

SECOND READING SPEECH

Crime (Confiscation of Profits) Amendment (Unexplained Wealth) *Bill 2013*

Mr Speaker, this Bill amends the *Crime (Confiscation of Profits) Act 1993* (“the Act”) to introduce an important new tool in the fight against organised crime.

The *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Bill 2013* contains this State’s proposed unexplained wealth forfeiture laws.

The power of the state to confiscate assets used in or derived from criminal acts is now well-accepted in criminal justice and each Australian jurisdiction, including Tasmania, has legislation governing the confiscation of proceeds of crime.

The fundamental principle of confiscation legislation is that people who engage in unlawful activity should not profit from breaking the laws of society.

At present the Act enables the courts to make three types of recovery orders: confiscation orders; forfeiture orders; and pecuniary penalty orders.

The current confiscation and forfeiture orders are used to recover assets generated from or used in a crime, including any profits made through the commercial exploitation of the notoriety gained from committing an indictable crime (for example by publishing a book). Pecuniary penalty orders are amounts payable to the Crown based on the benefits derived from an offence or other illegal activity.

Each of those orders can only be made after a person has been convicted of a specific crime in which the confiscated asset was used or from which confiscated assets were acquired, that is, they are conviction-based confiscation and forfeiture laws.

However, organised crime can be differentiated from other crime in that it is an economic activity where the participants accumulate capital and then reinvest it back into the “business”, that is, the criminal enterprise.

In many cases, senior organised crime figures, who organise and derive profit from crime, use business models which ensure that they are not linked directly to the commission of the offences or crimes which are the sources of their wealth.

In those circumstances, the existing conviction-based confiscation and forfeiture laws cannot apply to the senior organised crime figures.

Organised crime in Australia

The Australian Crime Commission has reported that in 2008 organised crime was estimated conservatively to have cost the Australian economy at least \$10 billion.

At Standing Committee of Attorneys-General meetings in 2009 it was agreed that the introduction of non-conviction based confiscation or forfeiture laws, so-called “unexplained wealth” provisions, with mutual recognition across borders would be of great assistance in combating organised crime.

Police Ministers have adopted a similar position.

Organised crime activities are for the most part about profit and “unexplained wealth” laws are intended to deter organised crime by targeting the “profit” and removing the funds which would otherwise be available for use in further criminal activities.

“Unexplained wealth” laws are intended to apply to people who derive profit from crime and whose wealth exceeds the value of their lawful earnings but who may be difficult to prosecute and convict of specific crimes.

Unlike existing confiscation orders, “unexplained wealth” declarations and consequential forfeiture orders will be able to be made without having to prove that the person has engaged in specific criminal activity or prove a link between the commission of a specific offence and the specific wealth.

The proposed amendments introduce civil law provisions and therefore do not involve any presumption of innocence or proof of criminal guilt.

These are non-conviction based forfeiture laws.

The proposal to introduce unexplained wealth provisions is squarely aimed at those people who apparently live beyond the income provided by their lawful occupation or investments, that is, they appear to have available to them quantities of “unexplained wealth”.

The proposed amendments will introduce processes to examine a person’s wealth and if the person cannot account to the Supreme Court for the acquisition of their wealth by lawful means, the Court will make an “unexplained wealth declaration” making the person liable to the State for a sum of money equal to the value of the unexplained component of the person’s wealth.

The unexplained wealth provisions will not affect ordinary citizens who are not criminals and are lucky enough to experience a financial windfall which can be easily explained.

The Supreme Court will only consider wealth about which the Director of Public Prosecutions has presented evidence.

The legislative approach

Unexplained wealth or similar laws have been enacted in most other Australian jurisdictions.

The most significant difference between legislative approaches at the national level has been whether or not a link to an offence is required.

We decided that a link to an offence should not be required and to follow the approach taken with the unexplained wealth laws in the *Criminal Property Forfeiture Act 2002* of the Northern Territory which itself was generally based on the law of Western Australia.

The Western Australian and Northern Territory schemes are the longest running, having been established in 2000 and 2003 respectively, and the Northern Territory provisions are consistent to a high degree with those of Western Australia.

A Report of the Commonwealth Parliamentary Joint Committee on Law Enforcement *Inquiry into the Commonwealth unexplained wealth legislation and arrangements*, published in March 2012, recommended that in any future national moves to achieve consistency across jurisdictions, unexplained wealth provisions should not be limited to having to prove an offence.

The Report also noted that the Northern Territory unexplained wealth laws had managed to effect cultural change in that jurisdiction, to thinking about the investigation of crime with unexplained wealth laws in mind rather than only investigating particular criminal offences for prosecution purposes.

The Inquiry Committee expressed its view that unexplained wealth laws represent a reasonable and proportionate response to the threat of serious and organised crime in Australia.

Before turning to the provisions of the Bill, I note some important features of the amendments:

- The responsibility for commencing proceedings under the provisions will be placed with the DPP.

- The Supreme Court will hear all applications and objections made under the new Part 9 – Unexplained Wealth, and will determine the outcome of all aspects of the process. The Magistrate's Court will deal with urgent interim matters, if required.
- The DPP will be required to apply to the Supreme Court for authority to conduct each step in the investigation and search processes, except that the DPP will be able to issue notices without a court order to financial and other specified institutions to produce records and information related to investigating unexplained wealth matters and conducting unexplained wealth proceedings.
- The Supreme Court when hearing an application from the DPP for any order under Part 9 will need to be satisfied that there are reasonable grounds for suspecting that a person has unlawfully acquired wealth.
- There are comprehensive secrecy obligations which, amongst other things, will operate to:
 - prevent disclosure that an institution, or an officer of the institution, has provided information or documentation to the DPP or to the Supreme Court;
 - prevent disclosure that a person has been ordered to attend an examination by the Supreme Court under an examination order in relation to unexplained wealth proceedings and has complied with the order;
 - protect the reputation of any person whose finances and assets are being investigated by prohibiting the disclosure of information concerning the processes being undertaken.
- The interests of co-owners of property are taken into account by the Supreme Court where co-owned property is subject to the operation of the unexplained wealth

provisions. The Bill expressly entitles a co-owner of property affected by restraint or forfeiture procedures to be heard by the Supreme Court.

- The commercial and financial interests of mortgagees and lessors are protected from restraints which would otherwise apply to their dealings with the property.
- Compensation may be ordered by the Supreme Court in limited circumstances, at the Court's discretion.

I now turn to the provisions of the Bill.

Unexplained wealth provisions

The unexplained wealth provisions are contained in a new Part 9 and will include powers and functions specific to unexplained wealth investigations and proceedings.

Part 9 will include provisions providing for:

- undertaking investigations and searches;
- restraining property;
- applying for and making unexplained wealth declarations;
- how an unexplained wealth liability to the state may be satisfied;
- how property used to satisfy an unexplained wealth liability is to be valued;
- the management of restrained or forfeited property and the return of forfeited property;
- the mutual recognition of restraining or forfeiture orders made in other States and Territories;
- how interests in registrable property are to be dealt with;

- jurisdictional matters of the courts and evidentiary matters and;
- miscellaneous matters and regulation-making powers.

As the expression implies, “unexplained wealth” laws are concerned with wealth that a person cannot explain as having been lawfully acquired.

The respondent to an application for an unexplained wealth declaration will be required to explain to the Supreme Court how the components of his or her wealth have been lawfully acquired.

The term *lawfully acquired* is defined in the Bill with reference to:

- the manner in which the property was acquired;
- whether the money with which property was acquired was itself lawfully acquired, being a reference to the practice of money laundering;
- whether the property was lawfully acquired by the person from whom it was acquired, a reference to dealing with unlawfully acquired property; and
- if property was received as a gift or bequest, whether it was lawfully acquired by the donor.

The respondent’s explanation to the Supreme Court operates in the legislative context that any property or benefit that is a constituent of their wealth is presumed not to have been lawfully acquired unless they prove otherwise.

It is difficult to think of a scenario where a person would not be able to explain how legitimately acquired assets were obtained.

The Supreme Court will hear a respondent’s explanation and if it is satisfied that it is more likely than not that the value of the

person's total wealth is greater than the value of his or her lawfully acquired wealth, the court will make a declaration to that effect specifying the value of the wealth that it has determined as being "unexplained" and which the respondent is then liable to pay to the State.

The details of the Bill

I will now explain the more significant details of the Bill, in the order in which they appear.

Investigation and search

To facilitate the DPP obtaining information in relation to a person's ownership or effective control of property and the scope of that person's financial assets and dealings, the following options are provided:

- A financial organisation is empowered to voluntarily provide the DPP with information about a transaction involving the organisation, if the organisation suspects, on reasonable grounds, that the information may be of assistance in investigating or commencing unexplained wealth proceedings in respect of a person.
- The DPP may also serve a notice on a financial organisation requiring it to provide information, including:
 - whether a specific person holds an account with it;
 - identifying accounts and deposit boxes held by that person; and
 - whether the person is arranging to undertake transactions involving the organisation.
- Similarly, the DPP may require a Government Business Enterprise, or other organisation which has a legislative requirement to comply with Treasurer's Instructions issued under section 114 of the *Government Business Enterprises Act*

1995, to provide specified records and information and to monitor transactions between them and a specified person.

- The DPP may apply to the Supreme Court for an order for the examination of a person in relation to unexplained wealth of another person. The Court will determine the content of the order and will conduct the examination. A person is compelled to comply with an examination order but is protected by the comprehensive secrecy provisions provided in Part 9. A person is required to answer questions personally but is entitled to have a legal advisor present during the examination. The legal advisor can advise the person during an examination but cannot speak on their behalf as their legal representative.
- The DPP may apply to the Supreme Court for a document production order seeking provision of specific property-tracking documents relating to unexplained wealth investigations and proceedings.
- The DPP may apply to the Supreme Court for monitoring orders and suspension orders in relation to financial transactions of a person. The Supreme Court may make such orders only where it is satisfied that there are reasonable grounds for suspecting that the person specified in the application has unexplained wealth or is about to be the subject of an unexplained wealth declaration or is, or is about to be, the person named in an interim wealth-restraining order or a wealth-restraining order.
- By way of protection to those providing information in accordance with the Bill:
 - to the extent that an organisation or an officer of an organisation provides information, or complies with a notice from the DPP, neither can be held to have breached any code of professional etiquette or ethics, departed from any accepted standard of professional conduct or contravened any Act;

- where a person is compelled to give information, the use to which the information may be applied is specified and limited.

As flagged previously, comprehensive secrecy obligations operate to the advantage of both a potential respondent, by protecting his or her reputation, and to the DPP by furthering the effectiveness of investigation and conducting unexplained wealth proceedings.

Powers to search, seize and detain have been included in the Bill. These are specifically restricted to circumstances where there are reasonable grounds for suspecting that a person has property or documents relating to unexplained wealth matters.

Restraining property

The main purpose of providing powers to search, seize and retain property and for obtaining interim wealth-restraining orders and wealth-restraining orders is to ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order.

Important aspects of these provisions are that the relationship between the property and prospective or actual unexplained wealth proceedings is maintained and, where there is a power of seizure which is not supported by the authority of a warrant or a court order, a time limit of 72 hours is specified as the period for which property may be restrained.

Where more than one person owns restrained property, the Supreme Court will order that the whole of the property is restrained unless the property is divisible or it is otherwise practical for only the share of the person named in the order to be restrained.

Where it is not possible for a only a share of property to be restrained, the co-owner's interest in the property will be taken into account either when a wealth-restraining order ceases to have effect as provided by the Act or, if the property

is forfeited, when the Supreme Court orders that the co-owner's share is it be returned.

Special provision is made in Part 9 to exclude specified kinds of property from being restrained, including, family photographs and portraits, necessary food and clothing.

The effect of a wealth-restraining order is to prohibit all dealings with the restrained property. However, rights and obligations under mortgages and leases affecting the restrained property are excepted from this prohibition.

The court has the power to set aside or vary a wealth-restraining order.

Unexplained wealth declaration

If the DPP forms the opinion that there is sufficient evidence to establish that a person has more wealth than they could have lawfully acquired an application may be made to the Supreme Court for an unexplained wealth declaration to be made against the person.

In response to such an application the named person may be required by the Supreme Court to explain the source of their apparent wealth.

The respondent then has the onus of proving that the wealth was legitimately acquired.

As I have said earlier, in practice it is difficult to conceive of scenarios by which any one would have significant amounts of wealth with no way of accounting for its legitimate accumulation.

It is possible that before an application for an unexplained wealth declaration is heard by the Court, the DPP and the respondent may reach agreement on whether or not the relevant property was lawfully acquired and the extent of liability to the State, if any.

In that case, there is provision in the Bill for the court to make consent orders as agreed to by the parties.

If the application goes to a hearing and the Supreme Court is satisfied that it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth it will make an "unexplained wealth declaration" making the respondent liable to the State for an amount of unexplained wealth determined by the court.

A person who has an unexplained wealth liability may voluntarily transfer property to the State in order to satisfy that liability.

However, if an unexplained wealth liability is not satisfied within the time period specified either by the Act or by the Court, the DPP can apply to the Supreme Court for an order that the respondent's property be forfeited to the State for that purpose.

The Supreme Court will only make a forfeiture order in relation to property to the extent that it considers it is necessary for satisfying an unexplained wealth liability.

Under the Bill, the Public Trustee has responsibility for the management or control of restrained property, unless the Supreme Court orders otherwise, and forfeited property until it is disposed of.

The Public Trustee can appoint a person to manage or control such property and the costs associated with performing these functions is recoverable from the proceeds of sale, before the balance is deducted from the respondent's liability to the State.

The value of forfeited property to be deducted from the respondent's liability to the State is calculated according to the priorities set out in the Bill.

This ensures that the costs of realising the monetary value of the respondent's property are borne by the respondent and not the State.

All money forfeited to the State under this Part and all proceeds of forfeited property sold under this Part will be paid into the Consolidated Fund.

Any payments to or from the State under an equitable sharing agreement are also to be met from the Consolidated Fund.

Provision is made in the Bill for the courts of each jurisdiction to recognise and enforce "unexplained wealth" orders made in the other jurisdictions.

In conclusion, I note that the approach taken in this Bill of tailoring existing legislation which has been successfully used in another jurisdiction is a sensible approach for a small jurisdiction like Tasmania to adopt.

Mr Speaker, I ask the house to note that there has been additional consideration given in this Bill to ensuring that there are sufficient checks and balances to protect those who are compelled to provide information to the DPP and the Supreme Court; those who co-own property that becomes the subject of unexplained wealth proceedings involving another co-owner; and that a person whose property is restrained or forfeited but who subsequently becomes entitled to have the property returned is able to apply to the Supreme Court for an order for compensation if the property was destroyed or sold in accordance with the Bill.

Mr Speaker, I am satisfied that with the close supervision of the Supreme Court the unexplained wealth provisions will not affect ordinary citizens who are not criminals and are lucky enough to experience a financial windfall.

The primary intention of this Bill is to remedy the unjust enrichment of criminals who profit at society's expense.

I consider this Bill represents a reasonable and proportionate response to the threat of serious and organised crime in Tasmania.

I commend this Bill to the House.