

**PROCEEDS OF CRIME CONFERENCE  
Civil Forfeiture and Unexplained Wealth  
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Australian Approaches to Proceeds of Crime  
A Western Australian Perspective

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## **Background**

Confiscation or forfeiture of criminal property in Western Australia is, for the most part, effected through the *Criminal Property Confiscation Act 2000* ("the CPCA").

The CPCA came into operation on 1 January 2001. It replaced the former *Crimes (Confiscation of Profits) Act 1988*.

The CPCA contained a number of features new to Western Australian confiscation law, including:

- Confiscation on unexplained wealth;
- Confiscation of all property owned, effectively controlled or given away by a person declared to be a drug trafficker;
- Confiscation of property in substitution of crime-used property where the crime-used property itself is unavailable for confiscation;
- An extension of the definition of crime-used property to include property on or in which certain sexual offences were committed;
- Automatic confiscation of (as it turned out) crime-used and crime-derived property where no objection to confiscation is lodged;
- Sought to exclude the discretion of the courts as much as possible;
- In almost all cases a reversal of the onus of proof;

- Made all confiscation proceedings civil proceedings and excluded legal rules applicable solely to criminal proceedings;
- Removed legal professional privilege and the right against self-incrimination.

## **Unexplained wealth under the CPCA**

The CPCA provides for the making of unexplained wealth declarations by a court against a respondent.

The relevant statutory provisions are set out in Attachment 1 to this paper.

In summary, the Director of Public Prosecutions ("the DPP") may apply to a court for an unexplained wealth declaration [s.11(1)].

On hearing of an application the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth [s.12(1)].

A person's wealth is widely defined [s.143].

Property is lawfully acquired if the property was lawfully acquired and any consideration given for the property was lawfully acquired [s.149].

All constituents of a person's wealth are presumed not to be lawfully acquired unless the respondent establishes the contrary [s12(2)].

The value of the respondent's unexplained wealth is the difference between the total value of the respondent's wealth and the value of the respondent's lawfully acquired wealth [ss.13(1) & 144].

When the court makes an unexplained wealth declaration the respondent becomes liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the respondent's unexplained wealth [s.14].

The amount owed by the respondent is payable within 1 month of the declaration or such longer time as the court allows [s.25(1)]. It can be recovered in a court of competent jurisdiction as a debt due to the State [s.25(3)].

Frozen property owned by a respondent may be taken with the consent of the respondent in payment or part payment of the respondent's liability [s.26(1)].

If the amount owed by the respondent is not paid within the time provided for in s.25(1), any frozen property owned by the respondent is available for the purpose of satisfying the respondent's liability [s.26(3)].

Property not owned by the respondent but effectively controlled or previously gifted by the respondent may be declared by a court to be available to satisfy the respondent's liability in certain circumstances [ss.28 & 29].

When property is given or taken in satisfaction of the respondent's liability to pay an unexplained wealth declaration it is confiscated to the State [s.6].

### **Amounts confiscated on unexplained wealth grounds**

Attachment 2 sets out details of the amounts confiscated under the CPCA from 1 January 2001 to 30 June 2011 on all grounds compared to amounts confiscated on unexplained wealth grounds and the number of cases involving confiscation on unexplained wealth grounds.

In summary, amounts confiscated on unexplained wealth grounds represent 11% of a total of \$54,669,341 confiscated under the CPCA over the last 10 years.

By way of limited comparison the total amount forfeited under the previous legislative regime (which included forfeitures) in the 6 year period from 1 July 1995 to 30 June 2001 was \$3,886,783. This included forfeitures under the *Misuse of Drugs Act 1981* as well as \$868,065 paid to Western Australia under the asset sharing arrangement with the Commonwealth.

The bases for confiscation of property under the CPCA are not mutually exclusive. While there have been occasions when the DPP has taken confiscation action using only the unexplained wealth powers it is more usual case to rely upon multiple grounds.

Further under s.8(1) of the CPCA when a person is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of a confiscation offence all the property that the person owns or effectively controls at the time the declaration is made and all property that the person gave away at any time before the declaration was made is confiscated.

An unexplained wealth declaration is made in respect of the value of property found by the court to have not been shown to be lawfully obtained (and, therefore, by implication to have been unlawfully obtained).

It is likely that many of those declared to be a drug trafficker had unexplained wealth. While in such cases both confiscation on drug trafficker and UW grounds would be open, action on UW grounds would, by definition, lead to confiscation of less property than on drug trafficker grounds. There is no way of knowing how many drug trafficking cases could have been potential unexplained wealth applications.

## **Judicial decisions**

Attachment 3 is a list of decided cases in the Western Australian jurisdiction which are relevant to the unexplained wealth provisions of the CPCA.

It is apparent from the list that there has been only a limited judicial consideration of the unexplained wealth provisions. This is because of the cases involving confiscation on unexplained wealth grounds, only 2 have proceeded to hearing. Both those cases were heard in the District Court of Western Australia and both involved unexplained wealth declaration applications in respect of discrete sums of money seized from the respondents of approximately \$200,000 and \$108,000.

The unexplained wealth provisions of the CPCA are, therefore, largely untested.

## **Cases taken by the DPP**

The DPP is not an investigatory agency. Confiscation action is commenced only in respect of cases referred to the Director by other law enforcement agencies.

The principle source of referrals is the Proceeds of Crime Squad of the Western Australian Police. This is a specialist unit tasked with investigations of confiscation matters.

However, the DPP has received referrals both from other State agencies (e.g. Corruption and Crime Commission) and Commonwealth agencies (e.g. ACC and ASIC).

## **The decision to initiate action**

The decision by the DPP to commence confiscation action under the CPCA is dependent upon an assessment that:

- There are reasonable prospects of success;
- There is property available to meet an unexplained wealth declaration;  
and
- It is otherwise in the public interest for confiscation action to be taken.

On occasion in unexplained wealth cases property has been frozen (usually the first step in any confiscation action) to allow the investigation processes contained in the CPCA to be used (e.g. examination orders). A decision to either commence or not commence a substantive unexplained wealth declaration application is made at the conclusion of the investigation phase.

### **Proceedings under the CPCA**

Proceedings under the CPCA are civil proceedings for all purposes [s.102(1)].

Applications for a freezing order on unexplained wealth grounds are usually commenced by way of ex parte notice of originating motion with supporting affidavit evidence. In almost all cases the affidavits will include a preliminary financial report.

The power of a court to make a freezing order is discretionary [see s.43 generally].

Section 43(3) deals with the making of a freezing order on unexplained wealth grounds. It does not, however, set out the factors to be considered by the court in exercising its discretion.

In *Bennett & Co (A Firm) v Director of Public Prosecutions for Western Australia* [2005] WASCA 141, the court dealt with, among other things, a freezing order issued on the ground that an examination order would be applied for within 21 days of the making of the freezing order. At para 50, Malcolm CJ, delivering the judgement of the court stated, in relation to freezing orders:

50 *Importantly, however, it seems to us that, as a matter of principle, the Court must have a discretion. The freezing order is draconian in its scope. It may prohibit a person from dealing with all of that person's property. Once properly made, it comes to an end only under the relatively limited circumstances described in s 49, or if set aside pursuant to a successful objection (with the objection provisions being limited in scope and casting the onus onto the objector). It seems unlikely therefore that it was intended, for example, that the Court would be required to make such an order merely because the DPP had advised the Court that an application for an examination order was likely to be made, even if there was no material before the Court which suggested the grounds upon which such an examination order might be sought, so as to enable the Court to consider whether any such application would be bona fide or would be made on reasonable grounds having any arguable prospect of success.*

It is considered that, in exercising the discretion to issue a freezing order on unexplained wealth grounds the courts will take the same approach.

In practice the DPP seeks to put before the court sufficient material to satisfy it that there are at least reasonable grounds to suspect that that the respondent has unexplained wealth.

Substantive applications for an unexplained wealth declaration are made by either a notice of motion filed in the freezing order proceedings or, if such proceedings have not been taken, by way of notice of originating motion.

Proceedings are heard on affidavit material though deponents may be (and usually are) required to attend court for the purposes of cross examination.

The DPP has responsibility of establishing the constituents of the respondent's wealth. Thereafter the onus is on the respondent to show that that wealth was lawfully acquired.

## **Review of cases**

Attachment 4 is a brief summary of cases involving unexplained wealth that have been conducted by the DPP.

I make the following observations about unexplained wealth under the CPCA from the experience of the DPP to date:

1. The cases fall into 2 broad categories. The first are cases where a respondent has been found in possession of a significant quantity of cash for which the respondent does not appear to have a lawful explanation. The second is where a consideration of the financial affairs of the respondent over several years indicates that he or she has unexplained wealth. In both types of cases a financial report from a forensic accountant is usually prepared. In the second category of cases such a report is critical to the case.
2. In relation to the second category of cases, the investigation phase undertaken before the initiation of confiscation action often takes a lengthy period and is hampered by the fact that the investigation must remain covert.
3. The financial report used to commence confiscation action is usually only a preliminary report. Once confiscation action has been initiated the "finalisation" of the financial report can take some time.
4. The reports relied upon by the DPP in unexplained wealth cases are the standard asset betterment and/or income expenditure analysis prepared by forensic accountants. This is so notwithstanding the definition of unexplained wealth in the CPCA which sits somewhat uncomfortably with such reports.



5. Unexplained wealth cases referred to the DPP are almost invariably connected to an ongoing criminal investigation. In the usual case the respondent is faced with criminal charges as well as confiscation action. This has affected the ability of the confiscation action to be progressed until after resolution of the criminal proceedings.
6. It has not been the DPP's experience that respondents to unexplained wealth declaration applications are willing to consider settlement negotiations early in an action, even where they are subject of an examination order. It seems to take some time before respondents or their legal advisers get to the point of meaningfully considering settlement options.
7. The investigation and prosecution of unexplained wealth cases requires considerable resources within both the investigating agency and the DPP.
8. It is the view of the current DPP that the existing model in Western Australia for confiscation on unexplained wealth grounds may be flawed. The DPP tends to favour an integrated taskforce approach to these matters.

It is fair to say that, in my experience, the separation between the prosecutor and the investigator which currently exists in Western Australia does result in some difficulties. There is much to be said, in my view, for early involvement of lawyers in the investigation phase of unexplained wealth matters both in order to help direct the investigation and to reduce the time between referral to the prosecuting agency and the commencement of proceedings. The current separation between the 2 functions of investigation and prosecution, however, prevents that early involvement in a number of ways. On the opposite side of the coin, however, is that too close an integration between the prosecutor and investigator runs the risk of loss of objectivity by the prosecutor.

