cases where it is not possible to catch the ringleaders of organised crime through traditional techniques, unexplained wealth provisions offer a way to remove the incentive to participate in criminal activity, to the benefit of the wider community.

4.100 Nationally consistent unexplained wealth provisions would be a powerful new tool supporting the national response to serious and organised crime. The committee encourages all Australian jurisdictions to work together to deliver the tools needed to ensure that crime does not pay.

Mr Chris Hayes MP
Chair

