

# Exploring the procedural barriers to securing unexplained wealth orders in Australia

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## Acronyms

|         |  |
|---------|--|
| ACC     | Australian Crime Commission                                      |
| AFP     | Australian Federal Police  |
| AGD     | Attorney-General's Department                                    |
| AIC     | Australian Institute of Criminology                              |
| ATO     | Australian Taxation Office                                       |
| AUSTRAC | Australian Transaction Reports and Analysis Centre               |
| CAB     | Criminal Assets Bureau (Ireland)                                 |
| CACT    | Criminal Assets Confiscation Taskforce                           |
| CARIN   | Camden Asset Recovery Interagency Network                        |
| CDPP    | Commonwealth Director of Public Prosecutions                     |
| PJC-ACC | Parliamentary Joint Committee on the Australian Crime Commission |
| PJC-LE  | Parliamentary Joint Committee on Law Enforcement                 |
| PoCA    | Proceeds of Crime Act 2002 (Cth)                                 |
| RICO    | Racketeer Influenced and Corrupt Organizations (US)              |
| SOCA    | Serious and Organised Crime Agency (UK)                          |
| UK      | United Kingdom   |
| UK-POCA | Proceeds of Crime Act 2002 (UK)                                  |

## Executive summary

There has been considerable discussion over the past three decades concerning the prevalence of serious and organised crime in Australia. To varying degrees state, territory and Commonwealth governments have developed legislative responses to organised crime that include proscribing new forms of crime, limiting the membership of organised crime groups and confiscating the proceeds of crime. Further policy responses to serious crime in Australia have been considered at all levels of government since fieldwork for the current study was completed.

Confiscation legislation aims to undermine the business model of organised crime by:

- removing the financial benefits of economic crime;
- punishing offenders for their wrongdoing and compensating society;
- preventing criminal assets from being used to fund future crime; and
- deterring potential and repeat offenders from engaging in crime.

Official statistics indicate approximately \$800m in proceeds of crime were recovered under Commonwealth, state and territory legislation between 1995 and 2014. While large, this amount is small in comparison with the Australian Crime Commission's (ACC's) estimate of the total cost of serious and organised crime, which was \$36b in 2013–14 (including prevention and response costs; ACC 2015).

One of the most substantial changes brought about by the enactment of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) was the introduction of unexplained wealth provisions at the Commonwealth level. These are an innovation in the realm of proceeds of crime orders, and Australia is one of the few countries to have introduced them to date. Elements of unexplained wealth legislation have been developed in a number of countries, although their scope and operation differ considerably.

Although unexplained wealth provisions have only recently been introduced at the Commonwealth level, similar provisions have been in force in Western Australia since 2000 and in the Northern Territory since 2003. Since the introduction of the Commonwealth legislation, similar laws have been enacted in Queensland, South Australia, New South Wales, Victoria and Tasmania, with the Australian Capital Territory currently considering legislation. The laws differ between jurisdictions, however, especially in relation to whether some connection to criminal conduct is required. Although unexplained wealth provisions have led to the restraint of assets in a relatively small number of cases, a number of legal and procedural barriers prevent successful orders being made.

This report examines how unexplained wealth orders are obtained and suggests how impediments to their success might be ameliorated through legislative or procedural reform.

Comparable systems in other countries have also been considered, to determine what best-practice approaches to unexplained wealth laws and processes should apply throughout Australia.

Information was sourced from published academic and policy literature and from 20 interviews with principal stakeholders working in police, prosecution and policy organisations throughout Australia, as well as a small number of academics. Interviews were conducted between August and September 2014 and the research was approved by an institutional Human Research Ethics Committee. All personally identifying information has been withheld for reporting purposes.

### *Australia's legislative regime*

Different laws and procedures relating to the confiscation of assets, including unexplained wealth, exist across Australia. In some jurisdictions police and Crown solicitors collaborate on unexplained wealth cases, while in others police and the Office of the Director of Public Prosecutions work together. In New South Wales and in Queensland, the state Crime Commission is the sole agency involved. New South Wales and the Northern Territory are the only jurisdictions that indicated satisfaction with their current unexplained wealth legislation.

Western Australia was the first Australian jurisdiction to enact unexplained wealth provisions in 2000. This model does not require that reasonable grounds for suspecting the subject of the inquiry has committed an offence be demonstrated; the police and the Director of Public Prosecutions collaborate to investigate and obtain unexplained wealth orders. It has been reported that Western Australia's unexplained wealth legislation is not effective due to legal costs, difficulties in obtaining examination and production orders, complexities around financial analysis and problems with liaison between police and prosecutors.

The Northern Territory's unexplained wealth processes have been relatively successful in recovering funds. The legislation was introduced in 2003 and was modelled on the Western Australian provisions. While the working relationship between the Solicitor for the Northern Territory and the police appears effective, this is arguably due to the small size of the jurisdiction, as problems with a dual-agency model were identified in all other jurisdictions. The Territory's geographic isolation from the east coast of Australia may contribute to the perception of a lack of assistance from Commonwealth agencies and the private sector.

In New South Wales, the New South Wales Crime Commission recovers assets and has developed an efficient model, which was praised by representatives of other jurisdictions in the consultation interviews. Unexplained wealth is identified and settlements made using coercive powers, with litigation rarely necessary.

The Crime and Corruption Commission in Queensland adopted the New South Wales model when it implemented unexplained wealth legislation in 2013. Unexplained wealth legislation in South Australia has been in place since 2009 but, until very recently, legislative issues limited the use of certain types of evidence, and the South Australian legislation has not yet led to the successful recovery of any unexplained wealth.

Legislation was enacted in Victoria and Tasmania in 2014 but remains in an early stage of development in both states. The Australian Capital Territory is currently developing unexplained wealth legislation.

Unexplained wealth orders were introduced at the Commonwealth level in 2010. Responsibility was initially shared between the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions, but in 2012 the AFP became exclusively responsible for the orders. While amendments to the legislation are currently before Parliament, it is unclear whether these will satisfactorily resolve the problems experienced and allow the successful recovery of unexplained wealth in the future.

Overall, the recovery of unexplained wealth has a strong legislative foundation in Australia, although a number of barriers to the successful recovery of funds from those suspected of possessing the proceeds of crime remain.

### *Overseas legislative regimes*

While Australia has some of the most extensive unexplained wealth legislation in the world, a number of other countries also have well-developed legislative regimes. Key legislation and case law relating to the civil recovery of unexplained wealth in Italy, Ireland, Canada, the United Kingdom, the United States and France has been reviewed. These international models and the issues experienced in overseas jurisdictions provide useful perspectives to inform future reform in Australia.

Italy introduced unexplained wealth laws in the 1950s to deal with their enduring problem with organised crime. Italy is the only jurisdiction in which a law imposing both imprisonment and the confiscation of assets has been enacted in this context. However, this law was only in force between 1992 and 1994, before being declared unconstitutional and repealed. Such an approach would also be highly controversial in Australia.

Unexplained wealth laws were introduced in the Republic of Ireland in 1994. As has been the case in many jurisdictions, these have been challenged as unconstitutional on several occasions. The Irish Criminal Assets Bureau contributed significantly to the establishment of the Camden Asset Recovery Interagency Network (CARIN), which facilitates the sharing of information across a number of countries, including Australia.

France has adopted novel procedural reforms for managing confiscated assets. Their approach provides investigation and litigation agencies with greater confidence they will not be held liable for losses suffered by respondents whose restrained assets are not subsequently confiscated, an issue that also has relevance for Australian jurisdictions.

The United States' civil forfeiture legislation was enacted in 2000. It is not as stringent as the unexplained wealth legislation of the other countries considered. Unlike the unexplained wealth approach, the burden of proof lies with the government rather than the respondent, and they must establish a substantial connection between the property to be restrained and any underlying crime. Other measures such as hardship provisions and time limits also apply. In

contrast, Canada's unexplained wealth legislation has been in place since 2001 and continues to be applied, despite having been subject to significant litigation around constitutional issues.

In the United Kingdom, the Proceeds of Crime Centre (PoCC) within the Economic Crime Command of the National Crime Agency is responsible for administering the *Proceeds of Crime Act 2002*, which governs the recovery of property obtained through unlawful conduct. Where an investigation by specialist police finds there is insufficient evidence to pursue criminal charges, or such charges are not made for public interest reasons, confiscation of assets orders can be obtained in the Crown Court. There have been a number of legal challenges to the civil recovery provisions on the basis that they reverse the presumption of innocence; in addition, the provisions have led to the recovery of the amount of funds initially anticipated (Bullock & Lister 2014).

These approaches to unexplained wealth and civil asset recovery provide an opportunity to reflect on potential options for Australian reform. Given the global nature of organised crime, the Australian approach to unexplained wealth and civil asset recovery must be seen as strong, relative to other countries, to ensure Australia is not viewed by individuals or groups as a favourable jurisdiction in which to undertake criminal activities.

#### *Application of unexplained wealth legislation in Australia*

Since unexplained wealth legislation was first introduced in Australia in 2000 a small number of orders and settlements have been made, with approximately \$9m restrained through unexplained wealth procedures and a further \$32.3m restrained through drug-trafficker declaration procedures. No proceedings, orders or settlements have yet been obtained at the Commonwealth level, or in Victoria or Tasmania. In New South Wales, \$2.6m has been confiscated through unexplained wealth proceedings and a further \$11.8m using other assets confiscation procedures (but which commenced as unexplained wealth applications). The total value of assets confiscated in Australia between 1995–96 and 2013–14 through all types of confiscation procedures is \$796,677,166—including amounts restrained using unexplained wealth procedures and drug-trafficker declarations. These statistics are, however, incomplete, as full data could not be obtained from some jurisdictions. There are no national statistics available on how successful unexplained wealth orders have been in recovering funds from those subject to such proceedings.

#### *Procedural and evidentiary barriers in Australia*

Unexplained wealth investigations are complex and difficult because they require swift action and specialist financial expertise. In jurisdictions where unexplained wealth legislation has been relatively successful, almost all recoveries of cash and assets have been made through settlement of cases prior to reaching trial, rather than as a result of finalised court proceedings.

More efficient and effective processes for confiscating unexplained wealth are needed at the state and territory level, including improved intelligence sharing and expertise and better collaboration between specialist Commonwealth entities and those of the states and territories.

During stakeholder interviews, a number of law enforcement agencies identified the crime commission model as the most desirable and effective of Australia's current approaches to unexplained wealth. This approach addresses procedural difficulties by integrating all functions into a single agency; it deals with evidentiary barriers by using coercive powers to obtain evidence and moving quickly to restrain unexplained wealth.

The crime commission model also acknowledges that unexplained wealth matters entail highly complex financial investigations of individuals, many of whom can afford to seek professional legal and financial advice on how to circumvent traditional investigations. Unexplained wealth cases need to be undertaken as efficiently as possible so assets can be identified and restrained before they are moved beyond the reach of law enforcement. Traditional police investigations and financial/legal proceedings have been so far ineffective in Australia as an approach to most cases involving unexplained wealth.

### *The way forward*

Australia needs a coherent national approach to the confiscation of unexplained wealth. The majority of the state and territory representatives interviewed indicated they would prefer an approach that would allow state, territory and Commonwealth legislation to coexist. They identified the text-based referral of legislative power, which would permit the application of Commonwealth legislation within the states and territories, as the most suitable and effective approach to adopt. Harmonised mirror legislation was generally considered a less acceptable alternative due to the difficulty of enacting uniform national legislation.

Most of the stakeholders consulted believed the New South Wales Crime Commission embodies the most effective approach to the confiscation of unexplained wealth of any approach currently taken in Australia. The New South Wales Crime Commission uses coercive powers to obtain information early in investigations, and cases are:

- dealt with by experienced financial intelligence analysts within a single agency; and
- settled in almost all cases without the need for costly court proceedings and for the amount determined to be unexplained.

The Crime and Corruption Commission in Queensland has already adopted the New South Wales model, and Western Australia is also considering doing so.

Most agencies supported achieving reform by amending Commonwealth legislation to incorporate elements of the New South Wales Crime Commission model. This approach would require broad consultation with agencies, followed by the text-based referral of powers to the Commonwealth to allow the amended legislation to be applied across all jurisdictions. Existing state and territory legislation would remain or be amended over time, but the aim would be to increase the Commonwealth's responsibility for unexplained wealth proceedings that extend across state and territory borders.

Many of those interviewed were concerned about how proceeds of crime recovered under a better-coordinated unexplained wealth regime would be shared. This was particularly of concern to those jurisdictions where unexplained wealth legislation has been most successful.



Representatives of these jurisdictions expressed concerns that their success in restraining assets would not be adequately recognised by the Commonwealth, and that they may not be able to access any proceeds recovered. Participants considered various models, based on jurisdictions' contributions to securing a successful outcome, for ensuring the fair distribution of recovered proceeds of crime. Ideally, the question of how recovered proceeds of crime are to be shared would be resolved in any agreement between the states and territories and the Commonwealth, when the text-based referral of powers is undertaken.

Finally, Australia needs national uniform data-collection procedures to allow assets confiscation proceedings to be monitored. These procedures could include the collection and analysis of discrete data on unexplained wealth proceedings, the value of assets restrained and/or confiscated and the value of funds recovered through court orders and/or negotiated settlements. Such data should be held in statistical collections that allow annual disaggregation across jurisdictions and agencies.

# Introduction

## **Background**

Australia's unexplained wealth laws form part of a range of measures introduced in response to growing concern about the prevalence of serious and organised crime. Other measures adopted (to varying degrees) by Commonwealth, state and territory governments include proscribing emerging crime types, criminalising membership of groups like outlaw motorcycle gangs and other legislation directed at confiscating the proceeds of crime, such as drug-trafficker confiscation laws. Further policy responses to serious crime in Australia have been considered at the Commonwealth, state and territory level since the completion of fieldwork for this study. Unexplained wealth laws and the confiscation of assets undermine the business model of organised crime by removing its financial benefits and preventing the use of such assets to fund future crime; they also allow society to be compensated and offenders to be punished, and deter people from engaging in crime (Bartels 2010a).

The ACC estimates serious and organised crime cost Australia \$36b in 2013–14, including prevention and response costs (ACC 2015). This estimate does not include the cost of other types of crime that do not involve serious and organised crime (Smith, Jorna, Sweeney & Fuller 2014). According to published national statistics, however, the total value of assets confiscated in Australian jurisdictions between 1995–96 and 2013–14 was approximately \$800m, averaging around \$44m annually. It is clear more must be done to target the profits of organised crime and that approaches such as unexplained wealth laws must be effective if they are to have any impact on organised crime (ACC 2013).

Unexplained wealth laws are a relatively new approach to the confiscation of proceeds of crime and provide a means of securing assets that cannot be recovered using traditional conviction-based legislative means. In contrast to traditional approaches to confiscation, the state need not prove the property owner has committed a criminal offence; the burden of proof is reversed so that the property owner bears the onus of proving the property was acquired legitimately. Unexplained wealth laws are designed to target those senior figures in criminal organisations who do not commit crimes themselves but who play a key role in planning, financing and directing criminal operations. Only a small number of countries, including Australia, Ireland and Columbia, have unexplained wealth laws, with variants in force in the United Kingdom, Italy, France and Canada (Booz Allen Hamilton 2012).

Australia's first unexplained wealth laws were introduced in Western Australia in 2000, followed by the Northern Territory in 2003 and the Commonwealth in 2010. New South Wales, Queensland and South Australia all introduced legislation after 2010, and Victoria and Tasmania only in 2014. The Australian Capital Territory is the only jurisdiction without unexplained wealth laws, but is currently developing them. These laws require individuals to justify their financial situation or forfeit that portion of their wealth they are unable to demonstrate was legitimately acquired.

Australia's unexplained wealth laws have been criticised by some legal academics concerned about the reversal of the burden of proof and, in some cases, the diminished right to silence. The necessity of the laws, and whether the relatively small amounts recovered under them outweigh their negative aspects, has also been questioned (Croke 2010). They are, however, one of a range of approaches to confiscation that can be applied to suit the circumstances of a particular case; in most cases they are employed as a last resort where there is insufficient evidence to link an individual to criminal activity (where such a link clearly exists).

### Legislative approaches

Australia's first unexplained wealth provisions, implemented in Western Australia in 2000, have a number of characteristics. The *Criminal Property Confiscation Act 2000* (WA) requires that the court make an order if it is satisfied a person's total wealth is greater than their lawfully acquired wealth. The judge has minimal discretion in making the order; the onus of proof is reversed in favour of the Crown and any property, service, advantage or benefit that constitutes part of the respondent's wealth is presumed to have been unlawfully acquired unless the respondent establishes otherwise. The Western Australian Director of Public Prosecutions can apply to a court for a production order that requires an individual (and the individual's financial institution) to produce documents justifying their wealth, as well as a restraining order that prevents the use of their property and assets for a specific period. The Western Australian law was the model for legislation adopted in the Northern Territory in 2003, although there are subtle differences between the jurisdictions.

The next major development in Australian law occurred in 2010, when unexplained wealth legislation was introduced at the Commonwealth level. The Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* requires an unexplained wealth order be made where a court is not satisfied that the total wealth of the person was not derived from one or more of the following:

- an offence against a law of the Commonwealth;
- a foreign indictable offence; and/or
- a state offence that has a Commonwealth aspect.

Under the initial arrangement, the AFP was responsible for investigating unexplained wealth orders and the Commonwealth Director of Public Prosecutions for litigation.

The unexplained wealth laws adopted by Australian jurisdictions differ in a number of ways, including in the level of discretion a judge has in making an unexplained wealth order, whether

hardship is taken into account in determining the value of an order, the degree of connection to criminal conduct that is required and the agency that is responsible for applying to a court for an unexplained wealth order. Given criminals tend to exploit lax regulatory environments, the inconsistencies between legislation across Australian jurisdictions raises questions about the overall effectiveness of the current regime.

### Prior evaluations and reviews

Unexplained wealth laws are relatively recent and little prior research or evaluation has examined them, but publicly available data such as annual agency reports indicate that, in most jurisdictions, unexplained wealth laws have not led to the recovery of significant amounts of money. The AIC undertook a review of Australian legislation when unexplained wealth laws were enacted at the Commonwealth level in 2010 (Bartels 2010a, 2010b). There have also been a number of federal parliamentary reviews.

The Commonwealth's unexplained wealth legislation was developed in line with the recommendations of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) which, in 2009, examined proposed legislation to outlaw serious and organised crime groups. In 2012, an inquiry by the Parliamentary Joint Committee on Law Enforcement (PJC-LE) into unexplained wealth laws made recommendations on the further development of unexplained wealth legislation. In 2014, the Senate Standing Committee on Legal and Constitutional Affairs (SSCLSA) tabled the report of their inquiry into a bill to amend unexplained wealth legislation, which was later passed by the parliament as the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015 (Cth)*.

Key stakeholders offered their general views on unexplained wealth laws, the relevant short- to medium-term issues and areas needing further reform in submissions to the 2012 and 2014 Senate committee reviews of unexplained wealth laws.

### Study scope and objectives

This study sought to identify the legal, procedural and evidentiary barriers to obtaining successful unexplained wealth orders and how these could be addressed. The authors consulted with all agencies involved in investigating unexplained wealth and applying to courts for unexplained wealth orders, as well as with associated Commonwealth agencies such as the ACC, the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC). AUSTRAC was the only relevant agency that declined to participate as, for security reasons, the agency did not wish to discuss its operational methodology. This was unfortunate, as financial intelligence is critically important in initiating and undertaking unexplained wealth investigations.

Issues discussed during interviews included:

- how investigations are conducted;
- the value of funds and/or assets recovered;

- practical issues contributing to success or failure;
- how respondents are identified;
- interagency cooperation and communication at the state, territory and Commonwealth levels;
- cooperation with private-sector stakeholders such as financial institutions;
- evidentiary issues, including obtaining information through the use of coercive powers;
- the circumstances of case settlement;
- court discretion;
- geographical constraints; and
- international cooperation.

The research will assist in the use of unexplained wealth orders in Australia by considering the views of relevant Australian agencies on the practical issues associated with obtaining unexplained wealth orders and recovering proceeds of crime. It examines the issues from state and territory and Commonwealth levels. Further context is provided by an examination of overseas approaches that identifies potential options to explore. A key objective of the study is to make recommendations that will ultimately result in more efficient and effective unexplained wealth investigations, and lead to the recovery of more confiscated assets.

The study's findings can be applied by individual agencies involved in investigating and prosecuting unexplained wealth matters at state, territory and Commonwealth level. It provides options the Commonwealth government can consider and discuss with stakeholders to determine the best way to move forward.

# Method

## Research design

This project examined the processes involved in obtaining unexplained wealth orders in Australian jurisdictions and sought to determine how barriers to obtaining orders could be removed through legislative or procedural reform. It also reviews comparable systems in other countries to determine best-practice approaches to unexplained wealth investigations.

Legislation was analysed and police, lawyers and relevant government agencies interviewed to evaluate the effectiveness of the current legislative framework and identify barriers to the successful recovery of unexplained wealth. As the agencies involved refused the project's request to review case files, interviews were its only source of information about the investigation and prosecution of unexplained wealth orders.

The academic literature on the comparable unexplained wealth laws of the United Kingdom, the United States, Canada, France, Ireland and Italy—and, where possible, the legislation—was reviewed.

Police commissioners and chief executives of relevant Australian agencies were advised of the study, and senior staff with experience in investigating, settling and litigating unexplained wealth cases were identified in each organisation and contacted with a request for a face-to-face interview. The interviewees were informed no personally identifying information would be recorded and that the views of specific individuals and agencies would not be directly quoted in the final report.

Interviews with senior police, prosecutors and government agency staff involved in unexplained wealth proceedings were conducted in Canberra, Sydney, Brisbane, Perth, Darwin and Adelaide. A small number of leading academics in the field were also consulted. The interviews were recorded, transcribed and analysed to identify issues relating to unexplained wealth legislation and procedures in Australia and potential solutions. The information obtained from these interviews was analysed in conjunction with legislation, judicial decisions, statistical data, academic literature and policy on unexplained wealth laws from Australia and overseas jurisdictions. The report has been reviewed and edited by the AIC.

At the project design stage, a number of research questions were developed to guide the research.

- How many unexplained wealth applications have been made at the Commonwealth level and at the state and territory levels since their introduction in 2000, and what have been the outcomes of applications?
- What legal, procedural and evidentiary barriers exist to obtaining successful unexplained wealth orders in Australian jurisdictions, and how might these be overcome?
- To what extent are respondents subject to detention by police for refusing to produce documents or evidence in connection with unexplained wealth proceedings?
- In what proportion of cases does a court exercise its discretion not to make an unexplained wealth order and on what grounds?
- In what proportion of cases does a court determine that part of the assets the subject of an unexplained wealth order should be excluded from an order, and on what grounds are such determinations made?
- To what extent and on what grounds are unexplained wealth orders discounted or dismissed by reason of potential hardship to the respondents' dependants?
- To what extent do successful unexplained wealth orders result in the actual recovery of funds from those the subject of proceedings?
- What comparable systems for the recovery of proceeds of crime exist in other countries?
- What legal, procedural and evidentiary barriers exist to obtaining successful unexplained wealth orders in overseas jurisdictions, and how have these been addressed?
- Which laws and procedures governing unexplained wealth proceedings in overseas countries could be applied to Australian jurisdictions to make Australian laws and procedures more effective in permitting the proceeds of crime to be confiscated?

Because it was not possible to obtain access to and examine case files, and due to a lack of available data, the study was unable to address some of the original research questions. It also became apparent that the vast majority of cases were settled before judicial proceedings commenced, which limited the amount of information on litigation and procedural issues available for examination. These limitations have no substantial impact on the value of the research and the conclusions drawn.

## **Ethical considerations**

The study involved ethical issues related to the confidential and sensitive nature of information provided by interviewees.

Interviews with government employees and academics were between one and two hours in length. All participants were over 18 years of age. Interviewees were asked to discuss matters associated with unexplained wealth cases and associated policy issues. They were not asked to reveal information about themselves, their agencies or the subjects of unexplained wealth investigations.



This research posed a low risk to human participants. Information was provided to AIC research staff securely, and the interviewees were adults who consented to interview. Where interviews were, on the whole, digitally recorded, interviewees were notified in advance of how they would be recorded and offered the option of being recorded by a scribe only, if they so preferred.

## Interviews

Interviews were key to this project. They were conducted to gain an understanding of views on the effectiveness of current Australian legislation and how potential issues could be resolved. Nominated personnel were provided the questions, along with a plain language information sheet describing the purpose of the research and inviting them to participate, prior to interview. These documents are at *Appendix 1* of this report.

In all, 20 interviews were conducted across Australia. Participants responded positively to the opportunity to share their views. The interviews were successful in eliciting information from participants about current issues in their jurisdiction. Individuals from the following agencies and universities were interviewed for this research project:

- the Australian Government Attorney-General's Department (AGD);
- the ACC;
- the AFP;
- the Australian Securities and Investments Commission;
- the ATO;
- Flinders University;
- Griffith University;
- the New South Wales Crime Commission;
- the New South Wales Police Force;
- the Northern Territory Police Force;
- the Office of the Director of Public Prosecutions for Western Australia;
- the Queensland Crime and Corruption Commission;
- the Solicitor for the Northern Territory;
- the South Australia Crown Solicitor's Office;
- South Australia Police;
- the University of Sydney; and
- Western Australia Police.

## Limitations

One of the study's main limitations was that researchers were unable to obtain access to unexplained wealth case files. The research proposal anticipated that researchers would

examine all administrative records and case files relating to unexplained wealth cases held by police and prosecution agencies. The participating agencies, though, did not agree to this request, citing privacy and confidentiality issues, operational sensitivity and the amount of time required to redact personal details from case files. However, all agencies (with the exception of AUSTRAC) were willing to participate in interviews and, in most cases, appreciated the opportunity to provide detailed descriptions of their most significant unexplained wealth cases and associated issues, and their views on how these problems could be resolved. Agencies also provided updated case statistics and statistics on funds recovered through unexplained wealth proceedings. The professional opinions of a wide range of people across all relevant jurisdictions in Australia on unexplained wealth cases were collated and analysed. Many of those interviewed had several years of relevant experience in the field. The lack of access to case files was, therefore, not a major limitation.

Judicial decisions relating to unexplained wealth cases were also examined. In many cases, these contained details that would otherwise have been drawn from the case files. To date, however, the vast majority of unexplained wealth cases in Australia have been settled out of court and have not proceeded to trial. The information obtained through interviews provided important insights into all matters dealt with.

### Prior research

The project examined prior reviews of unexplained wealth laws and procedures, including parliamentary reviews and papers published by the AIC while the Commonwealth legislation was being developed (Bartels 2010a, 2010b). Prior research on unexplained wealth laws and procedures is limited, although some high-quality analysis of Australian criminal-asset recovery systems has included discussion of unexplained wealth laws (Goldsmith et al. 2014). Past academic commentary on unexplained wealth legislation has predominantly involved critiques of aspects of the laws, such as the reversal of the burden of proof, that are controversial from an individual rights perspective (Gray 2012).

Unexplained wealth laws have been widely enacted in Australia; they have been accepted and integrated into the legal system. What has not previously been examined to any great extent is whether these laws achieve their objectives—in particular, whether they are widely used, what value of assets have been confiscated, and whether they effectively deter organised and other crime.

This study focused on the legal and procedural barriers to obtaining unexplained wealth orders in Australia. This included an examination of the processes involved in identifying those alleged to be in possession of unexplained wealth, obtaining evidence, undertaking litigation, obtaining unexplained wealth orders and recovering assets. Whether unexplained wealth laws are effective in terms of general deterrence is a wider question and beyond the scope of this study.

## Overseas approaches

Australia has some of the most developed unexplained wealth legislation in the world, but it is not the only country to have introduced such laws. Overseas legislation and the issues foreign jurisdictions experience can provide context to inform the further development of Australian laws. This section examines the legislative approaches of Italy, Ireland, Canada, the United Kingdom, the United States and France. Data and/or information on some of the overseas approaches, particularly those of jurisdictions where government documents are not in English, was limited. It was decided to include these as they offer valuable perspectives and provide context for the consideration of current and potential future Australian reforms.

### Italy

Italy has some of the longest-standing civil asset confiscation provisions in the world. These were first introduced in 1956 and directed at mafia-related organised crime groups. The Italian non-conviction-based asset confiscation regime has a crime prevention rationale and operates alongside conviction-based measures that can be used in criminal proceedings.

While non-conviction-based measures in Italy are directed at individuals suspected of being associated with drug trafficking, gambling, human trafficking and prostitution, these provisions are preventative in nature. They do not require a conviction and have been established outside criminal proceedings and associated judicial supervision.

The Italian legislation has been amended several times since it was first introduced. In 1982 it was amended to apply to any 'suspects belonging to mafia type associations' and, if the lawful origin of the assets could not be established, the property and assets of those suspects could be confiscated. Italian *Law No. 356* was enacted in 1992; it required individuals convicted of mafia-associated offences to demonstrate the lawful source of their income or potentially be imprisoned and have their assets confiscated. This law was declared unconstitutional in 1994 on the basis that it contravened the presumption of innocence (Paoli 1997).

Under Italian law, the individual's financial affairs, as well as those of their family members and associated legal entities such as companies, must be investigated. To be confiscated, the assets must firstly be (either directly or indirectly) at the suspect's disposal and, secondly, there must be evidence that the assets are proceeds of crime. The suspect's legitimate income must also be inconsistent with their total wealth. The burden of proof is reversed and the suspect must prove their assets have been lawfully acquired, or the court will issue a confiscation order.

In addition to these civil measures, Article 240 of the Italian Criminal Code states that, when a criminal conviction has been recorded, the judge may order the 'forfeiture of the things that were used or were intended to accomplish the crime or of the things that were the product or the profit'. This use or intended use must be proved beyond reasonable doubt. Confiscation provisions are either optional or mandatory depending on the offence type. The judge is required to impose confiscation provisions for a number of mafia-related crimes such as drug trafficking, extortion, loan sharking, money laundering and kidnapping (Paoli 1997).

## Ireland

Ireland's civil forfeiture laws are the *Proceeds of Crime Act, 1996* and the *Criminal Asset Bureau Act, 1996*. As other unexplained wealth legislation does, these laws shift the burden of proof to the respondent. The laws were criticised by academics and lawyers when they were first introduced and have been unsuccessfully challenged several times on constitutional grounds (McKeena & Egan 2009). The civil confiscation provisions of the Irish *Proceeds of Crime Act, 1996* shift the burden of proof to the respondent, who must establish the property was obtained legitimately; there is no requirement to demonstrate a link between the property and a specific crime, and belief (ie hearsay) evidence is admissible in establishing reasonable grounds for believing the persons possesses property that is the proceeds of crime. The introduction of civil-based asset confiscation legislation in the 1990s was a response to a number of high-profile Irish crimes and a significant increase in organised crime. Among other objectives, it sought to address the perception that only lower-level members of criminal syndicates were being prosecuted while the leaders of organised crime escaped prosecution (McKeena & Egan 2009). The Irish police view the implementation of the Irish legislation as a success and it is credited with reducing crime rates by influencing organised criminals to move to other jurisdictions. The Irish *Proceeds of Crime Act, 1996* is implemented by the Criminal Asset Bureau (CAB), a multidisciplinary agency staffed by the Irish police, the social welfare department and the revenue services agency. The CAB played a key role in establishing the CARIN, which facilitates information sharing across a number of countries including Australia, and is highly regarded internationally.

Under the Irish *Criminal Justice Act, 1994*, property can be confiscated following a conviction if, on the balance of probabilities, it is associated with a crime. In the case of drug-trafficking offences, there is a rebuttable presumption that all property received within six years of the day proceedings were commenced is the proceeds of drug trafficking. For all other offences, only benefits considered to be derived from the specific offence can be confiscated. Other provisions allow a defendant's assets to be restrained pending a criminal trial, to ensure they are available if a conviction is obtained. Persons who fail to make a court-ordered payment are liable to imprisonment for up to 10 years.

## Canada

Canada's non-conviction-based asset forfeiture legislation operates alongside conviction-based legislation. Non-conviction-based asset forfeiture was first established in Ontario's *Remedies*

for *Organized Crime and Other Unlawful Activities Act, 2001*, and applies in most provinces. Civil asset forfeiture in Canada is governed by provincial legislation, while the conviction-based legislation is governed by the federal criminal code. Under the Canadian constitution, provincial legislatures can enact civil laws, while the federal parliament has jurisdiction over criminal law. The Ontario legislation targets property, and contains a presumption in favour of forfeiture of the 'instrumentalities of crime'. Directly recovered funds are used to compensate victims of the associated criminal activity. All non-conviction-based legislation in the Canadian provinces allows the use of confiscated funds to compensate victims of crime and fund law enforcement (McKeachie & Simser 2009).

Three types of assets can be confiscated under the Ontario legislation: proceeds of unlawful activities, instruments of unlawful activities and instruments of conspiracies that injure the public. If the court is satisfied there are reasonable grounds to believe the property in question is the proceeds of crime or an instrument of unlawful activity, a restraining order can be made; it must be in the interest of justice to make such an order. Property forfeited under these provisions is held in a consolidated revenue fund and the finance minister may use it to pay compensation, assist victims or prevent unlawful activities, or to reimburse public bodies involved in bringing proceedings under the legislation (McKeachie & Simser 2009).

Canada's civil forfeiture legislation is controversial and has been criticised on the grounds that it amounts to criminal proceedings in the guise of civil proceedings. However, the Canadian judiciary has found confiscation proceedings are in rem and focus on property obtained through crime, rather than a person. In 2005, the Supreme Court of Canada upheld the legislation in the case *Attorney General of Ontario v \$29,020 in Canadian Currency et al.* [2005] CanLII 24251. This case centred on whether the Ontario Government's civil forfeiture provisions encroached on the federal government's authority in relation to criminal law. The court upheld the constitutionality of the legislation and found the laws were within the provincial legislature's jurisdiction.

In *Canadian Western Bank v Alberta* (2007) 2 SRC 3 the Supreme Court of Canada found the civil forfeiture law sought to deter crime and compensate the victims of crime. The court found it differed from criminal law, which involves not just a prohibition but a penalty and, further, does not involve an allegation that a person committed an offence in respect of which a penalty, punishment or imprisonment could be imposed.

## United Kingdom

The United Kingdom's *Proceeds of Crime Act 2002* governs criminal asset confiscation in the United Kingdom. This legislation was developed following a review by the Cabinet Office, initiated in response to the country's poor record of asset confiscation. While the review was being conducted the Asset Recovery Agency was created, non-conviction-based asset recovery legislation was introduced and a more effective taxation regime focused on suspected criminal

gains was implemented. Under the *Proceeds of Crime Act 2002 (UK)*, those in possession of the proceeds of crime can also be prosecuted for money laundering:

Section 329 of the Act states that a person commits a money laundering offence if he acquires criminal property, uses criminal property, or has possession of criminal property. This wide definition allows law enforcement agencies to bring charges of money laundering where an offender has assets that cannot be shown to have come from legitimate sources...The ability to demonstrate unexplained wealth would appear to provide an important avenue for potentially disrupting organised crime groups in cases where it has been impossible to establish a direct evidential link with criminality (Brown 2013: 264–265).

Since the review, the Asset Recovery Agency's functions have been taken over by the National Crime Agency.

Civil Recovery and Tax (CRT), a specialist department of the Economic Crime Command within the National Crime Agency, recovers property obtained through unlawful conduct in the United Kingdom. Cases are referred where there is insufficient evidence to pursue criminal charges, where criminal charges are not made for public interest reasons, if confiscation proceedings fail, when the defendant has absconded from the jurisdiction and there is no reasonable prospect of obtaining their extradition, or if the defendant is deceased (Bullock & Lister 2014). Five criteria must be satisfied:

- the case must be referred by a law enforcement or prosecution agency;
- the value of the property concerned must be at least £10,000;
- the property concerned must have been obtained within the last 12 years;
- there must be a significant local impact on communities; and
- there must be evidence of criminal conduct on the balance of probabilities.

If it can be argued the property concerned is 'recoverable property', the respondent must prove the property has a lawful source and produce evidence to rebut the allegation that the property is recoverable. The National Crime Agency can apply to the High Court for an interim receiving order for the detention, custody or preservation of property, and freezing injunctions where there is an imminent risk of dissipation. If the court considers the property to be recoverable, it must issue a recovery order and appoint a trustee to secure the property and realise its benefit.

Under the *Proceeds of Crime Act 2002 (UK)*, a confiscation order can be obtained within two years of a conviction if it can be demonstrated the defendant benefited from a crime. Criminal benefit is defined as the benefit obtained from particular criminal conduct or from general criminal conduct resulting from a criminal lifestyle; it is not necessarily equivalent to an

offender's realisable assets. Specific criminal benefits are those arising from a particular offence, while general lifestyle benefits arise from drug trafficking, money laundering, terrorism, people trafficking and a number of other offences detailed in the Act. Criminal lifestyle provisions may also apply if the offender has been convicted in the same proceedings of:

- three or more offences;
- two offences in the previous six years from which they benefited by more than £5,000; or
- an offence from which they benefited by more than £5,000 in six months.

In the United Kingdom, the state does not necessarily sell confiscated assets unless the offender is unable to satisfy the order.

The United Kingdom provisions have not recovered the amount of funds anticipated when they were introduced. The civil recovery provisions have been legally challenged on the basis that they reverse the presumption of innocence and are really criminal, rather than civil, proceedings (Bullock & Lister 2014); these appeals were dismissed by the High Court. For example, *Walsh v Director of the ARA* [2005] NICA 6 found they are civil proceedings that seek to recover unlawfully obtained property, rather than impose a penalty. For this reason the provisions are not subject to established criminal law principles and cannot be appealed in the European Court of Human Rights on that basis.

## United States

There are a number of asset forfeiture laws in the United States; however, these have not been developed in an integrated way. These US laws include the *Racketeering and Influenced and Corrupt Organizations (RICO) Act 1970*, the *Comprehensive Drug Abuse Prevention and Control Act 1970* and the *Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act 2001*, which provides for the confiscation of all assets held by a person engaged in terrorism.

There are three kinds of non-conviction-based forfeiture in the United States.

- Summary forfeiture allows police to seize unclaimed property on the spot, without the necessity for legal proceedings. This is most often applied to contraband such as illicit drugs, as ownership cannot be claimed for illegal property.
- Administrative forfeiture allows police to seize an individual's property on the basis of probable cause that the property would be subject to forfeiture. The individual may contest the forfeiture by a set date; if it is not contested by that date, a declaration (with the authority of a judicial order) is issued.
- Civil proceedings are used in relation to real estate and involve an in rem proceeding against the property. Unlike the other jurisdictions that have been discussed, a link must be established between the property in question and a specific offence and the government bears the civil burden of proof (the preponderance of evidence, in the United States) to establish that the property is tainted (Cassella 2003).

The *Civil Asset Forfeiture Reform Act of 2000* (US; the CAFRA) establishes a uniform civil forfeiture procedure at the federal level in the United States. This legislation applies to federal offences including theft, fraud and bribery, and authorises the seizure of forfeited proceeds and instruments of crime related to state offences including murder, robbery and drug trafficking.

Prior to the enactment of this statute, US federal legislation allowed forfeiture of property where the government or law enforcement could show probable cause the property was used to commit or facilitate a crime. Once the property had been forfeited, its owner was required to demonstrate it was not used to commit an offence or was proceeds of crime.

The CAFRA addresses some controversial aspects of earlier laws and places the burden of proof—to demonstrate seized property is the proceeds or an instrument of crime—on the government rather than the respondent. It also prevents the admission of hearsay evidence at trial and includes an ‘innocent owner’ provision that allows the respondent to recover legal fees and claim damages in appropriate instances. The Act also requires proof of a substantial connection between the property and underlying crime, and includes hardship provisions and time limitations. It was introduced following several years of lobbying by middle-class property owners for what they considered to be more just civil forfeiture legislation (Booz Allen Hamilton 2012).

## France

The Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) was established in France in 2010 to recover criminal assets and prevent the commission of further offences, through the seizure, management and confiscation of criminal assets and by providing assistance to prosecutors and the judiciary. The agency is supervised jointly by the Ministry of Justice and the Ministry of Budget and staffed by 18 officers from these ministries. It is designed to be a self-financing agency and draws funds from confiscated monies and assets. The agency has five key functions:

- the sale of assets seized in cases that have reached trial (when they are no longer required as evidence in the case);
- the centralised management of funds seized in criminal proceedings;
- the management of assets requiring administration;
- ranking civil claimants in criminal matters and compensating them; and
- informing public creditors to ensure debts are paid (AGRASC 2012).

AGRASC requests criminal courts make orders in appropriate cases and provides the courts with control over the restrained assets. The agency has the power to sell the assets and deposit the money in an interest-bearing account. If a person is acquitted, they are given the value of the asset in cash with no interest.

The management of restrained assets is a critical component of proceeds of crime litigation. In Australia, when an order to restrain a respondent’s assets is sought, an undertaking must be given regarding the value of the damages if the respondent suffers economic loss because their



assets have been restrained. Many cases involve bank accounts, houses and motor vehicles, and more significant cases often involve ongoing businesses or share portfolios.

## Summary

While Australia has some of the most extensive unexplained wealth legislation in the world, a number of other countries also have well-developed legislative regimes. Key legislation and case law relating to the civil recovery of unexplained wealth in Italy, Ireland, Canada, the United Kingdom, the United States and France has been reviewed. The models adopted and issues experienced in overseas jurisdictions offer useful perspectives that could inform future reform in Australia.

Italy introduced unexplained wealth laws in the 1950s to deal with their enduring problem of organised crime. Italy is also the only jurisdiction in which a law imposing both imprisonment and confiscation of assets has been enacted in this context. However, that law was only in effect between 1992 and 1994, before being declared unconstitutional and repealed. Such an approach would also be highly controversial in Australia.

Ireland introduced unexplained wealth laws in 1994 and, as is the case in many jurisdictions, these have been challenged as unconstitutional on several occasions. The Irish Criminal Asset Bureau contributed significantly to the establishment of CARIN, a network which facilitates information-sharing across a number of countries including Australia. Canada has had unexplained wealth legislation since 2001, which remains in place despite having been subject to significant litigation related to constitutional issues.

In the United Kingdom, the Economic Crime Command of the National Crime Agency can seek the civil recovery of property obtained through unlawful conduct. Cases are referred to the agency for a number of reasons—for example, where there is insufficient evidence to pursue criminal charges or criminal charges are not made for public interest reasons. A specialist department, Civil Recovery and Tax (CRT), conducts proceedings when it is not feasible to secure a criminal conviction, when a conviction is obtained but a no confiscation order is made, or if a relevant authority is of the view the public interest would be better served by using those powers rather than seeking a criminal disposal. There have been a number of legal challenges to these civil recovery provisions on the basis of the reverse presumption of innocence and, additionally, the UK provisions have not recovered the amount of funds initially anticipated.

The United States civil forfeiture legislation was enacted in 2000 and is not as stringent as the unexplained wealth legislation of the other countries considered. In contrast with the unexplained wealth approach, the burden of proof is on the government rather than the respondent. A substantial connection between the property to be restrained and underlying crime must also be established and other measures like hardship provisions and time limits also apply. Canada, however, has had unexplained wealth legislation since 2001, which remains in place despite having been subject to significant litigation related to constitutional issues.

France has adopted novel procedural reforms for managing confiscated assets. Their approach gives investigation and litigation agencies greater confidence they will not be held liable for losses suffered by respondents whose restrained assets are not subsequently confiscated. This issue also has relevance for Australian jurisdictions.

These overseas approaches to unexplained wealth and civil asset recovery provide an opportunity for Australia to reflect on a number of potential options for reform. Given the global nature of organised crime, the Australian approach to unexplained wealth and civil asset recovery must be strong relative to other countries, to ensure individual criminals and groups do not see Australia as a favourable jurisdiction in which to undertake criminal activities.

## Australian approaches

Unexplained wealth legislation forms part of a body of law that allows illegally obtained assets to be confiscated to undermine profits and prevent the use of such assets to fund crime. The underlying objective of such legislation is to deter crime, particularly organised crime, by removing the principal financial motivation for it. There are a range of conviction-based, civil forfeiture and unexplained wealth laws available to fulfil these purposes in Australian jurisdictions. This section outlines Australia's unexplained wealth laws and briefly describes associated conviction-based and civil forfeiture legislation. Conviction-based legislation allows confiscation orders to be made based on a criminal conviction, while civil forfeiture laws rely on a court's civil jurisdiction to confiscate criminal assets in accordance with the civil standard of proof, with no need to prove criminal conduct to the criminal standard of proof. Unexplained wealth laws go further, reversing the onus of proof by requiring respondents to prove their assets were lawfully obtained in specified circumstances.

### Western Australia

The Western Australia *Criminal Property Confiscation Act 2000* facilitates the confiscation of proceeds of crime in Western Australia. Proceeds of crime actions are initiated to deter illegal activities and deprive criminals of the proceeds of illegal activity. The Western Australia Police initiate most confiscations by obtaining a freezing notice on crime-used, crime-derived or drug trafficker grounds under section 34 of the Act.

The legislation allows the following confiscation orders:

- unexplained wealth declarations;
- criminal benefits declarations; and
- crime-used property substitution declarations.

### *Unexplained wealth declarations*

Western Australia became the first Australian jurisdiction to enact unexplained wealth provisions in 2000. The Western Australia Police investigate unexplained wealth declarations and the Director of Public Prosecutions applies to the Supreme Court of Western Australia for an unexplained wealth declaration if the DPP considers it is more likely than not that the person's total wealth is greater than their lawfully acquired wealth. Applications for

unexplained wealth declarations can be made without the need to demonstrate reasonable grounds for suspecting the person committed an offence. Under these provisions, the respondent bears the onus of proof and all their assets are presumed to be unlawfully acquired unless they can establish otherwise. The Court has minimal discretion in this jurisdiction when making an unexplained wealth declaration; they must make a declaration if it is more likely than not the respondent's total wealth is greater than that they acquired legally.

### *Criminal benefits declarations*

The Western Australia Supreme Court can also make a criminal benefit declaration, which requires the respondent to pay a specified amount to the state. Criminal benefits declarations can be made in relation to crime-derived property or in relation to unlawfully acquired property. Crime-derived property is property that is more likely than not to be derived from a specific offence committed by the suspect, including through the commercial exploitation of criminal activities—for example, literary proceeds of crime. A criminal benefits declaration order is granted if it is established, on the balance of probabilities, that the property was unlawfully acquired.

### *Crime-used property substitution declarations*

A crime-used property substitution declaration can be made where property is used in the commission of an offence but cannot be confiscated by the state because it is not owned by the offender. This, for example, would prevent an individual from circumventing the legislation by using a rented, stolen or borrowed car to commit a robbery. The legislation requires the subject of a declaration pay an amount equal to the value of the property used in the commission of the crime.

### *Automatic confiscation of declared drug traffickers' assets*

If a convicted offender is a declared drug trafficker the offender's entire property is forfeit, even that which was legally acquired. Western Australia and the Northern Territory are the only Australian jurisdictions where all property owned by declared drug traffickers is forfeit, even if it can be demonstrated the property was not derived from criminal activity or used in an offence.

Statistics on the use of assets confiscation orders in Western Australia and the amounts recovered are presented in Table 1. During the years 2008–09 to 2012–13 there was a decline in both the number and value of confiscations, although the number of applications and declarations each year has been very low. In total, crime-used property substitution declarations, unexplained wealth declarations and criminal benefits declarations have recovered \$2.65m. Most declarations were unexplained wealth declarations.

| Table 1: Western Australian assets confiscation statistics, 2008–09 to 2012–13 (number of proceedings) |             |         |         |         |         |         |
|--|-------------|---------|---------|---------|---------|---------|
| Other confiscation proceedings   |             | 2008–09 | 2009–10 | 2010–11 | 2011–12 | 2012–13 |
| Crime used substitution  | Application | 3       | 4       | 1       | 0       | 0       |
|  | Declaration | 0       | 1       | 2       | 3       | 1       |
| Unexplained wealth   | Application | 5       | 3       | 0       | 0       | 1       |
|  | Declaration | 1       | 1       | 5       | 0       | 2       |
| Criminal benefits  | Application | 1       | 0       | 1       | 0       | 0       |
|  | Declaration | 0       | 2       | 1       | 2       | 0       |
| <b>Amount recovered</b>  |             | \$0.52m | \$0.18m | \$0.60m | \$0.75m | \$0.6m  |

Source: Western Australia Director of Public Prosecutions *Annual Report 2013*.

Statistics related to the automatic confiscation of declared drug traffickers' assets are presented in Table 2. Considerably more of these declarations were made and greater amounts recovered than for the proceedings shown in Table 1. In all, Western Australia recovered \$32.31m through drug trafficker declarations and a total of \$34.96m for all types of confiscation proceedings.

| Table 2: Western Australian drug trafficker declarations, 2008–09 to 2012–13 |         |          |         |         |         |
|--|---------|----------|---------|---------|---------|
|  | 2008–09 | 2009–10  | 2010–11 | 2011–12 | 2012–13 |
| Number of declarations   | 120     | 111      | 83      | 68      | 89      |
| Amount recovered   | \$6.07m | \$10.05m | \$5.19m | \$5.23m | \$5.77m |

Source: Western Australia Director of Public Prosecutions *Annual Report 2013*.

### *Unexplained wealth procedures in Western Australia*

Unexplained wealth investigations in Western Australia are initiated in the course of crime-used and crime-derived proceeds of crime investigations, rather than investigations in their own right. The primary target of unexplained wealth investigations in Western Australia is organised crime, and the supporting rationale is the public interest in disrupting organised crime. Western Australia's preferred approach to civil confiscation matters is for the Director of Public Prosecutions to settle the case out of court rather than litigate; however, actions are taken to trial where appropriate.

The Western Australia Police's specialist confiscation team includes an in-house lawyer to provide advice on questions of law (such as property law, trust law and corporations law) and legislative compliance, and to assist in preparing investigation reports for the Director of Public Prosecutions.

There have been 28 applications for unexplained wealth declarations in Western Australia since 1 January 2001; 24 were successful, three unsuccessful and one is pending. A total of \$6.9m has been paid into the Confiscation Proceeds Account from unexplained wealth investigations, representing 8.8 percent of its total funds.

The Western Australia Police refer cases to the Director of Public Prosecutions, but investigations may also be initiated based on information provided by other agencies including the Western Australia Crime and Corruption Commission and the ACC. When police refer a matter, the Director of Public Prosecutions decides whether unexplained wealth proceedings should be initiated. In making this decision, they consider factors including the likelihood of success, whether there is property available to satisfy an unexplained wealth declaration if one were issued, how much unexplained wealth could potentially be recovered, the target's significance, any potential impact on third parties, the public interest and the available resources. Where other confiscation orders like drug trafficker declarations are relevant, the decision of which to pursue is based on which would recover the greatest amount.

### *Legal and procedural issues in Western Australia*

Individuals who have no identifiable connection with criminal conduct but are suspected of holding unexplained wealth can be pursued under the Western Australian legislation.

Unexplained wealth confiscation action can be taken against those who, although not personally engaged in criminal activity, are associated with suspected criminals. In Western Australia, the Director of Public Prosecutions applies for orders rather than the police—a slightly unusual procedure, given the traditional role of the police in criminal matters.

Only a small number of cases have been pursued to date. One factor that might explain why is the risk of losing a case at trial and being required to pay court costs and damages. The time it takes to obtain examination orders in unexplained wealth cases is a further barrier. The Western Australian legislation empowers the Director of Public Prosecutions to seek examination orders; the police may seek these early in an investigation, while the Director of Public Prosecutions may prefer to apply at a later stage. The issue for police is that such orders can take up to three months to obtain and implement, and this delay gives the respondent time to devise an explanation for their wealth or rearrange their financial affairs for an appearance of legitimacy.

Another issue is that the legislation contains no method for calculating unexplained wealth, despite there being a number of accepted ways of conducting a financial analysis. The ATO, for instance, uses the asset betterment method. This approach starts at a point in time (eg seven years prior to the start of the investigation) and works forward from that point to establish the sources of an individual's wealth. Another approach is to begin at the present and work

backwards. This could address the issue of criminals legitimising their assets over time, and the onus would be on the individual to demonstrate legitimate sources for their funds and assets.

There may also be communication difficulties between the police and the Director of Public Prosecutions. The Director of Public Prosecutions must satisfy model litigant requirements, which limits the extent of the advice it can provide.

Western Australia Police records show only two production orders have been issued in 14 years, and no monitoring orders have been made. The police do not have the power to issue orders; this function sits with the Director of Public Prosecutions, and orders must be obtained in the Supreme Court or the District Court of Western Australia. Obtaining orders is an investigative role that presents difficulties for the Director of Public Prosecutions, being outside the normal functions of the agency. The police require the support of the Director of Public Prosecutions to pursue unexplained wealth orders; they rely upon the DPP to conduct examinations and obtain monitoring orders. As a result, the police and the DPP must make these decisions in partnership.

Once the Director of Public Prosecutions establishes a person's wealth, it is that person's responsibility to discharge the onus of proof. However, this reversal of the onus of proof is only helpful to a certain extent. If a respondent, without producing documents, states that they obtained their wealth legally, and the court accepts their statement, then the onus is discharged, subject to the availability of evidence discrediting the witness. In one such case, *Director of Public Prosecutions v Morris* [2010] WADC 148, the judge deemed the respondent's evidence credible.

In contrast with other jurisdictions like New South Wales, cases in Western Australia are unlikely to be settled early in the process. Where they are settled, this is often a drawn-out process following litigation. There is a perception that Western Australian courts are more conservative than courts elsewhere, and that respondents are more likely to litigate than to settle. Interviewees reported the judiciary views the legislation unfavourably, which may influence the likelihood of future government efforts to reform this legislation. The legislation in Western Australia is also highly complex and politically sensitive, and thus difficult to amend.

Another significant problem—one not unique to Western Australia—concerns the use of professional privilege by lawyers and accountants. If individuals lodge all their business records with their lawyers, it can be very difficult for the police to investigate. Australian trust arrangements can also make it difficult to establish the true ownership of property and who has effective control of it. Changes to allow Commonwealth information, such as that relating to welfare benefits or taxation, to be used in state-based proceedings could also improve the efficacy of unexplained wealth legislation in Western Australia.

There appears to be cautious support in Western Australia for the introduction of national laws on unexplained wealth, to the extent that this would help limit the activities of organised crime. For this to be effective, however, it would be necessary to be sure such centralisation did not affect the legislation's effectiveness and benefits at a local level.

## Northern Territory

The Northern Territory's assets confiscation and forfeiture regime is governed by the *Criminal Property Forfeiture Act 2002* and the *Misuse of Drugs Act 1990*. Under this legislation, the property of a person associated with a relevant forfeiture offence is forfeit to the Northern Territory government, to compensate the community for the costs of detecting and dealing with criminal activity, and prevent the enrichment of individuals engaged in criminal activity.

The Northern Territory legislation distinguishes between crime-used property and crime-derived property. Property is crime-used if the property is or was used, or was intended for use, in the commission of a forfeiture offence. Crime-derived property is property derived, directly or indirectly, from the commission of a forfeiture offence. The Northern Territory legislation also allows the following confiscation orders:

- unexplained wealth declarations;
- restraining orders; and
- drug trafficker declarations.

### *Unexplained wealth declarations*

Unexplained wealth legislation modelled on the Western Australian provisions was introduced in the Northern Territory in 2003. The key difference is the Western Australian legislation's 'one-strike' approach, with respect to individuals who have committed a defined 'serious drug offence'. The Northern Territory's *Criminal Property Forfeiture Act 2002* refers to 'prescribed offences' but contains no reference to serious drug offences. The Director for Public

Prosecutions is the statutory applicant for all matters involving declarations concerning real and other types of property valued over \$100,000. Applications are made in the Supreme Court of the Northern Territory. The Solicitor for the Northern Territory acts on instructions for the Director for Public Prosecutions and may apply to the Supreme Court for an unexplained wealth declaration against a person.

As in Western Australia, there is no requirement to show reasonable grounds for suspecting the person has committed an offence. The Northern Territory legislation allows a judge minimal discretion when making an unexplained wealth declaration, as an unexplained wealth order must be made if the value of a person's total wealth exceeds their lawfully acquired wealth.

The onus of proof is on the respondent and any property, service, or advantage that forms part of the person's wealth is presumed to have been unlawfully obtained unless the respondent can establish the contrary. There is no need to establish a link to a criminal offence under the Northern Territory legislation.

### *Restraining orders*

A restraining order is a threshold requirement to commence proceedings under the *Criminal Property Forfeiture Act 2002* (NT). A person may apply to the court that issued the restraining order for the release of some of the property to meet reasonable living and business expenses;



however, this does not extend to legal expenses. Under section 59 of the Act a respondent can file an objection to the restraint of property within 28 days of the order being served.

### *Drug trafficker declarations*

The *Misuse of Drugs Act 1990 (NT)* requires the Supreme Court to declare a person a drug trafficker if they have three or more convictions for prescribed offences in the previous 10 years. Once the declaration is made that person's entire property is forfeit—even property that has been legally acquired.

In *Attorney General (NT) v Emmerson* [2014] HCA 13, the High Court upheld the Northern Territory's criminal forfeiture legislation requiring the confiscation of property regardless of whether there a connection with the commission of a crime is established. Emmerson was convicted of drug-related offences between 2007 and 2011, including the supply of more than 18 kilograms of cannabis. Although the majority of Emmerson's property was not related to his criminal conduct, all of it was confiscated. Emmerson challenged the forfeiture on the basis that the legislation violated the separation of judicial and executive power under the *Commonwealth of Australia Constitution Act 1900 (Cth)*, that the property was not acquired on just terms, and that this contravened section 50 of the *Northern Territory Self-Government Act 1978 (Cth)*. The challenge was rejected by a six-to-one majority of the High Court.

### *Unexplained wealth procedures in the Northern Territory*

While one early unexplained wealth case pursued in the Northern Territory was unsuccessful, all eight subsequent cases have been successful. All the successful cases were settled out of court and did not reach trial.

The total value of property forfeited to the Northern Territory Government as a result of these cases is approximately \$3.5m, including one large settlement of \$968,000.

### *Legal and procedural issues in the Northern Territory*

Northern Territory interviewees expressed the view that a national approach to unexplained wealth was the approach most likely to improve the targeting of criminal assets. There was, however, a view that existing Northern Territory laws were generally effective and should continue to operate alongside any new national approach that might be adopted.

Collaboration with Commonwealth law enforcement agencies appears to be a more significant issue in the Northern Territory than in other jurisdictions, partly owing to the unique nature of the relationship between the Commonwealth and the Territory. Interviewees noted that matters of importance to agencies in the Northern Territory are not sufficiently important in dollar terms to warrant the investment of time by Commonwealth agencies. This is frustrating when considerable time has been invested by Northern Territory authorities who have provided the evidence and documentation necessary for action to be taken. While there may

be political or legislative issues associated with assets held offshore in cases where the asset value is over \$100,000, the lack of cooperation was difficult to understand.

Geographic isolation may also contribute to reduced levels of cooperation with financial institutions, as most have head offices located in south-eastern Australia. The legislation does not compel financial institutions to provide information if there is no branch of the institution located in the Northern Territory, which may compound this isolation. This is an example of a situation in which national unexplained wealth legislation could make proceedings easier to conduct.

Issues associated with the definition of unexplained wealth were also identified as an impediment. According to the legislation, a person's unexplained wealth is the difference between their total wealth and their lawfully acquired wealth. As it is generally not possible to account for an individual's wealth from their birth due to a lack of records, the Northern Territory uses the asset betterment accounting system. Tracking may start, for example, at a point five years prior to the investigation, and what a person owns is determined by calculating their assets less their liabilities at that time. Asset growth and expenditure are assessed across the five years. All lawfully derived income is then deducted from the total, leaving a net amount of unexplained wealth.

This process is very time-consuming. All of an individual's bank accounts, and other financial evidence across a five-year period, must be identified and analysed. As all unexplained wealth cases in the Northern Territory have so far been settled or failed to proceed to trial, this accounting approach has not been tested in court, and no judicial directions have been made which determine if the approach is acceptable.

Interviewees described a close working relationship between the Northern Territory Police and the Solicitor for the Northern Territory. Specialised financial investigators embedded in the drug squad help to ensure that any searches obtain the evidence necessary for asset confiscation proceedings (eg notebooks containing coded records of drug deals) and the chain of evidence is secured.

While the details require further investigation, this approach is likely to improve cooperation and mutual support, increase intelligence sharing, and simplify access to information held by agencies such as the ATO and AUSTRAC. Asset-sharing arrangements (to allow other agencies to be compensated for resources used in joint investigations) would be one of the more complex details to be negotiated.

### New South Wales

The restraint and confiscation of crime-derived assets in New South Wales is governed by the *Criminal Assets Recovery Act 1990 (NSW)* and the *Confiscation of Proceeds of Crime Act 1989 (NSW)*. The former is a civil scheme, while the latter requires a conviction. The latter scheme empowers a court, on conviction, to make orders for the confiscation of property derived from or used to commit a 'serious offence' within the meaning of the Act. The New South Wales

Crime Commission recovers assets under the provisions of the *Criminal Assets Recovery Act 1990 (NSW)*.

A range of orders can be made in New South Wales:

- unexplained wealth orders;
- restraining orders;
- assets forfeiture orders; and
- proceeds assessment orders.

### *Unexplained wealth orders*

Unexplained wealth provisions were introduced in New South Wales in 2010 through an amendment to the *Criminal Assets Recovery Act 1990 (NSW)*. These provisions enable the New South Wales Crime Commission to apply to the Supreme Court for an unexplained wealth order. The order requires a person to pay the New South Wales Government the amount assessed as the value of the person's unexplained wealth. The New South Wales Supreme Court must make an unexplained wealth order if it finds there is a reasonable suspicion a person has engaged in serious crime-related activity or has acquired unexplained wealth from the serious crime-related activity of another person. Serious crime-related activity is defined as including offences related to the manufacture, supply and cultivation of prohibited drugs and certain other types of offences punishable by at least five years imprisonment. Once the Court is satisfied there is a reasonable suspicion, and the individual has or had unexplained wealth, the onus is on the individual to prove their wealth was not illegally acquired. The Court may refuse to make an unexplained wealth order, or make an order of an amount less than would otherwise be payable, only if it is in the public interest to do so.

### *Restraining orders*

The New South Wales Crime Commission can apply to the Supreme Court for a restraining order under the *Criminal Assets Recovery Act 1990 (NSW)* to prevent a person from disposing of property pending the outcome of confiscation proceedings. Along with the provisions of the *Confiscation of Proceeds of Crime Act 1989 (NSW)*, administered by the Director of Public Prosecutions, restraining orders prevent dealings with the property of persons convicted or charged with an indictable offence or suspected of committing a serious offence, and with property suspected of being the proceeds of an indictable offence.

### *Assets forfeiture orders*

Under the *Criminal Assets Recovery Act 1990 (NSW)*, an assets forfeiture order can be made in relation to interests in property of a person who is proved, on the balance of probabilities, to have engaged in a serious crime-related activity. It can also be made with respect to an interest in property that an authorised officer suspects was derived from the serious crime-related activity of another person if that other person is proved, on the balance of probabilities, to have engaged in a serious crime-related activity.

The interest in property subject to this order is usually the subject of a restraining order prior to its forfeiture. The Court has no discretion in making the assets forfeiture order. Once an assets forfeiture order has been made, the person whose interest has been forfeited may make an application for part or all of the forfeited interest to be excluded from the operation of the forfeiture order. The only basis for exclusion is if the person can prove, to the civil standard, that part or all of the interest in property was not the proceeds of an illegal activity.

### *Proceeds assessment orders*

A proceeds assessment order compels a person to pay the New South Wales Government the proceeds they have derived from illegal activity. The New South Wales Crime Commission applies for an order that requires the person to pay the amount the Supreme Court assesses to be the value of the proceeds from illegal activities within the previous six years. Proceeds assessment orders can also be made against a person who has derived proceeds from the illegal activities of another person in the previous six years. The order can only be made if the person knew, or ought reasonably to have known, that the proceeds were derived from an illegal activity. Table 3 compares the orders available under the *Criminal Assets Recovery Act 1990* (NSW).

**Table 3: Comparison of the three types of confiscation orders in New South Wales under the provisions of the *Criminal Assets Recovery Act 1990* (NSW)**

| Feature  | Assets forfeiture order               | Proceeds assessment order             | Unexplained wealth order                              |
|--|---------------------------------------|---------------------------------------|---|
| Requires conviction  | No                                    | No                                    | No  |
| Serious crime-related activity (SCRA) must be:   | Proved to the civil standard          | Proved to the civil standard          | Reasonably suspected                                  |
| Standard of proof imposed on the defendant   | Civil                                 | Civil                                 | Civil   |
| Period within which the Commission is required to prove engagement in SCRA   | 6 years preceding date of application | 6 years preceding date of application | Life of the defendant                                 |
| Period over which proceeds of crime are assessed by the order  | Unlimited                             | 6 years preceding application         | Unlimited   |
| Provision can be made for hardship of dependants   | Yes                                   | No                                    | Yes, if the Court considers it in the public interest |
| Judicial discretion to decline to make an order or to make an order of an amount less than would otherwise be made | No                                    | No                                    | Yes, if the Court considers it in the public interest |

Source: New South Wales Crime Commission *Annual Report 2012–13*.

## *Unexplained wealth procedures in New South Wales*

The *Criminal Assets Recovery Act 1990* (NSW) provides the legislative basis for unexplained wealth orders in New South Wales. The inclusion of unexplained wealth provisions provides the New South Wales Crime Commission with another option in cases where existing confiscation orders are unlikely to be effective. In this jurisdiction more than 95 percent of unexplained wealth matters are finalised through negotiated settlement, rather than by litigating the matter at trial. In practice, when considering whether to proceed with an unexplained wealth case, the evidence is weighed and a range of issues are assessed, including the likely success of refuting the respondent's argument to discharge their onus of proof, the cost of ongoing litigation and to what extent those costs and any confiscation proceeds are likely to be recoverable.

Substantial amounts have been recovered through unexplained wealth orders in New South Wales in recent years. In 2012, two unexplained wealth orders recovered approximately \$154,000; in 2013, three orders recovered approximately \$1,250,000; and in 2014, five orders recovered approximately \$1,225,000. It should be noted there were many cases which commenced as unexplained wealth proceedings but were finalised using other asset confiscation orders. The precise procedures to be used are negotiated as part of the settlement.

In many such cases, it would not have been possible to commence these matters if unexplained wealth provisions were not available. If the value of these outcomes is added to that of the confiscation orders listed above, the total value obtained increases substantially. In 2012, due to an additional three unexplained wealth orders that were finalised as another order, the increase would be \$771,530. In 2013, due to an additional 17 unexplained wealth orders that were finalised as another order, the increase would be \$6,299,764. And in 2014, due to an additional 14 unexplained wealth orders that were finalised as another order, the increase would be \$4,735,802. These figures highlight that the overall value of unexplained wealth orders may not always be apparent from statistics alone.

## *Legal and procedural issues in New South Wales*

For a restraining order to be granted under the *Criminal Assets Recovery Act 1990* (NSW), the Supreme Court must be satisfied there are reasonable grounds to suspect that a person has engaged in a serious crime-related activity or that a person has acquired serious crime-derived property from the serious crime-related activity of another person. In New South Wales, it is not necessary to demonstrate prima facie at a preliminary stage that an individual has unexplained wealth; and, indeed, in most cases this would be difficult owing to the need to review the respondent's financial history in some detail. In most cases it is far less difficult for the New South Wales Crime Commission to satisfy the Court that an individual has engaged in a serious crime-related activity or has acquired serious crime-derived property from the serious crime-related activity of another person. There are also provisions in the legislation to restrain property held in other people's names if there is a suspicion they have acquired property from the serious crime-related activity of another person. While the judicial discretion available in relation to unexplained wealth orders appears to be a significant departure from the lack of

discretion available under existing confiscation orders (because the vast majority of cases are settled without reaching trial), in practice this is not an issue.

The New South Wales Crime Commission has been proactive in taking action to restrain property as soon as possible in an investigation. Their capacity to restrain assets swiftly is vital to the success of the legislation in New South Wales. Experience has shown that if the assets are not restrained as swiftly as possible, they quickly disappear and cannot be recovered. Cases are also settled in a manner that the Commission considers maximises the outcome to the Crown (measured not only by the absolute value of the confiscation order involved but also such factors as the commerciality of, and risks associated with, continued litigation).

A further reason for the success of the unexplained wealth legislation in New South Wales is that the *Criminal Assets Recovery Act 1990* (NSW) is administered by the New South Wales Crime Commission, and all work on these investigations is carried out by specialists within the Crime Commission. The only element of the process undertaken outside the Commission is the referral of cases in the case identification phase. There are between 400 and 500 referrals each year, predominantly from New South Wales Police but also from organised crime investigations involving the New South Wales Crime Commission and Commonwealth agencies. In the rare cases that proceed to hearing, independent barristers are briefed. At the end of the process, the New South Wales Trustee and Guardian takes control and disposes of forfeited assets; however, the Crime Commission remains responsible for the collection of debts arising from unexplained wealth orders.

The New South Wales Crime Commission approaches unexplained wealth matters differently to agencies in other jurisdictions. Its approach is to treat these matters as financial investigations that can lead to and support legal proceedings, rather than legal proceedings which have a financial aspect. Forensic accountants are allocated a case load and manage confiscation proceedings from the beginning to the end of the process. This has advantages over an approach in which lawyers or police with no financial training and a limited understanding of financial investigation are tasked with complex unexplained wealth casework.

The New South Wales Crime Commission has very effective collaborative relationships with other state, territory and Commonwealth agencies, particularly through joint agency taskforces. Since 2009, the New South Wales Crime Commission has recommended the New South Wales Government share an estimated \$7m recovered through confiscation proceedings arising from joint investigations with Commonwealth agencies with the Commonwealth.

A number of issues were apparent in New South Wales in relation to collaboration with other agencies in unexplained wealth cases.

- The Commonwealth Attorney-General's Department is very helpful in processing overseas liaison requests; however, the processing time is usually substantial.
- AUSTRAC offers an important service, providing financial intelligence that is used extensively in investigations. They also provide liaison officers who facilitate access to their intelligence.

- In general, banks are helpful in providing information, although the extent of cooperation varies between institutions. Assisting law enforcement is a costly function for banks and poorly resourced.
- Unexplained wealth remains a politically contentious topic for political stakeholders due to the combination of the definitional ambiguity associated with unexplained wealth and political sensitivities.
- There is a strong desire for cooperation but jurisdictional issues, logistic problems, different security clearance processes and classifications, information and data-management systems and different agency priorities all create obstructions and inhibit collaboration.

There are a range of other barriers to successful unexplained wealth proceedings in New South Wales, including:

- millions of dollars being sent offshore in other people's names;
- company labyrinths and the continual moving of money through corporate structures and trusts;
- solicitors holding assets in trust accounts; and
- money being laundered through real estate, particularly property developments.

Although these are operational issues that could be resolved through improved information sharing and multi-party agreements on procedures to be adopted, harmonising state and Commonwealth law is likely to remain an important issue. One contentious issue relates to how the proceeds of confiscation proceedings would be divided between the Commonwealth, states and territories. Interviewees expressed concern about the level of resources the states would need to contribute and how confiscated funds would be shared. From a New South Wales state perspective, the AFP already have a heavy caseload and might have difficulty handling an additional caseload associated with joint unexplained wealth operations.

## Queensland

The *Criminal Proceeds Confiscation Act 2002* (Qld), as amended, governs confiscation schemes targeting financial gains obtained through illegal activity in Queensland. The civil-based recovery system is administered by the Queensland Crime and Corruption Commission, which can apply to the Supreme Court to confiscate assets on the basis of their suspected criminal origin through forfeiture orders, proceeds assessment orders and unexplained wealth orders, without requiring a prior conviction. The Queensland Crime and Corruption Commission also administers the serious drug offender confiscation order scheme (SDOCO). This is a conviction-based scheme whereby a person's property is liable to forfeiture once they have been convicted of a serious drug offence. The conviction-based regime is administered by the Queensland Director of Public Prosecutions and allows assets to be recovered where there is a direct connection between 'tainted property' and an offence. This regime includes unexplained wealth orders, restraining orders, forfeiture orders and pecuniary penalty orders.

### *Unexplained wealth orders*

The Queensland unexplained wealth provisions were established through the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013*. Under this legislation, the Supreme Court must make an unexplained wealth order if it is satisfied there is a reasonable suspicion the individual has engaged in serious crime-related activities or acquired serious crime-derived property, or that any of their current or previous wealth was acquired unlawfully. As with legislation in other jurisdictions, the unexplained wealth provisions reverse the onus of proof and require the respondent to demonstrate that their wealth was lawfully acquired.

### *Restraining orders*

Restraining orders under the civil scheme in Queensland are included in Chapter 2.3 of the *Criminal Proceeds Confiscation Act 2002* (Qld). The Supreme Court must be satisfied there are reasonable grounds to suspect that the person whose property is sought to be restrained has engaged in a serious offence, or that specific property is suspected of being derived from serious crime even if no offender can be identified. The application must be supported by an affidavit of an authorised officer of the Queensland Crime and Corruption Commission or the Queensland Police.

Restraining orders under the conviction-based scheme are also included in Chapter 3.3 of the Act. The Supreme Court can issue a restraining order if an individual's property (or that of another person) is suspected of being tainted property or 'benefit derived property', provided the person has been convicted of a confiscation offence. Restraining orders under the SDOCO regime are included in Chapter 2A.3 of the Act. The Supreme Court may grant a restraining order if there are reasonable grounds to suspect a person has committed a serious drug offence. Restraining orders apply to property held in Queensland or elsewhere.

Under all schemes, the Supreme Court may consider public interest considerations when deciding to make the order. The Court may make funds from the sale of restrained property available for the respondent's reasonable living and business expenses or to satisfy the respondent's debts.

### *Forfeiture orders*

Forfeiture orders are included in Chapter 2.4 of the *Criminal Proceeds Confiscation Act 2002* (Qld). Property must be forfeited if the Supreme Court is satisfied it is more probable than not that the respondent engaged in a serious criminal offence in the past six years. The onus is on the person with the interest in the property to prove, on the balance of probabilities, the property was not illegally acquired. The Queensland civil and conviction-based regimes allow a six-month period after the forfeiture order is granted in which a person may seek to exclude property from the forfeiture order.

Under the SDOCO scheme, the state must apply for a serious drug offender confiscation order within six months of a serious drug offender certificate being issued. The granting of a serious



drug offender confiscation order results in the property listed on the order being forfeited to the state. The relevant provisions are included in Chapter 2A.

Forfeiture orders are subject to public-interest considerations under both the civil and conviction-based systems. Conviction-based forfeiture orders are included in Chapter 3.4 of the Act, which provides for tainted property to be forfeited upon conviction of a person guilty of a confiscation offence (which includes a broad range of serious offences).

### *Proceeds and pecuniary assessment orders*

Civil proceeds assessment orders require an individual to pay the amount the Supreme Court determines is the amount derived from crime. Proceeds assessment order applications are made based on the value of the proceeds derived from illegal activity over the past six years. Once an application for a proceeds assessment order has been filed, the onus is on the individual to prove the proceeds were lawfully acquired.

Conviction-based pecuniary penalty orders also require an individual to pay the amount the Supreme Court determines is the amount derived from crime or equal to the benefit derived from the commission of an offence. Unless leave is granted by the Supreme Court, the application must be made within six months of the conviction. In making an assessment, the Court has discretion to determine the value of the benefits the offender derived from criminal activity.

### *Legal and procedural issues in Queensland*

Unexplained wealth orders have only been in place in Queensland since September 2013. The Queensland Crime and Corruption Commission must manage the expectations of the Government and the public about what the legislation is able to achieve.

The Queensland civil legislation is very similar to the legislation that operates in New South Wales and was modelled on the provisions administered by the New South Wales Crime Commission. A key difference between the two, however, is that in Queensland, the Director of Public Prosecutions is responsible for the litigation (as solicitor on the record) of confiscation proceedings and proceedings are undertaken in the name of the State of Queensland. In New South Wales, however, proceedings are undertaken by a barrister instructed by the New South Wales Crime Commission. In both jurisdictions cases can be settled before they reach trial.

The Queensland Crime and Corruption Commission has developed a close working relationship with the New South Wales Crime Commission. They also have strong relationships with the Queensland Police Service, the AFP, the ACC and the ATO.

### South Australia

The South Australian confiscation scheme is set out in the *Criminal Assets Confiscation Act 2005* (SA). This legislation provides the South Australian Director of Public Prosecutions with authority to confiscate the proceeds and instruments of crime. The legislation provides for:

- unexplained wealth orders;
- freezing orders;
- restraining orders;
- forfeiture orders; and
- pecuniary penalty orders.

### *Unexplained wealth orders*

Unexplained wealth orders were established in South Australia through the *Serious and Organised Crime (Unexplained Wealth) Act 2009*. The Director of Public Prosecutions may authorise the South Australian Crown Solicitor to apply to the Supreme Court for an unexplained wealth order if the Crown Solicitor reasonably suspects that a person or an incorporated body has unlawfully acquired wealth; there is no requirement to show reasonable grounds to suspect a person committed an offence. If an unexplained wealth order is granted, the property that is the subject of the order must be surrendered to the government.

### *Freezing orders*

The *Criminal Assets Confiscation Act 2005 (SA)* provides for an authorised South Australian Police officer to make a freezing order. These orders require that the specified financial institution must not allow any person to make transfers or withdrawals from a specified account. Freezing orders are only granted if the Supreme Court is satisfied on reasonable grounds that the person has committed, or is about to commit, a serious offence, was involved in the commission of a serious offence or has derived benefit from the commission of a serious offence.

### *Restraining orders*

The Supreme Court of South Australia can issue restraining orders over specified property. The property must then not be disposed of or dealt with by any person while criminal proceedings are ongoing. To grant a restraining order, the Court must be satisfied that a person has been convicted of a serious offence or is suspected to have committed the offence. Restraining orders can provide for certain expenses to be paid out of the restrained property, such as the property owner's reasonable living expenses or those of their dependents.

### *Forfeiture orders*

The Supreme Court can also make a forfeiture order with respect to specified property that is the proceeds of crime or was instrumental to an offence. These orders can only be granted if a person has been convicted of a serious offence and the court is satisfied that the property in the order is proceeds of that offence, or if the property in the offence is subject to a restraining order that has been in force for at least six months and the court is satisfied that the property is proceeds of a serious offence.

### *Pecuniary penalty orders*

The Supreme Court can also issue pecuniary penalty orders that require individuals to pay a specified amount if it is satisfied an individual committed a serious offence from which they derived benefits. When considering the value of pecuniary penalty orders, the Court must have regard to any hardship the order may be reasonably expected to cause any third parties.

### *Unexplained wealth procedures and issues in South Australia*

South Australia first introduced unexplained wealth legislation in 2009. A key difference between the approach taken in South Australia and other jurisdictions is that, rather than amending existing proceeds of crime legislation, the laws were enacted in separate legislation. This approach caused significant issues around information dissemination in unexplained wealth investigations, and rendered the legislation ineffective.

The frameworks through which South Australia Police obtain information from other agencies were based on the premise that a criminal investigation is being conducted. As unexplained wealth orders are civil rather than criminal matters, legislative barriers and the national privacy principles prevented South Australia Police from obtaining the information necessary to progress unexplained wealth investigations; South Australia Police were not able to use data from Commonwealth or other state agencies in unexplained wealth investigations. For this reason, between August 2009 and September 2013, South Australia Police were forced to rely on open-source information and, as a result, no cases were successful. In 2013, the problem was addressed by amending the legislation with the introduction of the phrase, 'for law enforcement purposes'. Since then, data from AUSTRAC and other agencies have contributed to progressing investigations against targets and progress has been made in developing a case against a high-wealth individual involved in organised crime.

## Commonwealth

The *Proceeds of Crime Act 2002* (Cth) facilitates the recovery of assets associated with Commonwealth offences, foreign indictable offences and indictable offences of Commonwealth concern. The legislation provides authority to investigate, restrain and confiscate the proceeds of crime resulting from Commonwealth and foreign indictable offences, and instruments of serious offences. In some circumstances it can also be used to confiscate the proceeds of crimes committed under state and territory law. Relevant offences include money laundering, drug importation, people smuggling and financing terrorism. The Commonwealth legislation includes both conviction-based and non-conviction-based approaches to confiscation. This legislation was preceded by the *Proceeds of Crime Act 1987* (Cth), which allowed property to be restrained while criminal proceedings were taking place to prevent the movement of assets that might be subject to confiscation. Recovery orders could only be issued after a conviction was secured.

The Criminal Assets Confiscation Taskforce (CACT) was established in 2011. The CACT is led by the AFP and comprises members of the ATO and the ACC. It coordinates Commonwealth

criminal asset confiscation and its members have operational, legal, intelligence and financial analysis experience. Its objectives include detecting, disrupting and deterring serious and organised crime by removing the proceeds and instruments of crime, debt recovery or international cooperation. These objectives are achieved by developing the most effective and appropriate enforcement strategy in each individual case, whether through criminal asset confiscation or through taxation remedies by the ATO. Since the enactment of the *Crimes Legislation Amendment Act (No. 2) 2011* (Cth), the Commissioner of the AFP has also been able to litigate proceeds of crime matters on behalf of the Commonwealth. CACT teams have been established in major capital cities around Australia.

Criminal asset confiscation matters are not litigated unless there is a reasonable prospect of success and/or where the public interest is sufficiently served by taking action. The majority of Commonwealth criminal assets confiscation matters, including both conviction-based and non-conviction-based matters, are undertaken by litigators on behalf of the AFP Commissioner. These litigators sit within the CACT but are independent of the investigation teams. This function was transferred from the Commonwealth Director of Public Prosecutions in 2012. The Commonwealth Director of Public Prosecutions continues to take proceeds of crime actions closely connected to the prosecutions they are conducting, where restraint is not required.

Approximately \$134m in assets was restrained by the Commissioner of the AFP in the 2013–14 financial year.

Cases are settled in accordance with the Proceeds of Crime Litigation Settlement Policy. In determining whether a case should be settled a number of factors are taken into account, including the public interest, the comparative cost of litigation and settlement, the deterrent value of pursuing a specific case and the disruption that could be achieved.

The AFP and AGD undertake international liaison in relation to Australian proceeds of crime matters, as well as liaison at the police-to-police and government-to-government levels.

Networks such as the CARIN and the Asset Recovery Interagency Network Asia Pacific (ARIN-AP) provide an opportunity to develop contacts and share information, and include police, lawyers, asset managers and financial investigators. These networks complement the formal mutual assistance process and facilitate more efficient collaboration.

Several orders may be obtained under the Commonwealth legislation, including:

- unexplained wealth orders;
- conviction and non-conviction based forfeiture orders; and
- pecuniary penalty orders.

### *Unexplained wealth orders*

The *Proceeds of Crime Act 2002* (Cth) was amended to incorporate unexplained wealth provisions in 2010. In contrast with existing proceeds of crime orders, under these provisions it is not necessary to establish that a person's wealth was obtained as a result of criminal activity; the onus of proving their wealth was legitimately acquired lies with that person. Unexplained

wealth orders require a person pay the Commonwealth the proportion of their wealth they are unable to satisfy a court was legitimately acquired.

Unexplained wealth restraining orders may be made under section 20A of the *Proceeds of Crime Act 2002* (Cth), and restrict a person's ability to dispose of or otherwise deal with the property. Restraining orders are granted if there are reasonable grounds to suspect a person's total wealth exceeds the value of their wealth that was lawfully acquired and there are reasonable grounds to suspect that the person has committed a relevant offence, or the whole or any part of the person's wealth was derived from a relevant offence.

The court can compel the person to attend court and prove, on the balance of probabilities, that their wealth is not derived from one or more offences linked to a Commonwealth head of power. If they cannot demonstrate this, the court can order them to pay the Confiscation Assets Account the difference between their total wealth and their legitimate wealth.

### *Freezing and restraining orders*

Part 2-1A and Part 2-1 of the *Proceeds of Crime Act 2002* (Cth) provide for freezing and restraining orders. A freezing order requires that a financial institution limit or prevent withdrawals from a named financial account while a court decides applications for restraining orders over those accounts. There must be grounds to suspect the funds are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, and there is a risk the account balance will be reduced.

A restraining order requires that a person not dispose of or interfere with the property specified in the order, except under specified circumstances. The person must have been convicted of or charged with (or it is proposed they be charged with) an indictable offence, or be suspected of having committed a serious offence; the property must be the proceeds of certain offences or the instrument of a serious offence. There is no requirement to demonstrate there is a risk of the property being disposed of or otherwise dealt with.

### *Forfeiture orders*

Part 2-2 and 2-3 of the *Proceeds of Crime Act 2002* (Cth) provides for both conviction- and non-conviction-based forfeiture of the proceeds or instruments of crime to the Commonwealth. The conviction-based forfeiture provisions are most commonly applied for at the time of sentencing.

### *Pecuniary penalty orders*

Pecuniary penalty orders are included in Part 2.4 of the legislation and require a person pay the Commonwealth an amount equivalent to the benefits obtained from the commission of an offence. Pecuniary penalty orders seek to deprive the accused of any benefit obtained through committing an offence. Such orders may be based on a conviction for an indictable offence or obtained without conviction.

### *Legal and procedural issues in Commonwealth proceedings*

Recent reviews of the Commonwealth unexplained wealth regime have identified a number of issues requiring resolution, although the legislation has not yet been tested in court. The principal concern relates to the extent of judicial discretion available to courts when making unexplained wealth orders. At present, and unlike other proceeds of crime orders available under Commonwealth legislation, the court has absolute discretion to grant unexplained wealth orders even where the threshold tests have been satisfied. Unexplained wealth investigations are resource intensive and highly complex, and the level of judicial discretion has proven to be a significant disincentive to progress investigations at the Commonwealth level.

Another concern relates to the possibility that restrained assets could be used by the respondent to proceedings to fund litigation. If the respondent can access restrained assets to fund their legal defence costs, this is likely to prolong a costly, complex and time-consuming litigation. Even if the litigation were successful, a significant proportion of the unexplained wealth may have been spent on legal expenses by the time the process has concluded. Other concerns relate to what may be seized as part of issuing a search warrant at a premises and the circumstances in which information may be shared with state, territory and overseas law enforcement agencies.

The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) seeks to resolve these issues by limiting the circumstances in which a court has discretion not to make a restraining order over property suspected to be unexplained wealth and the circumstances in which restrained assets can be used to fund a defence of the unexplained wealth order, and by broadening what may be seized as part of issuing a search warrant at a premises and the circumstances in which information may be shared with state and overseas law enforcement agencies. In time, the amendments should make it easier to obtain unexplained wealth orders and facilitate litigation under the legislation.

### Other states and territories

#### *Tasmania*

Tasmania's unexplained wealth legislation was modelled on the legislation established in the Northern Territory and enacted in 2013. The *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013* (Tas) amends the *Crime (Confiscation of Profits) Act 1993* (Tas). The new legislation enables the Supreme Court to make unexplained wealth declarations ordering the confiscation of unexplained wealth, and provides powers to investigate and conduct examinations and restrain property.

The unexplained wealth provisions complement the existing orders available under the *Crime (Confiscation of Profits) Act 1993* (Tas). This legislation provides for confiscation where a person is convicted of a serious offence, as well as forfeiture orders against tainted property and pecuniary penalty orders to recover benefits derived from criminal offences. The Tasmanian

Government has stated that unexplained wealth orders ‘for the forfeiture of over \$820,000 in cash, assets and firearms were issued in 2015-16’ (Hidding & Goodwin 2016).

### *Victoria*

Victoria is the most recent Australian jurisdiction to introduce unexplained wealth legislation, passing the *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* (Vic) to amend the *Confiscation Act 1997* (Vic) in August 2014. Under the Victorian civil confiscation scheme, the Director of Public Prosecutions can seek to have property restrained under an unexplained wealth restraining order where one of two tests are satisfied. The first is based on a suspicion on reasonable grounds that a person with an interest in the property has engaged in ‘serious criminal activity’. The total value of the property restrained must be at least \$50,000. The second test is a suspicion on reasonable grounds that the property to be restrained was not lawfully acquired. In this case there is no threshold value of the property.

The respondent can apply to the Supreme Court to have their property excluded from restraint by demonstrating that, on the balance of probabilities, the property was lawfully acquired. The property will be forfeited to the state after a period of six months has elapsed and applications for exclusion have been considered.

### *Australian Capital Territory*

The *Confiscation of Criminal Assets Act 2003* (ACT) establishes the conviction-based and civil asset forfeiture scheme in the Australian Capital Territory (ACT) and is administered by the Director of Public Prosecutions. The ACT is now the only jurisdiction in Australia not to have enacted unexplained wealth legislation; it has not been introduced or debated in the ACT Legislative Assembly. The most recent public information on the prospect of the introduction of unexplained wealth legislation in this jurisdiction is a policy document released prior to the last election. The document indicates that the current Australian Capital Territory Government is aware that such legislation has been adopted in other Australian jurisdictions and is supportive of unexplained wealth legislation in general. The ACT Government has stated it intends to implement unexplained wealth legislation in the future.

### **Summary**

As indicated above, a wide variety of procedures are available across Australian jurisdictions to allow the confiscation of unexplained wealth derived from the proceeds of crime. Table 4 summarises the principal elements of the various approaches.

Different laws and procedures relating to the confiscation of assets, including unexplained wealth, exist throughout Australia. In some jurisdictions, police and Crown solicitors collaborate on unexplained wealth cases; in other jurisdictions, police and the offices of the directors of public prosecutions work together. In New South Wales and Queensland, the Crime Commission is the sole agency involved. New South Wales and the Northern Territory are the only jurisdictions that indicated they are satisfied with their current unexplained wealth legislation.

Western Australia was the first Australian jurisdiction to enact unexplained wealth provisions in 2000. Under the Western Australian model, it is not necessary to demonstrate reasonable grounds to suspect that the subject of the inquiry committed an offence, and the police and the Director of Public Prosecutions collaborate to investigate and obtain unexplained wealth orders. Unexplained wealth legislation does not appear to function effectively in Western Australia; it could be made more efficient and effective by shifting responsibility to the Crime and Corruption Commission.

The Northern Territory has been relatively successful in terms of recovering funds through unexplained wealth provisions. The legislation was introduced in 2003 and was modelled on the Western Australian provisions. While the relationship between the Solicitor for the Northern Territory and the police appears to be effective, this is arguably due to the small size of the jurisdiction, as there were problems with a dual-agency model in all other jurisdictions. Western Australia's geographic isolation may contribute to the perception of a lack of assistance from Commonwealth agencies and the private sector.

In New South Wales, the New South Wales Crime Commission recovers assets and has developed an efficient model that was praised by interviewees from other jurisdictions around Australia. Using coercive powers, unexplained wealth is identified and settlements made without the need for expensive and time-consuming litigation.

The Crime and Corruption Commission in Queensland recently adopted the New South Wales model when it implemented unexplained wealth legislation in 2013. Unexplained wealth legislation has been in place in South Australia since 2009 but, until very recently, legislative issues limited the use of certain types of evidence, and no unexplained wealth has yet been recovered.



Table 4: Summary of Australian unexplained wealth models (excluding ACT)

| Criterion                              | Cth   | NSW  | QLD  | NT   | SA   | WA   | VIC   | TAS  |
|--|---|--|--|--|--|--|---|--|
| <b>Threshold</b>                       | Reasonable suspicion that a person has wealth that was not lawfully acquired                                | Reasonable suspicion that a person has engaged in a serious crime-related activity | Reasonable suspicion that a person has engaged in a serious crime-related activity | None   | Reasonable suspicion that a person has wealth that was not lawfully acquired | None   | Reasonable suspicion that a person has engaged in serious criminal activity | Reasonable suspicion that a person has wealth that was not lawfully acquired |
| <b>Agencies</b>                        | AFP   | Crime Commission   | Crime Commission   | Police, Crown Solicitor                                      | Police, DPP  | Police, DPP  | Police, DPP   | Police, DPP  |
| <b>Year established</b>                | 2010  | 2010   | 2013   | 2003   | 2009   | 2000   | 2014  | 2014   |
| <b>Value confiscated</b>               | 0   | \$2.63m  | 0  | \$3.5m   | 0  | \$2.65m  | 0   | 0  |
| <b>Satisfied with current approach</b> | No  | Yes  | Yes  | Yes  | Yes  | No   | N/A   | N/A  |
| <b>Key issues raised</b>               | Management of restrained assets, judicial discretion and hardship provisions (amendments before parliament) | N/A  | N/A  | Support from Commonwealth agencies                           | Initial legislation was ineffective (amended to resolve this issue in 2013)  | Crime Commission would be a better approach        | N/A   | N/A  |
| <b>Views on national approach</b>      | Yes: raised resourcing issues   | No: concerned about distribution of profits  | No: little additional benefit  | Yes: if text-based referral and coexisting state legislation | Yes  | Yes: but noted it would be a matter for government | N/A   | N/A  |

Unexplained wealth orders were introduced at the Commonwealth level in 2011. Responsibility was initially shared between the AFP and the Commonwealth Director of Public Prosecutions, but in 2012 responsibility was moved exclusively to the AFP. While proposed amendments are currently before parliament, it is unclear whether these will resolve the problems experienced and enable the successful recovery of unexplained wealth in the future. Legislation was enacted in 2014 in Victoria and Tasmania but remains in an early stage of development, and the Australian Capital Territory is currently developing unexplained wealth legislation. A strong legislative foundation for the recovery of unexplained wealth has been established in Australia, although a number of barriers still remain to successfully recovering funds from those suspected of possessing the proceeds of crime.

An attempt was made to obtain statistics from all jurisdictions in Australia on the dollar value of funds confiscated. Data were obtained from annual reports and during consultations with all jurisdictions except Tasmania, where data were unavailable. In some cases only incomplete information was available for some jurisdictions. Between 1995–96 and 2013–14 approximately \$800m was confiscated, as indicated in Table 5. During this period, New South Wales was responsible for the greatest amount of assets confiscated, amounting to more than \$320m; followed by the Commonwealth, which confiscated more than \$260m. Assets confiscated as a result of unexplained wealth proceedings or settlements amount to only one percent of the total, comprising \$8.8m since 2000–01. Western Australia alone has recovered \$32.3m under declared drug trafficker legislation.

Table 5: Total value of assets confiscated in Australia, 1995–96 to 2013–14 (incomplete; \$)

| Year            | Cth                | NSW                | SA                | WA                | ACT              | Qld               | Vic               | NT | Total              |
|-----------------|--------------------|--------------------|-------------------|-------------------|------------------|-------------------|-------------------|----|--------------------|
| 1995–96         | 7,498,130          | 5,105,008          | 238,835           | -                 | -                | -                 | -                 | -  | 12,841,973         |
| 1996–97         | 5,707,995          | 3,983,345          | 238,567           | -                 | -                | -                 | -                 | -  | 9,929,907          |
| 1997–98         | 7,048,592          | 10,152,292         | 359,261           | -                 | -                | -                 | -                 | -  | 17,560,145         |
| 1998–99         | 10,813,524         | 9,386,039          | 345,215           | -                 | -                | -                 | -                 | -  | 20,544,778         |
| 1999–00         | 4,916,905          | 11,015,299         | 520,247           | -                 | -                | -                 | -                 | -  | 16,452,451         |
| 2000–01         | 6,249,314          | 8,744,925          | 758,079           | 417,074           | -                | -                 | -                 | -  | 16,169,392         |
| 2001–02         | 6,888,411          | 9,411,967          | 678,674           | 779,533           | 44,617           | -                 | -                 | -  | 17,803,202         |
| 2002–03         | 3,431,964          | 16,692,136         | 666,786           | 1,388,500         | 72,213           | 18,763            | 2,200,000         | -  | 24,470,362         |
| 2003–04         | 10,350,041         | 15,204,694         | 1,502,615         | 1,170,275         | 68,995           | 17,22,187         | -                 | -  | 30,018,807         |
| 2004–05         | 7,921,268          | 14,068,743         | 1,009,485         | 2,091,774         | 112,600          | 2,903,000         | -                 | -  | 28,106,870         |
| 2005–06         | 18,420,556         | 13,125,527         | 807,299           | 2,524,917         | 384,902          | 2,905,508         | 6,600,000         | -  | 44,768,709         |
| 2006–07         | 19,147,112         | 17,764,497         | 1,222,116         | 5,070,596         | 230,520          | 5,901,000         | -                 | -  | 49,335,841         |
| 2007–08         | 24,739,937         | 29,654,262         | 1,686,520         | 12,618,686        | 48,976           | 5,940,000         | 10,000,000        | -  | 84,688,381         |
| 2008–09         | 19,201,519         | 24,060,808         | 1,408,372         | 7,837,418         | 41,575           | 4,650,000         | 15,330,000        | -  | 72,529,692         |
| 2009–10         | 34,998,472         | 44,929,650         | 924,728           | 13,438,281        | 174,144          | 6,141,430         | -                 | -  | 100,606,705        |
| 2010–11         | 13,946,311         | 20,989,149         | 2,219,598         | 7,332,843         | 2,721,823        | 9,778,074         | 20,000,000        | -  | 76,987,798         |
| 2011–12         | 45,620,000         | 17,088,267         | 2,275,170         | 7,520,000         | 549,572          | 7,731,058         | -                 | -  | 80,784,067         |
| 2012–13         | 10,194,369         | 20,631,008         | 2,320,296         | 9,360,000         | 1,870,774        | 17,769,250        | -                 | -  | 44,376,465         |
| 2013–14         | 4,860,009          | 29,297,732         | 1,697,319         | -                 | 606,480          | 8740081           | -                 | -  | 45,201,621         |
| <b>Subtotal</b> | <b>261,954,429</b> | <b>321,305,348</b> | <b>20,879,182</b> | <b>71,549,897</b> | <b>6,927,191</b> | <b>56,431,119</b> | <b>54,130,000</b> |    | <b>793,177,166</b> |

Table 5: Total value of assets confiscated in Australia, 1995–96 to 2013–14 (incomplete; \$) cont.

| Year                                    | Cth                | NSW                | SA                | WA                | ACT              | Qld               | Vic               | NT               | Total              |
|---|--------------------|--------------------|-------------------|-------------------|------------------|-------------------|-------------------|------------------|--------------------|
| Unexplained wealth<br>2000–2014         | 0                  | 2,629,000*         | 0                 | 2,650,000*        | 0                | -                 | 0                 | 3,500,000        | 8,779,000*         |
| Drug trafficker declarations<br>2008–14 | NA                 | NA                 | NA                | 32,300,000*       | NA               | -                 | NA                | 0                | 32,300,000*        |
| <b>Total</b>                            | <b>261,954,429</b> | <b>321,305,348</b> | <b>20,879,182</b> | <b>71,549,897</b> | <b>6,927,191</b> | <b>56,431,119</b> | <b>54,130,000</b> | <b>3,500,000</b> | <b>796,677,166</b> |

Note: The Tasmanian Government has stated that unexplained wealth orders ‘for the forfeiture of over \$820,000 in cash, assets and firearms were issued in 2015–16’ (Hidding & Goodwin 2016). No other statistics were available for Tasmania. Only unexplained wealth statistics were available for the Northern Territory.

\* These amounts are included in the confiscations recorded for individual years in the top section of the table and have not been added to the totals for New South Wales and Western Australia.

Source: NSW Crime Commission 1996–2014. NSW DPP 1996–2014. ACT DPP 2002–14. Qld DPP 2003–14. SA DPP 1996–2011. WA DPP 2001–14. OPP Vic 2003–11

## The way forward

A number of issues need to be canvassed in determining how best to improve Australia's unexplained wealth regime. They include the various procedural issues identified above, questions of interagency collaboration, the effectiveness of the regime in terms of the value of assets confiscated, rights issues and the need for harmonisation of legislation and procedures. The resolution of these questions requires not only legislative reform that might require a reference of legislative power from the states and territories to the Commonwealth, but also the development of consistent policies and procedures concerning investigations, the sharing of information and the distribution of confiscated assets between all jurisdictions involved.

Exploring a whole-of-government approach will ensure that Australia's unexplained wealth regime, and its asset confiscation procedures more generally, will be able to work efficiently and have the greatest impact on those who seek to profit from crime.

### Procedural, evidentiary and operational issues

Unexplained wealth legislation presents challenges for the Australian legal system due to the civil nature of the orders and the fact that they are investigated—and, in most cases, litigated—by agencies which in all other respects are involved in criminal matters and were established for that purpose.

In most jurisdictions around Australia, the vast majority of unexplained wealth matters are finalised through negotiated settlement rather than litigation. This is most evident in New South Wales, which has recovered the largest amounts of cash and assets in unexplained wealth investigations and settled more than 95 percent of its cases.

Under the New South Wales Crime Commission model, unexplained wealth cases are investigated and settled by specialists within the agency rather than the New South Wales Police Force or Director of Public Prosecutions. The New South Wales Police Force and a range of relevant Commonwealth agencies are still involved in the referral of cases, although a significant number of cases are identified internally.

During consultations conducted as part of this research, a number of law enforcement agencies around Australia identified the New South Wales model as the most effective and desirable of any of the approaches to unexplained wealth currently operating in Australia. The approach adopted by the New South Wales Crime Commission is fundamentally different to almost all

others around Australia, with the exception of the approach recently adopted by the Queensland Crime and Corruption Commission, which is based on the New South Wales model.

Unexplained wealth matters should be recognised as highly complex financial investigations of individuals who can afford the professional legal and financial advice necessary to circumvent traditional investigation practices. These investigations must be undertaken as efficiently as possible to ensure cash and assets are identified and restrained before they are moved beyond the reach of law enforcement and regulatory agencies. They require specialist skills in finance and intelligence analysis, as well as access to coercive powers of inquiry. Approaching unexplained wealth cases as traditional police investigations or legal proceedings with a financial aspect has proved to be ineffective in Australia. While there has been some success using the traditional approach in the Northern Territory this may be explained by the small size of the jurisdiction, which facilitates multiagency cooperation, and the influence of a small number of individuals in the relevant agencies who have the skills, experience and commitment to achieve relative success.

The amendments to the Commonwealth legislation that were introduced in 2014 seek to improve the regime by, for example, limiting court discretion and broadening what may be seized when enacting a search warrant at a premises. This legislation has not been tested in court. One element of the 2014 Act that is important to a future national model is the proposal to broaden the circumstances in which information about unexplained wealth proceedings may be shared with state, territory and overseas law enforcement agencies. In addition—although not an issue that could be remedied by legislative reform—measures to reduce the time and effort required to obtain information about assets held offshore by Australians would improve asset confiscation greatly (see Brown & Gillespie 2015).

### Interagency collaboration

Interviewees expressed a wide range of views on the current effectiveness of interagency collaboration among state, territory and Commonwealth law enforcement, criminal intelligence, and other relevant Commonwealth government agencies in relation to unexplained wealth proceedings in Australia.

In Western Australia, where the Police and the Director of Public Prosecutions each have responsibilities for progressing unexplained wealth cases, the system is reportedly not functioning effectively and the relevant agencies accept that moving these functions into the Crime and Corruption Commission would be a better approach. This ineffectiveness has been compounded by legislative requirements that prevent restraining orders from being issued within the necessary timeframes.

There are a number of reasons why shifting responsibility for unexplained wealth orders to the Western Australian Crime and Corruption Commission would be more effective. First, consolidating the functions within a single agency would resolve the problem of an agency that was set up to prepare and run criminal cases bringing a civil matter. Secondly, coercive powers could be applied, leading to more efficient and effective investigations. Finally, the agency

would have specialist expertise in criminal intelligence matters, including financial analysis, and would be more effective in building a case than the police.

Collaboration with Commonwealth law enforcement agencies appears to be a more significant issue in the jurisdictions away from the east coast of Australia. In some cases there was a view that matters of importance to law enforcement agencies in those jurisdictions are not sufficiently important in dollar terms to warrant Commonwealth agencies investing their time and resources—including matters involving six-figure sums. This view related to both cross-jurisdictional matters within Australia and international matters. The international situation would be improved by amendments to the Commonwealth legislation that seek to improve the international information-sharing system discussed in the previous section. This view also highlights the interjurisdictional nature of unexplained wealth investigations and the need for closer cooperation, something national unexplained wealth legislation could address. Political or legislative issues relating to assets held offshore will always be complex, but a streamlined Australian approach would still be beneficial.

Interviewees expressed consistent views on collaboration with Commonwealth agencies such as the ACC and AUSTRAC. AUSTRAC data were viewed as invaluable in financial investigations like unexplained wealth cases. However, some interviewees expressed concerns about how data are provided—that this process could be refined and data provided in a format that could more easily be interrogated and manipulated according to the needs of specific investigations.

Participants supported the idea of engaging with the ACC in unexplained wealth investigations. It was noted that the ACC ceased to provide examination evidence to state prosecution agencies for use in proceeds of crime matters following the decision in *ACC v OK* [2010] FCAFC 61. By harmonising Commonwealth, state and territory unexplained wealth legislation, Australia could implement a more coherent and coordinated national approach to unexplained wealth legislation. While the details of such an arrangement would need to be carefully considered, this approach is likely to improve intelligence sharing, cooperation and mutual support and simplify access to information held by agencies such as the ATO and AUSTRAC. Asset-sharing arrangements to compensate other agencies for resources that they have used in joint investigations would be one of the more complex details to be negotiated.

## Effectiveness

The effectiveness of unexplained wealth laws is framed by the debate around their validity from a rights perspective, and their promotion by government as a tough new measure against organised crime and a potential revenue source for funding crime-prevention projects.

Australia's unexplained wealth regime has yet to realise its potential. Governments must be realistic about what these laws can achieve and ensure that unexplained wealth investigations are well-coordinated and efficiently utilise the resources of all relevant state and Commonwealth agencies.

Four Australian jurisdictions have had unexplained wealth legislation in place for a significant period of time: Western Australia, the Northern Territory, New South Wales and the

Commonwealth. Acknowledging that these legislative regimes have been in place for varying periods of time, it would be fair to state that the two of these regimes—that of the Northern Territory and New South Wales—have been reasonably effective, while those of Western Australia and the Commonwealth have not.

It is clear that Commonwealth unexplained wealth legislation has not been effective. Despite operating for over three years, it has yet to recover cash or assets. The legislation's problems have been acknowledged and are addressed, in part, by the 2015 amendments. However, experience at the state and territory level indicates piecemeal legislative amendments will not be sufficient. The new approach needed at the Commonwealth level is significant in the context of proposals for a national approach to Australian unexplained wealth legislation.

The Northern Territory has had some success, but it is a reasonably small jurisdiction, and for that reason it is difficult to argue that its approach would be appropriate for broader application. Interviewees advised that, with the exception of one early unsuccessful unexplained wealth case, all eight cases since have been successful. However, it should also be noted that all of these successful cases were settled out of court and did not reach trial.

The total amount forfeited to the Northern Territory as a result of unexplained wealth cases between 2003 and 2014 is approximately \$3.5m. The largest unexplained wealth proceeding in the Northern Territory resulted in \$968,000 worth of assets being obtained by settlement. The Northern Territory has recovered an average of approximately \$300,000 annually through its unexplained wealth legislation. This figure places the Northern Territory third after New South Wales and Western Australia in the amount of funds confiscated under unexplained wealth legislation—which is impressive when the significant differences in population are taken into account. Australia should adopt a national approach to unexplained wealth legislation that permits the Northern Territory legislation to operate alongside any future national unexplained wealth legislation enacted by the Commonwealth.

In Western Australia there were 28 applications for unexplained wealth declarations between 2001 and 2014. Twenty-four of these were successful, three unsuccessful and one is pending. A total of \$6.9 million has been paid into the Confiscation Proceeds Account from unexplained wealth investigations, representing an average of approximately \$500,000 annually, for a population base of approximately 2.5 million. It was clear from the consultations that the administrative arrangement for obtaining unexplained wealth orders, in which the police and Director of Public Prosecutions share responsibility, is not working effectively. The police in particular are very frustrated with the legislation and the requirements for obtaining orders.

The police identified the New South Wales model as the ideal they would like to see implemented. Both police and the Director of Public Prosecutions agree that the Western Australia Crime and Corruption Commission would be better placed to have sole responsibility for administering Western Australia's unexplained wealth legislation.

Unexplained wealth orders in New South Wales have recovered significant amounts in recent years. In 2012, two unexplained wealth orders recovered approximately \$154,000; in 2013, three orders recovered approximately \$1,250,000; and in 2014, five orders recovered



approximately \$1,225,000—a total of \$2,629,000 in three years. When orders that could only have been commenced as unexplained wealth orders, but were settled as other orders (such as assets forfeiture orders) are also counted, this total rises to \$14.4m in the three-year period.

The New South Wales Crime Commission's ability to achieve settlement in short periods of time, while sacrificing little of the unexplained wealth in the negotiation process, was highlighted by a number of other jurisdictions as the most effective approach currently operating in Australia. In contrast, Western Australia Police do not have the power to negotiate or litigate. There is a perception that the Western Australian courts are more conservative than, for example, those of New South Wales, and that respondents are more likely to litigate than settle.

A key advantage of the New South Wales Crime Commission approach is the ability to issue a notice to give evidence in a star chamber. When individuals are issued with an examination notice, they often cooperate because they do not want to be examined. This stands in contrast with examinations undertaken in an open court with a judge, which are impartial and lack the power and effectiveness of the New South Wales Crime Commission approach.

In jurisdictions where more than one agency is involved in investigating unexplained wealth cases and obtaining orders, and particularly where the Director of Public Prosecutions is involved, there are issues with communication, coordination and agency functions and objectives.

## Rights issues

Unexplained wealth legislation has been controversial wherever it has been introduced because of a perception that the reversed presumption of innocence breaches individual rights. The individual rights arguments must be considered, and it is important that unexplained wealth legislation is used appropriately. This research did not identify any cases where the legislation was used inappropriately and, indeed, in some cases the problem is rather that it is not being used assertively enough.

The Law Council argued in a submission to the PJC-ACC (2009) that the lack of a requirement to present evidence that there are reasonable grounds to suspect a respondent of committing an offence, or that their wealth is derived from an offence, in combination with the reversed onus of proof, places them in a position where the suspicion regarding the wealth is the only trigger for forfeiture. The High Court of Australia has found that the right to a fair trial, or the principle of due process, is fundamental to the Australian legal system; it is implicitly required in Chapter III of the Australian Constitution (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24). The right to a fair trial includes the fundamental right to presumed innocence, with the onus of proving the allegations on the prosecution. While the presumption of innocence is part of Australian law, it has been argued that reverse onus provisions are required to enforce certain laws, particularly where the accusation involves subject matter that is within the personal knowledge of the accused (Hamer 2011).

In *Momcilovic v The Queen* [2011] HCA 34, reverse onus provisions required a person to prove that property (illicit drugs) found on their premises was not in their possession. The reverse

onus was accepted as it was necessary in order to enforce the law. The High Court found that a statutory provision affecting the presumption of innocence should be construed to 'minimise or avoid the displacement of the presumption' but that there could be no 'construction other than that required by the clear language of that section, which places the legal burden of proof on the accused' (Momcilovic [512]). As the Police Federation of Australia outlined in a submission to the PJC-ACC (2009), the ability to gather enough evidence to prosecute the heads of criminal organisations who orchestrate criminal activities, as opposed to the lower-level members who actually commit the crimes, is a significant challenge for law enforcement agencies. It was asserted that Australian police know who is involved in organised and serious crime in Australia but cannot prove beyond reasonable doubt that they are involved directly in specific crimes. Unexplained wealth legislation is viewed as the best way of preventing further crime. It enables law enforcement to attack the profit of criminal networks without needing to demonstrate a causal connection between the offences and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offence was committed. However, it is necessary to be mindful of the rights arguments related to unexplained wealth legislation, particularly if the Australian approach becomes more effective in the future.

### Harmonising legislation and procedures

It appears clear that Australia should adopt a holistic approach to unexplained wealth legislation. If this is not understood and implemented, organised crime groups may be able to circumvent legislation and structure their financial affairs by moving their assets to jurisdictions in which laws are more favourable and there is less risk that assets would be confiscated.

Unexplained wealth laws cannot be effective if the legislative regime across states in close geographic proximity within the same country is not coordinated.

The Parliamentary Joint Committee on Law Enforcement (PJCLE) Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements in 2012 recommended that a referral of powers be sought to facilitate the introduction of legislation in the states and territories and establish a national unexplained wealth scheme. In the consultation interviews conducted as part of this research project, a number of issues were raised concerning the introduction of a national approach to unexplained wealth. These included the government's reluctance to hand over powers to the Commonwealth, particularly in an arrangement where state laws could not operate alongside Commonwealth legislation; a perceived lack of consultation by the Commonwealth regarding the approach to the national laws and the legislation itself; and scepticism about the equitable sharing of profits.

There are precedents for harmonising the laws across Australia, and a national approach has been adopted in a number of related areas of the legal system. For example, in 2002 the states and territories referred terrorism laws to the Commonwealth following major incidents in the United States and Indonesia that had implications for Australia. As previously noted the states and territories that consider their unexplained wealth laws to be effective, such as New South Wales and the Northern Territory, felt they would be forced to accept what is, in their view,

inferior Commonwealth legislation that is not yet proved, or even tested, in the courts. To achieve a consistent national regime it may be necessary to adopt a new approach to Commonwealth unexplained wealth laws, based on an existing effective model and in consultation with states and territories. It is understandable that states and territories are reluctant to implement a new regime that may be less effective than that currently in place.

The interviews conducted as part of this research explored the harmonisation of unexplained wealth laws using mirror legislation. It was clear this approach was not preferred and would be very difficult to implement. A wide range of views on this were expressed. The Commonwealth would be required to consult, and be seen to consult—through, for example, a national roundtable—to arrive at an outcome that would be willingly accepted and implemented by all parties.

The significant question that remains for all states and territories is what resources they would be required to contribute, and what resources would be contributed by the Commonwealth. Unexplained wealth cases are expensive and involve resource-intensive financial investigations, and agreement on the distribution of profits is a major concern. A number of states also expressed the view that the AFP are already overburdened and may have difficulty handling additional work associated with joint operations. There are concerns that the states and territories would be required to contribute the majority of the resources, and that this would not be reflected in the distribution of profits. It was made clear in the consultations that there would be political barriers to be overcome as part of this process; the jurisdictions are likely to expect that the vast majority of the funds and assets forfeited (eg 80%) are returned to them for reinvestment in law enforcement and investigations.

## Conclusions

Recovering unexplained wealth from criminals can play an important role in deterring and disrupting organised crime, and in providing additional resources for the prevention and prosecution of crime. Organised crime generates many billions of dollars annually in Australia, but only a proportion of this has been recovered from high-level organised criminals to date.

All Australian states agree there is a need for an effective unexplained wealth regime. Between 2000 and 2014, all states and territories and the Commonwealth introduced such legislation (with the exception of the Australian Capital Territory, where a regime is currently being developed), although different laws and procedures exist in each jurisdiction. In some jurisdictions, police and the Crown solicitor work together on unexplained wealth cases; in other jurisdictions police work with the Director of Public Prosecutions; and in New South Wales and Queensland, crime commissions are responsible for unexplained wealth proceedings. This is in addition to a range of other legislative measures that allow the confiscation of the proceeds of crime generally.

The complexity and practical difficulties associated with unexplained wealth investigations and the need for specialist expertise, particularly with respect to financial investigations, is widely acknowledged. More efficient processes are needed at the state, territory and Commonwealth level. Intelligence sharing and collaboration between specialist Commonwealth agencies and the states and territories must be improved.

Except for New South Wales and the Northern Territory, all jurisdictions that introduced unexplained wealth legislation between 2000 and 2012 have experienced some level of frustration with aspects of their legislation and procedure. In some jurisdictions legislation has only recently been introduced but, overall, unexplained wealth laws in Australia have resulted in the restraint of only relatively modest amounts of cash and assets—mostly through settlement prior to reaching trial rather than through court judgments.

In interviews, representatives of the jurisdictions expressed a strong preference for an approach to unexplained wealth that would allow state and Commonwealth legislation to coexist. The best way of achieving this, according to those interviewed, would be through a text-based referral of legislative power from the states to the Commonwealth to enable the Commonwealth to extend its jurisdiction to the states and territories. To achieve this, the Commonwealth legislation would need to be amended, in consultation with the states and territories.

Interviewees held the view that the New South Wales Crime Commission's approach is the most efficient and effective approach to unexplained wealth in Australia at present. They highlighted a number of positive attributes of the New South Wales Crime Commission model. These include that matters are:

- dealt with by a single agency;
- dealt with by experienced specialist financial intelligence analysts;
- settled in almost all cases without the need for costly litigation;
- settled in almost all cases for the amount determined to be 'unexplained'; and
- investigated using the agency's coercive powers to obtain information at an early stage.

Queensland has based its unexplained wealth legislation on the New South Wales model, and a similar approach is also being considered by the Western Australia Government.

Recent reviews have attributed the lack of successful unexplained wealth proceedings at the Commonwealth level to problems with existing Commonwealth legislation. Amendments have, however, been proposed to address these issues.

Many of those interviewed were concerned by how proceeds recovered under a better-coordinated unexplained wealth scheme would be shared. This was particularly concerning to the jurisdictions with the most successful unexplained wealth legislation, representatives of which expressed concern that their efforts in restraining assets would not be adequately recognised. Various payment models could be used to ensure proceeds are distributed fairly, based on the resources provided by jurisdictions to secure successful outcomes. Ideally, this question could be resolved in an agreement between the states and territories and the Commonwealth when a text-based referral of powers is undertaken.

Finally, nationally uniform data collection is needed to monitor the number of assets confiscation proceedings undertaken, including the collection and analysis of discrete data for unexplained wealth proceedings and data on the value of assets restrained, the value of property confiscated and the value of funds recovered through the use of court orders and/or negotiated settlements. Statistics should be maintained to enable disaggregation across jurisdictions and responsible agencies on an annual basis.

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## Appendix 1: Interview documentation

### PLAIN LANGUAGE STATEMENT

*Exploring the procedural barriers to securing*

*unexplained wealth orders in Australia*

Principal Researcher:

**Project Title:** Exploring the procedural barriers to securing unexplained wealth orders

**Project Activity:** Consultation interviews

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What is the purpose of this research?

The AIC has commenced a study to examine the processes involved in obtaining unexplained wealth orders and determine how any identified impediments could be addressed through legislative or procedural reform.

How will I contribute to this research?

As an investigator or prosecutor or academic involved in unexplained wealth orders you will be asked to participate in an in-depth interview at your office that will take approximately 90 minutes of your time. You will be asked to comment on your experience in investigating or prosecuting unexplained wealth orders, and your views as to how barriers to obtaining successful orders could be addressed. Your name and any identifying information will not be sought and you must not mention individuals or organisations who have been involved in investigations by name. With your permission, your interview will be digitally-recorded.

Why have I been asked to participate?

You have been asked to participate in this research because of your knowledge or expertise as it relates to unexplained wealth orders.



### What are the expected benefits and outcomes of this project?

This research will help in identifying how barriers to obtaining unexplained wealth orders could be addressed with the introduction of new legislation or improved approaches to investigation and prosecution.

### Are there any risks involved?

There are no specific risks associated with this research. In the event that you feel any discomfort, tell the researchers so that they can pause or stop the interview.

### Will I be paid?

We greatly appreciate your involvement in this research but for ethical reasons participation is voluntary. You will not be offered any payment or other reward, financial or otherwise, for participating in this research.

### Will there be someone available to provide me with some support if I need it?

You can obtain advice from your Manager at your agency and you can obtain counselling and support from your agency's Human Resources Section. You can also contact the Principal Researcher and Human Research Ethics Coordinator – contact details below.

### What steps will be taken regarding confidentiality?

The data and information you will provide will be presented in de-identified form in any publication arising from this project. Names of individuals and organisations will not be collected or used in any publications. Your responses to the questions will not be able to be linked back to you and your agency will not know which interviewees provided the answers to questions.

### Can I withdraw from the research?

Your participation in this study is entirely voluntary. You are under no obligation to participate. You may decide not to answer any question; and you may withdraw at any stage. If you decide to withdraw, you may request that any information you have already provided not be used in the research.

### Where can I see the results from this research?

A confidential draft report will be submitted to the Criminology Research Advisory Council for feedback, revision of drafts and finalisation of report.

A condensed version of the report suitable for public dissemination will be made available in one of the AICs series of publications.

### **Who can I contact about this research?**

If you would like further information or to contact the researcher about any aspect of this study, please contact the principal researcher. If you have a complaint concerning the manner in which the research project *Exploring the procedural barriers to securing unexplained wealth orders in Australia* is being conducted, please contact the Secretariat to the AIC Human Research Ethics Committee, who is not connected with this project and who can pass on your concerns to appropriate person.

Thank you for participating in this research, your involvement is greatly appreciated.

*INTERVIEW  
PROCESS*

Exploring the procedural barriers to securing unexplained wealth orders in Australia

1. As part of the Australian Institute of Criminology's research into unexplained wealth orders, semi-structured face-to-face interviews are being conducted with relevant Commonwealth and state government agencies, and selected academics.
2. The following agencies are participating in interviews for this research project in July 2014:
  - Attorney Generals' Department
  - Australian Crime Commission
  - Australian Federal Police
  - Australian Securities and Investments Commission
  - Australian Taxation Office
  - New South Wales Crime Commission
  - New South Wales Police Force
  - Northern Territory Police Force
  - Office of the Director of Public Prosecutions for Western Australia
  - Queensland Crime and Misconduct Commission
  - Solicitor for the Northern Territory
  - South Australia Crown Solicitor's Office
  - South Australia Police
  - Western Australia Police
3. The AIC interviewer will travel to the agencies to meet the nominated participants and conduct the interviews. Each interview will be approximately 90 minutes in length. The interviewer will seek information from participants on their experiences obtaining unexplained wealth orders (where relevant) and their views on how barriers to obtaining successful orders could be addressed.
4. Participants will only be interviewed regarding unexplained wealth orders and will not be asked to reveal personal information relating to themselves or individuals the subject of investigation, or judicial processes. Responses to interviews will be recorded digitally or in handwritten notes, in agreement with interviewees.
5. Responses will be analysed and summarised in a final research report. Following the conclusion of the interviews, participants will be offered the opportunity to review transcripts or notes if they wish to do so. Views will not be attributed to individuals or

organisations.

6. Recordings and notes will be held securely on AIC premises in either locked cabinets or on AIC servers that comply with Commonwealth data security standards. On completion of the project, original recordings will be destroyed.
7. Interviews for this project will be conducted by Dr Marcus Smith, Senior Research Analyst, with oversight from Dr Russell Smith, Principal Criminologist. A summary of their qualifications, experience and contact details are available on the AIC website at [http://www.aic.gov.au/about\\_aic/researchprograms/staff.html](http://www.aic.gov.au/about_aic/researchprograms/staff.html)

#### *INTERVIEW QUESTIONS*

#### Exploring the procedural barriers to securing unexplained wealth orders in Australia

1. Could you please begin by briefly describing your training and past experience, your current role in the organisation, and how long you have worked in these roles?
2. How many unexplained wealth cases have you been involved in investigating or prosecuting and what has your role been in these cases?
3. Can you provide details of the number of unexplained wealth applications in your jurisdiction that were investigated, went to trial (application made), and were successful, and the amount of money that was ordered to be recovered, and actually recovered since the relevant legislation has been in force?
4. What factors contributed to whether an unexplained wealth order case was pursued?
5. Can you select one successful case and one unsuccessful case as representative examples, and briefly describe the facts involved in each?
6. Can you identify the key issues that contributed to the outcome of these cases, and discuss how frequently these issues arise in your jurisdiction?
7. How are individuals who are suspected of possessing unexplained wealth identified, and how might procedures to identify suspects be enhanced?
8. Can you describe, from a practical perspective, some of the barriers that exist to investigating and prosecuting unexplained wealth orders in your jurisdiction, and how these might be addressed?
9. Is there sufficient communication and cooperation between state and federal government agencies in relation to these cases, how could this be improved?
10. Is there sufficient communication and cooperation between specialist law enforcement units (e.g. financial analysis) in the investigation of these cases, how could this be improved?

11. To what extent is financial intelligence data collected by AUSTRAC used in connection with unexplained wealth proceedings. Could AUSTRAC data be used more effectively?
12. What are the implications for individuals who refuse to produce documents? To what extent does this occur in your jurisdiction?
13. To what extent are undercover operations used to investigate unexplained wealth, and what are the associated issues?
14. In your experience, what proportion of successful unexplained wealth orders result in the actual recovery of funds? How could this area be improved?
15. Can you suggest how procedures in this area could be strengthened either at the state or federal level?
16. To what extent are cases settled without going to trial? What factors lead to early settlement?
17. Are there any evidentiary issues that exist in relation to investigating or prosecuting unexplained wealth orders that could be dealt with through legislative amendment at the state or federal level?
18. In your jurisdiction does the court have a general discretion not to make an unexplained wealth order? In your experience, how frequently has a court exercised its discretion not to make an order?
19. How frequently has a court determined that assets should be excluded, or decide that an order should be discounted or dismissed due to hardship of the defendant or other persons?
20. Can you describe some of the barriers that exist from a legislative perspective in investigating/prosecuting unexplained wealth orders in your jurisdiction?
21. Can you suggest how the legislation in this area could be strengthened either at the state or federal level?
22. What geographical jurisdictional constraints exist in seeking unexplained wealth orders in your jurisdiction?
23. Have you assisted overseas jurisdictions or been assisted by overseas jurisdictions to obtain unexplained wealth orders? Can you describe the circumstances of such assistance?
24. How important is international cooperation in this area and how might it be improved?
25. Thank you for your participation. Is there anything else that you would like to discuss that has not been covered

