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Abstract | Australia's unexplained wealth laws form part of a range of measures introduced in response to growing concern about the prevalence and impact of organised crime.

The confiscation of criminal assets, including through the use of unexplained wealth legislation, seeks to undermine the business model of organised crime by removing its financial return, punishing offenders, compensating society, preventing the improper use of assets and deterring participation in crime (Bartels 2010a).

The Australian Crime Commission has conservatively estimated that serious and organised crime cost Australia \$36b in 2013–14 (ACC 2015). According to published national statistics, the total value of assets confiscated in Australian jurisdictions between 1995–96 and 2013–14 was approximately \$800m, averaging around \$44m annually. The discrepancy between these two amounts clearly shows more needs to be done to target the profits of organised crime.

This paper reviews Australia's current approaches to confiscating unexplained wealth and aims to identify any barriers to their implementation, to inform effective procedural reforms to the laws and better target the proceeds of crime of Australia's most serious criminals.

Procedural impediments to effective unexplained wealth legislation in Australia

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Unexplained wealth laws are a relatively new approach to the confiscation of proceeds of crime and provide a way of securing assets that cannot be recovered using conventional conviction-based legislative means. Unlike traditional approaches to confiscation, the state need not prove the property owner has committed a criminal offence. In addition, the burden of proof is reversed, with the property owner bearing the onus of proving the property was acquired legitimately. Unexplained wealth laws are designed for circumstances in which it is difficult to target senior figures in criminal organisations who do not actually commit crimes themselves, but who play a key role in planning, financing and directing significant criminal operations. Unexplained wealth laws exist in only a small number of countries including Australia, Ireland and Columbia, with variants also operating 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. By 2014, all Australian jurisdictions except the Australian Capital Territory had introduced such laws. Australia's unexplained wealth laws have been criticised by civil rights organisations and some legal academics, who have raised concerns about the reversal of the burden of proof and questioned the need for the laws, including whether the relatively small amounts currently being recovered are sufficient to outweigh counter-arguments (Croke 2010).

The Australian Institute of Criminology (AIC) reviewed existing Australian legislation when unexplained wealth laws were enacted at the Commonwealth level in 2010 (Bartels 2010a, 2010b). More recently Australian academics, in collaboration with practitioners, have analysed Australian criminal asset recovery systems and discussed unexplained wealth laws (see, for example, Goldsmith, Gray & Smith 2014).

This research

In 2014, the AIC undertook research to identify the barriers to obtaining successful unexplained wealth orders in Australia and explore how these could be addressed. Representatives of agencies involved with unexplained wealth orders throughout Australia, including police, crime commissions, government legal offices and associated Commonwealth entities such as the Australian Taxation Office, were interviewed. The issues discussed included how respondents were identified, how investigations were conducted, the value of assets recovered, the issues contributing to success or failure, case settlement, and interagency and international cooperation. In addition, legislation, case law, government reports and academic literature were analysed. The researchers were not, however, able to review case files due to the sensitive nature of unexplained wealth investigations. The research was funded by the Criminology Research Grants Program and approved by an Institutional Human Research Ethics Committee (AIC PO-215).

Current legislative regimes

Western Australia

The Criminal Property Confiscation Act 2000 (WA) facilitates the confiscation of proceeds of crime in Western Australia. Western Australia was the first Australian jurisdiction to enact unexplained wealth provisions in 2000. Western Australia Police investigate unexplained wealth cases and the Director of Public Prosecutions applies to the Supreme Court of Western Australia for an unexplained wealth declaration if it is considered more likely than not that a person's total wealth is greater than the value of their lawfully acquired wealth. It is not necessary to demonstrate reasonable grounds to suspect that the person committed an offence to apply for an unexplained wealth declaration.

Under the WA provisions the respondent bears the onus of proof, and their entire wealth is presumed to be unlawfully acquired unless they can establish otherwise. In this jurisdiction the court has limited discretion when making an unexplained wealth declaration; one must be made if it is more likely than not that the respondent's total wealth is greater than their legally acquired wealth.

At the time of writing, there had been 28 applications for unexplained wealth declarations since 1 January 2001 with 24 successful, three unsuccessful and one pending. A total of \$6.9m has been paid into the Confiscation Proceeds Account from unexplained wealth investigations in Western Australia.

Issues identified in Western Australia include:

- the risk of losing a case at trial and consequent requirement to pay court costs and damages means few cases have been pursued;

- it takes several months to obtain examination orders in unexplained wealth cases, which gives respondents time to plan an explanation for the situation or rearrange their financial affairs; and
- there have been problems with communication and collaboration between the agencies involved in unexplained wealth cases.

Queensland

The Queensland unexplained wealth provisions were established by the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld). Under this legislation, the Supreme Court of Queensland 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. Under legislation very similar to that operating in New South Wales, the Queensland Crime and Corruption Commission is responsible for unexplained wealth investigations. However, a key difference between the two is that in Queensland, the Director of Public Prosecutions is responsible for litigating confiscation proceedings (as solicitor on the record).

The Queensland legislation has only been in place for a short time and the Crime and Corruption Commission is aware it needs to manage government and public expectations of what unexplained wealth legislation is able to achieve. In terms of harmonising unexplained wealth laws, Queensland may be willing to facilitate a text-based referral of powers to the Commonwealth so Commonwealth legislation can be used against assets located in Queensland, while maintaining the current state legislation.

South Australia

Unexplained wealth orders were established in South Australia under the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA). The Director of Public Prosecutions may authorise the South Australian Crown Solicitor to apply to the Supreme Court of South Australia for an unexplained wealth order if it reasonably suspects that a person or an incorporated body has unlawfully acquired wealth. There is no requirement to show reasonable grounds to suspect that a person committed an offence.

A key difference between the South Australian legislative approach and that of other jurisdictions is that, rather than introducing an amendment, the laws were enacted in separate legislation. This caused significant issues with obtaining the information necessary for unexplained wealth investigations. As unexplained wealth orders are civil rather than criminal matters, legislative barriers and privacy restrictions prevented South Australia Police from obtaining data from Commonwealth or other state agencies in unexplained wealth investigations. Between August 2009 and September 2013, only open-source information could be used and, as a result, there were no successful cases. These legislative issues were addressed in 2013 and investigations are now progressing more effectively.

Northern Territory

The Northern Territory's assets confiscation and forfeiture regime is established by the *Criminal Property Forfeiture Act 2002* (NT). Unexplained wealth legislation was introduced in the Northern Territory in 2003 and, as with the Western Australian provisions, there is no requirement to show

reasonable grounds for suspecting a person has committed an offence. The judge has minimal discretion when making an unexplained wealth declaration.

The onus of proof is on the respondent, and any part of the person's wealth is presumed to have been unlawfully obtained unless they can establish the contrary; there is no need to establish a link to a criminal offence. The total amount of unexplained wealth forfeited to the Northern Territory Government so far is approximately \$3.5m, including one large settlement of \$968,000.

Agencies in this jurisdiction considered the legislation to be generally effective, but raised a number of issues:

- collaboration with national agencies could be improved;
- a national approach to unexplained wealth would improve the targeting of criminal assets, but the Northern Territory legislation must continue to operate; and
- obtaining the information necessary for investigations to be progressed from financial institutions is difficult.

New South Wales

The *Criminal Assets Recovery Act 1990* (NSW) provides the legislative basis for the New South Wales Crime Commission to obtain unexplained wealth orders. More than 95 percent of unexplained wealth matters in New South Wales are finalised through negotiated settlement, rather than by litigating the matter at trial. In considering whether to proceed with an unexplained wealth case the likely success of refuting the respondent's argument to discharge their onus of proof, the cost of litigation, and the extent to which those costs and any confiscation proceeds are likely to be recoverable are assessed. The New South Wales Crime Commission is proactive in restraining property as soon as possible during an investigation, which is considered vital to their success.

Substantial amounts have been recovered through unexplained wealth orders in New South Wales in recent years. In 2013 there were three orders worth approximately \$1.25m, and in 2014 five orders worth approximately \$1.225m. Many cases commence as unexplained wealth proceedings but are finalised using other asset confiscation orders.

A key reason for the success of these laws in New South Wales is that the legislation is administered by the New South Wales Crime Commission and all work carried out by specialist financial investigators. The only element of the process that is outside the Commission's control is the referral of cases in the case identification phase. In the rare cases that proceed to hearing, independent barristers are briefed.

The New South Wales Crime Commission approaches unexplained wealth matters differently to agencies in other jurisdictions. It treats such matters as financial investigations that can lead to and support legal proceedings, rather than legal proceedings with a financial aspect. Forensic accountants are allocated a case load, and manage confiscation proceedings from the beginning of the process to its end. This approach has advantages over one in which lawyers or police with a limited understanding of financial investigation are tasked with complex unexplained wealth casework.

The New South Wales unexplained wealth regime was amended by the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW), enacted on 11 May 2016. This

legislation amended the *Criminal Assets Recovery Act 1990* (NSW) to allow the Supreme Court to make a forfeiture order in respect of property used in, or in connection with, a serious crime-related activity or, if that property is not available for forfeiture, other property of the offender. It also clarifies the circumstances in which an interest in property ceases to be serious crime-derived property or illegally acquired property, for the purposes of the Act, on its sale or disposition.

Commonwealth

The *Proceeds of Crime Act 2002* (Cth) was amended to incorporate unexplained wealth provisions in 2010. The onus of proof lies with the respondent who must prove, on the balance of probabilities, that their wealth was not derived from one or more offences linked to a Commonwealth head of power.

The Commonwealth's unexplained wealth legislation has not yet been tested in court. This research identified a number of issues requiring resolution during the consultations. One of these related to the extent of judicial discretion available to courts when making unexplained wealth orders. Unexplained wealth investigations are resource intensive and highly complex, and the level of judicial discretion has hindered the progress of investigations at the Commonwealth level.

Another concern related to the potential use of restrained assets by the respondent to fund litigation. If restrained assets are available to fund legal defence costs this can prolong costly, complex and time-consuming litigation. By the time litigation has concluded, a significant proportion of the unexplained wealth may have been spent on legal expenses.

The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) sought 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;
- limiting the circumstances in which restrained assets can be used to fund a defence;
- broadening what items may be seized when executing a search warrant at premises; and
- broadening the circumstances in which information may be shared with state and overseas law enforcement agencies.

In time, these amendments should make it easier to obtain unexplained wealth orders and facilitate litigation under the legislation.

Other states and territories

The Tasmanian *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013* was modelled on the Northern Territory's legislation. This 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.

Victoria introduced unexplained wealth legislation in 2014, passing the *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014*, amending the *Confiscation Act 1997*. Under the Victorian legislation, the Director of Public Prosecutions can seek to have property restrained with a suspicion on reasonable grounds that a person with an interest in the property has engaged in serious criminal activity.

The Australian Capital Territory is now the only jurisdiction in Australia not to have enacted unexplained wealth legislation, but is expected to implement unexplained wealth legislation in the near future.

Procedural issues

Unexplained wealth legislation presents a number of challenges for the Australian legal system. Unexplained wealth proceedings involve the investigation and, in most cases, litigation of civil forfeiture orders by agencies that in all other respects pursue criminal matters and were established for that purpose.

Unexplained wealth matters are often finalised through negotiated settlement rather than litigation at trial. This is most evident in New South Wales, which has successfully recovered the most cash and assets through unexplained wealth investigations, and has settled the vast majority of its cases without recourse to litigation.

Financial investigatory expertise

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

Unexplained wealth matters involve complex financial investigations of individuals who may have access to the professional legal and financial advice necessary to circumvent traditional investigation practices. These investigations must be as efficient as possible to ensure cash and assets are identified and restrained before they can be moved beyond the reach of law enforcement and regulatory agencies. These types of investigations require specialist skills in finance and intelligence analysis and, in many cases, coercive powers of inquiry.

Approaching unexplained wealth cases as traditional police investigations or legal proceedings with a financial aspect has, arguably, proved to be ineffective in Australia. While there has been some success with that 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 with the skills, experience and commitment necessary for success.

Information sharing

The 2015 amendments to the Commonwealth legislation sought to address identified issues by, for example, limiting court discretion and broadening what items may be seized when executing a search warrant at premises. These amendments also broadened the circumstances in which information about unexplained wealth proceedings may be shared with state, territory and overseas law enforcement agencies. 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 (Brown & Gillespie 2015).

Effectiveness

Australia's unexplained wealth regime has not been greatly successful to date, but has great potential if it can be better integrated and coordinated. Governments must be realistic about what these laws can achieve and should appreciate the importance of a well-coordinated and efficient use of state and Commonwealth agency resources.

Four Australian jurisdictions have had unexplained wealth legislation in place for at least five years: Western Australia, the Northern Territory, New South Wales and the Commonwealth. The Commonwealth legislation has operated for several years but has not yet recovered any unexplained wealth. Acknowledging that legislation has been operating for varying periods in these jurisdictions, it would be fair to say the Northern Territory and New South Wales have been reasonably successful, while Western Australia and the Commonwealth have not.

In Western Australia, \$6.9m has been paid into the Confiscation Proceeds Account from unexplained wealth investigations over a 10-year period. Unexplained wealth orders in New South Wales have recovered a total of \$2.6m in three years and, when orders that could only have been commenced as unexplained wealth orders but were settled as other orders are also counted, this rises to \$14.4m. 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).

A number of interviewees highlighted the New South Wales Crime Commission's ability to achieve settlement in short periods of time, while sacrificing little unexplained wealth in the negotiation process, as an important element of its success. A key advantage of the New South Wales Crime Commission model is the ability to issue a notice to give evidence in a coercive hearing or 'star chamber'. Court hearings are impartial and lack the power and effectiveness of a star chamber. 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 associated with communication, coordination and agency functions. As far as possible, unexplained wealth cases should be managed by a single agency.

Models for reform

The 2012 report of the Parliamentary Joint Committee on Law Enforcement (PJCLE) found the Commonwealth unexplained wealth legislation was not working as intended and that a national approach to unexplained wealth legislation would be a more effective response to organised crime. The committee recommended a referral of powers from the states and territories to the Commonwealth (PJCLE 2012). There are a range of views on this around Australia with some states keen to adopt this approach—particularly those where state legislation is ineffective—and others less so.

The two options for a national approach to unexplained wealth legislation are the harmonisation of unexplained wealth laws through the use of mirror legislation, and a referral of powers by the states and territories to the Commonwealth. Given the difficulties associated with achieving a uniformity of approach across eight jurisdictions, mirror legislation is not the preferred option.

Text-based referral of powers

The consultations made it apparent there is support for a text-based referral of legislative power from the states and territories to the Commonwealth to allow agreed Commonwealth legislation to be used to confiscate unexplained wealth located in the states and territories. However, the states and territories would not support a more general referral of state and territory legislative power on unexplained wealth to the Commonwealth if it required the repeal of state and territory legislation.

Uncertainty around how any proceeds of crime recovered under Commonwealth legislation would be shared among the agencies contributing to the investigation and prosecution of cases is a key impediment to the referral of powers to the Commonwealth. Further consultation between the states and territories and the Commonwealth is needed to progress a national approach to unexplained wealth.

A number of reviews over the past three years have involved consultation on an individual basis between states and territories. A national forum would help to clarify issues and be a move toward an agreement on the wording of the legislation, operational processes, interagency cooperation and responsibilities, and the sharing of investigation proceeds. Jurisdictions could discuss training and knowledge sharing initiatives, financial intelligence and analysis, and the improvement of intelligence sharing at a national level, particularly through the Criminal Asset Confiscation Taskforce.

Reformed Commonwealth laws that apply throughout the country and operate in conjunction with local state and territory laws would enable a coordinated approach and facilitate cross-border investigations, making unexplained wealth laws across Australia more efficient and effective.

Barriers to a national approach

A number of factors may make it difficult to adopt a national approach to unexplained wealth laws. These include political issues associated with ceding power to the Commonwealth, a lack of consultation, the ineffectiveness of current Commonwealth legislation, uncertainty about the practical benefits of the approach and uncertainty about how proceeds of crime would be shared between the states and territories and the Commonwealth.

In addition, a number of constitutional issues would need to be analysed and resolved, particularly those concerning the need for a link to a suspected criminal offence to satisfy the requirements of section 51 (xxxi) of the Constitution (that the Commonwealth only acquire property on 'just terms'). The implications of section 109 of the Constitution, relating to the coexistence of state and Commonwealth laws in this area, would also need to be examined.

National monitoring

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

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All URLs correct at June 2016

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