

Parliamentary Joint Committee on Law Enforcement inquiry into Commonwealth unexplained wealth legislation and arrangements

**Question on Notice 2**

*The discussion paper outlines the committee's intention to investigate the potential to harmonise Commonwealth, state and territory unexplained wealth provisions. To further this element of the inquiry, the committee would appreciate the Department's input on the following:*

- a. The current state and territory unexplained wealth (or like) provisions, highlighting key points of difference and the significance of specific gaps between jurisdictions;*
- b. The relative merits of current state and territory models; and*
- c. The advantages and disadvantages of harmonising unexplained wealth provisions across Australia through options including a referral of powers, model legislation or other mechanism.*

**a. Current State and Territory unexplained wealth provisions, key points of difference and the significance of specific gaps between jurisdictions**

Unexplained wealth legislation has been in force in Western Australia since 2000 and in the Northern Territory since 2003. Since 2009, unexplained wealth laws have been introduced by New South Wales, Queensland, South Australia and the Commonwealth.

**Western Australia – *Criminal Property Confiscation Act 2000***

- The Director of Public Prosecutions (DPP) may apply to the court for an unexplained wealth declaration against a person.
- An application for an unexplained wealth declaration may be made in conjunction with an application for a freezing order.
- There is no requirement to show reasonable grounds to suspect that a person committed an offence.
- The court **must** make a declaration that a respondent has unexplained wealth 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.

- The onus of proof is on the respondent ('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').

#### **Northern Territory – *Criminal Property Forfeiture Act***

- The DPP may apply to the Supreme Court for an unexplained wealth declaration against a person.
- An application for an unexplained wealth declaration may be made in conjunction with an application for a restraining order.
- There is no requirement to show reasonable grounds to suspect that a person committed an offence.
- The court **must** make a declaration that a person has unexplained wealth 'if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth'.
- The onus of proof is on the respondent ('any property, service, advantage or benefit that is a constituent of the person's wealth is presumed not to have been lawfully obtained unless the person can establish to the contrary').

#### **South Australia – *Serious and Organised Crime (Unexplained Wealth) Act 2009***

- 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.
- There is no requirement to show reasonable grounds to suspect that a person committed an offence.
- The court **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').

South Australian unexplained wealth legislation sits independently of other proceeds of crime legislation in that State.

Investigative powers under the Act 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.

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.

#### **New South Wales – *Criminal Assets Recovery Act 1990***

- The New South Wales Crime Commission may apply to the Supreme Court for an unexplained wealth order against a person.
- The Commission may also 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.
- 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.
- 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.
- The Commissioner must satisfy the court that a person has engaged in, or acquired property from, serious crime-related activity, but 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.

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 – *Criminal Proceeds Confiscation Act 2002***

Queensland does not have ‘traditional’ unexplained wealth laws, but has 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.

- 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 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.
- A proceeds assessment order requires the court to find that it is more probable than not that the person engaged in serious crime related activity within the last 6 years, but does not require a finding that any particular offence has been committed.
- The State must satisfy the court that it is more probable than not that a person engaged in serious crime related activity, and must also bring evidence to establish the value of property (or expenditure) over the previous 6 years.

Queensland’s provisions are not generally regarded as unexplained wealth laws akin to those discussed above. The Queensland provisions 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.

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.

### **b. The relative merits of current State and Territory models**

The Department understands that proceedings have only been commenced under the Western Australian and Northern Territory unexplained wealth provisions and that almost all of these proceedings have been settled (rather than going to a contested hearing). The Commonwealth, New South Wales and South Australian provisions are yet to be tested. As such, it is difficult to comment on how these models will operate in practice or how effective they will be.

The main differences between the models outlined above are:

- 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.

The advantages and disadvantages of these different key features have been canvassed in the submissions and evidence previously given to the Committee in relation to the Commonwealth provisions.

### **Removing the requirement to have a link to an offence**

#### *Positives*

Currently, only Western Australia and the Northern Territory have used their unexplained wealth laws. The provisions in these jurisdictions do not require a link to an offence and generally appear to be operating effectively. Law enforcement agencies have advised that the requirement to show a link to an offence is difficult and restricts the use of unexplained wealth laws.

#### *Negatives*

At a Commonwealth level, a connection to an offence with a link to a Commonwealth head of power is required at both restraining order and forfeiture order stage to ensure that the Commonwealth unexplained wealth provisions are constitutionally valid. Consequently, unless a referral of powers is made, any Commonwealth laws will need to have some link to an offence.

### **Giving the court discretion to make an order**

#### *Positives*

At present, the Commonwealth and South Australia are the only jurisdictions that give courts a discretion to make or not make an unexplained wealth order, although some jurisdictions allow for a court to refuse to make an order if it is not in the public interest to do so.

Giving the court this discretion ensures that a court can take into account the individual factors of each case, such as the person's culpability, difficulties that a person might have

had in substantiating the sources of their wealth, hardship that might be caused by making an order, the need to protect the public and the deterrence value in making an order.

#### *Negatives*

Providing for judicial discretions, particularly in deciding whether to make an order, makes it more difficult to predict what the likely results of proceedings will be (which may have associated implications in relation to costs orders). This can lead to inconsistent outcomes, especially where no guidance is given to judicial officers on how to exercise their discretion.

#### **Placing unexplained wealth provisions in stand-alone legislation**

The advantages and disadvantages of placing unexplained wealth provisions in stand-alone legislation are discussed in item 16 of the Department's response to the Committee's first Question on Notice.

#### **Placing time limits on unexplained wealth orders**

##### *Positives*

Queensland is the only State to have a time limit included for its unexplained wealth proceedings. Time limits can be useful in limiting the scope of a person's affairs that need to be considered when seeking an unexplained wealth order.

##### *Negatives*

Confining the time to which an application for an unexplained wealth order may relate has a number of disadvantages, including:

- a person will be able to retain any unexplained wealth that they have accumulated prior to the period to which the order relates
- it focuses on the time that wealth was accumulated, rather than whether that wealth was legitimately acquired
- it would require law enforcement agencies to build a comprehensive understanding of when each component of the person's wealth was acquired
- it could preclude unexplained wealth provisions being used against certain targets if there is a delay in detecting that they have unexplained wealth, and
- it will encourage those involved in organised crime to better conceal evidence of their wealth in an attempt to draw out the time that it takes to investigate an unexplained wealth matter (with the result that less of the person's wealth is captured).

The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) removed the six year time limitation on orders for non-conviction based restraining and forfeiture of proceeds of crime under Commonwealth legislation. This was in response to recommendations made by Mr Tom Sherman AO in 2006 in his *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002*.

**c. The advantages and disadvantages of harmonising unexplained wealth provisions across Australia through options including a referral of powers, model legislation or other mechanism.**

The submissions and evidence of the Australian Federal Police, Australian Crime Commission, South Australia Police and Victoria Police have expressed support for efforts to harmonise unexplained wealth laws nationally. A key benefit of harmonisation is that it would facilitate national operations in relation to unexplained wealth. It would also prevent particular jurisdictions from being seen as ‘soft targets’ by organised crime groups.

As the Committee has noted, harmonisation could be achieved through a referral of power, the development of model legislation, or other mechanisms, such as the development of guiding principles or key elements.

**Referral of power**

In broad terms, a referral of power would involve the States and Territories formally agreeing to allow the Commonwealth to legislate in relation to unexplained wealth. There are a number of different types of referrals:

- Subject referrals – a ‘subject’ referral is one in which a general subject matter is referred to the Commonwealth, without any specification as to how the Commonwealth is to deal with it.
- Text referrals – a ‘text’ referral is one in which the Commonwealth is given the necessary power to enact the text of a particular Bill. It is generally necessary for text referrals to make specific provision for amendments to the law in the future to ensure that laws remain flexible enough to deal with changing circumstances.
- Hybrid referrals – in addition to giving the Commonwealth power to make laws with respect to matters referred by one or more States, the Constitution also allows Commonwealth laws to be adopted by the States.

The form of a referral in relation to unexplained wealth would need to be developed in consultation with other jurisdictions. A referral of power is most effective when all States and Territories agree to the referral.

Referrals of power are the most effective way to implement a single, national law, as they result in consistent legislation applying throughout all referring jurisdictions and ensure that any future amendments also apply uniformly.

In the context of unexplained wealth laws, a referral of power would also have the benefit of removing the need for Commonwealth laws to require a link to an offence within Commonwealth power.

As noted in Iain Anderson's evidence to the Committee on 4 November 2011, it would also be possible for the Commonwealth to retract its legislation in this area and rely instead on State and Territory laws, provided that the Commonwealth was empowered to carry out and assist in operations in those jurisdictions under their laws.

### **Model laws**

Model laws are another possible method for achieving nationally consistent unexplained wealth laws and have been used extensively in a number of other areas.

One disadvantage of model laws is that they are susceptible to inconsistent implementation and can tend to drift apart over time.

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.

### **Guiding principles**

Other options for achieving nationally consistent unexplained wealth laws could include the development of guiding principles in relation to unexplained wealth.

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.

The development of guiding principles would not remove the need for Commonwealth laws to require a link to an offence within Commonwealth power.