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Foreword | *Unexplained wealth laws are a relatively recent development in confiscation law, which require a person who lives beyond their apparent means to justify the legitimacy of their financial circumstances. Unexplained wealth laws are currently in place in the Northern Territory and Western Australia, while Commonwealth provisions recently came into effect. New South Wales has recently announced its intention to introduce laws mirroring the Commonwealth legislation. Similar laws are expected to come into effect shortly in South Australia. Laws of this nature are thought to deter would-be criminals by reducing the profitability of illegal activities and may prevent crime by diminishing offenders' ability to finance their future criminal acts. However, critics argue that the laws infringe on people's right to silence and undermine the presumption of innocence. This paper examines the evolution of unexplained wealth laws in Australia and considers the arguments for and against such provisions, as well as highlighting the need for further research in this area.*

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Unexplained wealth laws in Australia

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This paper considers the scope and impact of unexplained wealth laws in Australia and considers the arguments for and against such provisions. The power of the state to confiscate assets derived from criminal acts is well-accepted in criminal justice and each Australian jurisdiction has legislation governing the confiscation of proceeds of crime (see Bartels 2010). Some Australian jurisdictions have gone further, however, with the introduction of unexplained wealth laws. Laws of this nature place the onus of proof on the individual whose wealth is in dispute. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate on the balance of probabilities that the wealth has been obtained by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means. The paper draws on recent developments in this context, particularly the recent report of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) on the legislative arrangements to outlaw serious and organised crime groups.

Existing unexplained wealth laws in Australia

Western Australia

Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws, with the *Criminal Property Confiscation Act 2000 (WA)*. Citing the parliamentary speeches when the legislation was introduced, Lusty (2002: 355) notes that the Act is 'squarely aimed at "those people who apparently live beyond their legitimate means of support"'. However, the legislation has also been the subject of criticism from academics and key stakeholders, including the WA Law Society and Criminal Lawyers' Association (see Clarke 2004, 2002).

The PJC-ACC (2009) identified the following key aspects of the WA and NT legislation, which was modelled on the WA provisions:

- the requirement that courts make an order if satisfied that a person's total wealth is greater than their lawfully acquired wealth. Courts have minimal discretion when making such orders;
- the reversal of the onus of proof in favour of the Crown, providing that 'any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary' (see *Criminal Property Forfeiture Act 2002* (NT), s 71(2); *Property Confiscation Act 2000* (WA), s 12(2)); and
- respondents have a right to object to their property being restrained within 28 days of being served with an order restraining the property.

The legislation in both jurisdictions sets out the following processes whereby law enforcement and prosecutors can obtain information about criminal assets:

- the Director of Public Prosecutions (DPP) or police may require a financial institution to provide information about the transactions and/or assets of a particular person;
- the DPP can apply to the courts for an order allowing them to conduct an examination of a suspect individual, which can require a person to furnish the court with information and/or documents;
- the DPP can also obtain documents relating to assets or property by applying for a production order;
- the DPP can apply to the court for orders requiring a financial institution to monitor or suspend a person's account and provide that information to the police or DPP; and
- the police can detain a person if they have a reasonable suspicion that the person has, in their possession, property liable to forfeiture, or documents identifying or determining the value of a person's unexplained wealth.

There are also provisions to ensure that property remains available for forfeiture. In particular, police have the power to seize property if they reasonably believe it was derived from or used in a crime and both

the police and the DPP have the power to apply to the court for a restraining or freezing order, which prevents property or assets from being used for a period of time (see PJC-ACC 2009: [5.37]).

Table 1 Number of unexplained wealth declarations in Western Australia, 2000–09

Year	No. of declarations
2000–01	8
2001–02	4
2002–03	3
2003–04	2
2004–05	0
2005–06	0
2006–07	0
2007–08	2
2008–09	5
Total	24

Source: WA ODPP 2009

The WA provisions do not appear to have been used extensively, with no declarations made between 2004 and 2007. This period coincided with public criticism of the DPP and government over the application of the laws, especially in respect of an elderly couple who were convicted of possessing cannabis after their son concealed the drugs in their roof (Clarke 2004; 'Elderly drug dealers lose their appeal' *Sydney Morning Herald* 15 March 2005; Weber 2004). According to the PJC-ACC, the absence of declarations may be due in part to a perceived reluctance by the WA DPP, as well as issues of timing in relation to investigation processes (PJC-ACC 2009: [5.63]).

At 30 June 2009, there had been 24 unexplained wealth declarations made in Western Australia (see Table 1). Of these, 17 had been finalised and 14 had led to confiscation. As at September 2009, approximately \$5.4m had been paid into the Confiscation Proceeds Account as a result of unexplained wealth-related matters, which accounted for approximately 15 percent of monies confiscated (M Rakich personal communication 14 Sept 2009).

Northern Territory

The Northern Territory introduced unexplained wealth laws in 2003 (see *Criminal Property Forfeiture Act 2002* (NT),

ss 67–72). According to the PJC-ACC, the NT legislation 'expanded and improved' on the WA legislation' (PJC-ACC 2009: [5.39]).

The PJC-ACC noted that the Northern Territory 'has been remarkably successful in utilising its unexplained wealth laws to seize assets from suspected organised criminals' (PJC-ACC 2009: [3.72]). Evidence from the police indicated that '[t]o date the Northern Territory Police has seized over \$13 million dollars in criminal property forfeiture cases with approximately \$5 million forfeited to the Crown' (PJC-ACC 2009: [5.40]). To date, there have been nine matters finalised, all by consent and/or settlement conferences. The restrained value is \$9.07m, with \$3.76m forfeited. The difference is made up of property that was originally identified as part of the unexplained wealth figure, but was then legitimised by the respondents, as well as the result of negotiations in settlement conferences (Schultz personal communication 2010).

According to evidence before the PJC-ACC, the Northern Territory appears to employ 'an investigative and prosecutorial model that has a much greater level of interaction between prosecutors, police and the Department of Justice' than operates in Western Australia (PJC-ACC 2009: [5.64]). The PJC-ACC also identified three key differences between the NT and WA unexplained wealth provisions. First, in Western Australia, confiscation pursuant to an unexplained wealth order is not regarded as a mitigating factor in sentencing (see *Sentencing Act 1995* (WA), s 8), whereas the NT law allows courts to take an offender's cooperation in such proceedings into account on sentencing (see *Sentencing Act 1995* (NT), s 5(4)). Second, whereas the WA legislation only requires a drug trafficker to have been convicted of one offence before their assets can be declared as unexplained wealth for the purposes of asset confiscation, the Northern Territory sets the threshold higher, at three convictions. Finally, because the Northern Territory is a territory, the Constitution requires property to only be confiscated by the government 'on just terms'. As a result, in the Northern Territory, a court order is required for confiscation after a declaration has been

made that the relevant property is unexplained wealth. No such requirement exists in Western Australia, although declarations there are subject to the court's assessment of the value of the property (M Rakich personal communication 14 Sept 2009).

Queensland

The *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) came into effect on 22 June 2009. Although these provisions are not generally regarded as unexplained wealth laws akin to those discussed above, the amendments create a statutory presumption that the unexplained portion of a person's wealth is derived from illegal activity, subject to a finding that the person engaged in 'serious crime-related activity' and evidence of unexplained wealth. The onus then falls upon the respondent to rebut that presumption by satisfying the court that the increase in wealth was not related to illegal activity (s 83). These amendments align the forfeiture provisions with the proceeds assessment provisions in terms of requiring the state to establish a threshold level which then causes the onus of proof to shift to the respondent to prove the legitimacy of his or her wealth.

Future developments

South Australia

The Serious and Organised Crime (Unexplained Wealth) Bill 2009 (SA) was introduced to the SA Parliament on 16 July 2009 (Rann 2009) and passed the Legislative Council on 29 October (Atkinson 2009). When introducing the Bill, the Attorney-General, Michael Atkinson, commented that the proposed laws were aimed at catching people who had managed to evade the authorities. He went on to state:

the police and the public look at them and think 'How on earth did a bloke who appears to do no work or no legitimate work acquire hundreds of thousands of dollars worth of cars or millions of dollars worth of real estate?' The answer is almost certainly drug dealing and extortion ("Unexplained" wealth in SA Govt's sights' *ABC News* 16 Sept 2009).

The legislation will 'enable the confiscation of any wealth where that crime gang member cannot explain how that wealth was obtained by legal means' (Rann 2009). It is proposed that any proceeds obtained by the Crown are to be credited to the Victims of Crime Fund (Rann 2009: np). The Act received assent on 26 November 2009 but it is not yet clear when it will come into effect.

Commonwealth

Commonwealth confiscation is governed by the *Proceeds of Crime Act 2002* (Cth) (POCA 2002; for discussion, see Bartels 2010). In 2006, Tom Sherman AO conducted an independent review of the legislation, which raised a number of areas for improving the effectiveness of the Act. In particular, Sherman (2006: 37) concluded that

Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community?...On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions but the matter should be kept under review.

In April 2009, the Standing Committee of Attorneys General (SCAG) agreed to a set of resolutions for a national response to combat organised crime. As part of this decision, ministers 'noted the Commonwealth's intention to consider the introduction of a range of reforms including unexplained wealth' (SCAG 2009: 8). In June 2009, the Attorney General, Robert McClelland, introduced the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) (the Commonwealth Bill), which purports to 'respond to recommendations of law enforcement agencies and the [Sherman Report]', as well as

Implement[ing] the Commonwealth's commitment as part of the SCAG agreement to enhance its legislation to combat organised crime by...introducing unexplained wealth provisions' (Commonwealth of Australia 2009: 2).

Under the Commonwealth Bill as originally introduced, a relevant court must make an unexplained wealth order where:

- a preliminary order has been made; and
- the 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 federal aspect (see cl 179E(1)).

The principal difference between the Commonwealth Bill and the WA and NT legislation is that the former is limited to confiscating unexplained wealth derived from offences within Commonwealth Constitutional power. The Australian Federal Police Association has prepared a more detailed analysis of the differences between the three models, especially in respect of the definitions of *property*, *interest* and *wealth* (AFPA 2009).

The PJC-ACC handed down its report in August 2009, noting some concerns with the proposed operation of the restraining orders in the Commonwealth Bill (2009: [5.74]–[5.83]). Ultimately, however, the PJC-ACC concluded that the proposals were 'a reasoned and measured approach to the problem of organised crime' (PJC-ACC 2009: [5.84]). In particular, it was noted that the provisions are civil provisions and that no presumptions of criminal guilt or innocence are involved. Furthermore, under POCA 2002, information obtained in an examination relating to a restraining order for an unexplained wealth declaration cannot be used as evidence in criminal proceedings against the person. The PJC-ACC also found that well-constructed legislation would be able to incorporate safeguards, such as administrative or judicial review mechanisms and evidentiary safeguards (PJC-ACC 2009: [5.67]) and recommended that the Bill be passed (PJC-ACC 2009: Recommendation 3).

The Senate Legal and Constitutional Affairs Committee (SLCAC) reported on the Commonwealth Bill in September 2009 and considered the following issues:

- concerns that the provisions infringe civil liberties;
- concerns that the provisions will be ineffective;
- the threshold for commencing unexplained wealth proceedings;
- the burden of proof; and
- definitions of wealth and unexplained wealth.

The SLCAC recommended that the Bill be passed, subject to certain recommendations (SLCAC 2009: Recommendation 13), including that:

- the court should have the discretion to revoke a preliminary unexplained wealth order or refuse to make an order 'if it is in the public interest to do so'; and
- that the information supporting an application for a preliminary unexplained wealth order should include the grounds on which an officer holds a reasonable suspicion that a person's total wealth exceeds his or her lawfully acquired wealth.

These recommendations were adopted by the government in its amended version of the Bill, which now overcomes many of the key arguments against unexplained wealth provisions considered below. The Bill was passed by both houses of Parliament on 4 February and assented to on 19 February 2010. The majority of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) (the Commonwealth Act) commenced on assent, with the balance to come into effect on 19 May 2010.

New South Wales

On 18 May 2010, New South Wales announced its intention to introduce unexplained wealth laws which will 'mirror' the Commonwealth provisions (Welch & Jacobson 2010: np), with the proposed legislation expected to be introduced into Parliament this year. A spokesperson for NSW Police stated that NSW Police was 'of the view the new amendments will strengthen the legislation allowing police to better target organised crime' (Welch & Jacobson 2010: np), in contrast to earlier evidence to the PJC-ACC where it was stated that NSW confiscation legislation was

'working pretty well' and that there did not appear to be any 'proposals or any need at the moment to revamp [it]' (PJC-ACC 2009: [3.39]).

Arguments in favour of unexplained wealth laws

What, then, are the key arguments cited in support of unexplained wealth provisions? When considering the Commonwealth Bill, the SLCAC noted a submission from the Police Federation of Australia that unexplained wealth laws have three objectives, namely:

- to deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from that activity;
- to prevent crime by diminishing the capacity of offenders to finance any future criminal activity that they might engage in; and
- to remedy the unjust enrichment of criminals who profit at society's expense (SLCAC 2009: 16).

The AFP noted in its submission to the Sherman review that 'investigations can often be frustrated through lack of evidence against people with significant wealth and no apparent source of legitimate income' (Sherman 2006: 37). The Explanatory Memorandum to the Commonwealth Bill likewise notes that the existing confiscation mechanisms under POCA 2002

are not always effective in relation to those who remain at arm's length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences...

Unexplained wealth provisions have been successfully used in Italy in recent years in relation to the Mafia. The Northern Territory and Western Australia also have unexplained wealth schemes. It is estimated that more than \$40 million

in alleged criminal assets has been seized in the Northern Territory and Western Australia under unexplained wealth provisions since 2003 (Commonwealth of Australia 2009: 5).

The PJC-ACC noted that the wider use of unexplained wealth provisions was supported by a number of agencies, including the Australian Crime Commission and Australian Tax Office, the Australian Federal Police (AFP) and police in most jurisdictions. This would seem to be a change from 2006 when Sherman (2006: 37) noted in his review of POCA 2002 that although unexplained wealth laws were supported by the AFP and AFPA, '[n]o other person or organisation has suggested the adoption of these provisions'.

It was suggested to the PJC-ACC that laws of this nature, if applied successfully, remove the financial incentive to commit organised crime and they do so more effectively than proceeds of crime laws, because they do not rely on prosecutors being able to link the wealth to a criminal offence (PJC-ACC 2009: [5.51]). In a submission to the SLCAC, Professor Rod Broadhurst observed that

tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in [organised crime] is usually indirect in terms of actual commission. Indeed, unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery that often facilitate serious crime (SLCAC 2009: [2.56]).

It has also been argued that unexplained wealth laws would assist in enforcing tax legislation and would constitute a more effective means of dealing with outlaw motorcycle gangs, because they target the benefits accumulated by the individuals of greatest concern to law enforcement. In addition, unexplained wealth laws may assist law enforcement agencies in investigations, with respondents choosing not to contest applications, rather than implicate themselves further (PJC-ACC 2009: [5.54]).

Finally, submissions to the PJC-ACC noted that some of the difficulties law enforcement agencies face in identifying and confiscating assets which are located or moved between jurisdictions would be overcome if there was nationally consistent unexplained wealth legislation (PJC-ACC 2009: [5.57]).

The PJC-ACC (2009: [5.66]) ultimately concluded that 'unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime'. The perceived benefits include:

- preventing crime from occurring by ensuring profits cannot be reinvested in criminal activity, as opposed to simply reacting to serious and organised crime;
- disrupting criminal enterprises;
- targeting the profit motive of organised criminal groups; and
- ensuring that those benefiting most from organised crime are the ones captured by the law, which they are often not under ordinary criminal laws and proceeds of crime laws, which require a link to a predicate offence.

Arguments against unexplained wealth laws

There are a number of arguments against unexplained wealth provisions. Indeed, Clarke (2004: 263) argued that in a democratic society,

depriving citizens of privately-owned assets is a highly intrusive act of state. Such conduct is prima facie in conflict with norms such as the sanctity of property ownership, freedom of citizens from unnecessary interference by the state and the right to privacy. The seizure of assets by organs of the state is a coercive exercise of power which should not be undertaken lightly.

The principal argument is that the reversal of the onus of proof raises the risk of 'confiscating assets from innocent people because of their breadth' (PJC-ACC 2009: [5.59]). The President of the Australian Council for Civil Liberties described the scope of the laws as 'utterly obnoxious'

(PJC-ACC 2009: [5.61]), while the Law Council of Australia considered such laws to 'offend common law and human rights principles' (PJC-ACC 2009: [5.60]). The Law Council went on to specify the following concerns:

- the reverse onus of proof undermines the presumption of innocence;
- the provisions infringe on the right to silence and exclude legal professional privilege. The WA and NT laws enable the respective DPPs to use information found in the process of examining unexplained wealth to be used for criminal prosecution. The suspicion of a person having obtained wealth illegally is sufficient for the DPP to obtain an order compelling a person to answer questions on oath. In addition, the WA laws exclude legal professional privilege by requiring lawyers and other professionals to provide information that would otherwise be privileged;
- the inadequacy of appeal rights in respect of unexplained wealth declarations (subject to the right to appeal a declaration on a matter of law); and
- the potential for arbitrary application of the laws, with the Law Council concerned that the use of the laws may be politically motivated and/or target those who fail to keep receipts or records (PJC-ACC 2009: [5.60]).

In a submission to the SLCAC on behalf of the Law Council, Tim Game SC pointed out that the absence of a requirement to present evidence that shows there are reasonable grounds to suspect a person has committed an offence, or that his or her wealth is derived from an offence, when combined with the reverse onus, 'put[s] the person in a position where the suspicion in relation to the wealth is the sole thing that has triggered their forfeiture' (PJC-ACC 2009: [2.61]). As noted above, in the final version of the Commonwealth Act, the relevant authorities will need to provide supporting evidence for the application and there is discretion for the court to refuse to make or confirm an order.

Another argument against such provisions is that they have been of limited use in Western Australia, leading the Queensland Crime and Misconduct Commission to argue that 'the jury is still out...on unexplained wealth' (PJC-ACC 2009: [5.62]), although the NT provisions are considered to be effective. Police and prosecuting agencies also expressed concern to the SLCAC that the provisions in the Commonwealth Bill would be ineffective, as they were too restrictive (PJC-ACC 2009: [2.63]-[2.68]).

Many of the foregoing concerns can be ameliorated through appropriate legislative drafting and administrative processes, but it is acknowledged that criticisms of the WA legislation (see Clarke 2004) have not resulted in legislative amendment. It is therefore vital to strike the correct balance from the outset.

Transparency is also required to ensure the powers granted to police and prosecuting authorities are not abused. This is especially true, given the potential for 'fishing expeditions', whereby investigators use their powers for other forensic purposes. Respondents who refuse to cooperate may face losing lawfully-obtained property (Clarke 2002).

Conclusion

This paper presents an overview of current and proposed unexplained wealth regimes in Australia. It is beyond the scope of this paper to examine the operation of similar laws overseas, for example, in the United Kingdom and Italy, which have reportedly been effective in recovering criminal assets and preventing organised crime (PJC-ACC 2009). Future research should include a critical and empirical analysis of comparable international regimes and their relevance to the Australian context.

In its report, the PJC-ACC (2009: [5.88]) 'urge[d] the Commonwealth to continue to consult with the States and Territories about the adoption of uniform unexplained wealth laws', later noting that

in order for any law which targets a national problem to have maximum effect, it is critical that all levels of government adopt harmonised approaches to unexplained wealth confiscation. The committee encourages the states and territories to give this matter due consideration (PJC-ACC 2009: [5.139]).

This paper provides a foundation for the development of nationally consistent legislation in this context. In addition, it examines the key arguments for and against such laws. In particular, the potential ability of such laws to disrupt organised crime is to be balanced against the rights of the individual and broader community expectations regarding burdens of proof and possible asset confiscation.

Clarke (2004: 268; 2002: 87) described unexplained wealth laws as a 'novel innovation' and 'the most revolutionary... weapon in the confiscation armoury', with 'the potential to do great good and harm. In light of this potential, Clarke (2004) suggested that the operation and impact of such provisions require particular scrutiny. This paper highlights the need for further research on their impact and effectiveness.

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All URLs correct at 23 April 2010

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