Civil Forfeiture: Forfeiting Civil Liberties? A Critical Analysis of the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 *(Cth)*

Abstract

The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) creates a new regime of 'unexplained wealth' orders, which allows the Commonwealth Government to confiscate the assets of particular individuals who cannot explain how they afforded their assets. It is being implemented in order to target the leaders of organised crime who shield themselves from the reach of the law. This comment explores the three principal shortcomings of the regime. First, the regime undermines the presumption of innocence by reversing the onus of proof. Second, it is subject to a very low threshold test, which creates the possibility of the laws being used to harass individuals. Third, it distorts the investigatory incentives of police. As this comment explains, there are feasible and low-cost safeguards that would advance the policy goal while avoiding these problems.

Introduction

Asset confiscation seems to be popular in Australia at the moment. From bonuses 'earned' by bailed-out bankers, to Melbourne Cup winnings being paid to Chechen warlords, there is an unmistakeable post 'Credit Crunch' public clamour that those in possession of wealth must have earned it (see, eg, Pryor 2009; Cormick 2009). Moreover, the public wants the Australia Government to do something about it. It is from the intersection between these febrile impulses and the ever-present public concerns about the rising problem of organised crime that the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) ('*Amendment Act*') has emerged.

The *Amendment Act* amends the *Proceeds of Crime Act 2002* (Cth) ('*POCA*') to create a new regime of civil asset forfeiture based on the concept of 'unexplained wealth'. Unexplained wealth should broadly be conceived as assets that cannot be proved to be within someone's legitimate means (*Amendment Act* sch 1). Where a particular individual is thought by police to be involved in criminal activity, they may be asked to account for their assets and prove that they were legitimately acquired, or risk forfeiture of those assets. While asset forfeiture has long formed a part of the criminal law, it has historically been linked to the proven commission of an offence. *POCA* significantly widens the scope of existing Commonwealth asset forfeiture laws and sits within an increasing global trend of using civil procedures to recover assets that are obtained in the course of criminal activity (Kennedy 2006:132).

The *Amendment Act* also introduces new police powers for undercover operations (*Amendment Act* sch 3); creates new joint commission criminal offences (*Amendment Act* sch 4 pt 1); and facilitates greater access to telecommunications interception for criminal offences (*Amendment Act* sch 4 pt 2). The focus of this comment, however, is solely on the new asset confiscation regime.

Ultimately, this comment contends that the new regime poses significant concerns for the ongoing protection of civil liberties. Further, it argues that the legitimate and important law enforcement objectives of the legislation in combating organised crime are not in fundamental tension with civil liberties. Instead, there are clear and straightforward alternatives that would better balance protection of civil liberties with the need for more aggressive law enforcement against organised crime.

Section 1 will outline the procedural history of *POCA*. Section 2 will explore the operation of unexplained wealth orders. Sections 3, 4 and 5 will examine concerns over: the reversed onus of proof; the minimal threshold for invoking the unexplained wealth order process; and the problematic investigatory incentives that such a regime creates. In exploring all of these areas, this comment will also seek to advance suggestions as to how the *Amendment Act* could better protect civil freedoms.

1. Procedural history

The *Amendment Act* emerges from a range of different legislative impulses. Primarily, it implements an April 2009 agreement by the Standing Committee of Attorneys-General (SCAG) to generate a comprehensive national response to combat organised crime. This agreement committed all states and territories to investigate new laws in order to 'improve our capacity to effectively prevent, disrupt, investigate and prosecute organised crime activities' (SCAG 2009). The *Amendment Act* also emerges from a 2006 review ('the Sherman Report') into *POCA* (Sherman 2006); and from the recently completed inquiry of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) into organised crime (PJC-ACC 2009:ch 5).

The Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) ('the Amendment Bill') was introduced to the House of Representatives on 24 June 2009 and was debated on 27 October 2009.[1] On 25 June 2009, the Senate referred the Amendment Bill to the Legal and Constitutional Affairs Legislation Committee (LCALC) who tabled their report on 17 September 2009 (LCALC 2009). The LCALC supported the passage of the Amendment Bill subject to a few minor amendments. Most of these recommendations were then accepted by the House of Representatives and, subsequently, also by the Senate (Supplementary Explanatory Memorandum).

While it ultimately recommended against the introduction of unexplained wealth orders, the Sherman Report noted that they '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?'(Sherman 2006:37). It is not altogether clear that the final *Amendment Act* got that careful balance right.

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[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6964 (Robert McClelland, Attorney-General); Commonwealth, *Parliamentary* Debates, House of Representatives, 27 October 2009, 11127–11154.

2. What are 'unexplained wealth orders'?

The *Amendment Act* creates two distinct remedies to deal with unexplained wealth. First, it allows for the making of restraining orders that prevent dealings with particular property (*Amendment Act* s 20A). Secondly, it creates a regime of confiscation orders termed 'unexplained wealth orders' (*Amendment Act* pt 2.6). As the restraining orders are ancillary to the confiscation orders, the focus of this comment is on confiscation.

Before making an unexplained wealth order, a court must first make a preliminary unexplained wealth order requiring a person to appear before the court (*Amendment Act* ss 179B–D). The effect of these orders is that:

> once a court is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court must order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth (the unexplained wealth amount).[2]

Previously, at a Commonwealth level, asset forfeiture was subject to a range of limitations. The main limitation was that it was offence-based. *POCA* acted to deprive persons of the proceeds of offences, the instruments of offences and the benefits derived from offences.[3] Where there has been a conviction for an offence, a court could issue either a pecuniary penalty order or a forfeiture order to recover property that represents either the proceeds, or an instrument, of that offence (*POCA* s 48(2); see also Young 2009:129). Alternatively, the Commonwealth Director of Public Prosecutions (CDPP) could apply for a forfeiture order where it can show, on the balance of probabilities, that: an offence has been committed; it was committed within the last six years; it is a 'serious offence'; and the property has been the subject of a restraining order for at least six months (*POCA* s 47).

The *Amendment Act* removes almost all of these limitations. The relevant standard of proof to obtain an order in the absence of a prior conviction is relaxed from one where the Commonwealth must affirmatively prove, to a civil standard, the existence of an offence; to one where a subject must disprove the existence of any offence. The onus of proving that the property was legitimately acquired will be placed upon the person who is the subject of the order. There will also be no time limitation placed upon forfeiture claims.

There certainly seems to be real and valid policy motives behind such changes. Following the 'money trail' is recognised as an important and effective means of reducing organised crime. As one submission to LCALC noted, 'tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement is usually indirect in terms of actual commission' (Broadhurst 2009:1). Or, as expressed more bluntly by Senator Stephen Parry at LCALC's hearing into the *Amendment Act*, the aim is simply to ensure that '"drug barons" … cannot get away with accumulating wealth gained from illegal means' (LCALC Public Hearing, Senator Stephen Parry:17) .

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2 Explanatory Memorandum: 5. An 'authorised officer' is an authorised member of the Australian Federal Police (AFP), the Australian Crime Commission (ACC), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Customs and Border Protection Service (Customs) or the Australian Securities and Investment Commission (ASIC): *POCA* s 338. The court must have 'proceeds jurisdiction'. This includes any state or federal court which has the capacity to deal with criminal matters on indictment: *POCA* s 335.

3 A 'serious offence' is an offence against the law of the Commonwealth that is indictable: *POCA* s 338.

These laws have been deliberately modelled on similar laws that have existed in Western Australia (WA) and the Northern Territory (NT) for nearly a decade.[4] Troublingly, the operation of the WA and NT laws does not seem to have been scrutinised closely by the Commonwealth Parliament. The PJC-ACC Inquiry Report notes cursorily that the WA laws have been used rarely (PJC-ACC 2009:113), and the LCALC Inquiry took brief note of self-described 'anecdotal evidence' from witnesses regarding the NT experience (Evidence to LCALC: 27, Mark Burgess). Yet, the momentum for such laws is strong. A Bill, largely identical to the *Amendment Act*, is currently before the South Australian Parliament.[5] New South Wales is reportedly also contemplating the introduction of an unexplained wealth regime based on Commonwealth legislation (Jacobson and Welche 2010). This is not a process and trend that is limited to Australia. Indeed, the liberalisation of asset forfeiture regimes seems to be a global phenomenon.[6] Australia has, however, always led the world in pushing the boundaries of asset forfeiture — the *Proceeds of Crime Act 2002* (Cth) represents one of the first instances where a country has adopted a confiscation regime on the basis of proof to a civil standard that is separate from the existence of a conviction (see Simser 2009:13, 17). These laws may become a template for other jurisdictions to draw on.

3. The reversed onus and the presumption of guilt

In order to have an order revoked, a subject must affirmatively demonstrate that their total wealth was not derived from either an offence against the Commonwealth, a foreign indictable offence, or a State offence that has a federal aspect (Amendment Bill s 179E(1)(b)). Critically, this means that police no longer have to prove a link between the property and the likely commission of an offence. Rather, a subject must prove that there was no offence.

Advocates of the *Amendment Act* have consistently emphasised the relative ease with which this requirement can be met, noting that 'if you prove how you have obtained your wealth, you should have no fear of prosecution' (LCALC Public Hearing, Senator Stephen Parry:18). Police associations have even gone so far as to criticise the requirement of *any* link to an offence (Australian Federal Police Association 2009:Issue 1, 4–6).

The reversal of the onus of proof seems especially problematic. It creates an open-ended category of criminality and threatens 'the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property' (Law Council of Australia 2009:17). The overall implication of such a confiscation regime is that we should readily accept that some citizens should be thought of as criminals before the civil law even though the reach of the criminal law does not readily cover them. As was noted at the LCALC hearing, many ordinary citizens might be unable to produce receipts, for example, for cars bought five or ten years ago and lack the financial records to be able to affirmatively prove the legitimacy of their assets (Evidence to LCALC:22, Lance Williamson). More fundamentally, the reversed onus threatens basic presumption of innocence. The combined effect of this regime is to enlarge our conception of what it means to be 'guilty' before the

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4 *Criminal Property Confiscation Act 2000* (WA), ss 11–14; *Criminal Property Forfeiture Act 2002* (NT), ss 67–72. See also, Clarke (2002).

5 Serious and Organised Crime (Unexplained Wealth) Bill 2009 (SA).

6 See *Criminal Proceeds (Recovery) Act 2009* (NZ), which shifts their forfeiture regime from one that is conviction-based to one where police only need demonstrate, on the balance of probabilities, that someone has unlawfully benefited from criminal activity.

eyes of the law and reduce the application of the presumption of innocence. Regardless of guarantees from police associations that the powers would be exercised cautiously and responsibly, it is no reason to jeopardise one of the fundamental tenets constraining government power.

The possibility of these laws being applied in an arbitrary and detrimental fashion cannot be underestimated. There is the possibility of both individual and third party property rights being grossly interfered with, given that 'unexplained wealth' can include property owned by the person at any time, property that has been under the 'effective control'[7] of the person at any time, and property that the person has disposed of or consumed at any time (*Amendment Act* s 179G(1)).

Further, even if one did accept the validity of the reversed onus, there are nevertheless feasible constraints on the operation of police power under the legislation that might mitigate dangerous side effects. First, as was suggested by the Law Council, keeping the six-year time limit on claims would help provide some limit on the extent to which individual rights could be infringed (Law Council of Australia 2009:26). The adoption of the Sherman Report's suggested 12-year time limit might also be a useful compromise (Sherman 2006:72). Second, it is unclear why an asset threshold could not be introduced like those found in Ireland and the UK.[8] This would help remove the possibility of the powers being used to potentially harass witnesses (Law Council of Australia 2009:18). Third, if the focus is on organised crime, to invoke the rebuttable presumption that the property has been unlawfully acquired, there should be a requirement of proof of some connection between the subject of the order and the gang or syndicate with which they are purported to be associated, as included in similar legislation in Canada.[9] This minimal requirement of association is applied in other countries where comparably strong civil forfeiture laws are limited to particular classes of people — for example, the Mafia in Italy or public servants in Hong Kong (see PJC-ACC 2009:103–4; Young 2009:278, 292).

4. 'Suspect' vs 'believe'

For an order to be issued, an authorised officer must sign an affidavit indicating that they believe there are 'reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired' (*Amendment Act* s 179B(2)). Following the LCALC Report, the Government amended the Amendment Bill to require the affidavit to also specify 'the grounds on which he or she holds a reasonable suspicion that a person's total wealth exceeds his or her lawfully acquired wealth' (Supplementary Explanatory Memorandum:3). A court must further be satisfied that the authorised officer has reasonable grounds to support a suspicion (*Amendment Act* s 179B(1)(b)).

This is an incredibly low evidentiary threshold. Accordingly, it was criticised by the Office of the Privacy Commissioner, the Law Council of Australia and Civil Liberties Australia in their submissions to the LCALC Inquiry into the Amendment Bill (Office of the Privacy Commissioner 2009:2; Law Council of Australia 2009:17–18; Civil Liberties Australia 2009:3–4). Although the precise threshold test of suspicion under this legislation

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7 'Effective control' of property includes property that is not yet in the possession of the person subject to the order: Amendment Bill s 179S.

8 See *Proceeds of Crime Act 2002* (UK) c 2, s 287 and *Proceeds of Crime Act 1996* (Ireland), ss 2–3.

9 *Criminal Property Forfeiture Act*, SM 2004 (Canada), c 1, s 11. See also, Kennedy (2006:139–140).

remains unformulated, if one follows analogous common law tests that distinguish between a 'suspicion' and a 'belief', then it might be fair to characterise the threshold test as one where an authorised officer need only show that there is a *possibility* rather than a *probability* that the assets were illegitimately acquired.[10] This low threshold has the very real potential to be abused.

In answer to this criticism, supporters of the *Amendment Act* argue that the CDPP will act as an effective gatekeeper to prevent frivolous claims from being made (Evidence to LCALC:29, John Whitehead). Further, they contend that courts will still have an opportunity to interrogate the reasonableness of the grounds for holding the suspicion. One of LCALC's recommendations, which has been adopted in the final legislation, was to insert an exception into the *Amendment Act* allowing courts to deny claims on the basis of the public interest (Supplementary Explanatory Memorandum:3).

Yet these contentions in support of the *Amendment Act* seem misplaced. First, it is unclear how effective a gatekeeper the CDPP can be. As the laws are currently written, the relevant requirement is that an authorised officer, and not the CDPP, holds the suspicion. There are certainly administrative reasons, such as limited resources, for believing that the CDPP might only seek to put forth the most serious applications, but these are *informal* safeguards. Interestingly, the fact that the CDPP (and not the Commonwealth Solicitor-General) is the relevant responsible agency indicates that these laws represent criminal law in civil law's clothing (Civil Liberties Australia 2009:[40], 8). Curiously, in the Australian Federal Police (AFP) submission to the LCALC Inquiry, they requested that AFP officers be given standing in court to apply for the orders, thereby bypassing the CDPP offence (Australian Federal Police Association 2009:7).

Second, the Court's capacity to interrogate the reasons behind a relevant suspicion is limited by it being a mere suspicion. There is good reason to prefer a higher threshold test of a reasonably-held 'belief'. As was set out in several submissions to the LCALC Inquiry, the requirement of a belief still allows for a flexible regime whereby law enforcement authorities can effectively target unexplained wealth (see, eg, Civil Liberties Australia 2009:3–4). However, it ensures that the unexplained wealth orders are issued subject to a stricter legal test and, consequently, on a potentially less arbitrary basis. A representative from the Office of the Privacy Commissioner noted that this standard 'could assist in making sure that individuals who have not actually committed any offence nor gained personally from any illegal activity are not inadvertently caught up through this' (Evidence to LCALC:8, Timothy Pilgrim). As was noted in the LCALC Report, 'this test is not uncommon under federal legislation and exists in provisions in both the Crimes Act and the Criminal Code' (LCALC 2009:[1.9], 66). Alternatively, as was suggested by the Liberal Senators on LCALC, the formulation of 'suspect' could apply only to the restraining orders where the confiscation order might require a 'belief' (LCALC 2009:[1.9], 67).

Given the significant resources that might be required to contest such orders and the placing of that onus upon their subject, it is important that the process prior to the orders being issued adequately incorporates safeguards against them being issued in an oppressive and capricious fashion. A higher threshold test of 'belief', in particular, would achieve this.

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[10] Suspicion is a 'state of conjecture or surmise' or a 'slight opinion but without sufficient evidence': *George v Rockett* (1990) 170 CLR 104, 115. The Privy Council has described the requirement of 'reasonable grounds for suspicion of guilt' as a very limited requirement: *Shaaban Bin Hussien v Chong Fook Cam* [1970] AC 942 at 949.

5. Investigatory incentives

The ease with which it is intended that law enforcement authorities can access unexplained wealth orders raises real concerns as to how it will affect their work. Liberal Senator George Brandis has somewhat infelicitously described this as the danger of 'lazy policing' (LCALC Public Hearing, Senator George Brandis:29). Faced with limited resources, law enforcement agencies might decide that a civil forfeiture claim is more likely to succeed than a criminal prosecution and abandon the riskier prosecution, thereby increasing the financial impact on the alleged criminals, but decreasing the deterrent effect of prison.

The principle at stake here is twofold. First, no one would dispute that the priority of law enforcement authorities should be on criminal (rather than civil) punishment of the facilitators of organised crime. Second, this regime threatens a subtle erosion of the principle of double jeopardy insofar as it allows for law enforcement authorities to punish individuals in instances where a criminal conviction has not been secured (Civil Liberties Australia 2009:9).

Flexibility seems to be one of the animating purposes behind the *Amendment Act*. Advocates speak of unexplained wealth confiscation as being 'a tool in the armoury' (Evidence to LCALC:34, Mark Burgess) and an 'additional tool for law enforcement' (Evidence to LCALC:58, Mandy Newton). They envisage its role as being necessarily complementary to existing efforts. Recognising this, it seems a reasonable suggestion that an application for an unexplained wealth order should note 'the reason why a criminal prosecution has not been brought or, if brought, has failed' (LCALC Public Hearing, Senator George Brandis:40).

An additional safeguard might be to set up a distinct agency with responsibility for running the unexplained wealth regime. In Ireland, for example, a separate independent agency (the Criminal Assets Bureau) manages the civil forfeiture regimes. This would remove the choice of resource direction and focus separate agencies on particular goals. Obviously inter-agency cooperation could prove challenging, but there is no reason to think that it would be impractical.

While the inclusion of discretion for courts to revoke an unexplained wealth order if it believes it to be in the 'public interest' is welcome, this protection could go further (*Amendment Act* s 179C(5)). Courts could be given the power to stay confiscation proceedings until criminal proceedings conclude or to decline to make an order if it feels insufficient efforts have been made to bring a criminal prosecution. This need not extend into courts taking on an inquisitorial role, but merely buttresses the important oversight role that courts have in relation to law enforcement authorities.

Although these measures might seem to undermine the flexibility of the regime in some respects, the greater harm is that these bodies may seek the remedy they see as being most likely to succeed, rather than pursuing criminal sanctions, thereby having a 'detrimental effect on making ordinary prosecutions against criminals'(LCALC Public Hearing, Senator George Brandis:31).

Conclusion

These are far from 'salad days' for defenders of civil liberties. Public demand for action against spectral criminal threats has led to the growth of all sorts of new crimes and police powers. A note of scepticism should remain a civic duty. At the heart of the *Amendment Act* is a very real and valid policy objective: to reduce the observed power of organised crime. Yet, we should not so readily accept the zero-sum trade-off between law enforcement and civil liberties. As this comment has addressed, there are significant and low-cost safeguards that the *Amendment Act* could incorporate that would support the laudable policy ambition of combating the power of organised crime, while also preserving our civil freedoms.

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Cases

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