

Explanatory Notes on the Criminal Proceeds Confiscation (Serious and Organised Crime Unexplained Wealth) Amendment Bill 2010.

Clause and Explanatory Notes

Introduction

An Australian Parliamentary Joint Committee into serious and organised crime reported (PJC-ACC)-

“Although this inquiry initially focussed on the effectiveness of association-type offences to prevent organised crime groups from committing criminal offences, the committee heard repeatedly, from almost every law enforcement agency with which it met, that one of the most effective ways of preventing organised crime is by ‘following the money trail’.

The Australian Crime Commission said to that same Committee...

“Organised crime is for the most part about profit. They are not generally about a better quality of firearm or a better quality of drug. Perhaps there is something of that in there but by and large it is about the balance sheet for them. Our focus then is not necessarily about the predicate activities or even some of the individuals involved in it, but recognising that, wherever the criminal activity takes place and whatever crimes are involved in it, if we can take away the profit benefit then we are having more impact than we would through any number of—and I hesitate to use this term— minor charges. If we drive at what is the profit motive here, I think we will be more successful in unpicking and deterring—and perhaps even in the crime prevention area”.

Unexplained wealth provisions across Australia

The Australian Institute of Criminology reported in its trends and issues report number 395 that Western Australia was the first jurisdiction to introduce 'unexplained wealth' provisions, which were followed by the Northern Territory in 2003. The AIC notes 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]). The AIC also point to the PJC-ACC submissions that 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]).

Reasons for the Bill

This Bill is designed to strip organized crime groups of their unexplained wealth and give the State the power to seek an unexplained wealth order against a person. This Bill is designed to compliment the existing criminal confiscation legislation.

Fundamental legislative Principals

The Bill places a reverse onus on the respondent to make them explain how their wealth was acquired and this does breach fundamental legislative principles but the amendments are weighed against the need to tackle serious and organised crime. The introduction of an active role for the Public Interest Monitor within the scheme is felt to provide sufficient safeguards to ensure that the public interest is able to be represented fully at any hearing held under the provision of this Bill. This approach is far less intrusive than that proposed in any form of anti-association laws and offers greater scrutiny.

Clause 1 – This clause details that the Act may be cited as the Criminal Proceeds Confiscation (Serious and Organised Crime Unexplained Wealth) Amendment Act 2010.

Clause 2 – This clause states that it is the Criminal Proceeds Confiscation Act 2002 to be amended.

Clause 3- Amends the references to property that is not available for forfeiture.

Clause 4 This clause makes a consequential amendment to section 213 to make it clear that property obtained under drug trafficker declarations are not applicable under this section.

Clause 5 This clause makes it clear that property obtained through drug trafficker declaration provisions cannot be disposed of until all appeal periods have expired under the new section 216O. Once the relevant appeal period has expired the state may dispose of the property.

Clause 6 – Clause 3 inserts a new Chapter 5A.

Chapter 5A Unexplained wealth declarations and declared drug traffickers

Part 1 Unexplained wealth declarations

Division 1 Interpretations

216A (1) (a to f) This new clause outlines what the court can consider a persons wealth when determining an unexplained wealth application. This can include property currently owned or in effective control of the respondent at the time of the application or property that was owned by the respondent but has since been disposed of. This assessment may also include any benefit that the respondent has derived, and any property that has been acquired by another person at the request of the respondent.

For example a respondent may have been in possession of a number of vehicles but prior to the application sold or gave away these vehicles. This property is to be considered when the court assesses a respondent's wealth.

216A (2) This sub clause states that the accumulation of wealth is not limited to Queensland and may have been acquired in Australia or elsewhere.

216B Meaning of unexplained wealth

This part defines what unexplained wealth is, it is that which is greater than wealth that can be lawfully explained or justified by the respondent. This wealth can be made up of both property and benefits.

216C Meaning of lawfully acquired

This part details that property is lawfully acquired when it is acquired within the law.

216D This clause explains that definitions used in this part have the same meaning as those referred to in the Act under section 19, 20 and 21 of the Act and the meaning of respondent can be found at section 216E(1).

Division 2 Unexplained wealth declarations

216E Application for unexplained wealth declaration

This section allows for the State (the applicant) to make an application to the Supreme Court for an unexplained wealth declaration against a person, who is the respondent in such an application. Such an application can be made in conjunction with an application for a restraining order under this Act.

216F Making unexplained wealth declarations

Sub clause 1 provided that the court does not have a discretion to make an unexplained wealth declaration once it is satisfied on the civil standard of proof that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. That is, in such circumstances it is mandatory for the court to make the declaration. As such a declaration is aimed at removing the ill-gotten gains it is not appropriate that there be any discretion.

Sub clause 2 places an onus of proof onto the respondent to establish that their wealth was lawfully acquired. It is much easier for a person to prove wealth was lawfully acquired rather than the State to establish to the contrary. This provision goes to the heart of the objectives of the Amendments. The ability of the Public Interest Monitor to appear at any such hearing and test the evidence and make submissions balances the significant impact that this subclause has.

Sub clause 3 provides the Court with a range of powers in deciding whether the Respondent has unexplained wealth. That is, the Court has a wide discretion in having regard to a Respondent's income and expenditure over time. Furthermore the Court may have regard to the submissions made by the Public Interest Monitor under 230H in making its final decision.

Criminal Proceeds Confiscation (Serious and Organised Crime Unexplained Wealth) Amendment Bill 2010.

Subclause 4 sets out the requirements placed on the Court in making a declaration in terms of process to be followed in assessing unexplained wealth and in specifying unexplained wealth.

Subclause 5 provides wide powers to ensure the Court may make orders to give effect to a declaration it has made.

216G Assessing the value of unexplained wealth

Sub clause 1 sets out the basis upon which unexplained wealth is calculated. In order to achieve an accurate assessment of a person's unexplained wealth the method for assessment of unexplained wealth must be flexible and subclause 2 and 3 are directed at this.

It is not appropriate for an unexplained wealth declaration to take into account the value of property which has previously been confiscated. Subclause 4 specifies matters the Court must not take into account when assessing the value of a person's unexplained wealth.

216H Unexplained wealth payable to the State

This section states that a respondent is liable to pay to the State an amount equal to the amount stated in the declaration.

Division 3 Recovery of unexplained wealth

216I recovery of unexplained wealth

This section provided along with 55I the scheme by which an amount payable pursuant to a declaration may be recovered.

Subclause 2 of 55H is necessary to provide the Court with power to allow a person further time within which to pay the amount, notwithstanding that the specified period has elapsed.

Subclause 3 is necessary to enable the State to rely on the usual civil powers and procedures to recover unpaid amounts.

216J Use of restrained property to meet liability

It is necessary for the effective and efficient operation of the Act to provide wide power for the State to recover amounts due to it.

In particular, subclause 2 is needed otherwise property which is frozen under the Act could not be executed against to satisfy the amount due to the State.

216K Use of effectively controlled property or gifts to meet liability

Given the nature of the application only the DPP may apply to the Court for the same.

For the effective operation of the Act subclause 2 provides that an application may be made at any time.

216L Confiscable property declaration

For reasons of certainty, subclause (1) provides that property not owned by the respondent must be specified in a confiscable property declaration before it is available to satisfy the respondent's liability.

Subclause 2 places an onus of proof onto the respondent to establish that the property was not under their effective control at the material time or after giving the property away. The ability of the Public Interest Monitor to appear at any such hearing to test the evidence and make submissions balances the significant impact that this subclause has.

Subclause 3 provides the Court the power to declare property not owned by the respondent to the application is available to satisfy the respondent's liability under section 55G.

Subclause 4 provides wide powers to ensure the Court may make orders to give effect to a declaration it has made.

216M Restrictions on confiscation of declared confiscable property

For reasons of certainty, subclause 1 provides that property not owned by the Respondent must be specified in a confiscable property declaration before it is available to satisfy the respondent's liability.

Because of the usual method of satisfying a debt has been extended to property other than that owned by the person who is liable to pay the amount to the State.

Sub clause (2) restricts the circumstances in which specified in a confiscable property declaration is available to satisfy the respondents liability.

Part 2 Declared drug trafficker

216N Meaning of a declared drug trafficker

The confiscation provisions in relation to a declared drug trafficker are very broad. This is a fundamental intention of the Act. This provision sets out the

provisions for when a person is declared drug trafficker for the purposes of this Act.

When the declaration is made under the drugs misuse Act 43AA the person is taken to be a declared drug trafficker. This declaration can be made and enforced even if the person absconds for the offence.

216O Drug trafficker's property

Contrary to other types of convictable property, the confiscation of property on the basis that a person is declared a drug trafficker does not have retrospective operation. This is because the type of property which is confiscated is not limited to removing from a person ill-gotten gains but may extend to legitimate property, including property owned, effectively controlled or given away by the person who is declared a drug trafficker.

Sub clause (1) deals with confiscation arising from the declaration that a person is a drug trafficker and provides the time at which relevant property is confiscated, namely the date on which the person is declared to be a drug trafficker. Property acquired by the person after that date is not confiscated as a result of that declaration.

Sub clause (2) deals with confiscation arising in specified cases where a person hasn't been declared, but is taken to be, a drug trafficker. A person is taken to be a declared drug trafficker under Clause 158(2) in specified circumstances if he cannot be found or he dies prior to the relevant charge been finalised. Without these provisions the objectives of the Act would be defeated where the accused person has fled the jurisdiction or died.

Sub clauses (3) and (4) make clear that the retrospective limitations in relation to the confiscation of property of a declared drug trafficker do not limit the making of a criminal benefits declaration or an unexplained wealth declaration against such a person.

Essentially sub clauses (4) and (5) make it explicit that the confiscation of crime-derived or crime-used property, and the making of a criminal benefits and unexplained wealth declarations, is not dealt with by the Act in any different way simply because it may involve a declared drug trafficker.

Part 3 Other Orders

216P Definitions for pt 3

For the purpose of other orders covered under Part 3, the definitions included in this clause provide guidance to when such orders are applicable.

216Q Relief from hardship for dependants

This clause allows the Court to order the State to pay to the dependent of a respondent, out of amounts forfeited, which would prevent them suffering hardship. The determination of hardship in such cases will be assessed on a case by case basis and is for the court to determined based on submissions made from respective parties.

216R Exclusion of value of innocent party interest of property under chapter 5A declaration

This clause provides for a person with an interest in property forfeited to apply to the court for an innocent party interest of property order. The person has 6 months after an unexplained wealth declaration to make the application.

216S When Supreme Court may give leave for s 216R

This clause allows for the court to grant leave to apply under 216R after the 6 months expires if it is satisfied the neglect in delay was not the fault of the applicant.

216T Making of innocent party interest exclusion order

A third party applicant for particular amounts forfeited must prove to the court that their claim is not attributable to illegal activity.

216U what is an *innocent party interest exclusion order*

This particular clause provides the definition for what is an innocent party interest exclusion order for the purpose of this particular part.

Part 4 Notification to and appearance of public interest monitor

216V states that this part applies if the State intends to apply for an unexplained wealth declaration under section 55A or 145A.

216W defines what an application is and that the Public Interest Monitor means the Public Interest Monitor as defined in 230H.

216X details the requirement on the State to provide details of the application to the public interest monitor.

216Y This provision provides for full disclosure to the public interest monitor.

216Z provides for the role and function of the Public Interest Monitor at a hearing of an application. This section allows for the Public Interest Monitor to play an active role in a hearing by way of asking questions and testing evidence and make submissions to the Court.

216ZA provides that confidentiality provisions do not apply under this Act. General confidentiality provisions of the Act are covered 230J.

216ZB provides the Public Interest Monitor may report on non-compliance by the State within this part. The Public Interest Monitor must give a copy of the report to the parliamentary commissioner within the meaning of the *Crime and Misconduct Act 2001* and the Parliamentary Crime and Misconduct Committee of the Legislative Assembly.

216ZC Public Interest Monitor appointment made will be under the Crime and Misconduct Act 2001.

216ZD provides for the delegation by Public Interest Monitor the Public Interest Monitor may delegate to the Deputy Public Interest Monitor any of the Public Interest Monitor's powers under this part, other than a power to report to the Attorney-General. The Deputy Public Interest Monitor must provide proof of delegation if asked under this provision.

216ZE provides for liability protections when performing functions under this Act.

Clause 7 This provision ensures that a person subject to such applications under unexplained wealth provisions will have access to legal aid.

Clause 8 For the purpose of this clause a person subject of an unexplained wealth order or drug trafficker declaration has the right of appeal to the 'Court of Appeal'.

Clause 9 Amendments to the Dictionary are made in this clause to insert particular references to terms used as part of the new unexplained wealth and declared drug trafficker provisions of this Bill.

Clause 10 amends the Drugs Misuse Act 1986

Clause 11 states drug trafficking is defined as an offence under section 45 of the Drugs Misuse Act.

Criminal Proceeds Confiscation (Serious and Organised Crime Unexplained
Wealth) Amendment Bill 2010.

The clause goes on to say that the court convicting the person of the relevant offence must, on the application of the prosecuting authority, declare the person to be a drug trafficker.

An application for a declaration under subsection (2) may be made at the time of the conviction for the relevant offence or at any time within 6 months from the day of the conviction.