



CRIMES LEGISLATION (ORGANISED CRIME AND OTHER MEASURES) BILL

Submission of the Police Federation of Australia and the
Australian Federal Police Association to the Senate
Committee on Legal and Constitutional Affairs



31/01/2013

Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Madam Chair,

It is with pleasure that we make this submission on behalf of the Police Federation of Australia (PFA) and the Australian Federal Police Association (AFPA) to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill.

The PFA and the AFPA have an obligation to our members and the Australian people to ensure that the Commonwealth can effectively protect the public from criminal attack, especially by organised crime groups. Both organisations are committed to helping law enforcement agencies fight organised crime in Australia. To this end, we support any legislative action that will effectively tackle the problem driving motivation for large-scale organised crime: profit. Therefore, we would like to take this opportunity to again call for broader reforms to the unexplained wealth regime.

Over the past five years, the AFPA and the PFA have been active in presenting evidence before the Parliamentary Joint Committee on Law Enforcement and the Senate Legal and Constitutional Affairs Committee in support of legislation designed to fight organised crime including criminal organisation and association offences, reforms to the *Proceeds of Crime Act 2002 (Cth)* (PoCA) and anti-corruption and anti-bribery measures.

The AFPA and the PFA support the measures proposed in this Bill. Nonetheless, we believe that further reform is needed to reduce the destructive power of organised crime in this country. A truly national, harmonised unexplained wealth regime is needed to effectively target those who benefit most from organised crime. Further, predicate offences must be removed so that the regime is truly an *unexplained* wealth regime. Those who gain the most from criminal enterprise are often those most disconnected from it. Therefore, the requirement that the unexplained wealth should be linked to a predicate offence needs to be removed from the legislation.

Yours faithfully,

Jon Hunt-Sharman

President
Australian Federal Police Association

Mark Burgess

Chief Executive Officer
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1. The Amendments in the Bill

- 1.1. We believe that the bill does go some way to address current issues with organised crime. Therefore we would like to express our support for the proposed changes in the bill. We would like to applaud the government for adopting some the recommendations from the Parliamentary Joint Committee on Law Enforcement's (PJCLE) inquiry into Commonwealth unexplained wealth legislation and arrangements.

Removing Judicial discretion from unexplained wealth orders (ss 20A(1), 179B(1) and 179E(1))

- 1.2. We would like to publically state that we support the removal of judicial discretion for unexplained wealth restraining orders, preliminary orders and final orders. This brings unexplained wealth into line with other kinds of proceedings conducted under the PoCA.

Allowing the collection of evidence relevant to unexplained wealth proceedings during search warrants

- 1.3. In line with Recommendation 5 of the PJCLE inquiry, we would like to express our support for allowing evidence relevant to unexplained wealth to be collected.

Preventing restrained assets from being used to meet legal expenses (s 20A(3A))

- 1.4. Both the AFPA and the PFA agree with PJCLE Recommendation 10 which has been adopted by this bill. We do not believe that assets subject to unexplained wealth restraining orders should be able to be used to pay legal expenses.

Creating a charge over restrained property (s 45(6A))

- 1.5. Allowing for a charge to be registered over restrained property will further harmonise the provisions in the PoCA. Further it will ensure that the property is available to satisfy an unexplained wealth order, if granted.

Changes to the Criminal Code – Firearms trafficking

- 1.6. Both our organisations have campaigned for a stronger response to illegal firearms in Australia. We are glad to see that some of the necessary changes have been included in this bill.
- 1.7. The PFA and the AFPA would also like to call for a strengthening of the firearms regime across Australia. We would like to call for the introduction of a power similar to that in the *Summary Offences Act 1953 (SA)* ss 21H and 21L. This power allows the Commissioner to make an order against dangerous offenders who are believed to possess a prohibited

weapon. Where an order applies to a person, a police officer may detain the person, stop a vehicle or enter a premises to search for prohibited weapons.

- 1.8. Such provision could be included in the Criminal Code Act 1995 (Cth) Chapter 9 Dangers to the Community Part 9.4 Dangerous Weapons. This would complement the amendment proposed in this Bill.

2. The need for a national unexplained wealth regime

- 2.1. Organised crime is an almost wholly profit driven phenomenon, the most effective way of attacking this industry is to remove the financial incentives that accompany large-scale illicit activity. The current patchwork of unexplained wealth legislation throughout the states and territories does not best serve these interests. A truly national unexplained wealth regime, which does not rely on predicate offences, would be an extremely powerful weapon against organised crime.

Substantial Disappointment with the current unexplained wealth provisions

- 2.2. Unexplained wealth provisions were added to the PoCA and enacted through the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, in February 2010. The Attorney-General, the Hon Robert McClelland MP, articulated the purpose of the Bill during its passage through Parliament: "It is important that we put strong laws in place to combat organised crime. We need to target the profits of crime and remove the incentive for criminals to engage in organised criminal activity. We also need to empower our law enforcement agencies to defeat the sophisticated methods used by those involved in organised criminal activity to avoid detection, often with the assistance of highly skilled professionals... New unexplained wealth provisions will be a key addition to the Commonwealth criminal asset confiscation regime. These provisions will target people who derive profit from crime and whose wealth exceeds the value of their lawful earnings. In many cases, senior organised crime figures who organised and derive profit from crime are not linked directly to the commission of the offence. They may seek to distance themselves from the offence to avoid prosecution or confiscation action. Unlike existing confiscation orders, unexplained wealth orders *will not require proof of a link to the commission of a specific offence* and in that sense they represent a quantum leap in terms of law enforcement strategy."
- 2.3. Unfortunately however, the unexplained wealth aspects of the PoCA as introduced to the Parliament require proof of a link to the commission of a specific offence. To date, no cases have been able to be brought before the courts under the Commonwealth legislation.
- 2.4. The proposed amendments are not going to change the fundamental principle that the unexplained wealth provision as enacted is unworkable for law enforcement when linked to a predicate offence. It is simply not what it says it is. It is all explainable wealth provision not unexplained wealth.

Removing the Predicate Offence

- 2.5. The primary purpose of unexplained wealth provisions should be to specifically deal with those criminals who successfully distance themselves from the criminal activity from which they aggregate so much of their wealth. As stated above, the current legislation requires a link to be established between a person's wealth and a predicate offence before an unexplained wealth order is granted. This situation makes it impossible to target the criminals who succeed in distancing their wealth from the criminal source under this

provision. Generally, those with the most sophisticated and disciplined criminal networks are the best at distancing themselves from the actual crime committed. Thus, those that are the targets of unexplained wealth provisions are the most able to avoid facing such proceedings.

- 2.6. Mr Tom Sherman AO who conducted the 2006 *Report on the independent review of the Operation of the Proceeds of Crimes Act 2002 (Cth)* has noted that *“investigations can often be frustrated through lack of evidence against people with significant wealth and no apparent source of legitimate income. Particularly the bosses who are often far removed from the actual criminal activity.”*
- 2.7. Further, we note the AFP Expert on Money Laundering Investigations has advised that *‘we have developed this fiction that following the money trail will directly lead police to the top echelons of crime in Australia. It is possible in many cases to identify persons of interest who have accumulated significant wealth which appears to be unexplained but any proof of their involvement in crime is totally absent. The money flows up but the evidence of criminality does not.’*
- 2.8. There are generally three stages of money laundering: *placement, layering, and integration*. In reality, the current regime only allows for confiscation of criminal assets at the placement stage. This is really the only point at which the wealth can be linked to a predicate offence.
- 2.9. A pure unexplained wealth regime without a predicate offence would be able to target assets at the layering and integration stages. Usually, the only vulnerability at this stage is the inability to demonstrate a legitimate source for the wealth. This regime will more effectively target: higher echelon criminals, criminals involved in management of organised crime organisations/groups, criminals assisting transnational organised crime organisations/groups, persons or corporate structures or nominees assisting domestic criminals to conceal wealth and assets, corrupt public officials including police who have assets that exceed their known lawful income, foreign criminals who control assets in Australia acquired by funds that have originated from illegal activity committed offshore but laundered in Australia, and persons or corporate structures or nominees assisting foreign criminals to conceal or ‘park’ assets and wealth in Australia
- 2.10. The retention of the predicate offence is totally contrary to the nature of unexplained wealth provisions. The wealth is not *unexplained* but is rather explained by the commission of the predicate offence. If there are reasonable grounds to suspect any Commonwealth offence/s from where the wealth may have originated then property restraint could be pursued using the mechanisms at s18 and s19 of the PoCA.
- 2.11. The AFPA and the PFA would like to again take this opportunity to strongly urge that the predicate offence be removed as a requirement. We note that the lack of use of these

unexplained wealth provisions is tied to the difficulty of linking a predicate offence to wealth.

Enacting a National, Uniform Unexplained Wealth Regime

- 2.12. A national approach is necessary to combat organised crime in Australia due to its sophisticated and national nature. The PFA and the AFPA would strongly recommend that the Commonwealth government attempt to enact unexplained wealth provisions which are applicable across all jurisdictions.
- 2.13. As is noted in the PJCLE's recommendations, professional criminals (and money launderers in particular) will always target the jurisdiction with the weakest asset seizure regime. As the PFA earlier noted in our submission to the PJCLE, "a national scheme should provide 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."

The External Affairs power

- 2.14. The PFA and the AFPA believe that the external affairs power in s 51(xxix) of the Constitution can be used as a basis to enact unexplained wealth provisions.
- 2.15. The AFPA has received advice that pure unexplained wealth provisions could be supported by the current multilateral treaty framework. Dr Andreas Schloenhardt has previously stated that "Australia has signed the *Convention against Transnational Organised Crime* but it is not certain whether the implementation of the Convention rests with the Commonwealth or the States or Territories. In the past, especially in *Commonwealth v Tasmania* (1983) 46 CLR 625, the High Court applied a very broad reading of the Commonwealth external affairs power, suggesting that the Federal Parliament can legislate on any criminal law issue arising out of international treaties signed by the Federal Government."
- 2.16. The AFPA and the PFA believe that the current frame work of multilateral treaties including the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, the *United Nations Convention against Corruption*, and the *United Nations Convention against Transnational Organised Crime* could provide sufficient basis for the Federal Parliament to legislate pure unexplained wealth provisions.
- 2.17. At previous hearings the Attorney-General Department stated that "It is not possible to provide the Committee with an exhaustive list of all conventions, treaties and any other agreements which are relied on to support the [*Crimes Legislation Amendment (Serious and Organised Crime)*] Bill [2009], nor to link every treaty, convention or other agreement relied on, to specific provisions of the Bill. There are thousands of offences across Commonwealth

legislation and reviewing all of these for their reliance on international agreements would take very considerable resources and time.”

2.18. We would ask, due to the importance of the issue, that the link between unexplained wealth provisions and international treaties be specifically explored.

2.19. It could also be argued that these measures flow from treaty provisions in the Merida Convention including those relating to the illicit enrichment of public officials¹, asset seizure and the freezing of funds (and proceeds of crime more generally. Article 21 refers to combating bribery in the private sector and Article 22 the embezzlement of private sector property.

2.20. If there is no basis in the current multilateral treaties to legislate a national unexplained wealth regime then the AFP and the PFA urge the government to seek a bilateral treaty with Ireland or another nation which has pure unexplained wealth provisions. Such a treaty, made with the object of enhancing cooperation on large-scale organised crime would allow the Commonwealth to enact pure unexplained wealth provisions.

Referral of Powers from the States

2.21. The AFP and PFA also urge the Commonwealth government to seek a referral of state power on the issue. We like to publically voice our support for the PJCLE Recommendation 15 which advocates that the Commonwealth government take the lead on creating a national unexplained wealth regime through referral of states powers.

Equitable Sharing Program

2.22. We believe that an equitable sharing program should be instituted between the Commonwealth and State governments to share any assets recovered through unexplained wealth proceedings.

2.23. 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’.

2.24. 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 proceedings.

¹ Article 20, *UN Convention Against Corruption* (Merida Convention).

2.25. We believe that confiscated assets, taken from those who have wrongfully obtained it, should be reinvested in crime prevention and registered charities providing assistance to the victims of crime and law enforcement officers. There is something very fitting about proceeds of crime being for this purpose. Such a process has a circularity that is both morally and poetically just. The PFA and AFPA see confiscation methods to be an increasingly important tool for fighting crime. With the potentially huge pool of assets the Confiscated Assets Account could be used to fund further confiscation operations, or further innovation that makes confiscation operation more advanced and effective. This represents the potential for a circular pattern of crime detection and prevention, whereby successful confiscation operations generate more funding that increases the capacity for further successful confiscation operations, as well as funding to innovation or community programs.

Broadening the application of unexplained wealth provisions

2.26. If pure unexplained wealth provisions cannot be enacted because it is constitutionally necessary to link a restraining order under s20A under (1)(g) and 3(c), then the legislation should be amended to provide practitioners with a broader approach to those persons committing an offence, to include the persons involved and persons benefiting from the commission of offences. There is a precedent for this type of provision with regard to monitoring orders in s129 of the *Proceeds of Crime Act 2002 (Cth)*.

Including as specific reference to s 400.9 of the Commonwealth Criminal Code

2.27. If our preferred model of unexplained wealth cannot be enacted then s20A should be amended by the insertion of two new paragraphs, namely (1)(h) and (3)(d), providing express examples of what may be required by preceding paragraphs (1)(g) and 3(c), with similar description to s400.9(2) of the *Criminal Code 1995 (Cth)*.

Deeming certain types of unexplained wealth to be unlawfully obtained

2.28. During the PJCLE Inquiry into Commonwealth unexplained wealth legislation and arrangements, the ACC proposed that deeming provisions or presumptions be put in place to assume that assets far in excess of tax-declared wealth are obtained illegally. The AFPA and the PFA would like to support this proposal, we believe that this kind of provision could overcome the constitutional issues associated with enacting pure unexplained wealth provisions.

Using the powers of the ACC

2.29. In the alternative to our preference of removing the predicate offence from the unexplained wealth provisions, the AFPA and the PFA would like to urge the committee to amend the ACC legislation which would allow the ACC to use its coercive powers to investigate unexplained wealth. The PJCLE's recommendations 2, 3 and 4 should be given very serious consideration. Allowing evidence from ACC coercive investigations to be used in unexplained

wealth proceedings would greatly enhance the ability of the Commonwealth to recover the proceeds of crime.

Criminal Assets Confiscation Taskforce

- 2.30. The AFPA and the PFA also support the PJCLE's recommendations 6 and 7, that a Criminal Asset Confiscation Taskforce be prescribed under the *Taxation Administration Regulations 1976*. This would allow for information obtained by other agencies to be put to better use and proceeds of crime more easily identified.

Inclusion of an illicit enrichment offence

- 2.31. Notwithstanding anything above the Commonwealth has without doubt the ability to introduce an 'illicit enrichment' offence for public officials. This should be included in the Bill as encouraged in Art 20 of the *United Nations Convention Against Corruption*.
- 2.32. This provision could specifically apply to *Australian Public Service Act 1999* (Cth) employees with other agencies with law enforcement functions being able to be added by regulation