



AFP
AUSTRALIAN FEDERAL POLICE

**Parliamentary Joint Committee
on Law Enforcement**

Inquiry into unexplained wealth

**Submission by the
Australian Federal Police**

October 2011

Executive summary

The Australian Federal Police (AFP) strongly supports the concept of unexplained wealth provisions, which provide law enforcement with an additional method to investigate and confiscate the profits of crime generated by organised crime networks.

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

iii. Unexplained wealth legislation only commenced at the Commonwealth level in February 2010, and has yet to be tested by the courts. The AFP has, however, been actively considering the application of unexplained wealth provisions and has identified technical improvements that could be made to the regime. The AFP submission proposes a range of law reform proposals that could be pursued immediately.

iv. More importantly, however, this inquiry provides an opportunity to address a fundamental gap in the operation of the Commonwealth unexplained wealth regime. Because of constitutional limitations, unexplained wealth provisions require a jurisdictional nexus to criminal activity within the scope of the Commonwealth's legislative power: if the unexplained wealth is not linked to an offence that is an offence within Commonwealth power, the unexplained wealth proceeding will fail.

v. In the absence of nationally consistent unexplained wealth laws, the AFP is concerned that the gap in Commonwealth legislation could be exploited by criminals, potentially creating safe havens for the accumulation of unexplained wealth. If removing the financial incentive to commit crime is to remain a national objective the AFP recommends that Australian governments take more concerted action to ensure that all jurisdictions have complementary unexplained wealth laws in place that operate to provide national coverage and adequately address the gap in the Commonwealth regime.

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

vii. This inquiry is also an opportunity for the Committee to consider broader challenges for law enforcement in combating those who profit from serious and organised crime. In particular, the AFP is concerned about emerging trends in relation to money laundering with the professionalisation of money laundering activities. The AFP recommends that a watching brief be maintained to ensure that recent reforms to money laundering legislation remain effective against these emerging trends.

Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement (PJC LE) inquiry into unexplained wealth legislation and arrangements.

2. The *Proceeds of Crime Act 2002* (PoCA) provides a scheme to trace, restrain and confiscate the proceeds of crime at the Commonwealth level. It can be used to effectively confiscate the money and property derived from Commonwealth, foreign and some State criminal activity.

3. The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (the SOC Act) amended PoCA by introducing a regime for unexplained wealth at the Commonwealth level. Unexplained wealth provisions are just one of the tools law enforcement use to target the profits of serious and organised crime. It is important that unexplained wealth provisions are considered in the broader context of the full suite of criminal asset confiscation measures provided for in PoCA.

4. All proceedings under PoCA are civil proceedings and the standard of proof is the civil standard (balance of probabilities). There are, however, five streams of PoCA action.

- *Conviction based restraint and confiscation*: Restraining orders may be made when a person has been, or will be, charged with a Commonwealth offence. However, restraint is not a precondition to the making of final orders following conviction. Final orders may include pecuniary penalty orders and forfeiture of non-restrained property. Automatic forfeiture applies in respect of restrained property upon conviction for a serious offence.
- *Non-conviction person-directed restraint and confiscation*: Restraining orders may be made when a person is suspected of committing certain serious offences. Final orders may be made where the court is satisfied that the person committed a relevant offence (even though there may have been no conviction for that offence).
- *Non-conviction asset-directed restraint and confiscation*: Restraining orders may be made over property suspected of being the proceeds of certain offences. Final orders may be made where either the court is satisfied that the property is proceeds of a relevant offence, or no claim is made in respect to the property.
- *Literary proceeds*: Literary proceeds orders may be made where the court is satisfied that: the person committed a relevant offence (even though there may have been no conviction for that offence); and the person has derived benefits through the commercial exploitation of his or her notoriety resulting from the commission of the offence.
- *Unexplained wealth orders*: Unexplained wealth provisions enable the restraint and forfeiture of unlawful wealth on the basis that the total wealth of an individual exceeds their lawfully acquired wealth, specifically:

- An *unexplained wealth restraining order* may be made where the court is satisfied that an authorised officer has reasonable grounds to suspect that: the person's total wealth exceeds the value of their lawfully acquired wealth; and the person committed a specified offence and/or the whole or part of their wealth was derived from a specific offence.
- A *preliminary unexplained wealth order* may be made where the court is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of their lawfully acquired wealth. The person subject to the order must attend court and prove that his or her wealth was lawfully derived, or was not derived from a Commonwealth offence, a foreign indictable offence or State offence with a federal aspect.
- If the court is not satisfied of the matters outlined above, the court may make a *final unexplained wealth order* which requires the person to pay, to the Commonwealth, the difference between their total wealth and their legitimate wealth.

5. The AFP strongly supports the concept of unexplained wealth provisions. Unexplained wealth provisions provide law enforcement with an additional method to investigate and confiscate the profits of crime generated by organised crime networks.

6. One of the challenges for law enforcement is how to effectively target persons who derive an income from criminal activity, but because of where they sit in a criminal enterprise and their lack of proximity to the offences committed, cannot be pursued through criminal prosecution or traditional proceeds of crime action. Unexplained wealth provisions enable law enforcement to better investigate those individuals who distance themselves from the commission of criminal activity, but benefit from it.

7. Under the current arrangements, PoCA cases (including unexplained wealth action) are investigated and litigated by separate agencies. Subject to the passage of relevant amendments, which are currently before the Parliament, these arrangements will change. It is anticipated that from January 2012, the AFP-led Criminal Assets Confiscation Taskforce will become responsible for litigating all PoCA actions relevant to investigations undertaken by the Taskforce, and all non-conviction based PoCA matters (including unexplained wealth matters) referred by other agencies.

8. The AFP has been the primary Commonwealth investigative agency under PoCA and has undertaken the majority of investigations for cases litigated to date. As part of its proceeds of crime operations in 2010-11, the AFP restrained \$41.1 million in assets, while \$3.7 million in assets were forfeited. Pecuniary penalty orders to the value of \$17.1 million were also made. This experience provides the AFP with a significant foundation to develop capabilities to undertake conviction and non-conviction based asset confiscation action under the new Taskforce arrangements.

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

Unexplained wealth legislation

9. The unexplained wealth provisions inserted by the SOC Act commenced on 19 February 2010. To date, no unexplained wealth matters have been tested in the courts. It remains to be seen how the legislation will be interpreted by the judiciary. It will take some time and case law to determine whether or not the unexplained wealth provisions operate as intended. The application of the unexplained wealth provisions has been under active consideration by the AFP. The AFP currently has two unexplained wealth investigations on foot (but cannot, for operational reasons, comment on those cases).

10. 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.

11. While the AFP has limited casework to inform full commentary on the effectiveness of unexplained wealth legislation, the AFP has identified potential issues with the anticipated operation of certain unexplained wealth provisions. Several proposals for immediate law reform to enhance the technical operation of unexplained wealth legislation are identified throughout this submission, under paragraph (f) of the terms of reference.

Constitutional limitations – the need for a national response

12. An assessment of the effectiveness of Commonwealth unexplained wealth legislation, needs to take into account the inherent constitutional limitations of the regime. Because of constitutional requirements, Commonwealth unexplained wealth provisions include a jurisdictional nexus to criminal activity within the scope of the Commonwealth's legislative power.

13. The constitutional limitations operate in two ways. Firstly, depending on the type of unexplained wealth order that is sought, there must be a link between the person and a criminal offence, or a link between the wealth and a criminal offence. Secondly, the criminal offence must be a Commonwealth offence, foreign indictable offence or State offence with a federal aspect (which includes all Territory offences). The jurisdictional nexus requirements create two key challenges for unexplained wealth cases.

14. The first challenge is that the need to demonstrate a link between the person/wealth and a crime may effectively impose an onus of having to make out a predicate offence (that is, the crime from which money was originally derived)

before unexplained wealth action can be taken. This could be particularly problematic where there is a disconnect between the illicit wealth and the criminal activity from which that wealth has been derived. This is often the case in money laundering offences, in which the facilitators involved may have no knowledge or involvement in the predicate offence (such as drug trafficking).

15. The second challenge is that the need to demonstrate a link between the person/wealth and a crime within the Commonwealth's legislative power means that wealth derived from State offences that do not have a federal aspect (such as murder, theft of property etc) will not be captured by the Commonwealth scheme.

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

17. 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.

18. All jurisdictions agreed in 2009 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.¹ However, currently only New South Wales, Western Australia, South Australia and the Northern Territory have unexplained wealth laws, and these laws operate in different ways.²

19. In the absence of nationally consistent unexplained wealth laws, the AFP is concerned that the gap in Commonwealth legislation could be exploited by criminals, potentially creating safe havens for the accumulation of unexplained wealth. If removing the financial incentive to commit crime is to remain a national objective the AFP recommends that Australian governments take more concerted action to ensure that all jurisdictions have complementary unexplained wealth laws in place that operate to provide national coverage and adequately address the gap in the Commonwealth regime.

¹ These agreements were made at the April and August 2009 meetings of the Standing Committee of Attorneys-General.

² For example, under the Western Australian and South Australian regime, there is no need to establish a link between the person/wealth and criminal activity. Rather, the court needs to be satisfied that the person has wealth that has not been lawfully acquired. However, under the New South Wales unexplained wealth regime, a connection between the person/wealth and criminal activity is required.

20. The AFP does not propose the development and adoption of model laws for unexplained wealth. Rather, the AFP considers that an appropriate Ministerial Council (such as the Standing Council on Law and Justice) could develop a set of guiding principles for unexplained wealth laws that could be implemented by all jurisdictions.

Associated administrative arrangements

Criminal Assets Confiscation Taskforce

21. In August 2009, the Parliamentary Joint Committee on the Australian Crime Commission (PJC ACC) tabled the report of its inquiry into the legislative arrangements to outlaw serious and organised crime groups. The PJC ACC considered the investigative and prosecutorial arrangements for confiscation of criminal assets. Following a review of domestic and international models, the PJC ACC recommended that the Government examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency.

22. During the 2010 Federal election campaign, the Government committed to establishing a multi-agency asset confiscation taskforce to boost the identification of assets that should be seized, and strength the pursuit of wealth collected by criminals at the expense of the community.

23. An interim Criminal Assets Confiscation Taskforce, led by the AFP, commenced operations in January 2011.³ The interim Taskforce brings key Commonwealth agencies together in a collaborative arrangement, which ensures that the skills, expertise and knowledge, as well as the legislative mandate of each agency, are used to their full potential.

24. The interim Taskforce draws on the existing resources of the AFP, the Australian Crime Commission (ACC), and the Australian Taxation Office (ATO), and is supported by the Commonwealth Director of Public Prosecutions (CDPP) which litigates matters. The interim Taskforce comprises 68 AFP members, six ACC officers and five ATO officers. Additional support (not co-located with the Taskforce) is provided by the ATO's Serious Non-Compliance Teams. Regional Taskforce Teams are operational in Sydney, Melbourne, Brisbane, Perth and Canberra.

25. The permanent Taskforce arrangements will commence following the passage of the Crimes Legislation Amendment Bill (No.2), which will enable the AFP to conduct proceeds of crime litigation (including unexplained wealth action) under PoCA. The Bill was passed by the House of Representatives on 24 May 2011, and was introduced in the Senate on 14 June 2011. The Bill was referred to the Senate Legal and Constitutional Affairs Committee (the Senate Committee) for inquiry. The Senate Committee tabled its report on 23 August 2011. If passed through both Houses of Parliament, the earliest possible commencement date for the permanent Taskforce would be January 2012.

³ Prior to the establishment of the interim Taskforce, AFP operations to support criminal assets confiscation were conducted through the specialised Asset Forfeiture Teams located in Sydney, Melbourne Brisbane, Perth and Adelaide.

26. The amendments made by the Bill reflect the renewed approach to coordinating law enforcement efforts to combat serious and organised crime by attacking the financial base of criminals that is being implemented through the Taskforce. The Bill will amend PoCA and other relevant legislation to enable the Commissioner of the AFP to exercise the powers and functions relating to confiscation action under PoCA that are currently exercised only by the CDPP. This means that the Taskforce will become responsible for both investigating and litigating proceeds of crime matters.

27. Following passage of the Bill, and the Taskforce in operation, it is envisaged that the Taskforce will be responsible for litigating all proceeds of crime relevant to investigations undertaken by the Taskforce, and all non-conviction based proceeds of crime matters (including unexplained wealth matters) referred by other agencies.

28. The establishment of the Taskforce recognises the significant operational and administrative benefits that can be realised by consolidating proceeds of crime investigations and litigation within one agency. The objectives of the Taskforce are as follows.

- Disrupt and deter serious and organised crime in Australia by removing the proceeds and instruments of crime.
- Provide a coordinated and integrated approach to Commonwealth criminal asset confiscation.
- Maximise the effectiveness of confiscation efforts.
- Protect the public finances of Australia from criminal abuse of the tax system.

29. The Taskforce will use the following strategies to achieve its objectives.

- Employ a dynamic, innovative approach to criminal asset confiscation with intelligence, operations, legal, policy and other resources from participating agencies all working together.
- Utilise a proactive, intelligence-led approach to the identification of potential criminal asset confiscation matters, and respond and take restraint action early.
- Facilitate the most effective and appropriate enforcement strategy for each individual case. This could include:
 - criminal asset confiscation action;
 - application of taxation remedies by the ATO;
 - other Commonwealth processes (such as debt recovery action); and
 - asset recovery through State and Territory, or international law enforcement agencies.

The AFP anticipates that the new Taskforce arrangements will likely have a positive flow on effect on the pursuit of unexplained wealth.

(b) The likely effectiveness of proposed Commonwealth unexplained wealth legislation

30. The Crimes Legislation Amendment Bill (No.2) 2011 (CLAB No.2), which facilitates the operation of the permanent Taskforce by allowing the AFP to litigate proceeds of crime (including unexplained wealth action), is described above at paragraphs 26 – 27.

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

31. The AFP is aware that other countries have legislative provisions that in some fashion target unexplained wealth. However, it is difficult to make a direct comparison with the Commonwealth unexplained wealth regime.

32. In developing the Taskforce model, the AFP considered overseas arrangements for criminal asset confiscation. In particular, the AFP examined the Serious and Organised Crime Agency (SOCA) in the United Kingdom, and the Irish Criminal Assets Bureau (CAB). While the approach of SOCA, CAB and the Taskforce differ, they all recognise the merit in pursuing non-conviction based action to target the profits of crime.

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

International treaties and conventions

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

34. The *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* encourages parties to adopt legislative and other measures to enable the confiscation of instruments and proceeds of crime. The concepts of instruments and proceeds are connected to the commission, or intended commission, of an offence (that is, conviction based action).

35. The *United Nations Convention against Corruption* creates obligations to prevent and criminalise corruption and money laundering, as well as establishing a framework for international cooperation and asset recovery.

36. The *United Nations Convention against Transnational Organized Crime* also focuses on the prevention, investigation and prosecution of money laundering, corruption and obstruction of justice and the criminalising of participation in particular organised crime groups.

International arrangements

37. There are relevant international arrangements which assist in the pursuit of proceeds of crime more broadly and, to a lesser extent, address unexplained wealth matters.

38. Australia is a member of the Financial Action Task Force (FATF), an intergovernmental organisation founded in 1989 on the initiative of the G7. FATF recommendations include implementing relevant international conventions and enabling authorities to confiscate the proceeds of money laundering or predicate offences or instrumentalities used in the commission of these offences. FATF recommendations also promote non-conviction based forfeiture, and reverse onus of proof (that is, the subject must demonstrate the lawful origin of property in confiscation matters), which are consistent with Australia's unexplained wealth regime.

39. The AFP Commissioner Negus also co-chairs the Asia-Pacific Group on Money Laundering (the APG) which plays a significant role in representing the interests of the Asia-Pacific region at international anti-money laundering forums such as the FATF. The APG is particularly focused on money laundering and the identification of terrorist financing in the Asia-Pacific region and helps its members implement recommendations made by the FATF in relation to money laundering and terrorism financing.

40. The Interpol General Assembly has recognised that unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity and recommended that jurisdictions should consider reversing the burden of proof in respect of the confiscation of alleged proceeds of crime.⁴ Again this is consistent with Australia's current approach.

Mutual assistance

41. Mutual assistance is the process countries use to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions, and some criminal asset confiscation matters.

42. Whilst international cooperation is improving, assistance provided by foreign countries in asset tracing is inconsistent and a number of countries cannot enforce Australian forfeiture and pecuniary penalty orders. The AFP and other relevant Australian agencies are however actively involved in capacity building to engender greater cooperation in asset tracing.

43. 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).⁵

⁴ Resolution 17 at 66th session of The ICPO-Interpol General Assembly, meeting in New Delhi from 15th to 21st October 1997.

⁵ Currently, Australia is only able to register and enforce non-conviction based foreign orders for the five foreign countries specified under the regulations. The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (the Extradition and MA Bill), introduced in the House of Representatives on 5 July 2011, amends the MA Act to allow Australia to register and enforce foreign non-conviction based proceeds of crime orders from any country without the need for particular foreign countries to be prescribed by regulation.

Once registered, a foreign proceeds of crime order can be enforced as if it were an Australian proceeds of crime order.

44. The MA Act also contains a number of investigative tools that Australia can use to assist foreign countries in relation to proceeds of crime matters. These include notices to financial institutions, monitoring orders, search warrants and production orders.⁶

45. However, unexplained wealth investigations and proceedings (because they are non-conviction based and do not contain the requisite link to a criminal offence) fall outside the scope of the mutual assistance regime.

46. The inability to obtain evidence from foreign jurisdictions in relation to unexplained wealth proceedings presents particular difficulties for the AFP. The unexplained wealth provisions place an onus on individuals to provide an explanation for their wealth to demonstrate that it was not derived from a Commonwealth offence, foreign offence or State offence with a federal aspect. An individual may claim that their wealth was derived from legitimate overseas sources. If the AFP is unable to obtain overseas evidence in relation to the proceedings it can be difficult to refute such a claim. The AFP proposes amendments to the MA Act to address these issues – this is discussed further below under paragraph (f) of the terms of reference.

Police to police assistance

47. Police to police assistance is informal cooperation between police services in different countries. It allows police to share information and intelligence to assist each other in the performance of their duties. Police to police assistance however does not include providing information that must be obtained through the use of coercive powers, such as search warrants. Any information that a jurisdiction wishes to use as evidence must also be sought through the mutual assistance process which, as discussed above, cannot currently be used for unexplained wealth investigations.

Equitable sharing program

48. The *United Nations Convention Against Corruption* (to which Australia is a party) obliges parties to the Convention to share profits of crime where assistance in the recovery of those profits contributes to legal enforcement cooperation. Part 4-3 of PoCA provides for the making of payments to foreign countries under the 'equitable sharing program'. The equitable sharing program refers to arrangements under which the Commonwealth shares, with a foreign country, a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister's opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

49. 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.

⁶ The Extradition and MA Bill will streamline the authorisation process for proceeds of crime investigative tools to allow a more efficient response to mutual assistance requests.

(e) The interaction of Commonwealth, State and Territory legislation and law enforcement activity in relation to the targeting of criminal assets of serious and organised criminal networks

Interaction of Commonwealth, State and Territory legislation

50. The need for nationally consistent unexplained wealth laws in all jurisdictions is addressed above under paragraph (a) of the terms of reference.

Interaction of Commonwealth, State and Territory law enforcement activity

ANZPAA Protocol

51. In September 2010, the Australian New Zealand Policing Advisory Agency (ANZPAA) Board (all Australian Police Commissioners) endorsed the *Protocol on Multi-Jurisdictional Investigations for Serious Organised Crime*. The Protocol establishes a national framework to support the prioritisation and coordination of multi-jurisdictional investigations, targets and threats to combat serious organised crime. It is through this framework that Commonwealth, State and Territory agencies will determine, in relation to joint investigations, the approach to any criminal asset confiscation action. The Protocol consolidated existing collaborative arrangements into one single document. The AFP considers that this framework is effective in ensuring Commonwealth, State and Territory interaction on asset confiscation.

Equitable sharing program

52. 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. Some Australian jurisdictions, however, do not have reciprocal sharing provisions in their legislation and are currently unable to share proceeds that they recover. The AFP proposes some improvements to equitable sharing arrangements below under paragraph (f) of the terms of reference.

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

53. In addition to the need for nationally consistent unexplained wealth laws, the AFP proposes a number of reforms to PoCA and related legislation to enhance the operation of the Commonwealth unexplained wealth regime.

Requirement to meet threshold test twice

54. Unexplained wealth proceedings can either commence with an application for a restraining order (and then an application for a preliminary unexplained wealth order), or with an application for a preliminary unexplained wealth order.

55. Applications for unexplained wealth restraining orders and preliminary unexplained wealth orders must be accompanied by an affidavit made by an authorised officer. The affidavit for both applications must include certain matters. The court may then make a restraining order or preliminary unexplained wealth order if it is satisfied of the matters dealt with in the affidavit. In this way, the affidavit requirements form the basis for the threshold test which must be met before the court may make an order.

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

57. This means that where a restraining order is sought before an application for a preliminary unexplained wealth order is made, the Commonwealth will need to meet the same threshold test twice. As orders may be sought from different judges, the result may be that two different judges are required to be satisfied of the same threshold.

58. The AFP is concerned that this process could lead to a duplication of effort and an inefficient use of resources, particularly when the value of requiring the threshold to be considered at both stages of the process is unclear. The AFP therefore proposes that the process could be streamlined by amending the relevant provisions to provide that:

- where an unexplained wealth restraining order has been made (and the court is satisfied that the authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's lawfully acquired wealth);
- the affidavit for a preliminary unexplained wealth order does not have to address the same matter.

One way to achieve this would be to amend section 179B so that, where a restraining order has been made under section 20A, the requirements in paragraphs 179B(1)(b) and 179B(2)(b) do not apply.

59. This would mean that, where the AFP applies for an unexplained wealth restraining order and then applies for a preliminary unexplained wealth order, the threshold test would only have to be met once. This approach would be consistent with other non-conviction based forfeiture action under PoCA.⁷

⁷ The application for a restraining order under sections 18 or 19 must be accompanied by an affidavit of an authorised officer, stating certain matters that the officer suspects on reasonable grounds. The court can only make a restraining order under section 18 or 19 if the court is satisfied that the authorised officer holds the suspicions stated in the affidavit on reasonable grounds (ie the court can only make an order once the threshold test has been met). Forfeiture orders made under sections 47 or 49, which are linked to property restrained under sections 18 and 19 respectively, do not require the threshold test to be met again for a preliminary forfeiture order, before the court hears the forfeiture application.

Time limit for service

60. Currently, there is a seven day period in which the Commonwealth must give a person notice of a preliminary unexplained wealth order, and provide the person with a copy of the application and accompanying affidavit. In some situations, there may be difficulty or delays in locating a person to give notice to, or in giving notice to the person.

61. The AFP therefore proposes that the relevant provision in PoCA be amended to enable the court to extend the time limit for notice, on application of the Commonwealth, to accommodate extraordinary circumstances. One way to achieve this would be to amend subsection 179B(2) to provide for service within seven days, unless the court orders otherwise. Similar provisions which allow a court to effectively extend the time for service appear in a number of Court Acts and Rules, see for example rule 18.4 of the *Uniform Civil Procedure Rules* (NSW) and section 41 of the *Magistrates Court Act 1930* (ACT).

Legal expenses

62. The *Proceeds of Crime Act 1987* (PoCA 1987) permitted access to restrained property to meet legal expenses incurred in relation to proceedings under that Act. In 1999, the Australian Law Reform Commission report, *Confiscation that counts*, considered that this practice was incompatible with the principles underlying PoCA 1987, namely that property liable to forfeiture should be preserved for that purpose (and not dissipated through legal expenses).

63. When PoCA was introduced in 2002, it included provisions allowing certain expenses to be met from restrained property. These provisions specifically excluded legal expenses incurred in connection with PoCA or criminal proceedings. During debate of the SOC Act, the opposition moved an amendment which inserted provisions into PoCA allowing the court to order that property restrained as part of unexplained wealth proceedings be disposed or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses.

64. The stated purpose of the amendments was to ensure that persons subject to unexplained wealth proceedings could fund an 'appropriate and sufficient defence' against such proceedings. The opposition indicated that unexplained wealth proceedings differed from ordinary PoCA proceedings, as no specific crime needed to be alleged. This difference therefore justified a different policy approach to whether legal expenses could be met from restrained property.

65. During debate, the Government indicated that it was prepared to accept the opposition's amendments in the interests of securing passage of the SOC Act. In doing so, the Government indicated that it had reservations about allowing restrained assets to be used to pay for legal expenses. In particular, the Government was concerned that this had the potential to create loopholes in the unexplained wealth regime and that legal advisers have been known to assist their clients to launder the proceeds of crime.

66. The AFP's experience under PoCA 1987 was that the provisions allowing legal expenses to be paid for out of restrained property were exploited to deliberately frustrate the objectives of the scheme and dissipate property through protracted litigation.

67. The AFP is concerned that this will happen under the unexplained wealth provisions. The AFP is not convinced that provisions which require a costs assessor to certify that legal expenses have been properly incurred will act as a sufficient safeguard to prevent the inappropriate dissipation of assets.

68. The AFP therefore recommends that PoCA be amended so that legal expenses cannot be met from property restrained as part of unexplained wealth proceedings. This would ensure consistency with the existing PoCA regime, and ensure that property that has been unlawfully acquired cannot be dissipated and therefore frustrate the very objectives of the unexplained wealth scheme.

Information gathering powers

69. PoCA provides for a range of specific information gathering powers that can be used to support PoCA actions. Relevantly, under part 3-5 of PoCA, a magistrate can issue a warrant to search a premises, or persons in the vicinity of the premises, for 'tainted property' or 'evidential material'. Tainted property is defined as proceeds of certain indictable offences or an instrument of an indictable offence (such as vessels used to import narcotics or computers used to transmit child exploitation material). Evidential material means evidence relating to: property in respect of which PoCA action has or could be taken; benefits derived from the commission of certain offences; or literary proceeds.

70. PoCA search warrants are a valuable investigative tool to gather evidence to support PoCA proceedings, particularly where there is no current or parallel investigation of a criminal offence. However, the definition of evidential material does not appear to extend to evidence of unlawful activities from which a person has derived wealth. The AFP therefore proposes that the search warrant powers in Part 3-5 be amended to ensure evidence relevant to unexplained wealth proceedings can be obtained. This would provide the AFP with an additional investigative tool to gather information relevant to an unexplained wealth investigation.

Taxation information

71. Taxation information can be crucial to law enforcement investigations into persons suspected of profiting from organised criminal activity. Recent reforms have enhanced the arrangements for the sharing of taxation information with law enforcement agencies. In December 2010, the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010* amended the provisions in the *Taxation Administration Act 1953* governing disclosure of taxpayer information to law enforcement agencies. The amendments in conjunction with other Commonwealth organised crime related legislative reforms:

- removed limitations on the use of taxpayer information enabling use of this information for the prosecution of serious offences; and
- allow for the disclosure of taxpayer information to law enforcement agencies and courts for the investigation of unexplained wealth matters.

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

73. The AFP would support the Criminal Assets Confiscation Taskforce being prescribed as a taskforce under the *Taxation Administration Regulations 1976*. Prescribing the Taskforce would mean that the ATO could disclose taxpayer information for the broader purposes of the Taskforce, namely the better identification of assets that should be seized, and pursuing wealth collected by criminals at the expense of the community.

Mutual assistance reforms

74. As discussed above under paragraph (d) of the terms of reference, there are currently limitations on government to government assistance that can be provided in relation to unexplained wealth investigations and proceedings. The AFP proposes 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. This would allow the AFP to seek evidence from foreign jurisdictions to assist in determining claims that a person's wealth had been legitimately obtained from an overseas source.

Enforcement provisions

75. Division 4 of Part 2-6 of PoCA deals with the enforcement of unexplained wealth orders. The process for enforcing an unexplained wealth order is substantially similar to the process for enforcing pecuniary penalty orders under Division 4 of Part 2-4 of PoCA. However, Division 4 of Part 2-6 does not include any equivalent provisions to sections 142 and 143 which deal with the creation and registration of charges over property restrained to satisfy an unexplained wealth order.

76. This creates the potential for a situation in which, following the making of an unexplained wealth order, the Commonwealth cannot effectively enforce the order because its interests over property cannot be secured. Accordingly, the AFP proposes that provisions – similar to sections 142 and 143 – be inserted into Division 4 of Part 2-6 of PoCA. This would ensure that the Commonwealth could create and register a charge over property that has been restrained by the court to satisfy an unexplained wealth order.

Equitable sharing program

77. As discussed above under paragraph (e) of the terms of reference, the 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.

Issues for future consideration

78. The AFP has also identified issues with the unexplained wealth legislation that will require careful monitoring as cases are litigated. Depending on how these provisions are ultimately applied by the courts, it may be necessary to consider whether legislative amendments are required. The issues are simply flagged in this submission for future consideration as, without being tested in the courts, it is too early to tell whether law reform is required.

Undertaking as to damages

79. One of the opposition amendments to the SOC Act inserted provisions into PoCA requiring the Commonwealth to give an undertaking as to damages in all unexplained wealth proceedings, even where no property has been restrained. The stated purpose of the amendments was to safeguard against the Commonwealth bringing inappropriate unexplained wealth proceedings.

80. Undertakings as to damages are an important safeguard where property rights have been interfered with pending the outcome of proceedings, and already exist in relation to all other restraint proceedings under PoCA. The AFP supports the requirement for an undertaking as to damages as part of an application for an unexplained wealth restraining order.

81. However, applications for a preliminary unexplained wealth order do not affect property rights. A preliminary unexplained wealth order merely requires a person to attend court and answer questions about his or her wealth. Further, final unexplained wealth orders are designed to affect property rights by depriving a person of their illicit wealth. Any damages sustained as a result of this are an intended outcome of the order itself. Allowing an individual to recover damages suffered as a result of such an order would appear to defeat the purpose of the regime, namely depriving an individual of their illicit wealth.

82. It will be important to monitor how these provisions are ultimately applied by the courts. Once there is more experience with litigating unexplained wealth proceedings, it may be useful to consider whether undertakings as to damages are appropriate where property has not been restrained.

Indemnity costs

83. Another opposition amendment to the SOC Act inserted provisions into PoCA providing a statutory basis for indemnity costs to be awarded in relation to unexplained wealth proceedings. The stated purpose of the amendments was to enable the court to appropriately deal with 'fundamentally misconceived or abusive' applications for unexplained wealth orders.

84. The ability to award indemnity costs is part of a court's inherent jurisdiction in civil matters and does not require a statutory basis. Indemnity costs are generally awarded by the courts in exceptional circumstances such as: where proceedings are completely without substance (that is, fundamentally misconceived); where proceedings amount to an abuse of process; or where parties have acted unreasonably or with impropriety.

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

86. Again, it will be important to monitor how these provisions are ultimately applied by the courts. Once there is more experience with the litigating unexplained wealth proceedings, it may be useful to consider (as part of any future review of unexplained wealth laws) whether a statutory basis for indemnity costs without a test for the award of costs is appropriate, given the court's inherent jurisdiction to award costs in the kind of circumstances the provisions were intended to address.

Emerging trends in money laundering

87. This inquiry also an opportunity for the Committee to consider broader challenges for law enforcement in combating those who profit from serious and organised crime. In particular, the AFP is concerned about emerging trends in relation to money laundering.

88. Abuse of alternative remittance services and specialised money laundering syndicates are a significant threat in the serious and organised crime environment. Since October 2009, the AFP, working with its partner agencies, has seized over \$16 million in cash and arrested 12 persons on money laundering charges, linked to these kinds of activities.

89. An emerging trend in recent years is the prevalence of specialised money laundering syndicates. These syndicates launder money on behalf of organised crime groups, but have no involvement in, and in most cases have no knowledge of, the predicate crime (that is, a crime such as drug trafficking from which the money was originally derived). The more significant specialised money laundering syndicates are often controlled by overseas organisers.

90. Under the *Criminal Code Act 1995* (Cth) it is not necessary to obtain a conviction for the predicate offence to prosecute a money laundering offence. Practically however, there are difficulties in proving that the money being laundered is proceeds or an instrument of crime without having to adduce sufficient evidence to prove the commission of the predicate offences (which may have been committed by other persons, and of which the alleged money launderer has no knowledge). The AFP continues to refine its operational strategies to ensure those involved in money laundering do not escape conviction.

91. A further challenge for investigations and prosecutions is that money laundering is a transnational crime. The *Crimes Legislation Amendment (Serious and Organised Crime) Act (No.2) 2010* (the SOC No.2 Act) extended the geographical jurisdiction of money laundering offences in the *Criminal Code* (Cth). These amendments removed limitations on the scope of the offences to enable them to apply to the full extent of the Commonwealth's constitutional power in this area.

92. The AFP anticipates that these amendments should capture the activities of money laundering syndicates that are directed from overseas.

93. The AFP considers the abuse of alternative remittance services to be a significant threat in the serious and organised crime environment. Earlier this year, amendments were made to Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) by the Combating the Financing of People Smuggling Act 2011. The primary purpose of the amendments was to reduce the risk of money transfers by remittance dealers being used to fund serious crimes by introducing a more comprehensive regulatory regime and improved supervision for the remittance sector. The amendments introduced greater controls over the registration process, expansion of the enforcement options for dealing with non compliance and extension of regulation to businesses that operate as providers of remittance networks.

94. The AFP considers it important that a watching brief be maintained to ensure that both sets of reforms described above remain effective against emerging trends in money laundering typologies.