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# Unexplained Wealth Laws

The Queensland Government recently announced that, as part of its multi-pronged approach to tackling organised crime and outlaw motorcycle gangs, legislation was being drafted to allow the confiscation of unexplained wealth.

This Research Brief:

- describes the nature of unexplained wealth laws and how they go a step further than existing criminal proceeds confiscation laws;
- briefly summarises the framework of the conviction-based and civil-based confiscation regimes under the *Criminal Proceeds Confiscation Act 2002* (Qld) and the three basic elements of each;
- sets out the central features of unexplained wealth provisions. These are summarised from legislation in Western Australia and the Northern Territory and proposals contained in a Private Member's Bill (introduced into the Queensland Parliament by the then Deputy Opposition Leader in 2009. The Bill subsequently failed to pass);
- discusses issues surrounding unexplained wealth provisions; and
- outlines unexplained wealth legislation in other jurisdictions.

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## Key Points

1. The Queensland Government recently [announced](#) that, as part of its multi-pronged approach to tackling organised crime and outlaw motorcycle gangs, legislation was being drafted to allow the confiscation of unexplained wealth (**Section 1** of this Research Brief).
2. The main [object](#) of criminal proceeds confiscation laws is to remove the financial gain and increase the financial loss associated with illegal activity. However, senior organised crime figures might fund and support criminal activities but seldom carry them out. This means they are often unable to be linked to specific offences as required by many confiscation schemes. ‘**Unexplained wealth**’ laws go a step [further](#) than traditional confiscation laws:
  - they do not require a link between a person’s significant wealth and a crime; and
  - they reverse the onus of proof.If, for instance, a financial investigation of a person finds he/she has wealth which has no apparent legitimate source given the person’s lifestyle, a court might place the onus on the person to show the wealth was lawfully acquired (**Section 2**).
3. Most states and territories have criminal proceeds confiscation legislation but not all have ‘unexplained wealth’ legislation. Under Queensland’s [Criminal Proceeds Confiscation Act 2002 \(Qld\)](#) (the [Act](#)), the **civil-based confiscation system** (in Chapter 2) currently operates alongside the **conviction-based regime** (in Chapter 3). Each regime allows the Supreme Court to make restraining orders (to prevent dissipation of assets prior to a confiscation hearing), confiscation orders forfeiting property to the State, and proceeds assessment/pecuniary penalty orders requiring the respondent to pay an amount equal to the value of illegally derived benefits. The conviction-based regime requires a link between the relevant property and conviction of an offence before property can be confiscated whereas the civil regime allows for the confiscation of assets on the basis of their suspected criminal origin without requiring that someone is first convicted (**Section 3**).
4. The **unexplained wealth provisions** envisaged by the Liberal National Party (LNP) would seek to complement the existing criminal and civil confiscation regimes but go further. In principle, prosecutors would not need to prove, on the balance of probabilities, that a person’s property/benefits were obtained via criminal activity. Instead, if a person has accumulated wealth that does not seem commensurate with his/her lifestyle and livelihood, that person would bear the onus of proving that the wealth was legitimately acquired.
5. In 2010, the then Deputy Opposition Leader, Mr Lawrence Springborg MP, introduced the [Criminal Proceeds Confiscation \(Serious and Organised Crime Unexplained Wealth\) Amendment Bill 2010 \(Qld\)](#) as a **Private Member’s Bill** seeking to add unexplained wealth provisions to the [Act](#). The Bill, which had similarities to such laws in other jurisdictions, reversed the onus of proof and required the Court to make an unexplained wealth declaration if the onus of showing that his/her assets were not obtained via criminal activity was not discharged by a respondent. It would have allowed confiscation of unexplained assets of such a respondent as well as assets effectively controlled or gifted by the respondent in the 6 years before making the declaration. However, the Bill contained a number of safeguards, particularly by proposing that the [Public Interest](#)

[Monitor](#) would appear at the hearing to represent the public interest. The Bill failed at second reading in October 2011 (**Section 4.1-4.2**).

6. While there are benefits in having unexplained wealth legislation, such laws also have controversial aspects. A March 2012 Commonwealth Parliamentary Joint Committee on Law Enforcement Report ([Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements](#)) considered that a careful balance was needed in developing publicly acceptable and workable laws that were appropriate to Australia's democratic system. In brief, some [issues](#) regarding unexplained wealth legislation include (**Section 4.3**):
  - the fact that, by reversing the onus of proof, unexplained wealth laws reverse the long legal tradition of a presumption of innocence;
  - the laws can be [intrusive](#) (as submitted by the Law Council of Australia) in that there is no requirement for prosecutors to link wealth to an offence, even 'on the balance of probabilities' (as required under the civil confiscation regime);
  - according to the [Queensland CMC](#), to have a trigger of mere existence of wealth beyond apparent legitimate means is '*quite draconian and ... highlight[s] the tension ... between individual rights and the broader interests of the community. It also heightens the potential for malicious misuse*'.
7. Unexplained wealth legislation has existed in [Western Australia](#) since 2000 and in the [Northern Territory](#) since 2002 (both giving the Court a limited discretion about making a declaration if the respondent is unable to discharge the onus of proof placed upon him/her). It has been estimated that, in WA, approximately \$5.4m had been paid to the State up to September 2009 as a result of the laws and, as at July 2010, \$3.76m had been paid to the NT under its laws. [South Australia](#) recently passed stand-alone unexplained wealth laws that are similar to those in WA and the NT but the SA legislation gives the Court the final discretion about making an order. [New South Wales](#) amended its confiscation legislation in 2010 to include unexplained wealth laws. Unlike the foregoing jurisdictions, the NSW legislation sets a higher threshold before the onus of proof is reversed (requiring a reasonable suspicion of a serious crime related activity). The [Commonwealth](#) has also passed unexplained wealth laws with similarities to those in WA and the NT but which give the Court somewhat more discretion about making the order. A Commonwealth [Parliamentary Committee](#) has recommended that there be a nationally consistent unexplained wealth scheme to improve the overall effectiveness of unexplained wealth legislation (**Section 5**).

*For further clarification and analysis of the relevant issues, the reader should consult the Research Brief and refer to the Explanatory Notes to the Bill as well as to the Bill itself.*

## Dictionary

AFP	Australian Federal Police
CMC	Crime and Misconduct Commission (Queensland)
DPP	Director of Public Prosecutions (Queensland)
ODPP (WA)	Office of the Director of Public Prosecutions (Western Australia)
PJCLE	Parliamentary Joint Committee on Law Enforcement (Commonwealth)
SCRA	Serious Crime Related Activity





## 1 Introduction

The Queensland Government recently announced that, as part of its multi-pronged approach to tackling organised crime and outlaw motorcycle gangs, legislation was being drafted to allow the confiscation of unexplained wealth.<sup>1</sup>

This Research Brief:

- describes the nature of unexplained wealth laws and how they go a step further than existing criminal proceeds confiscation laws;
- briefly outlines the framework of the conviction-based and civil-based confiscation regimes under the [Criminal Proceeds Confiscation Act 2002 \(Qld\)](#) and the three basic elements of each;
- sets out the central features of unexplained wealth provisions. These are summarised from legislation in Western Australia and the Northern Territory and the proposals contained in a Private Member's Bill (introduced into the Queensland Parliament by the then Deputy Opposition Leader in 2009. The Bill subsequently failed to pass);
- discusses issues surrounding unexplained wealth provisions; and
- canvasses unexplained wealth legislation in other jurisdictions.

## 2 Background

The main [object](#) of criminal proceeds confiscation laws is to remove the financial gain and increase the financial loss associated with illegal activity.<sup>2</sup> In this way, the financial incentive to engage in crime is removed. However, senior organised crime figures might fund and support criminal activities but seldom carry them out. This means they are often unable to be linked to specific offences as required by many confiscation schemes.<sup>3</sup>

'Unexplained wealth' laws go a step [further](#) than traditional confiscation laws:

- they do not require a link between a person's significant wealth and a crime; and
- they reverse the onus of proof.

If, for instance, a financial investigation of a person finds he/she has wealth which has no apparent legitimate source given the person's livelihood and lifestyle, a court might place the onus on the person to show the wealth was lawfully acquired instead of the prosecution needing to show it is more probable than not that the wealth was obtained by criminal activity.<sup>4</sup>

The March 2012 Report on the [Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements](#) by the Commonwealth Parliamentary Joint Committee on Law Enforcement (PJCLE Report) observed (in para 2.10) that during a previous inquiry<sup>5</sup> it had

<sup>1</sup> Hon Jack Dempsey MP, Minister for Police and Community Safety, '[Newman Government cracking down on bkie gangs](#)', Ministerial Media Statement, 1 June 2012.

<sup>2</sup> [Criminal Proceeds Confiscation Act 2002 \(Qld\)](#), s 4.

<sup>3</sup> Australian Parliamentary Joint Committee on Law Enforcement, [Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements](#), Report ([PJCLE Report](#)), March 2012, para 2.13.

<sup>4</sup> [PJCLE Report](#), paras 2.4, 2.7-2.8.

<sup>5</sup> Australian Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC), [Inquiry into the legislative arrangements to outlaw serious and organised crime groups](#), 2009.

repeatedly heard evidence from law enforcement agencies that one of the most effective ways of preventing organised crime is to follow the money trail. During the PJCLE's 2012 inquiry, the Australian Federal Police (AFP) told the Committee:<sup>6</sup>

... where there is a significant serious and organised crime target who has disassociated himself from the criminal activity, that is where the vulnerability is. If we know he is involved in criminal activity and we know the assets he has obtained are from criminal activity, without ... robust unexplained wealth legislation that is a real vulnerability for us.

### 3 Existing Conviction-Based and Civil-Based Schemes

Most states and territories (and the Commonwealth) have traditional criminal proceeds confiscation legislation but not all have 'unexplained wealth' legislation. Queensland's [Criminal Proceeds Confiscation Act 2002 \(Qld\)](#) (the [Act](#)) establishes a scheme whereby a civil-based confiscation system operates alongside the conviction-based regime. Only the very basics of the Queensland scheme are provided here, merely to provide a context for the subsequent discussion of unexplained wealth laws:<sup>7</sup>

- a [conviction-based regime](#) (Chapter 3) allowing recovery of assets provided there is a direct connection between the property (known as 'tainted property' (s 104 of the [Act](#))) and the offence(s). That is, the property must have been used for, or in the commission of, a 'confiscation offence' (defined under the Act and which includes serious criminal offences), or must be derived from the commission of such an offence. Confiscation can occur only if, and after, a person is convicted. The regime is administered by the [Director of Public Prosecutions \(DPP\)](#);
- a [civil-based regime](#) (Chapter 2) enabling the Court to order the confiscation of assets on the basis of their suspected criminal origin (i.e. from 'illegal activity' as defined under the Act) without requiring that someone is first convicted. It also allows confiscation of property derived from a [serious crime related activity](#) (SCRA) (as defined under s 16 of the Act and [includes](#), among other offences, an indictable offence carrying a maximum penalty of at least 5 years imprisonment), even if no offender has been identified (s 13). A civil standard of proof applies so property can be forfeited if it is 'more probable than not' a SCRA has occurred. This regime is administered by the [Crime and Misconduct Commission \(CMC\)](#).

In Queensland, \$458,074 was forfeited to the State under the conviction regime and \$9.32m under the civil regime in [2010-2011](#).<sup>8</sup>

#### 3.1 Elements of the Confiscation Regimes

The conviction-based and civil-based regimes are underpinned by three basic orders, outlined briefly below.

##### 3.1.1 Restraining Orders

Application can be made to the Supreme Court for a *restraining order* to prevent the dissipation/disposal of assets before determination of a forfeiture application.

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The Senate Parliamentary Joint Committee on Law Enforcement was formerly the Parliamentary Joint Committee on the Australian Crime Commission.

<sup>6</sup> [PJCLE Report](#), 2.13, quoting Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, p 2.

<sup>7</sup> More detail about the Queensland confiscation laws can be found in the Queensland Parliamentary Library e-Research Brief, '[Strengthening Laws for Confiscating Proceeds of Crime – Criminal Proceeds Confiscation and Other Acts Amendment Bill 2008 \(Qld\)](#)'.

<sup>8</sup> Office of the Director of Public Prosecutions (Qld) [Annual Report 2010-2011](#), p 26.

Under the **civil regime**, the Court (s 31) must be satisfied that:

- there are reasonable grounds for suspecting that the person (respondent) whose property is sought to be restrained engaged in a SCRA;<sup>9</sup> or
- certain property is suspected of being serious crime derived property (even if no offender can be identified).<sup>10</sup>

Under the **conviction regime**, the Court can make a *restraining order* on the basis that the respondent's or another person's property is suspected of being 'tainted property' or 'benefit derived property' provided that the respondent has been convicted of the confiscation offence or will be charged with such within 48 hours (ss 118, 122).<sup>11</sup>

Under both schemes, public interest considerations may dictate against the Court making the order.

### 3.1.2 Confiscation/Forfeiture Orders

Under the **civil regime**, the property must be *forfeited* to the State if the Court is satisfied it is more probable than not that the SCRA in question occurred during the past 6 years (s 58).

Under the **conviction regime**, the tainted property can (s 151) be *forfeited* upon conviction of the respondent.

The making of the forfeiture order is subject to public interest considerations under both regimes.<sup>12</sup> Safeguards under each include hardship provisions, exclusions of property and protection of innocent interests.

### 3.1.3 Proceeds Assessment /Pecuniary Penalty Orders

Under the **civil regime**, a *proceeds assessment order* recovers a monetary sum equal to the value of proceeds derived from illegal activity over the past 6 years, unless it is not in the public interest to make the order (s 78). Once the State shows that the respondent has been involved in a SCRA, the onus shifts to the respondent to prove the lawful derivation of the increased wealth and expenditure sought to be recovered (s 83). The reversal of onus provision is [not technically](#) an 'unexplained wealth' provision although, provided there is a finding of criminal activity, it creates a statutory presumption of unexplained wealth being derived from illegal activity.<sup>13</sup>

Under the **conviction regime**, a *pecuniary penalty order* can be made (ss 183-184) that the respondent pay an amount the Court assesses to be equal to the benefit derived from the commission of the offence. Again, the onus is on the respondent to prove the lawful derivation of any increase in property value (ss 188-189).<sup>14</sup>

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<sup>9</sup> Someone else's property can also be restrained on the basis of a reasonable suspicion it is derived from a SCRA of the respondent.

<sup>10</sup> The order remains in force for up to 28 days.

<sup>11</sup> Generally, the order is in force for up to one year.

<sup>12</sup> The Court can also (ss 153A-153E) make a tainted property substitution order to require the forfeiture of a respondent's property in substitution for tainted property that cannot be forfeited (e.g. where a rental house is used to make drugs but the respondent also owns another house, the latter might be forfeited).

<sup>13</sup> PJCLE Report, 4.22.

<sup>14</sup> In its submission to the PJCLE Inquiry, the Queensland Crime and Misconduct Commission (Queensland CMC) expressed the view that while the reversal of onus provisions in the Qld Act had yet to be judicially considered, the CMC anticipated that they will produce a similar practical outcome to the unexplained wealth provisions enacted in other jurisdictions: Queensland CMC, [Submission 1](#) to the PJCLE Inquiry (2012), p 3.

### 3.1.4 Related Provisions

Other features of the Act, not discussed here, include **automatic forfeiture** of property in particular instances involving serious offences attracting 5 or more years imprisonment (Ch 3, Part 5) and **forfeiture of literary proceeds** (where a person sells their story about the person's criminal activities) under Chapter 4. Under Chapter 8, **financial institutions** are required to assist authorities in detecting and recovering criminal proceeds and **Chapter 9** deals with **money laundering**.<sup>15</sup> In 2009, the Act was amended to extend to SCRA arising out of an offence in other Australian jurisdictions and in other countries.

## 4 Unexplained Wealth Laws

The Liberal National Party (LNP) Government proposes to introduce unexplained wealth laws as a means to tackling organised crime in Queensland.<sup>16</sup> The laws would, most likely, seek to complement the existing confiscation regimes.<sup>17</sup> In essence, unexplained wealth laws go further than, even, the civil regime. In principle, prosecutors would not need to prove, on the balance of probabilities, that a person's property/benefits were obtained via criminal activity. Instead, if a person has accumulated wealth that does not seem commensurate with his/her lifestyle and livelihood, that person would bear the onus of proving that the wealth was legitimately acquired.<sup>18</sup>

### 4.1 2010 Queensland Parliament Private Member's Bill

In November 2010, the then Deputy Opposition Leader, Mr Lawrence Springborg MP, introduced the [Criminal Proceeds Confiscation \(Serious and Organised Crime Unexplained Wealth\) Amendment Bill 2010 \(Qld\)](#) as a Private Member's Bill. It sought to add unexplained wealth provisions and 'drug trafficker declarations' to the Act. The unexplained wealth provisions proposed to allow the confiscation of unexplained assets of a respondent as well as assets effectively controlled or gifted by the respondent in the 6 years before the declaration was made. The Bill failed at second reading in October 2011.<sup>19</sup>

### 4.2 Features of Unexplained Wealth Provisions

Whether a person has unexplained wealth is usually established by a covert financial investigation begun as a part of a criminal investigation or as a result of certain intelligence.<sup>20</sup>

Basic **features** of unexplained wealth laws (summarised from information contained in an Australian Institute of Criminology (AIC), [Research Paper](#)<sup>21</sup> and proposals in the above [Private Member's Bill](#) (PMB)) include:

- [enabling](#) the State to apply to the Court for an unexplained wealth declaration against a respondent to recover wealth acquired within a specified period (6 years under the PMB)

<sup>15</sup> The Court can also make various ancillary orders of an administrative (e.g. payment of legal expenses from restrained property) or investigative nature (e.g. examination orders).

<sup>16</sup> Hon Jack Dempsey MP, '[Newman Government cracking down on bikie gangs](#)'.

<sup>17</sup> As was proposed by a 2010 Private Member's Bill introduced into the Queensland Parliament by the then Deputy Opposition Leader (of the LNP) and which is discussed below (see the [Explanatory Notes](#) for the Bill, p 2).

<sup>18</sup> PJCLE Report, 2.4-2.8.

<sup>19</sup> See Second Reading Debate, *Queensland Parliamentary Debates*, 12 October 2011, pp 3147-3158, esp. p 3158 (that the Bill be read a second time resolved in the negative 49:33).

<sup>20</sup> PJCLE Report, 3.51.

<sup>21</sup> Australian Institute of Criminology (AIC), '[Unexplained wealth laws in Australia](#)', *Trends & Issues in Crime and Criminal Justice*, No 395, July 2010, p 2 which drew information from a Commonwealth Parliamentary Committee considering unexplained wealth laws in WA and the NT.

(proposed s 216E)) before the application day. Under the unexplained wealth laws in New South Wales, there is no time specified;

- stating that ‘unexplained wealth’ is the value of one’s wealth that is greater than the value of one’s lawfully acquired property and benefits. Under the PMB (proposed s 216A), a respondent’s ‘wealth’ can include:<sup>22</sup>
  - property currently owned by him/her or under his/her effective control;
  - property that was given away or used or discarded;
  - benefits that the respondent has derived;
  - property/benefits, and benefits derived by another person at the respondent’s request;

For instance, a respondent might have had a number of vehicles but, prior to the application, has sold or given away those vehicles. The vehicles are to be considered in the assessment of the respondent’s wealth.

- placing a ‘reverse onus’ on the respondent requiring the respondent to explain how the unexplained wealth was acquired. The presumption is that the wealth was not lawfully acquired unless the respondent proves otherwise;
- after hearing the application (at which the respondent and interested parties may appear), the Court could (i.e. as under the laws in Western Australia and the Northern Territory and as was proposed by the PMB) be given a limited jurisdiction about making an unexplained wealth declaration upon finding it is more probable than not that the total value of the respondent’s wealth is greater than that of his/her lawfully acquired wealth. Alternatively, the laws could, as in South Australia or in NSW, give the Court a final discretion about making the declaration (see below);
- establishing the method (e.g. proposed s 216G of the PMB) the Court uses to assess a person’s unexplained wealth and stating what property and benefits are not taken into account (e.g. previously forfeited property);
- allowing, as was proposed by ss 216K-216M of the PMB, the DPP to apply to the Court for property not owned by the respondent but under his/her effective control, or that was given away to avoid a declaration, to be used to meet the respondent’s unexplained wealth liability to the State;
- establishing safeguards (such as had been proposed for Queensland by Part 4 of the PMB) to allow the Public Interest Monitor, appointed under the Crime and Misconduct Act 2001 (Qld), to appear at the hearing to test the validity of unexplained wealth applications, to ask questions and to make submissions);
- providing other safeguards (as was envisaged by the PMB) such as requiring notice be given to interested parties about the hearing; provisions (in Part 3) to prevent hardship to dependants; providing for innocent party interest exclusion orders (if that party can prove that the amount claimed is not attributable to illegal activity); and giving rights of appeal.

### 4.3 Issues Relating to Unexplained Wealth Laws

While there are benefits in having unexplained wealth legislation, such laws also have controversial aspects, as discussed in the abovementioned AIC Research Paper and the 2012 Commonwealth Parliamentary Joint Committee on Law Enforcement Report ([Inquiry into](#)

<sup>22</sup>

See the [Explanatory Notes](#) to the Private Member’s Bill, p 3.

[Commonwealth Unexplained Wealth Legislation and Arrangements](#)) ([PJCLE Report](#)). Those issues include:

- that unexplained wealth laws reverse the long legal tradition of a presumption of innocence because, once certain thresholds are met, the respondent must prove that the wealth has been lawfully acquired (PJCLE Report, [2.18](#));
- that the laws can be intrusive as there is no requirement for prosecutors to link wealth to an offence, even ‘on the balance of probabilities’ (as required by the civil confiscation regime). Thus, there is more chance of an innocent person having their assets confiscated (PJCLE Report, [2.20](#), citing the submission by the Law Council of Australia ([LCA](#))).<sup>23</sup>
- that (as submitted by the [Queensland CMC](#) (p 2) to the 2012 PJCLE Inquiry) having a trigger of mere existence of wealth beyond apparent legitimate means is ‘quite draconian and ... highlight[s] the tension ... between individual rights and the broader interests of the community. It also heightens the potential for malicious misuse’. The CMC believed that the investigations were likely to be ‘resource intensive with uncertain outcomes’ and that taxation laws provide a more appropriate and effective mechanism for addressing the accumulation of unexplained wealth (p 2).<sup>24</sup> The CMC also commented (p 2) that, apart from the Western Australian legislation, unexplained wealth laws are relatively recent and ‘it is difficult at this early stage to judge their effectiveness. Even the Western Australian provisions, despite being introduced in 2000, appear to have been infrequently utilised’.<sup>25</sup>

The PJCLE Report believed that a careful balance needed to be achieved in delivering workable laws that are publicly acceptable and appropriate to Australia’s democratic system (PJCLE Report, [3.2](#)). While resource constraints on law enforcement agencies would mean that unexplained wealth proceedings would, in reality, only be brought in serious cases, the PJCLE considered that such ‘serious and intrusive’ laws should have legislative safeguards, ensuring the laws were used only against serious organised criminal bodies [[3.13](#), [3.16](#)].<sup>26</sup>

## 5 Other Jurisdictions

Much of the information in this section is sourced from the PJCLE Report, Chapters [2](#) and [4](#).<sup>27</sup>

<sup>23</sup> On the other hand (as noted in the PJCLE Report, [2.23](#)), it is difficult to think of ways in which a person could lawfully accumulate wealth without being able to account for it.

<sup>24</sup> Queensland CMC, [Submission 1](#) to the PJCLE Inquiry (2012), p 2. See also, AIC, p 5, noting a similar submission made by the Queensland CMC to the earlier PJC-ACC Inquiry.

<sup>25</sup> The AIC Research (p 2) noted that the ‘WA provisions do not appear to have been used extensively’ and that this could have been due to factors raised by the earlier PCJ-ACC Inquiry such as ‘perceived reluctance’ by the WA DPP and issues of timing of investigations, particularly in the context of adverse media reports of how the laws were being used. See also, PJCLE Report, 2.77. However, in its 2009 [Report](#) [3.78] the PJC-ACC noted that the Northern Territory laws had been ‘remarkably successful’. See also, AIC, p 2 noting police evidence to the PJC-ACC inquiry that up to February 2009, approximately \$5m had been forfeited to the Territory.

<sup>26</sup> The [PJCLE Report](#) considered three safeguards: amending the objects of unexplained wealth provisions to reflect that the laws are directed at undermining the profitability of criminal enterprises (3.17-3.22); establishing a monetary threshold so that only where the wealth is above \$100,000 must the Court make the relevant order (below that amount, the Court has a discretion) (3.23-3.30); and having stand-alone legislation for unexplained wealth cases (3.31-3.34). It also recommended (3.200) enhancement of statutory oversight arrangements. See also AIC, p 5.

<sup>27</sup> See also, L Roth, [The Criminal Assets Recovery Amendment \(Unexplained Wealth\) Bill 2010](#), e-brief 13/2010, NSW Parliamentary Library Research Service, August 2010, Section 6.3.



## 5.1 Overseas

The PJCLE Report [2.46] commented that the Committee had, during an inquiry in 2009, been told that **Italy** had legislation directed at preventing the mafia from using illegally obtained assets to fund future crimes.<sup>28</sup> The legislation allows law enforcement agencies to investigate suspected illegally obtained assets without requiring evidence of an offence. The matter can then be referred to a judge for further investigation to determine the source of the assets (Italy being a civil law country which has an inquisitorial court system, unlike the Australian adversarial judicial system). During the court process, the onus is on the defendant to prove his/her assets have lawful origin [2.47, 2.49].

The PJCLE had been told that the process had been '*very effective in confiscating criminal assets and preventing organised crime in Italy*' [2.48].

In the **United Kingdom**, as well as providing a traditional restraint and forfeiture of assets scheme, the *Proceeds of Crime Act 2002* allows for the confiscation of assets gained from a 'criminal lifestyle', as defined by the Act (involving conviction of certain offences). The Act contains provisions for assessing the benefit a person derives from this 'criminal lifestyle' and the person then has the onus of proving the assets are not so derived (PJCLE Report, 2.42-2.43). The PJCLE Report [2.45] observed that the Committee had been told by the UK authorities that these provisions had been effective in recovering criminal assets but, also, that the recovery process was very lengthy.

## 5.2 Australian States and Territories

In recent years, a number of Australian jurisdictions have introduced 'unexplained wealth' laws. These developments, dealt with in detail below, are:

- **2000:** the [Criminal Property Confiscation Act 2000 \(WA\)](#) in **Western Australia**;
- **2002:** the [Criminal Property Forfeiture Act 2002 \(NT\)](#) in the **Northern Territory**;
- **2009:** the [Serious and Organised Crime \(Unexplained Wealth\) Act 2009 \(SA\)](#) in **South Australia** (stand-alone unexplained wealth laws);
- **2010:** the [Crimes Legislation Amendment \(Serious and Organised Crime\) Act 2010 \(Cth\)](#) amending the [Proceeds of Crime Act 2002 \(Cth\)](#) at the **Commonwealth** level;
- **2010:** the [Criminal Assets Recovery Amendment \(Unexplained Wealth\) Act 2010 \(NSW\)](#) in **New South Wales**.

### 5.2.1 Western Australia and Northern Territory

Western Australia was the first jurisdiction (in 2000) to enact unexplained wealth provisions, with the [Criminal Property Confiscation Act 2000 \(WA\)](#) on which the **Northern Territory** modelled its [Criminal Property Forfeiture Act 2002 \(NT\)](#). There is no requirement under either legislation to show reasonable grounds for suspecting the person has committed an offence (i.e. no statutory threshold). Under both Acts, there is minimal judicial discretion about making an unexplained wealth declaration upon finding it is more likely than not that the total value of the respondent's wealth is greater than that of his/her lawfully acquired wealth. Both also place the onus of proof on the respondent (PJCLE Report, 4.3-4.7).

<sup>28</sup>

Australian Parliament, [Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom & the Netherlands](#), June 2009, p 62.

The WA Office of the Director of Public Prosecutions (ODPP (WA)) Annual Reports indicate that 27 declarations have been made under the WA laws between July 2001 and June 2011.<sup>29</sup> Up to September 2009, around \$5.4m had been paid as a result of unexplained wealth matters (AIC, p 2). The ODPP (WA) notes that unexplained wealth applications are complex.<sup>30</sup> The laws in WA are largely untested as only 2 matters have proceeded to hearing.<sup>31</sup>

The AIC Research (p 2) observes that, as at July 2010, there had been 9 matters finalised (all by consent and/or settlement) under the **NT legislation** and **\$3.76m** forfeited to the Territory.

### 5.2.2 South Australia

South Australia has stand-alone unexplained wealth legislation – the [Serious and Organised Crime \(Unexplained Wealth\) Act 2009 \(SA\)](#) (which commenced on 29 August 2010).<sup>32</sup> The law has similarities to the WA and NT legislation. There is no requirement for showing reasonable grounds for suspecting the respondent has committed an offence, only that there is reasonable suspicion a person's wealth was not lawfully acquired.

The respondent bears the onus of proof of showing the wealth was lawfully acquired. The Court has the final discretion regarding making an unexplained wealth order but should make the order unless it is manifestly unjust to do so. Also, the Court can exclude parts of a person's wealth from an application if satisfied it is not reasonably possible for the person to prove that these parts were lawfully acquired ([s 9](#)).<sup>33</sup>

### 5.2.3 New South Wales

New South Wales amended the Criminal Assets Recovery Act 1990 (NSW) during 2010, introducing unexplained wealth provisions (Part 3, Div 2). Under the new laws, a higher threshold than that existing in the above jurisdictions' unexplained wealth laws must be met before the provisions apply. It is necessary that there is a finding of a reasonable suspicion that a person has engaged in a SCRA, or has acquired property from someone else's SCRA although it need not be based on reasonable suspicion about the commission of a particular offence. The period over which the wealth is assessed is not limited to 6 years as is the case with proceeds assessment orders.<sup>34</sup>

Once the Court is satisfied there is such a reasonable suspicion, the onus is on the person to prove that his/her current or previous wealth has legitimate origin. The Court has limited discretion about making the unexplained wealth order but it can refuse to do so if it finds that it is not in the public interest to make the order (or it can reduce the amount that would otherwise be payable) (s 28A). Under the Act (s 32), 50% of funds recovered pursuant to

<sup>29</sup> AIC, p 2 and WA Office of the Director of Public Prosecutions (ODPP (WA)), [Annual Report 2010-2011](#), p 30.

<sup>30</sup> (ODPP (WA)), [Annual Report 2010-2011](#), pp 30, 57.

<sup>31</sup> I Jones, Practice Manager (Confiscations) ODPP for WA, 'Australian Approaches to Proceeds of Crime – a Western Australian Perspective', Proceeds of Crime Conference, Melbourne 2011, p 5.

<sup>32</sup> See [s 2](#).

<sup>33</sup> Under [s 12](#) investigative powers can be used only against persons convicted of, or found liable to supervision for, a serious offence, those subject to a control order under the *Serious and Organised Crime (Control) Act 2008*, or those about whom there are reasonable grounds for suspected involvement in serious criminal activity or of being a member of a declared organisation. It also applies to persons acquiring gifts from such a person or his/her deceased estate (PJCLE Report, [4.8-4.12](#)).

<sup>34</sup> New South Wales Crime Commission, [Annual Report 2010-2011](#), p 13. The Commission brings applications for the relevant orders.



proceeds assessment and unexplained wealth orders are payable into the Victims Compensation Fund.

During 2010-2011 (the legislation commencing on 9 September 2010)<sup>35</sup> the NSW Crime Commission made applications for 7 unexplained wealth orders, none of which had been resolved at the end of the reporting year.<sup>36</sup>

### 5.3 Commonwealth

In 2010, the **Commonwealth** Parliament made [amendments](#) to the [Proceeds of Crime Act 2002 \(Cth\)](#) by inserting unexplained wealth provisions (Part 2-6), to implement the Commonwealth's commitments as part of the then Standing Committee of Attorneys-General (SCAG's)<sup>37</sup> agreement for a comprehensive national approach to combat organised crime.<sup>38</sup>

Under Part 2-6, if a Court is satisfied that there are reasonable grounds for suspecting that a person's total wealth is more than the value of wealth that was lawfully acquired, the person must prove to the Court, on the balance of probabilities, that the relevant wealth was not derived from certain offences (the specified offences necessarily being limited to those within Commonwealth constitutional power). If the person cannot so prove this, the Court may make an unexplained wealth order but it can refuse to do so if it is not in the public interest (s 179E). However, the Court must direct the Commonwealth to pay out of the amount paid to it by the person under the order, an amount necessary to offset hardship of a dependant of the person (s 174L) (PJCLE Report, [2.62-2.64](#)).

Although the provisions commenced in February 2010, as at March 2012, no unexplained wealth proceedings had been brought, although two cases were under investigation (PJCLE Report, [2.75-2.76](#)).

In July 2011, the Commonwealth Parliamentary Joint Committee on Law Enforcement initiated an [Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements](#) and reported ([PJCLE Report](#)) in March 2012. The Committee expressed concern [[2.78](#)] about the limited use of the Commonwealth provisions.

The PJCLE Report made a number of [recommendations](#), many of which concerned suggestions for amendments to various provisions of the Commonwealth Act and to the operations of law enforcement agencies in the context of unexplained wealth investigations etc.

The PJCLE considered various issues arising from the differences in the operation of unexplained wealth legislation between those jurisdictions that have such laws as well as the lack of unexplained wealth provisions in other jurisdictions (see [4.24-4.33](#) considering problems such as crime networks relocating assets to jurisdictions with more favourable laws). The Committee observed that there was support for harmonising unexplained wealth legislation and arrangements across Australia but diverse views about how to achieve this [[4.34-4.45](#)]. The PJCLE Report [[4.46-4.69](#)] went on to examine options for developing nationally consistent laws: model unexplained wealth legislation for adoption in each jurisdiction; the development of guiding principles for drafting unexplained wealth laws; and the states referring power to the Commonwealth to pass unexplained wealth legislation.

<sup>35</sup> [Criminal Assets Recovery Amendment \(Unexplained Wealth\) Act 2010 \(NSW\)](#), s 2.

<sup>36</sup> NSW Crime Commission, *Annual Report 2010-2011*, p 13.

<sup>37</sup> SCAG is now the [Standing Council on Law and Justice](#) (SCIJ).

<sup>38</sup> Crimes Legislation Amendment (Serious And Organised Crime) Bill 2009 (Cth), [Explanatory Memorandum](#), p 1.



## Key Documents and Links

### Relevant Queensland Legislation

- [Criminal Proceeds Confiscation Act 2002 \(Qld\)](#)

#### Private Member's Bill

- [Criminal Proceeds Confiscation \(Serious and Organised Crime Unexplained Wealth\) Amendment Bill 2010 \(Qld\)](#), [Explanatory Notes](#)

### Related Queensland Parliamentary Library Publications

- ['Strengthening Laws for Confiscating Proceeds of Crime – Criminal Proceeds Confiscation and Other Acts Amendment Bill 2008 \(Qld\)'](#), e-Research Brief 2009/03
- [Expanding the Criminal Assets Forfeiture Regime - Criminal Proceeds Confiscation Bill 2002 \(Qld\)](#), RBR2002/33

### Ministerial Media Statements

- Hon Jack Dempsey MP, Minister for Police and Community Safety, ['Newman Government cracking down on bikie gangs'](#), 1 June 2012

### Reports

- Office of the Director of Public Prosecutions (Qld) [Annual Report 2010-2011](#)
- Crime and Misconduct Commission, [Annual Report 2010-2011](#)
- L Bartels, Australian Institute of Criminology, ['Unexplained wealth laws in Australia'](#), *Trends & Issues in Crime and Criminal Justice*, No 395, July 2010

### Commonwealth Legislation and Parliamentary Committee Reports

- [Crimes Legislation Amendment \(Serious and Organised Crime\) Act 2010 \(Cth\)](#); [Explanatory Memorandum](#) to the originating Bill introduced 24 June 2009 (the Bill was subsequently amended in response to recommendations made by a Parliamentary Committee and was passed by both Houses on 4 February 2010)
- Australian Parliamentary Joint Committee on Law Enforcement, [Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements](#), Report, March 2012

### Newspaper Articles

- 'State may claw back spoils of old crooks', *Courier Mail*, 23 June 2012, p 35.

## Queensland Library Publications - 2012

No.	Title	Date
RBR 2012/01	Police Powers and Responsibilities (Motor Vehicle Impoundment) Amendment Bill 2011 (Qld)	Jan 2012
RBR 2012/02	The Heavy Vehicle National Law and the National Heavy Vehicle Regulator: Heavy Vehicle National Law Bill 2011 (Qld)	Feb 2012
RBR 2012/03	Shield Laws for Journalists	Feb 2012
RBR 2012/04	Review of Queensland's Marine Mammal Legislation	Apr 2012
RBR 2012/05	The Future for Manufactured Homes in Residential Parks in Queensland	May 2012
RBR 2012/06	e-Waste	May 2012
RBR 2012/07	Treasury (Cost of Living) and Other Legislation Amendment Bill 2012 (Qld): repeal of Sustainability Declarations Provisions	May 2012
RBR 2012/08	Proposed Changes to Offence Provisions in the Weapons Act 1990 (Qld)	Aug 2012
RBR 2012/09	Unexplained Wealth Laws	Aug 2012