Law Council
OF AUSTRALIA

17 August 2011

Mr Jon Bell
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: Le.committee@aph.gov.au

Dear Mr Bell

INQUIRY INTO COMMONWEALTH UNEXPLAINED WEALTH LEGISLATION AND ARRANGEMENT

The Parliamentary Joint Committee on Law Enforcement is currently conducting an Inquiry into the Commonwealth's unexplained wealth legislation and arrangements. The key terms of the reference for the Inquiry are:

- 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; and
- the likely effectiveness of proposed Commonwealth unexplained wealth legislation.

These are matters of great interest to the Law Council, which was an active participant in the relatively recent Senate Committee inquiry and parliamentary debate which shaped the current legislation.

However, as there have been no proceedings yet to test the legislation, the Law Council, is unable to comment on the first of these points.

The Law Council is aware of the comments recently made by the Australian Crime Commission (ACC) and Australian Federal Police (AFP) about the current unexplained wealth provisions at May Senate Estimates. Mr John Lawler, the CEO of the ACC, commented that:

> "*The Australian Crime Commission has been investigating matters in relation to unexplained wealth. The provisions are less than optimal, and it is fair to say that*

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the commission and, I understand, other partners are experiencing difficulties in giving practical effect to the provisions as they currently stand."[1]

Commissioner Tony Negus of the AFP offered the following comments in response to questions about the effectiveness of the current provisions:

> *"There have been some concerns. The original legislation as it was proposed was not delivered in the way that it was first put forward, and we understand the process around that. It has proved difficult for investigators, and I saw Mr Lawler's evidence from the Australian Crime Commission yesterday when he raised that. I think the words he used were 'less than optimal' as far as our ability to do this.*
>
> *What tends to happen is–and the condition had been written into the legislation–that we must demonstrate reasonable grounds to suspect the person has committed the Commonwealth or foreign offence, or state offence with a federal aspect or that that person has derived wealth from an offence of that kind. It is not far removed from the predicate offence provisions which already existed under the proceeds of crime legislation. We are looking at matters, and we have certainly had one matter on foot which we are looking at that may well fulfill that criteria. But when you have to tie the unexplained wealth provisions in their broader sense–and I think if you just take the title, for instance, it sets an expectation that people would be required to account for unexplained wealth–with reasonable grounds to suspect that the person has committed an offence, that makes it far more difficult for investigators.*
>
> ***…****we have certainly spoken about this at agency level, and we are looking again. Until this is tested in the courts, this becomes the difficult component of this. The interpretation of what reasonable grounds are to suspect that the person has committed an offence has not yet been established by the courts, so there are varying legal interpretations of what that may be. Until we actually run one of these matters through the courts, I think it will be difficult to provide that. But can I just take Mr Lawler's comments to say that it is less than optimal, and was not what we were hoping for in the context of looking at seizing assets from major organised criminals who place themselves one step removed from the action. It is very difficult to tie them to a criminal offence, even when they cannot explain where the wealth they have accumulated comes from."*[2]

When asked when the first Commonwealth unexplained wealth proceedings may occur, Commissioner Negus replied:

> ***"****It is very difficult to give you an estimate on that. Again, it is an ongoing matter and really the assessment will need to talk to the DPP and a range of others before we even push forward and look at that. But it is under investigation at the moment. "*[3]

As these comments reveal, the unexplained wealth provisions which were introduced into the *Proceeds of Crime Act (Cth)* in 2010 were not necessarily in the precise form sought by the law enforcement agencies. The Parliament was aware of the position of those

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[1] Legal and Constitutional Affairs Legislation Committee, Senate Estimates Hansard, 25 May 2011, p.70, available at http://www.aph.gov.au/hansard/senate/commttee/S13792.pdf

[2] Legal and Constitutional Affairs Legislation Committee, Senate Estimates Hansard, 26 May 2011, pp.26-27, available at http://www.aph.gov.au/hansard/senate/commttee/S13793.pdf.

[3] Ibid., p.27.

agencies on how the provisions should be framed in order to maximise their effectiveness. However, following lengthy debate, which included discussion about the need to balance law enforcement imperatives with safeguards and respect for individual privacy and rights, the Parliament ultimately enacted the current regime. That regime prescribed the threshold tests which must be met before preliminary or final orders can be sought and made.

It is assumed that the Committee does not intend to revisit these policy debates so soon after the legislation has been passed, and in the absence of proceedings to test the provisions and demonstrate their practical application, the Law Council suggests that it will be difficult to meaningfully advance the discussion about their effectiveness further at this stage.

With respect to the second term of reference – "the likely effectiveness of proposed Commonwealth unexplained wealth legislation" – the Law Council is unaware of any relevant, publically available, draft legislation, and is therefore, again, unable to provide comment or input.

Yours sincerely

Bill Grant
Secretary General