Review of the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth

Mr Andrew Cappie-Wood AO

June 2024

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Contents

Executive Summary

Unexplained wealth laws are a key component of each Australian jurisdiction's criminal asset confiscation framework, and the national effort to fight serious and organised crime. Targeting illegally derived assets through confiscation, including through the use of unexplained wealth laws, aims to remove the financial incentive from participation in crime. Taking the proceeds, instruments and benefits out of criminal activity acts as a powerful deterrent and prevents the reinvestment of illegally obtained funds into future criminal activity. Unexplained wealth laws target those who manage, fund and benefit from organised crime groups but distance themselves from their illegal activities. These laws provide law enforcement agencies with additional flexibility to adapt their responses to serious and organised crime on a case-by-case basis.

The National Cooperative Scheme on Unexplained Wealth (the Scheme) was introduced in 2018 and, in the absence of harmonised national legislation, has sought to address some of the practical barriers to collaborative cross-jurisdictional action on unexplained wealth. This has included improving information sharing and information gathering between jurisdictions, as well as the equitable sharing of assets confiscated from cross-jurisdictional operations.

Participation in the Scheme is open to all jurisdictions, with the current signatories comprising the Commonwealth (Cth), New South Wales (NSW), South Australia (SA), Northern Territory (NT) and the Australian Capital Territory (ACT). The Scheme is governed by the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth (the Agreement). The Agreement specifies that the primary objectives of the Scheme are to support cooperation between law enforcement agencies and to assist them in disrupting and undermining serious and organised crime. The Agreement also establishes the Cooperating Jurisdictions Committee (CJC) which is coordinated through the CJC Secretariat housed within the Australian Federal Police (AFP). The CJC is responsible for deciding matters in relation to equitable sharing under the Scheme. All participating jurisdictions are represented on the CJC.

The *Proceeds of Crime Act 2002* (Cth) (POCA) requires the Attorney-General to cause an independent review of the national unexplained wealth provisions as soon as practicable after 3 October 2022 (the Review).[1] The Review has considered the efficacy of existing processes, compliance with obligations, progress on commitments, the need for broader access to investigative powers under the POCA, improvements to enhance the Scheme, and how the Commonwealth can better promote the Scheme to non-participating jurisdictions.

As part of the Review, representatives have been interviewed from each Australian jurisdiction's relevant criminal asset confiscation authorities. All stakeholders were consulted with regards to the Terms of Reference, particularly in relation to the effectiveness of the Scheme, progress on reducing barriers to collaboration, potential improvements to the Scheme, and their individual experiences in pursuing unexplained wealth.

[1] *Proceeds of Crime Act 2002* (Cth), s 327A.

Having reviewed the Scheme's effectiveness it is clear that some elements of the Scheme have been underutilised. The access to Commonwealth information gathering powers for unexplained wealth matters has not been used by any participating jurisdiction. At the same time, the Commonwealth has not undertaken any unexplained wealth matters with reliance on relevant state offences. Whilst these elements of the Scheme have been underutilised there are, however, signs that some of the actions taken to support the Scheme's objectives have been successful. This is evidenced through the success of the Scheme's equitable sharing arrangements. The sharing of criminal assets confiscated as a result of collaborative action has significantly increased in volume and value. This is a tangible indicator of the progress made in coordinated efforts to target criminal wealth. The resulting increased collaboration between participating jurisdictions has assisted information sharing, improved cross agency communication and led to sharing investigative resources. It can be concluded that the Scheme, as a means of supporting collaborative action, has in part, been useful to the participants. The Scheme's objective of cross-jurisdictional collaboration is critical in the national and transnational fight against organised crime and for this reason the Scheme is worthy of retention. It does however, require further refinement.

The Scheme recognises that unexplained wealth laws are only one part of the wider asset confiscation framework of each jurisdiction. This is implied through the equitable sharing and information sharing arrangements being inclusive of a range of non-conviction-based asset confiscation laws. It is in consideration of the interrelated nature of unexplained wealth and other asset confiscation laws that I have recommended the Scheme be reframed as a comprehensive criminal asset confiscation initiative. This broadening of the Scheme would cover unexplained wealth, proceeds of crime and other forms of asset confiscation. I suggest the reframed Scheme be referred to as the National Scheme on Unexplained Wealth and Criminal Assets Confiscation. Whilst the reframed Scheme would cover all forms of asset confiscation the naming of the Scheme is intended to be self-explanatory.

The reframed Scheme should be supported by an extension of state and territory access to Commonwealth information gathering powers for use in unexplained wealth and asset confiscation matters more broadly. This will require legislative amendments to the POCA. Similarly, consideration should be given to the extension of the Commonwealth's use of relevant state or territory-based offences for undertaking asset confiscation actions. This will raise the question of a referral of powers to the Commonwealth. It must be recognised that this was an issue for some jurisdictions when initially considering joining the Scheme. The efficacy of the Commonwealth's use of relevant jurisdictional offences for unexplained wealth matters being extended to asset confiscation matters would need to be established before proceeding in this direction.

The intention of the Scheme was to have all states and territories participate. To date Victoria (Vic), Queensland (Qld), Western Australia (WA) and Tasmania (Tas) have chosen not to join the Scheme. This has resulted in a differentiation between participating and non-participating jurisdictions which causes unintended barriers to collaborative action. The Australian Government must consider arrangements that facilitate the inclusion of all jurisdictions in the Scheme, and in so doing achieve a truly national collaborative approach to the fight against serious and organised crime. In looking at the structure of the reframed Scheme, I have recommended that the successful equitable sharing arrangements become the foundational or, first level. It is proposed that those jurisdictions that wish to go further, can participate in the second level of the reframed Scheme which would provide access to Commonwealth information gathering powers for unexplained wealth and asset confiscation matters. The second level would also involve a referral of powers to enable the Commonwealth to utilise participating jurisdictions' offences to pursue unexplained wealth and other asset confiscation matters. The reframed Scheme, with a two-level structure, would enable all jurisdictions to participate at a level that best suits their asset confiscation framework. All jurisdictions should be invited to be a party to the reframed Scheme.

There are numerous practical issues that impact the effectiveness of each jurisdiction's efforts to tackle unexplained wealth and asset confiscation matters. Not least of these issues is the highly labour-intensive nature of these types of cases, requiring specialist financial analysts, forensic accountants and litigators as parts of skilled multi-disciplinary teams. The availability of such skilled investigators has often been the critical factor in the decision to pursue these complex cases. To assist in this issue, I suggest consideration be given to a training and retention program to increase the availability of these critical skills, and in so doing specifically assist those jurisdictions that are often struggling to find suitably skilled staff.

There are a range of other issues that have been raised during consultations that impact the use and effectiveness of unexplained wealth and other asset confiscation legislation. For example, the potential for harmonised laws and prescribed definitions. There are numerous procedural, policy and operational matters that invite consideration, to facilitate improvements to asset confiscation frameworks. Whilst such matters are not directly within the Terms of Reference of this Review, their workings have a direct bearing on the overall effectiveness of efforts to target illegally obtained assets. Under the reframed Scheme the CJC could be tasked with exploring solutions to issues that impede cross-jurisdictional collaboration.

In providing these recommendations, consideration has been given to the time taken to develop a national approach to unexplained wealth, and the role of the Review in remedying aspects of the Scheme which may have been conceptually sound, but are equivocal in practice. In providing this report it is acknowledged that, should the Australian Government provide its endorsement, implementation of these recommendations requires a careful and considered approach particularly in relation to non-participating jurisdictions. It must be stated that a truly national approach requires participation from all jurisdictions which not only requires a sustained commitment, but the collective political will to dismantle high value serious and organised crime syndicates.

Andrew Cappie-Wood AO

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Acronyms and Abbreviations

ABF	Australian Border Force
ACC	Australian Crime Commission
ACIC	Australian Criminal Intelligence Commission
ACT	Australian Capital Territory
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAC Act	*Criminal Assets Confiscation Act 2005* (SA)
CACT	Criminal Assets Confiscation Taskforce
CAL	Criminal Assets Litigation
CARA	*Criminal Asset Recovery Act 1990* (NSW)
CCA Act	*Confiscation of Criminal Assets Act 2003* (ACT)
CCA Amendment Act	*Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020* (ACT)
CDPP	Commonwealth Director of Public Prosecutions
CJC	Cooperating Jurisdictions Committee
CPCLA Act	*Confiscation of Proceeds of Crime Legislation Amendment Act 2022* (NSW)
CCP Act	*Crime (Confiscation of Profits) Act 1993* (Tas)
CPCA	*Criminal Proceeds Confiscation Act 2002* (Qld)
CPC Act	*Criminal Property Confiscation Act 2000* (WA)
CPF Act	*Criminal Property Forfeiture Act 2002* (NT)
CPFA Act	*Criminal Property Forfeiture Amendment Act 2020* (NT)
Confiscation Act	*Confiscation Act 1997* (Vic)
CPOC Act	*Confiscation of Proceeds of Crime Act 1989* (NSW)
Cth	Commonwealth
DPP	Director of Public Prosecutions
the Agreement	Intergovernmental Agreement on the National Scheme on Unexplained Wealth

LCCSC	Law, Crime and Community Safety Council
NPCF	National Proceeds of Crime Forum
NT	Northern Territory
NSW	New South Wales
NSWPF	New South Wales Police Force
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJC-LE	Parliamentary Joint Committee on Law Enforcement
POCA	*Proceeds of Crime Act 2002* (Cth)
Qld	Queensland
QPS	Queensland Police Service
the Report	Independent Report of the Panel on Unexplained Wealth
SCAG	Standing Council of Attorneys-General
SA	South Australia
the Scheme	National Cooperative Scheme on Unexplained Wealth
SES	Senior Executive Service
SOCUW Act	*Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)
TAA	Taxation Administration Act 1953 *(Cth)*
Tas	Tasmania
TIA Act	*Telecommunications (Interception and Access) Act 1979* (Cth)
UWLAB	*Unexplained Wealth Legislation Amendment Bill 2018* (Cth)
Vic	Victoria
WA	Western Australia

Recommendations

A Reframed National Scheme

Recommendation 1

It is recommended that the National Cooperative Scheme on Unexplained Wealth be reframed as a National Scheme on Unexplained Wealth and Criminal Assets Confiscation. The scope of the reframed Scheme should be extended beyond unexplained wealth to all aspects of asset confiscation, including to conviction-based, non-conviction-based, administrative and automatic asset confiscation.

The objectives of the reframed Scheme should continue to focus on supporting interjurisdictional collaboration to remove the proceeds, instruments and benefits from serious and organised crime.

Recommendation 2

It is recommended that all jurisdictions be engaged in the process of reframing the Scheme and be invited to participate in a truly national effort to tackle serious and organised crime. Currently there is a divide between those jurisdictions participating in the Scheme and those operating independently. A reframed Scheme provides an opportunity to re-engage all Australian jurisdictions in a national collaborative effort.

It is proposed that the reframed Scheme be structured with two levels of involvement. The first level would cover the equitable sharing arrangements. The second level would be for those jurisdictions that wish to go further and access the information gathering powers of the Commonwealth and enable the Commonwealth to utilise state-based predicate offences to pursue asset confiscation matters. The two-level structure of the reframed Scheme will enable all jurisdictions to participate at a level that best works with their own asset confiscation framework.

Recommendation 3

It is recommended that the core legislative components of the current Scheme be reframed and/or amended as follows:

1. The information gathering provisions under the *Proceeds of Crime Act 2002* (Cth), which may be utilised by participating jurisdictions for unexplained wealth matters, should be amended to enable utilisation for all asset confiscation matters.
2. The Commonwealth's ability to rely on relevant participating jurisdictions' offences to pursue unexplained wealth matters, could be extended to allow for their use in asset confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth). An extension of this nature would require a referral of powers from the states and territories to the Commonwealth. An assessment of the need and potential utility for such powers should be undertaken prior to any action to advance a referral of powers.

Recommendation 4

It is recommended that the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth be amended to reflect the scope and structure of the reshaped Scheme and to cover all Australian asset confiscation legislation in the equitable sharing arrangements.

Presently, changes must be made to Appendix A and B to the Agreement every time there is any new or amended proceeds of crime legislation. It is proposed that Appendix A and B to the Agreement be removed and replaced with a 'catch-all' clause. This will support the expansion of the Scheme from unexplained wealth to asset confiscation and, in so doing, support cross-jurisdictional collaboration on a wider range of matters.

Information Gathering Powers

Recommendation 5

It is recommended that the Scheme's current public reporting requirements on each participating jurisdictions' use of the Commonwealth information gathering powers under the *Proceeds of Crime Act 2002* (Cth), be retained.

Recommendation 6

It is recommended that a detailed 'user manual' be developed for jurisdictions, to support the use of the Commonwealth information gathering powers. The user manual should detail the application of, procedures required to access, and the scope of, the Commonwealth information gathering powers available under the Scheme.

Information Sharing

Recommendation 7

It is recommended that further work be undertaken through the reframed Scheme to improve the appropriate sharing of information between jurisdictions in the pursuit of asset confiscation matters.

Information sharing is critical to supporting the objectives of the Scheme and the effective detection, investigation and litigation of asset confiscation matters. Where there are procedural or operational barriers to sharing relevant information, there needs to be focused national effort to explore how they can be overcome. Under a reframed Scheme the Cooperating Jurisdictions Committee should be given responsibility for identifying and pursuing information sharing improvements.

Recommendation 8

It is recommended that the reframed Scheme work with key agencies, such as the Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Taxation Office (ATO), Australian Border Force (ABF), and Services Australia to create nationally consistent procedures for requesting, accessing and sharing relevant information from these agencies.

Equitable Sharing

Recommendation 9

It is recommended the equitable sharing arrangements be retained as a primary component of the reframed Scheme.

The current equitable sharing arrangements have proven to be successful in encouraging interjurisdictional collaboration. Building on this success, all jurisdictions should be invited to participate in these arrangements. As such, all jurisdictions would have appropriate representation on the Cooperating Jurisdictions Committee.

Recommendation 10

It is recommended the notification threshold under the equitable sharing arrangements of the reframed Scheme be lifted from $100,000 to $500,000. This will reduce administrative reporting requirements and help focus collaborative efforts on the more serious matters.

Recommendation 11

It is recommended that consideration be given to funding the Australian Federal Police to develop an online portal to support the reporting of equitable sharing notifications and the administration of the Cooperating Jurisdictions Committee.

Supporting the Reframed Scheme

Recommendation 12

It is recommended that the functioning of the reframed Scheme continue to be supported by the Cooperating Jurisdictions Committee.

The CJC would, in addition to its oversighting of the equitable sharing provisions, be charged with driving the objectives of the Scheme, promoting and improving information sharing, and improving procedures in support of cross-jurisdictional asset confiscation matters. Reporting on the progress of these responsibilities would assist in maintaining focus and momentum on improving collaborative action.

Recommendation 13

It is recommended that consideration be given to further the development of specialised capabilities, such as forensic accountants, that support the investigation and litigation of asset confiscation matters.

This initiative could include investment in training, retention and the application of specialised personnel across jurisdictions. There is also scope for jurisdictions to collaborate in the development and/or funding of specialised qualifications. The increasing sophistication of means used to hide, disguise and launder proceeds, benefits and instruments of crime must be matched by the development of specific skills. These skills are in short supply and their lack of availability can act as a hand-brake on the efforts to tackle serious and organised crime.

Recommendation 14

It is recommended that consideration be given by the governments of each jurisdiction to utilising confiscated criminal assets to fund the development and deployment of specialised personnel for asset confiscation matters.

Utilising confiscated funds in this way would recognise the significant benefits to the Australian community in removing the proceeds, benefits and instruments of serious and organised crime.

Recommendation 15

It is recommended that the reframed Scheme explore opportunities to harmonise key procedural and definitional legislative provisions where possible, through a relevant forum such as the Australian Transnational, Serious and Organised Crime Committee or similar.

An example of potential harmonised definitions includes that of financial institutions, digital and crypto assets. Harmonising definitions where possible, will reduce procedural and operational barriers to cross-jurisdictional collaboration.

Chapter 1: Introduction

Unexplained wealth laws have a critical role in the asset confiscation framework of each Australian jurisdiction. These laws are an essential tool for law enforcement in that they are specifically designed to target the upper echelons of organised crime groups, who profit the most from criminal activity and are able to take active steps to distance themselves from the criminal activities they facilitate and instruct. Whilst each Australian jurisdiction has introduced its own unexplained wealth regime, the Scheme was introduced to provide a national approach to targeting unexplained wealth, and to enable all participating jurisdictions to work collaboratively to deprive criminals of their unlawfully obtained wealth irrespective of the jurisdiction in which they operate.

The primary objectives of the Scheme are to support cooperation between law enforcement agencies and assist them to:

- deprive persons of profits associated with serious and organised crime
- prevent illicit funds being reinvested to support further criminal activity
- deter, disrupt, and dismantle criminal syndicates, and
- reduce the harm caused by serious and organised crime to the community.

The Scheme came into force on 10 December 2018 and is governed by the Agreement entered into by participating jurisdictions. It allows participating jurisdictions to:

- access information-gathering powers in unexplained wealth cases, including notices to financial institutions and production orders under the Act
- telecommunications interception for unexplained wealth proceedings under the *Telecommunications (Interception and Access) Act 1979* (Cth), and
- share confiscated proceeds of crime between domestic jurisdictions that contributed to joint investigations, therefore encouraging cooperation between jurisdictions.

The jurisdictions currently participating in the Scheme include NSW, ACT, NT, SA, and the Commonwealth. Membership is open to all other Australian jurisdictions.

The POCA requires the Attorney-General to cause an independent review of the national unexplained wealth provisions as soon as practicable after 3 October 2022. The Independent Reviewer, Mr Andrew Cappie-Wood AO, was appointed by the Attorney-General, to undertake the Review. Responsible Ministers of participating jurisdictions endorsed the appointment, which was subsequently agreed to by the Prime Minister on 22 August 2023. The Independent Reviewer has been supported by a Secretariat provided by the Attorney-General's Department.

Terms of Reference

The Terms of Reference were agreed to by all participating jurisdictions as required by the Agreement. The Terms of Reference provide that the Review will consider:

- whether the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth has facilitated greater cooperation between the parties, including consideration of information sharing in unexplained wealth and organised crime matters, and equitable sharing in the context of the national scheme
- whether processes in accordance with the Agreement are working effectively
- compliance with obligations to consult and obtain consent before amending relevant legislation
- progress on the commitments to enhance information sharing under Part 5 of the Agreement
- consideration of providing state and territory law enforcement with additional investigative powers under the *Proceeds of Crime Act 2002* (Cth)
- whether any cooperative investigations that have not resulted in unexplained wealth litigation have been successfully pursued through other action – for example, under taxation laws
- whether parties have been appropriately compensated through equitable sharing under the Scheme
- whether parties should commence negotiations to consider whether participating and cooperating state parliaments refer powers to the Commonwealth Parliament to enable the amendment of the *Proceeds of Crime Act 2002* (Cth) to allow Commonwealth law enforcement agencies to take action under other parts of that Act (beyond unexplained wealth) in relation to state proceeds of crime offences
- whether any improvements could be made to enhance the administration and resourcing of the Scheme for all participating jurisdictions, and
- how the Commonwealth could better promote the Scheme to non-participating jurisdictions and whether there is additional support which the Commonwealth can provide for participating jurisdictions.

Consultation

During the course of the Review the agencies and law enforcement stakeholders at Appendix C were consulted. The Review was undertaken through five phases, which include:

- phase 1: Preliminary engagement with participating jurisdictions (virtually or face-to-face as appropriate)
- phase 2: Development of a discussion paper in collaboration with participating jurisdictions to guide substantive engagement
- phase 3: Substantive engagement with participating jurisdictions (virtually or face-to-face as appropriate)
- phase 4: Engagement with non-participating jurisdictions (virtually), and
- phase 5: Invitation to provide a submission and/or written feedback if stakeholders chose to do so.

Structure of the report

The report is organised around the key themes which emerged during the course of this Review and therefore do not directly mirror the Terms of the Reference.

Chapter 2: Background

The Australian Institute of Criminology (AIC) estimates that serious and organised crime cost Australia up to $60.1 billion dollars in 2020-21.[2] It is estimated that the total cost of serious and organised crime has increased by 65% since 2013-14, and by 41% as a percentage of GDP.[3] The significant cost of organised crime to the national financial, health and social wellbeing warrants the continuous reassessment of national efforts in the fight against serious and organised crime groups.

Serious and organised crime in Australia is enduring, transnational in nature, technology enabled, profit motivated and increasingly efficient.

Transnational in nature

Approximately 70% of Australia's serious criminal threats include an international dimension, contributing to the $870 billion per annum cost of transnational crime globally.[4] The most serious transnational crime threats impacting Australia include the manufacture and trade of illicit commodities, serious financial crime, cybercrime, and professional enablers of organised crime.[5]

Technology enabled

Serious and organised criminal activity is enabled by technology, either through the online environment or advances in technological capabilities such as secure communication platforms. Technology is an attractive tool for organised crime as it can provide anonymity, obfuscate locations and increase their global reach. Organised crime is also engaging the services of professional facilitators with the knowledge and skills to assist in the commission of technology enabled criminal activity.[6] Organised crime continues to target our banking, investment and superannuation sectors, as well as individuals, businesses and government entities, through complex financial crimes that result in significant damages to institutional reputations and personal financial security.

Profit motivated

Financial gain is both a key motive and key enabler of organised crime as illegally obtained funds are reinvested back into ongoing criminal activities. Money laundering remains a cornerstone of serious and organised crime in Australia. Not only is it a key enabler of profit-motivated crime, it is a lucrative criminal enterprise in and of itself. The aim of money laundering is to give illicit funds the appearance of legitimacy. These laundered funds are then reinvested in businesses or schemes that conceal the origins of the funds, or into further criminal activities. Money laundering enables serious and organised crime to hide and accumulate wealth, evade taxes, increase profits and avoid prosecution.[7]

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[2] Russel G Smith and Amelia Hickman, *Estimating the costs of serious and organised crime in Australia 2020-21* (Report, 6 September 2022) 3.
[3] Ibid.
[4] Cat Barker, *Transnational organised crime,* Parliament of Australia Briefing Book (Web Page) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/TransnationalCrime>.
[5] Department of Home Affairs, *What is transnational, serious and organised crime?* (Web Page, 5 June 2023) <https://www.homeaffairs.gov.au/nat-security/Pages/what-is-tsoc.aspx>.
[6] Australian Criminal Intelligence Commission, *Organised Crime in Australia 2017* (Report, 2017) 1.
[7] Ibid 8.

Increasingly efficient

The Australian Crime Commission (ACC) noted that '*organised crime is increasingly diversifying its activities, with convergences being observed between legitimate or licit markets and illicit markets*.'[8] Organised crime has moved towards a business model that employs professional enablers to conduct key activities such as money laundering and creating consistent revenue streams through low-risk criminal activities.[9]

Professional enablers provide services to launder the proceeds of crime, conceal illicitly obtained wealth and enhance the criminal activities of serious and organised crime. Professional enablers are persons who possess specialist skills and knowledge, who are used either wittingly or unwittingly in the facilitation of criminal activity. The use of professional enablers can result in significant financial gains for organised crime groups through tax evasion, money-laundering, superannuation fraud and phoenixing activities.[10] These practitioners can also be used to create complex structures that create distance between those committing criminal activities and their illicit wealth.

It is therefore no surprise that criminal investigations are becoming increasingly complicated for law enforcement agencies. Not only has there been a significant increase in the proportion of serious and organised crime investigations, there has also been an increase in the resources and time required to undertake these investigations. This is due to a number of factors including the increased use of professional enablers, offshore elements and the use of decentralised finance. Responses to serious and organised crime therefore need to be adaptive to the ever-changing criminal threat environment. This requires ongoing interagency and interjurisdictional collaboration, investment and legislative improvements.

Internationally, strengthening asset confiscation frameworks and improving asset recovery outcomes has emerged as a priority. In particular, the Financial Action Task Force (FATF) — the international anti money laundering and counter-terrorism financing standard setter — has now published strengthened standards on the confiscation of criminal property. With countries now required to implement non-conviction-based confiscation and encouraged to adopt unexplained wealth frameworks. Across the global community there is increasing recognition that decisive and proactive action by countries to strip criminals of the proceeds of their crimes is one of the most effective ways to disrupt the criminal model, and that robust and flexible unexplained wealth and asset confiscation tools and mechanisms are crucial.

The National Strategy to Fight Transnational Serious and Organised Crime (the National TSOC Strategy) was established in 2018 to provide national strategic guidance to inform responses to organised crime. The four pillars of the National TSOC Strategy are:

1. integrated – drawing on all tools of government, policy, legislation, technology and intelligence to use the right intervention at the right time
2. united – utilising interjurisdictional partnerships, international partnerships, the private sector, civil society and academia
3. capable – ensuring those at the forefront of fighting crime are equipped with the right people, systems, technology, infrastructure and data now and into the future, and
4. evolving – continuously evaluating our strengths and weaknesses to keep pace with the rapidly changing criminal environment.

[8] Australian Crime Commission, *Organised Crime in Australia* (Report, 2013) 7 ('Organised Crime in Australia').
[9] *Organised Crime in Australia* (n 8), 1.
[10] Ibid 13.

Informed by these pillars, in 2022 all Australian jurisdictions agreed to National Strategic Priorities to drive consistent counter-organised crime responses:

- safeguarding the Australian community from TSOC harms
- taking the fight offshore and hardening Australian borders
- removing the profits from criminal networks
- protecting institutions and public revenue, and
- disrupting TSOC exploitation of emerging technologies.

The Scheme is an important component of the broader framework that gives effect to the National Strategic Priority of removing the profits from criminal networks.

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Chapter 3: What is Unexplained Wealth?

Including removing the profit from criminal networks as one of the National Strategic Priorities recognises the importance of asset confiscation frameworks in the fight against serious and organised crime. These frameworks reflect the understanding that responses to serious and organised crime need to go beyond criminal convictions and the threat of imprisonment.

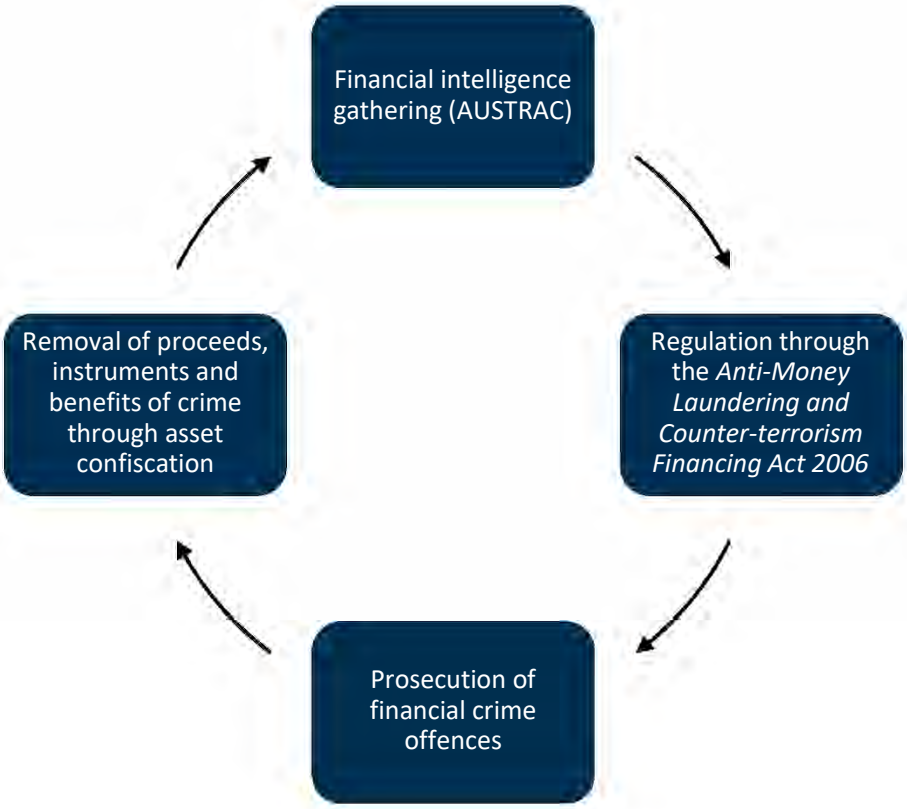
Whilst both falling under the asset confiscation umbrella, the terms *'proceeds of crime'* and *'unexplained wealth'* are often conflated with each other despite having distinct applications. Proceeds of crime describes the illicit profits or assets gained through engagement in criminal activity. In other words, it describes the target of asset confiscation laws. Unexplained wealth laws target the act of illicit enrichment, where an individual's wealth exceeds their wealth that was lawfully acquired. Unexplained wealth orders generally require the payment of the difference between their lawfully acquired wealth and their total wealth to be paid to the relevant jurisdiction. The principal aim of unexplained wealth orders is to target the crime figures who fund and benefit form organised crime groups but remain distant from the illegal activity.

Whilst each Australian jurisdiction has different asset confiscation frameworks, the main types of asset confiscation laws are categorised below for reference.

Asset confiscation laws in Australia

Asset confiscation laws are an important component of Australia's response to serious and organised crime. Asset confiscation aims to remove the proceeds, instruments and benefits of crime from those engaged in criminal activity, therefore reducing the motivation for offending and preventing reinvestment in crime. Figure 1 below demonstrates how the combination of intelligence gathering, anti-money laundering and counter-terrorism financing regulation, the prosecution of financial crime offences, and asset confiscation forms a robust framework to combat profit-motivated crime.

Figure 1: Framework to combat profit-motivated crime



Asset confiscation laws were first introduced in Australia in 1977 when the *Customs Act 1901* (Cth) was amended to allow for the seizure and confiscation of the proceeds of drug-related crimes and the drugs involved. Over the past few decades asset confiscation laws have been expanded to include the seizure and confiscation of assets derived from a broader range of criminal activities, and for conviction-based and non-conviction-based confiscation. However, the frameworks of each jurisdiction operate distinctly, and have their own distinct features. Table 1 below outlines some of the main features of each jurisdiction's asset confiscation framework.

Table 1: Comparison of Australian jurisdiction's asset confiscation laws

Asset confiscation laws	Cth	NSW	SA	NT	ACT	Qld	WA	Tas	Vic
Freezing orders	✓	✓	✓	✓			✓	✓****	✓
Restraining orders	✓	✓	✓	✓	✓	✓		✓	✓
Forfeiture orders	✓	✓	✓	✓	✓	✓	✓	✓	✓
Conviction based forfeiture orders	✓	✓*	✓	✓**	✓*	✓	✓	✓	✓*
Pecuniary penalty orders	✓	✓	✓		✓	✓	✓***	✓	✓
Unexplained wealth restraining orders	✓		✓		✓			✓	✓
Unexplained wealth orders	✓	✓	✓	✓	✓	✓	✓	✓	✓
Crime used or tainted property substitution			✓	✓		✓	✓		✓
Administrative forfeiture orders		✓							
Drug trafficking restraining orders		✓				✓			✓
Drug trafficking declaration or forfeiture orders		✓	✓			✓	✓		✓

* including automatic forfeiture for specific offences.
** including interim restraining orders.
*** including criminal benefits declarations.
**** including interim wealth restraining orders.

The main types of asset confiscation laws in Australia include:

- conviction-based asset confiscation
- non-conviction-based asset confiscation
- administrative asset confiscation
- automatic asset confiscation, and
- unexplained wealth laws.

Conviction-based asset confiscation

Conviction-based asset confiscation enables the recovery of assets associated with criminal activity once a conviction for the relevant crime has been secured.[11]

[11] Australian Institute of Criminology, 'Confiscation of the proceeds of crime: federal overview' (Report, 2008) <https://www.aic.gov.au/sites/default/files/2020-05/tcb001.pdf>.

Administrative asset confiscation

Administrative asset confiscation usually involves a procedure for recovering assets suspected of being associated with criminal activity, without a court order. It is usually applied to assets seized in an investigation. For example, cash seized during the execution of a search warrant. Whilst a judicial process is not required to seize the relevant assets, generally persons affected by the seizure can apply for relief from the confiscation. For example, through judicial review of the administrative decision.

Case example: New South Wales – *Criminal Assets Recovery Act 1990* (NSW)

In June 2023, AAZ as the driver and sole occupant of a rental van, which was stopped by Riverina Highway Patrol at Coolac for random mobile roadside testing. Police saw AAZ was unusually nervous when discussing his employment and reasons for travel. Police noticed that the rear seats were laid flat, and a green shopping bag was protruding from under one of the seats. Police computer checks were conducted before AAZ was asked to exit the vehicle and a vehicle search conducted. When the rear door of the van was opened, NSW Police saw there were three shopping bags under the third-row seats, that had been laid flat. The bags contained cash totalling $990,545, which was seized by NSW Police.

On 14 February 2024, an assets forfeiture notice was issued under s 21 of the *Criminal Assets Recovery Act 1990* (NSW) by the NSW Crime Commission. No dispute claim has been received. The assets forfeiture notices took effect immediately on 17 April 2024 after the dispute period expired (60 days after the publication of the notice).

Non-conviction-based asset confiscation

Non-conviction-based asset confiscation does not rely upon a criminal conviction to recover assets. It is a civil action, allowing restraint and recovery of assets suspected of being associated with criminal activity.[12] This includes where property has been used in connection with the commission of a specified offence, or where property is derived from the commission of a specified offence.[13] The burden of proof requirement for non-conviction-based asset confiscation is generally that a '*reasonable suspicion*' can be established.

Automatic asset confiscation

Automatic asset confiscation generally involves assets suspected of being associated, or used in the commission of criminal activity, being automatically forfeited as a consequence of conviction of the relevant crime. In reality, this action is not '*automatic*' and requires the relevant authority to undertake positive acts according to the corresponding legislation to obtain the final forfeiture, as demonstrated in the case example below. Therefore, automatic asset confiscation is also known as '*asset confiscation by operation of statute'*.

[12] Ibid

[13] Natalia Skead, Hilde Tubex, Sarah Murray and Dr Tamara Tulich, 'Pocketing the proceeds of crime: Recommendations for legislative reform' (Report, July 2020) <https://www.aic.gov.au/sites/default/files/2020-07/CRG-27-1617-FinalReport_0.pdf>.

Case example: South Australia – *Criminal Assets Confiscation Act 2005* (SA)
South Australia Police (SA Pol), investigating offences against the *Controlled Substances Act 1984* (SA), executed a general search warrant at the respondent's home address. There they located 12 cannabis plants being grown hydroponically, 8 kilograms of dried cannabis and $37,350 in cash. The SA Pol Confiscation Section identified, seized and initiated restraint of assets owned by or under the effective control of the respondent pursuant to the *Criminal Assets Confiscation Act 2005* (SA) (CACA). The respondent was later convicted of trafficking in a large commercial quantity of a controlled drug and became a prescribed drug offender pursuant to the CACA. Upon conviction the restrained assets owned by or under the effective control of the respondent were deemed forfeited. The Director of Public Prosecutions obtained a declaration of forfeiture under Part 4, Division 1, Subdivision 1A of the CACA. The following assets with a total estimated value of $290,500 were forfeited to the Crown:

- $100,000 payment in lieu of forfeiture of the respondent's home
- a Harley Davidson motorcycle
- a Caterpillar Bobcat
- $85,500 cash, and
- a Holden HG Brougham.

Unexplained wealth laws
The act of illicit enrichment or having unexplained wealth, can be defined as the enjoyment of an amount of wealth that is not justified through reference to lawful income.[14] A person may accrue unexplained wealth through a range of criminal activities including: dealing or trafficking illicit drugs, money laundering, fraud, corruption, collusion or bribery, and tax evasion.[15]

Illicit enrichment or unexplained wealth laws may be defined as any provision in a statutory instrument that empowers a court to impose a criminal or civil sanction if it is satisfied that illicit enrichment has taken place and that does not specify a need to establish a separate or underlying criminal activity before this sanction can be imposed.[16]

Unexplained wealth laws differ from other asset confiscation frameworks as, in their purest form, they do not require the state to establish that certain assets are the proceeds or instruments of crime. Rather, they impose sanctions on the basis that a person has enjoyed an amount of wealth that has not been justified through legal sources of income. Not requiring the establishment of a criminal offence is a significant rationale for the adoption of unexplained wealth laws. In 2009 the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) conducted an inquiry into legislative arrangements to address serious and organised crime. The PJC-ACC recommended the introduction of Commonwealth unexplained wealth provisions, noting '*unexplained wealth laws appear to offer significant benefits over other legislative means of combating serious and organised crime.*'[17]

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[14] Enjoyment referring to the acquisition, receipt or use of something of pecuniary value. Andrew Dornbierer, 'Illicit Enrichment A Guide to Laws Targeting Unexplained Wealth' (Report, 2021) ('Targeting Unexplained Wealth Report') <https://baselgovernance.org/publications/illicit-enrichment-guide-laws-targeting-unexplained-wealth>.
[15] Western Australia Corruption and Crime Commission, 'What are the unexplained wealth indicators?' *Unexplained Wealth Now* (Web Page) <https://www.ccc.wa.gov.au/report-unexplained-wealth-now/what-are-unexplained-wealth-indicators>.
[16] *Targeting Unexplained Wealth Report* (n 14).
[17] Parliamentary Joint Committee on the Australian Crime Commission, 'Inquiry into the legislative arrangements to outlaw serious and organised crime groups' (Report, 2009), 114.

The increasing sophistication of organised crime has been a driving concern for the establishment of unexplained wealth frameworks. Those who profit most from the criminal activities of organised crime groups are able to distance themselves from the crimes committed, whilst playing a key role in the planning, directing and financing criminal activities.[18] Unexplained wealth laws, theoretically enable the upper echelons of organised crime to be targeted through not requiring criminal activity to be established to pursue asset confiscation. They also provide law enforcement with the additional flexibility to determine the most appropriate response to serious and organised crime on a case-by-case basis. It is common for investigations to move between different types of asset confiscation proceedings, and for case strategies to evolve depending on the particular circumstances of a matter. However, as with the overall asset confiscation frameworks, unexplained wealth laws vary between each Australian jurisdiction. The Scheme aims to address these differences and foster a culture of cooperation on unexplained wealth matters.

[18] Marcus Smith and Russell G Smith, 'Procedural impediments to effective unexplained wealth legislation in Australia' (2016) 523 *Australian Institute of Criminology Trends & issues in crime and criminal justice* 1.

Chapter 4: The National Cooperative Scheme on Unexplained Wealth

In 2012, the Parliamentary Joint Committee on Law Enforcement (PJC-LE) Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements Final Report noted that there was widespread operational support for harmonising unexplained wealth laws and found that the national response to serious and organised crime would benefit from consistent laws on unexplained wealth.[19] The report suggested the Commonwealth should take the lead in developing a nationally consistent regime and recommended it seek a referral of powers from the states and territories for the purposes of legislating a national unexplained wealth scheme.

In 2014, the Independent Report of the Panel on Unexplained Wealth by Mr Ken Moroney AO APM and Mr Mick Palmer AO APM, noted the Panel strongly supported this recommendation.[20] The Panel on Unexplained Wealth was appointed in June 2013 to develop an understanding of state and territory concerns with national laws and recommend options for ministerial consideration.

The Final Report made the following key recommendations:

- that all Australian governments agree to a referral of powers from the states and territories to the Commonwealth to enable the unexplained wealth provisions in the POCA to be broadened to also apply where a link to a suspected state or territory offence can be established, and
- that the Commonwealth take a lead role in settling new business rules and substantially simplified equitable sharing arrangements which favour the states and territories in the distribution of proceeds recovered from any joint unexplained wealth confiscation action.

These recommendations were adopted by the *Unexplained Wealth Legislation Amendment Bill 2018* (Cth) (UWLAB). The UWLAB amended the POCA to give effect to the Scheme, supplemented by the Agreement. The accompanying Explanatory Memorandum to the UWLAB noted that the Scheme would provide a national approach to target unexplained wealth, enabling all participating jurisdictions to work together to effectively deprive criminals of their wealth, irrespective of the jurisdiction in which they operate.[21]

The UWLAB and the Agreement gave effect to the following aspects of the Scheme:

- extending the scope of Commonwealth unexplained wealth restraining orders[22] and unexplained wealth orders under the POCA to territory offences and '*relevant offences*' defined in the legislation of '*participating states*'[23]
- allowing '*participating*' state and territory agencies to access Commonwealth information gathering powers under the POCA for the investigation or litigation of unexplained wealth matters under state or territory unexplained wealth legislation, through inserting new provisions based on current production orders and notices to financial institutions powers
- provisions to ensure the continued effective operation of state and territory confiscation regimes

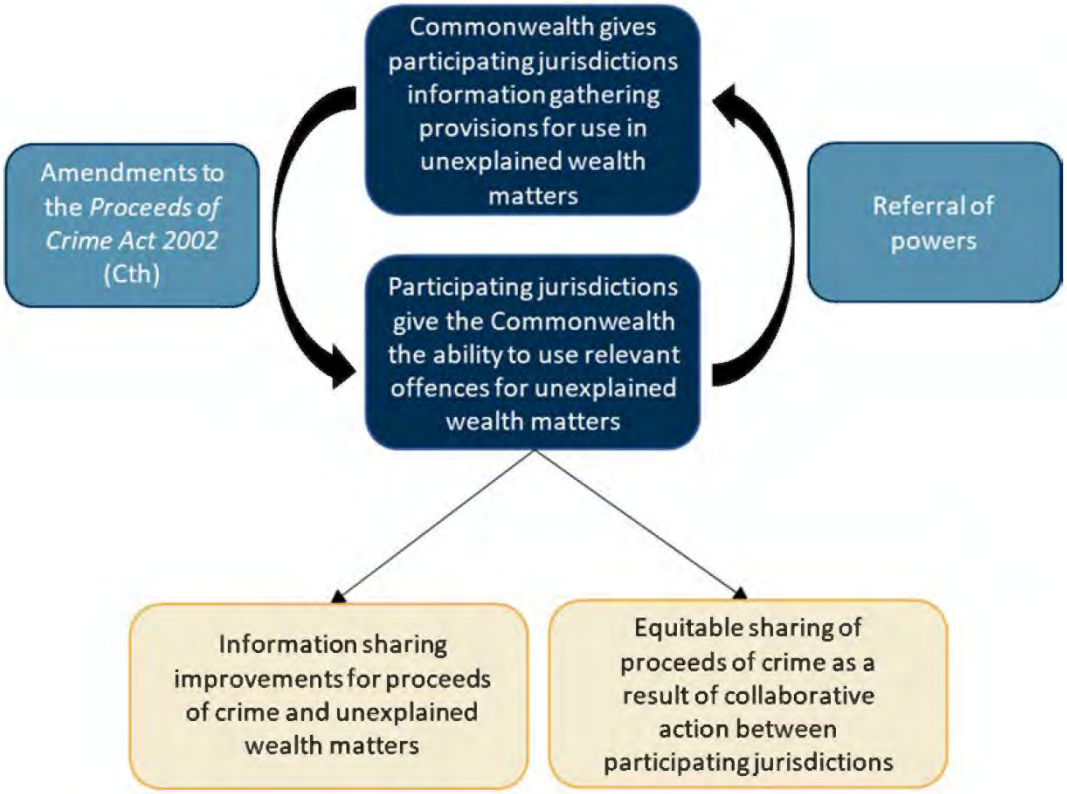
[19] Parliamentary Joint Committee on Law Enforcement, 'Inquiry into Commonwealth unexplained wealth legislation and arrangements' (Report, 2012).
[20] Ken Moroney AO APM and Mick Palmer AO APM, *Report of the Panel on Unexplained Wealth* (Final Report, February 2014) 9 ('Report of the Panel on Unexplained Wealth').
[21] Explanatory Memorandum, Unexplained Wealth Legislation Amendment Bill 2018 (Cth), 1 ('UWLA Bill').
[22] *POCA* (n 1) s 20A.
[23] Ibid s 179E.

- new equitable sharing arrangements to ensure that the contributions of Commonwealth, state, territory and foreign law enforcement entities to investigating and litigating proceeds of crime matters and associated criminal proceedings are appropriately recognised through the sharing of recovered proceeds, and
- amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) allowing Commonwealth, territory and '*participating state'* law enforcement agencies to use, communicate and record lawfully intercepted information in relation to unexplained wealth investigations and proceedings.[24]

As Figure 2 demonstrates, the key features of the Scheme are:

- the referral of powers from participating states and territories to allow for the Commonwealth to rely on state-based offences to pursue unexplained wealth matters under the POCA
- the Commonwealth providing access to specified information gathering powers under the POCA, to participating states and territories, and
- providing for equitable sharing between jurisdictions for assets confiscated as a result of collaborative action.

Figure 2: **Interaction between the relevant elements of the Scheme**



[24] *UWLA Bill* (n 19), 1-2.

Referral of powers

Through a limited text-based referral of powers from participating state parliaments to the Commonwealth Parliament, the Commonwealth unexplained wealth provisions may operate in relation to relevant state offences, in addition to those offences with a link to a Commonwealth head of power.[25]

The Agreement commits parties to introduce the legislation required for the Scheme and establishes procedures for consultation and agreement between the parties before the enactment, amendment or repeal of any legislation that would amend or alter the Scheme.[26] To date, the Commonwealth has not undertaken any unexplained wealth matters in relation to state offences.

Information gathering powers

As outlined in the Agreement, amendments made to the TIA Act allows for participating jurisdictions to access specified information gathering powers for unexplained wealth investigations.[27] Participating jurisdictions also agreed to identify and develop appropriate measures to enhance information sharing arrangements to support unexplained wealth and organised crime investigations.[28] Participating jurisdictions must cause an annual report to their responsible Minister, and provide a copy to the Commonwealth Minister.[29] To date, no participating jurisdiction has reported use of the Commonwealth information gathering powers for unexplained wealth investigations.

Equitable sharing

Under the Scheme, Commonwealth, state and territory law enforcement agencies retain autonomy for investigating relevant matters within their jurisdiction.[30] However, where a state or territory authority is seeking, or obtains, a substantive asset confiscation order of an amount equal to, or more than $100,000, the authority is required to notify the other participating states and territories.[31] This requirement is not applicable where a state or territory determines that the matter is not, or will not become a cross-jurisdictional matter.[32] The forfeiting jurisdiction is then to notify the CJC within 60 days of a final order, negotiated settlement, or other forfeiture order. Table 2 provides an overview of notifications made by each participating jurisdiction, the matters deemed shareable, and shareable matters that have been finalised.

[25] Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth, Clause 3.1 ('Intergovernmental Agreement').
[26] Ibid, Clause 3.2.
[27] Ibid, Clause 5.1.
[28] Ibid, Clause 5.4.
[29] Ibid, Clause 4.2.
[30] Ibid, Clause 4.1.
[31] A substantive asset confiscation order includes a restraining order or forfeiture order, or similar. Ibid, Clause 4.5.4.
[32] Ibid, Clause 4.5.6.

Table 2: Sharing Outcomes

Originating Jurisdiction	Notification Count	Notification Total Value	Notification Shareable Count	Notification Shareable Value	Finalised Shared	Finalised Shared Value
ACT	12	$9,940,000	-	-	-	-
Cth	197	$283,070,000	13	$21,420,000	6	$5,040,000
NSW	313	$179,190,000	44	$43,300,000	38	$20,090,000
NT	10	$8,210,000	2	$720,000	-	-
SA	36	$13,170,000	4	$2,620,000	2	$400,000
Total	**568**	**$493,580,000**	**63**	**$68,060,000**	**47**	**$25,530,000**

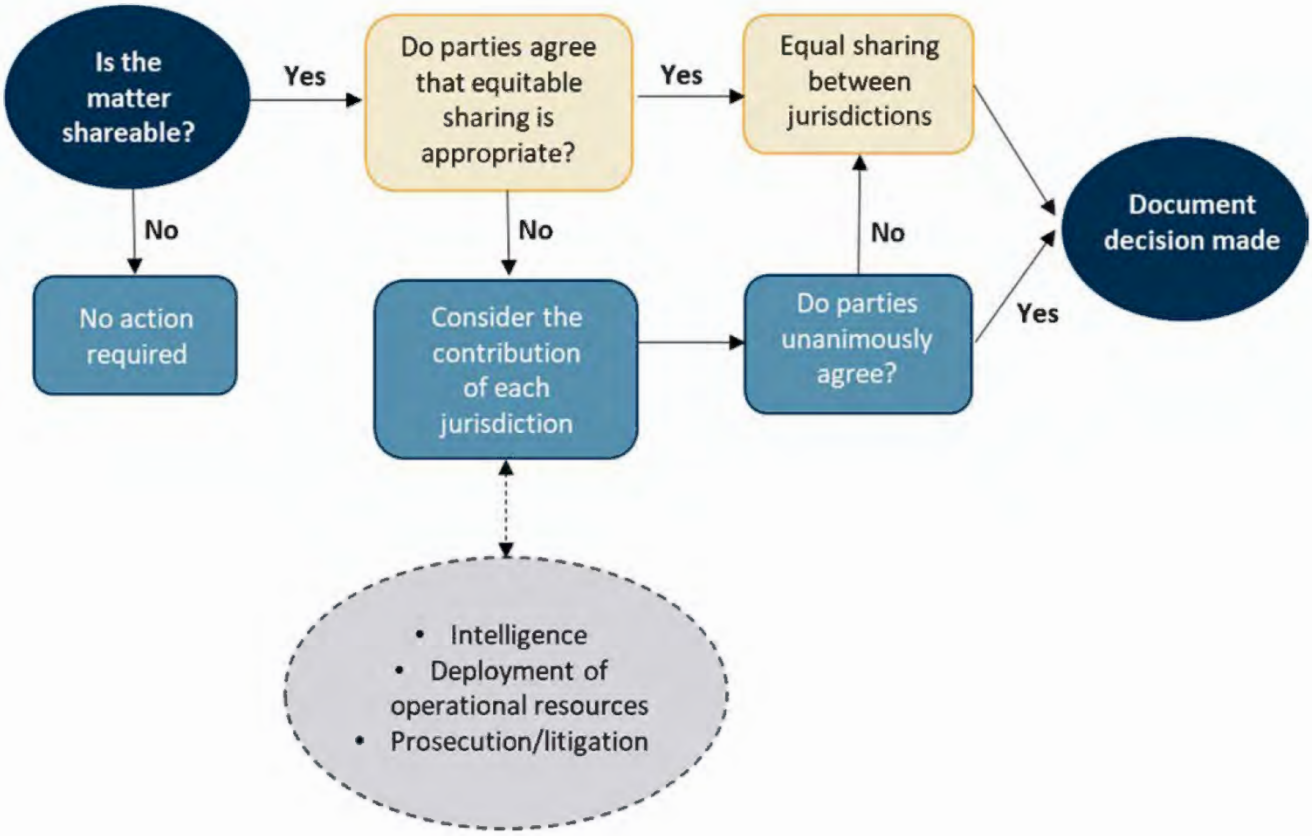
'Finalised Shared' and 'Finalised Shared Value' represent the payments received as at 26 February 2024, excluding payments that have been agreed but not yet processed.
All dollar values are in AUD.

The CJC is responsible for deciding matters in relation to equitable sharing of confiscated assets. Each participating jurisdiction is represented on the CJC and the AFP is the Chair. Once notified of a final order, the CJC forms a sub-committee consisting of the forfeiting jurisdiction and any other participating jurisdiction that has contributed to the matter. The sub-committee members are entitled to equal shares of the proceeds unless it is unanimously decided to vary this presumption. The specified payment is then made from the forfeiting jurisdiction to the relevant participating jurisdictions within a specified period.[33]

Figure 3 outlines the guiding principles utilised by the CJC and its sub-committees for determining equitable sharing of confiscated assets.

[33] Ibid, Clause 6.3.

Figure 3: Equitable sharing guiding principles



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Chapter 5: Effectiveness of the Scheme

The primary objectives of the arrangements contained in the Agreement are to support cooperation between law enforcement agencies and assist them to:

- deprive persons of the proceeds benefits and instruments associated with serious and organised crime
- prevent illicit funds being reinvested to support further criminal activity
- deter, disrupt, and dismantle criminal syndicates, and
- reduce the harm caused by serious and organised crime to the community.

The effectiveness of the Scheme, and its processes and arrangements were considered with regard to the above objectives within the context of the Terms of Reference. The below discussion reflects the main themes raised during consultation with participating jurisdictions.

Equitable sharing

Interjurisdictional collaboration to tackle serious and organised criminal activity, has in the past, been impacted by the lack of a national equitable sharing mechanism for assets confiscated from collaborative actions. The equitable sharing arrangements have significantly contributed to overcoming this barrier to cooperation between participating jurisdictions and is a key feature of the Scheme.

Since the Scheme's commencement in December 2018, the equitable sharing matters referred to in the Scheme have a combined value of $493.5 million as at 26 February 2024. Of this amount, approximately $68 million is considered shareable under the Scheme, with $25.5 million having been finalised and distributed according to the decisions of the CJC sub-committees (Table 2 refers).

The equitable sharing arrangements reflect the objectives of the Scheme to support collaboration between law enforcement agencies on unexplained wealth matters. These arrangements have extended beyond just unexplained wealth to asset confiscation matters as well. Some non-participating jurisdictions commented they have discussed the development of separate sharing arrangements with the Commonwealth, based on the arrangements under the Scheme, where there has been potential to collaborate on asset confiscation cases.

Equitable sharing with non-participating jurisdictions, as depicted in Table 3, is possible under the Scheme,[34] however it can require additional approval procedures to be undertaken. These additional requirements can act as a hurdle to furthering collaborative action on asset confiscation. The equitable sharing arrangements under the Scheme envisaged the context of sharing with non-participating jurisdictions in circumstances where there were two or more participating jurisdictions also involved in the cross-jurisdictional matter. However, the reality has been that the cross-jurisdictional matters have been between one participating jurisdiction and one non-participating jurisdiction. This has led to situations where the singular participating jurisdiction has had to make a unilateral decision, under the Scheme, to share with a non-participating jurisdiction, and thus has had sole responsibility for using the sharing guidelines to determine the amount that should be shared. As at 26 February 2024 there have been four matters which have been shared, specifically with Western Australia (Table 3 refers). However, to date only one of these matters has been finalised.

[34] Ibid, Clause 6.3.

Table 3: Sharing with non-participating jurisdictions

Forfeiting Jurisdiction	Receiving Jurisdiction	Sharable Notification Value	Agreed Sharing Amount	Finalised Shared Value
NSW	WA	$276,000	$92,000	-
NSW	WA	$192,000	$64,000	-
Cth	WA	$2,217,000	$1,552,000	$1,552,000
Cth	WA	$698,000	$628,000	-
All dollar values are in AUD.				

Legislation in Appendix B to the Agreement lists each participating jurisdiction's laws that are covered by the equitable sharing arrangements under the Scheme. The legislation listed in Appendix B covers not only unexplained wealth legislation, but different aspects of asset confiscation legislation more broadly. This may reflect the fact that some jurisdictions have separate unexplained wealth and asset confiscation legislation, whilst others have a combined legislative framework. The Agreement does not specify that equitable sharing arrangements should only apply to unexplained wealth matters. The Agreement refers *'to equitable sharing from joint criminal asset confiscation action.'*[35] This is implemented in practice through the sharing of assets confiscated through conviction and non-conviction-based asset confiscation matters, in addition to unexplained wealth matters.

However, Appendix B covers most, but not all, of each participating jurisdictions' asset confiscation legislation. The Agreement requires participating jurisdictions to consult the Commonwealth on any draft legislation which may impact the Scheme, however this has not always taken place. This has resulted in certain pieces of legislation remaining outside the scope of the Scheme, and thus not covered by the equitable sharing arrangements. For example, the *Confiscation of Proceeds of Crime Legislation Amendment Act 2022* (NSW) (CPCLA Act) that give effect to administrative forfeiture notices introduced to NSW in February 2023 remains outside the scope of the Scheme, and thus outside equitable sharing provisions.

Equitable sharing procedures

In relation to the procedures for equitably sharing confiscated assets, participating jurisdictions noted they have been successfully implemented. The equitable sharing procedures are viewed as a reliable and transparent mechanism. Participating jurisdictions also noted no concerns with the equitable sharing guiding principles (Figure 3 refers) and supported their continued operation.

As outlined above, as part of the equitable sharing arrangements, jurisdictions are required to notify other participating jurisdictions when they are seeking any substantial asset confiscation order. For example, when seeking a restraining or forfeiture order. Participating jurisdictions are only required to make this notification where the value of the matter is of $100,000 or more. During consultations, participating jurisdictions noted that this was a relatively low threshold and resulted in a significant number of notifications being made for matters of a relatively low value. As Table 4 demonstrates, at present approximately 63% of the 568 notified matters since the Scheme commencement are between $100,000 and $500,000 whilst these matters represent only about 17% of the total value of notified matters under the Scheme.

[35] Ibid, Clause 6.1.1.

Table 4: Notification outcomes

Notification Estimate	Notification Count	Notification Total Value	Notification Shareable Count	Shareable Notification Value
Less than $250,000	219	$35,040,000	24	$3,840,000
$250,000 - $499,999	137	$48,390,000	9	$3,210,000
$500,000 - $749,999	59	$35,900,000	7	$4,570,000
$750,000 - $999,999	30	$25,660,000	5	$4,320,000
$1,000,000 - $1,499,999	45	$53,450,000	5	$5,980,000
$1,500,000 - $4,999,999	63	$156,450,000	11	$25,050,000
Greater than $5,000,000	15	$138,690,000	2	$21,090,000
Total	**568**	**$493,580,000**	**63**	**$68,060,000**
All dollar values are in AUD.				

As Table 4 demonstrates, the total amount relating to shareable matters is significantly higher for matters over $500,000. Of the 356 notifications under $499,999, 33 were considered shareable, with these 33 matters having a combined total notification value of just $7.05 million. By comparison, of the 212 notifications above $500,000, 30 were considered sharable matters, and had a combined total value $61.01 million. Moreover, as outlined by Table 5, 74.72% of sharable notifications received that are under $500,000 are made by states and territories. This is compared with 49.53% of sharable notifications received over $500,000 originating from states and territories. Participating jurisdictions noted that focusing on matters over $500,000 would reduce the associated administrative burden. It was also noted this would better focus the Scheme towards the more serious end of organised crime. As organised crime is profit motivated, matters involving organised crime groups are more likely to involve substantial amounts, well into the millions. Raising the reporting threshold would support the objectives of the Scheme in targeting significant and high-level offending.

Table 5: Notifications by jurisdiction

Originating Jurisdiction	Notifications Under $500,000	Total Value	Notifications Over $500,000	Total Value
ACT	6 (1.69%)	$1,030,000	6 (2.83%)	$8,910,000
Cth	90 (25.28%)	$20,840,000	107 (50.47%)	$262,230,000
NSW	224 (62.92%)	$54,060,000	89 (41.98%)	$125,130,000
NT	6 (1.69%)	$1,100,000	4 (1.89%)	7,110,000
SA	30 (8.43%)	$6,400,000	6 (2.83%)	6,770,000
Total	**356 (100%)**	**$83,430,000**	**212 (100%)**	**410,150,000**
All dollar values are in AUD.				

The equitable sharing arrangements under the Scheme have proved to be effective and support collaborative action for participating jurisdictions. However, the differentiation between participating and non-participating jurisdictions has resulted in an unintended barrier to collaborative action that needs to be addressed.

Use of information gathering powers

The introduction of the Scheme coincided with amendments to the POCA to permit law enforcement agencies of participating jurisdictions to utilise information gathering powers for the purposes of their unexplained wealth matters. These powers include the ability to apply for and issue production orders, notices to financial institutions and access telecommunication intercepts.[36] The Agreement requires states and territories to report annually on the use of these powers. To date there has been no reported usage of the information gathering provisions by participating jurisdictions.

When asked about the lack of use of the Scheme's information gathering powers, participating jurisdictions commented that their current legislative frameworks supported their investigative needs. Some jurisdictions pointed out that they were unfamiliar with the circumstances under which it would be preferable to use the Commonwealth powers as well as the interplay between their jurisdiction's legislation and the POCA. Moreover, the procedures for, and familiarisation with, accessing such powers are unclear. Stakeholders also noted that the application of the powers are limited to unexplained wealth matters. As most jurisdictions have not undertaken many unexplained wealth matters there has been limited ability to develop familiarity with the information gathering powers available through the Scheme.

Each jurisdiction's information gathering powers for asset confiscation matters varies. Where there are gaps or differences in information gathering arrangements, it can create additional barriers to efficiently pursuing investigations. For example, the CPFA (NT) does not provide for surveillance powers, or for a power to execute a search warrant electronically.[37] This has led to the relevant law enforcement agency experiencing difficulties in gathering relevant and often vital information, where third parties do not have a physical presence in the NT. Moreover, some jurisdictions noted difficulties in obtaining and processing data sets from third-parties, such as financial institutions. One jurisdiction noted that they often only serve notices for information to some financial

[36] *POCA* (n 1), Parts 3-2, 3-3.
[37] *Criminal Property Forfeiture Act 2002* (NT), Division 6.

institutions due to the time taken to receive, process and then investigate the data. The information is also often not provided in a format that is conducive to analysis. They noted this often leads to only obvious or more easily identifiable assets being targeted by their investigations.

The information gathering provisions of the Scheme have not been used. This is in part due to lack of understanding and familiarity. The absence of assistance to understand the potential and application of the Commonwealth information gathering has contributed to their lack of use.

Information sharing

The Scheme emphasises the importance of information sharing between jurisdictions. The Agreement states '*any information that relates to the detection, investigation, and litigation of proceeds of crime should be shared between one another, where lawful and possible.*'[38] This clause refers to '*litigation of proceeds of crime*' which is taken to be inclusive of all asset confiscation litigation, as captured by Appendix B to the Agreement. It is important to note the Scheme's information sharing improvements are not constrained to participating jurisdictions and as such, are aimed at improving lawful information flows across all jurisdictions.

Leading up to the commencement of the Scheme, the Commonwealth implemented a number of measures to improve and increase information sharing from agencies such as the ABF, ATO and Services Australia. Some of these measures were specific to unexplained wealth matters, whilst others covered unexplained wealth and asset confiscation generally. The Agreement committed the Department of Home Affairs, the ATO and Services Australia to progress a further twelve information sharing improvements within six months of commencement of the Agreement. Not all commitments have been undertaken as a range of these actions have been superseded by alternative measures to improve information sharing requests.

Success in tackling serious and organised crime depends largely on information gathering powers and sharing capabilities for law enforcement agencies. The effectiveness and efficiency of these information sharing arrangements are often determined by the procedures that surround them. An example of this is how information sharing by the ATO operates in practice in response to general law enforcement agency requests and Taskforce requests. Taskforces as defined under the *Taxation Administration Act 1953* (Cth) (TAA) have dedicated ATO staffing who are familiar with their counterparts in other agencies. [39] As Taskforces have established governance structures in place which oversee and direct their operations, this provides a level of assurance around the intent and purpose of the Taskforces functions which facilitates having enduring oral disclosure authorisations in place. Given general law enforcement agency requests do not have an established governance framework, they are required to be managed on a case-by-case basis. Additionally, a disclosure by the ATO to a Taskforce can be made to any Taskforce officer as defined in the legislation. Whereas a general law enforcement agency request must be disclosed to an appropriately authorised officer, which can differ between law enforcement agencies depending upon the approach taken, and as such can take additional time to process. Consistent with all requests made under the TAA, Senior Executive Service (SES) agreement is a requirement to facilitate disclosure, with dedicated SES for Taskforce functions and a general pool of SES for all other law enforcement agency requests.

Most agencies have some form of specific liaison arrangements with law enforcement bodies to help channel and assist with information requests. However, these arrangements are not always consistent. For example, requests by most law enforcement agencies for information from Services Australia are coordinated through a designated officer within the law enforcement agency, who then

[38] *Intergovernmental Agreement* (n 23), Clause 5.1.2.
[39] *Taxation Administration Act 1953* (Cth), s 355-70.

liaises with the Services Australia Information Release Section. However, Queensland Police do not have a designated agency contact, rather each officer requesting information must liaise directly with the Information Release Section. Whilst this is may appear to be a minor difference, a lack of national consistency in relation to information sharing procedures can have a significant impact on the efficiency of access to information, particularly where more information from the law enforcement agency is needed to appropriately prioritise information sharing requests.

Stakeholders have indicated that the CJC, which was established by the Agreement and is chaired by the AFP, has been a useful forum for sharing of information on the operation of the Scheme. The CJC, whilst overseeing the equitable sharing arrangements of the Scheme is similar to the National Proceeds of Crime Forum (the Forum), and also chaired by the AFP. The Forum commenced in 2021 as a means of including all states and territories in discussions on asset confiscation practices. The Scheme, whilst aiming to improve cooperation could be seen to have unintentionally created a divide between participating and non-participating states and this has impacted information flows and joint operations.

The complexity that often characterises asset confiscation investigations is in no small part due to the time-consuming processes of obtaining information from third parties. In relation to information sharing between jurisdictional law enforcement agencies there have been improvements under the Scheme as shown by the increases in collaborative action and level of equitably shared proceeds. As the sophistication of organised crime syndicates and networks increases, so to does there need to be a correspondingly sustained effort to reduce barriers to lawful information sharing between jurisdictions.

Scheme support

The Scheme established the CJC, chaired by the AFP to manage and where necessary decide matters in relation to equitable sharing arrangements. The CJC meets quarterly and has developed operating arrangements that have enabled the equitable sharing arrangements to function well. In the view of participating jurisdictions, the CJC has functioned well and been a point of reference for clarification on the equitable sharing aspects of the Scheme.

The objective of the Scheme is to support cooperation between law enforcement agencies and assist them to pursue proceeds of crime matters. There is no body or group that is charged with furthering the Schemes objectives. During consultations on this report there were many issues and potential improvements raised by jurisdictions that could be actioned that would assist in cooperative action. The lack of such a body with responsibility for furthering actions in support of the Schemes objectives has reduced overall effectiveness.

Resourcing

Unexplained wealth proceedings generally require a calculation to be made by the court, to determine the difference between a person's legitimate wealth and wealth that has been illegally derived. This therefore, requires significant levels of time and resourcing to undertake investigations to prepare sufficient evidence for litigation. Particularly as investigative powers are generally used throughout proceedings to supplement and test evidence which supports the calculation of the respondent's wealth.

The way each jurisdiction approaches the calculation of a respondent's unexplained wealth varies. This often depends on each jurisdictions' definitions of '*wealth*' and '*total wealth'*, and whether an unexplained wealth restraining order is required before a forfeiture order can be made. Nonetheless, in all proceedings evidence adduced to support an unexplained wealth order must be tested by the court to support the calculation of the amount payable under the order. Unexplained wealth matters may be further complicated if the respondent has access to professional legal and financial services that wittingly, or unwittingly, enables them to circumvent traditional investigation practices, or to obfuscate the origins of their assets. Investigations need to be efficient to ensure assets are identified and either frozen or restrained before they can be moved or dissipated. This requires specialist skills in finance and intelligence analysis, forensic accounting and in some cases coercive powers of inquiry. This must also be balanced with the fact that confiscation proceedings can have associated criminal investigations, which have separate procedural and operational considerations.

The relative scarcity of experienced specialist financial investigation and litigation personnel has often been mentioned by stakeholders as a key issue in the decision to pursue unexplained wealth matters. Furthermore, the capacity to retain key staff given the competition for those skills from the private and other parts of the public sector has impacted the capacity of some jurisdictions to undertake asset confiscation work. During consultation some jurisdictions noted that they have only a small number of staff with a depth of skill and experience capable of handling complex cases which, in turn has an impact on the selection and management of cases. Jurisdictions that have experienced the greatest successes, are those which have sufficient resources to employ a designated and independent team to implement asset confiscation legislation. For example, the multi-agency CACT employed by the Commonwealth successfully brings together skills and experience from a range of agencies including the AFP, ACIC, AUSTRAC, ATO and ABF.

All jurisdictions have difficulty attracting suitably skilled and experienced staff and this is especially so for smaller states and territories. This limitation alone can have the impact of reducing the number of unexplained wealth matters pursued. Without the right resources that can be dedicated to complex and lengthy unexplained wealth and proceeds of crime cases there is little prospect of success. There is a concern that the less well-resourced jurisdictions in this regard could potentially become the focus of *'jurisdiction shopping'* by organised crime groups.

Pursuing Commonwealth unexplained wealth matters based on state offences

The Scheme enables the Commonwealth greater opportunity to pursue unexplained wealth matters by widening the categories of predicate offences to include appropriate state offences. This is in addition to existing relevant Commonwealth predicate offences including, foreign indictable offences and state offences with a federal aspect. To date there has been no application of the expanded offence provisions enabled under the Scheme. The referral of powers under the Scheme was required to address perceived deficiencies in the Commonwealth's original unexplained wealth laws, which were limited to Commonwealth offences for Constitutional reasons. The referral of powers enables the CACT to use state offences from participating jurisdictions for the purposes of unexplained wealth matters.

To date the Commonwealth have not used these powers under the Scheme. The AFP during consultation, noted their ability to utilise relevant commonwealth predicate offences to undertake unexplained wealth or alternative asset confiscation matters. For example, the money-laundering offences contained in Division 400 of the Commonwealth *Criminal Code* which provide that dealing with money or property that is the proceeds of '*indictable crimes'* or '*general crimes'* or that is, or will become an instrument of crime is an offence. These offences are often relied upon as predicate offences by the AFP to undertake asset confiscation matters. Both the proceeds of indictable offences and of general crime can include money or property realised or derived from the commission of a state or territory indictable offence.[40] Thus, it is common for the AFP to change and adapt their approach to proceedings depending on the particular factual circumstances of the matter. Since the commencement of the Scheme the AFP have undertaken three unexplained wealth cases. Two of the cases were finalised with the third matter concluded by other means. In these cases, it was determined that the most appropriate response to target and confiscate the relevant illicit wealth was through alternative asset confiscation streams.

The lack of use of the core aspects of the Scheme, being the additional information gathering powers and the referral of powers to the Commonwealth to undertake unexplained wealth matters based on state offences, reflects that most jurisdictions have utilised their unexplained wealth legislation sparingly and often pursue asset confiscation through other legislative means. In recognising the significant potential of the legislation, jurisdictions noted the complex, resource intensive and lengthy nature of undertaking unexplained wealth cases has contributed to its low usage. This is so, particularly in comparison to the utilisation of other asset confiscation legislation. A number of stakeholders mentioned that a *'return on investment'* had to be carefully considered before pursuing very complex unexplained wealth investigations that take a long time, often years to resolve and tie up their limited number of specialised investigators and litigators.

Another issue is the number of agencies involved in the process of unexplained wealth cases. The number of agencies involved can influence the path an unexplained wealth matter can take as differing priorities, resource levels and experience can impact how or, in some cases, if a matter proceeds. It was noted by some stakeholders that the most effective unexplained wealth frameworks are those with combined investigation and litigation arrangements. Other aspects that influence the use of unexplained wealth powers include the respective jurisdictional emphasis on litigated or negotiated outcomes, as well as whether civil unexplained wealth action run in parallel or sequentially to a related criminal action. The impact of COVID-19 has in recent times also influenced the number and duration of unexplained wealth cases undertaken nationally. Notwithstanding the various factors in the relatively low use of unexplained wealth provisions, a number of stakeholders commented that unexplained wealth is a powerful tool that has been used as leverage to settle matters under other parts of their asset confiscation framework.

The pursuit of alternative asset confiscation action may be the result of most unexplained wealth matters in jurisdictions which require the state to provide evidence of a reasonable suspicion of underlying criminal activity. Once the evidence required to establish this reasonable suspicion is collected it may be more effective to pursue non-conviction-based asset recovery litigation.

[40] *Criminal Code Act 1995* (Cth), sch 1 ('Criminal Code'), s 400.1.

For the Commonwealth, it is often more effective to pursue non-conviction-based asset confiscation proceedings under the POCA rather than via unexplained wealth proceedings. This is due to the operation of s 400.9(2)(c) of the Commonwealth *Criminal Code*. This section provides that a person is guilty of an offence where the value of the money and property involved in the suspected conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant's income and expenditure. This may then be utilised as a predicate offence to pursue proceeds of crime litigation rather than unexplained wealth litigation. For example, the Commonwealth can provide evidence of a reasonable suspicion that the target is in possession of property reasonably suspected of being the proceeds of crime, where it is suspected they have unexplained wealth. This in effect works as a quasi-unexplained wealth offence, allowing the AFP to undertake alternative non-conviction-based proceedings rather than having to undertake the more laborious, resource intensive and often riskier unexplained wealth proceedings. This adaptive approach is considered common when managing asset confiscation cases. Cases can move between conviction-based and non-conviction-based proceedings and case management strategies can evolve depending on the risk, emerging evidence and factual circumstances as outlined by the case example below.

Case example: Operation Enguri

In May 2016, the AFP-led CACT commenced an investigation, known as Operation Enguri, which identified a person of interest residing in Western Australia. This person possessed approximately $1 million in assets, spent hundreds of thousands of dollars a year to facilitate their lifestyle, and did not appear to have any legitimate source of income. Investigations indicated the suspect had created a trust structure to hide their assets, and was using family members and other associates to make the funds appear legitimate. The CACT further suspected the suspect had links to outlaw motorcycle gangs operating in Perth.

The Supreme Court of Western Australia made an unexplained wealth restraining order in August 2017. However, due to the compelling evidence gathered by the CACT, this matter was ultimately resolved by consent. The outcome was that all restrained property was forfeited to the Commonwealth, rather than a final unexplained wealth order being made for a monetary amount. To facilitate this outcome, the property subject to the unexplained wealth restraining order was restrained under section 19 of the POCA (asset directed restraint based on a suspicion that the property is proceeds and/or an instrument of crime) and a related forfeiture order was made, both by consent, in October 2020. The confiscated property included several vehicles, real property, and cash, amounting to approximately $1 million in confiscated assets.

The flexibility and the range of tools offered by the POCA was crucial to achieve the legislation's objectives in this matter, in which there was no related criminal investigation or prosecution. Without this framework, preparations to seek a final unexplained wealth order would have been highly resource intensive and involved complex legal and factual considerations

During the course of consultation, the AFP suggested improvements and clarifications under POCA that would assist in the use of unexplained wealth orders. Whilst noting they are outside the specific Terms of Reference for this review they are worthy of consideration as a means of removing barriers to the AFP pursuing unexplained wealth matters. They include:

- the definitions of '*wealth*' and '*total wealth*' for the purposes of an unexplained wealth order being clarified
- harmonising the processes and requirements for service of documents
- powers to search for and seize digital assets, and
- powers to access information relating to digital assets being improved.

Participation

The effectiveness of the Scheme has been reduced by having only some jurisdictions as parties to the arrangements. Without all jurisdictions being participants, it is not a truly national scheme. The reasons given at the time as to why some states and territories did not join the Scheme have included concerns about the referral of powers and the impact on jurisdiction based unexplained wealth matters. During the consultations with non-participating jurisdictions it was apparent that concerns regarding the sharing arrangements may have been a significant factor in the decisions not to participate in the Scheme when it was first discussed in detail. Misunderstandings of the intention or misinterpretation of the proposed equitable sharing mechanisms may, at the time, have contributed to their concerns. Political differences and political will was also seen as a factor in the decision to participate.

The lack of advocacy for, and promotion of, the Scheme was mentioned several times in discussions. Comments have also been made that indicated the process of developing the Scheme did not adequately engage Ministers in the strategic decisions. This could reflect the four and a half years the Scheme took to come to fruition noting that a number of Ministers and senior officials changed in that time. During consultations with stakeholders on the report it was apparent that the open discussions on the workings and potential improvements to the Scheme were welcomed. Some non-participating jurisdictions at an officer level indicated an interest in how the Scheme could be improved to better meet their needs in pursuing asset confiscation matters.

National consistency

One of the main drivers behind the establishment of the Scheme was to establish a national approach to target unexplained wealth.[41] Initially, there were limited concerns associated with each jurisdiction implementing its own unexplained wealth or asset confiscation framework, or that each framework differed in some respects. However, the lack of uniformity and cohesion between frameworks has created barriers to interjurisdictional cooperation, and ultimately to targeting serious and organised crime. Previously a referral of powers to the Commonwealth to create national unexplained wealth laws, and seeking agreement from the states and territories to develop harmonised laws had been considered. However, the Scheme was seen as the most practical and achievable model to realising a national approach to unexplained wealth.[42]

However, as previously noted, without the participation of all jurisdictions in the Scheme, a truly national approach to unexplained wealth is difficult to establish. Both participating and non-participating jurisdictions alike, noted the need for national consistency across a number of areas, including definitions within legislation, procedural requirements, access to information, information sharing procedures and dealing with digital assets. One jurisdiction noted legislative inconsistencies between jurisdiction's often means teams will need to compare legislation side by side, line by line, to ensure there are no issues in pursuing a cross-jurisdictional operation.

Stakeholders noted there was a lack of leadership in relation to pursuing best practice for procedural and definitional improvements. Stakeholders agreed that there would be benefit in aligning, where possible, procedural and definitional provisions to improve operational efficiencies for cross-jurisdictional matters. For example, establishing best practice in relation to the search for and seizure of digital assets. Other matters were mentioned where improvements or clarification would be of assistance such as the interplay of unexplained wealth orders on superannuation and bankruptcy matters.

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[41] *Explanatory Memorandum UWLA Bill* (n 19), 1.

[42] *Report of the Panel on Unexplained Wealth* (n 18), 4-5.

Legislative, procedural and operational inconsistencies are a natural result of each jurisdiction having unique asset confiscation frameworks. Whilst some jurisdictions have made significant progress in developing their asset confiscation frameworks, other jurisdiction's frameworks have not kept pace with the evolving criminal environment. The most significant differences between each jurisdiction's legislative framework include:

- whether unexplained wealth provisions are contained in a stand-alone piece of legislation or contained in asset confiscation legislation
- whether a link to a criminal offence is required to pursue confiscation action
- how '*total wealth*' is defined or calculated
- what information gathering powers are available to authorities, and
- what alternative asset confiscation options are available.

In examining the differences between frameworks, it should be reiterated that unexplained wealth laws are only one part of each jurisdiction's broader asset confiscation framework (Appendix B refers). Whilst the different types of asset confiscation laws are utilised for different purposes, it is their collective use that forms a robust framework to take the proceeds and benefits out of serious and organised crime. In considering the legislative, procedural and operational differences, not only in the context of unexplained wealth but in asset confiscation more generally, a question arises as to whether the Scheme's remit is broad enough to establish a truly national approach.

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Chapter 6: Improving the Scheme

A Reframed National Scheme

The importance of the actions to target the proceeds, instruments and benefits of crime cannot be underestimated when faced with the continued increase in the reach and impact of organised crime. As previously noted, the Scheme is one element in the network of legislation, practice, policy and procedures in operation across Australian jurisdictions that target the proceeds of criminal activity. Each jurisdiction has developed their own asset confiscation frameworks, all of which include unexplained wealth laws. This reflects the significant impact asset confiscation can have on serious and organised crime.

Whilst labelled the National Cooperative Scheme on Unexplained Wealth, the Scheme does not engage with unexplained wealth exclusively. The Scheme consists of a mixture of elements which support the use of unexplained wealth laws, and asset confiscation more broadly. This is best seen in the information sharing and equitable sharing arrangements that apply not only to unexplained wealth matters but also to proceeds of crime matters.

The Scheme is clearly an important element in combatting serious and organised crime. However, it would benefit from being reframed to clarify its scope and structure. It is proposed that the Scheme be retained and reframed as the National Scheme on Unexplained Wealth and Criminal Assets Confiscation. The reframed scheme would support jurisdictional cooperation across all aspects of asset confiscation, including unexplained wealth, conviction-based and non-conviction-based asset confiscation. This would overcome some of the confusion between some elements covering only unexplained wealth and other elements that cover asset confiscation generally.

The objectives of the reframed scheme should continue to focus on supporting collaboration between law enforcement agencies to remove the proceeds, instruments and benefits from serious and organised crime. The reframing would also provide greater consistency across jurisdictions in the pursuit of criminal assets, rather than the Scheme being primarily focused on unexplained wealth.

Recommendation 1

It is recommended that the National Cooperative Scheme on Unexplained Wealth be reframed as a National Scheme on Unexplained Wealth and Criminal Assets Confiscation. The focus of the reframed Scheme should be extended beyond unexplained wealth to all aspects of asset confiscation, including to conviction-based, non-conviction based, administrative and automatic asset confiscation.

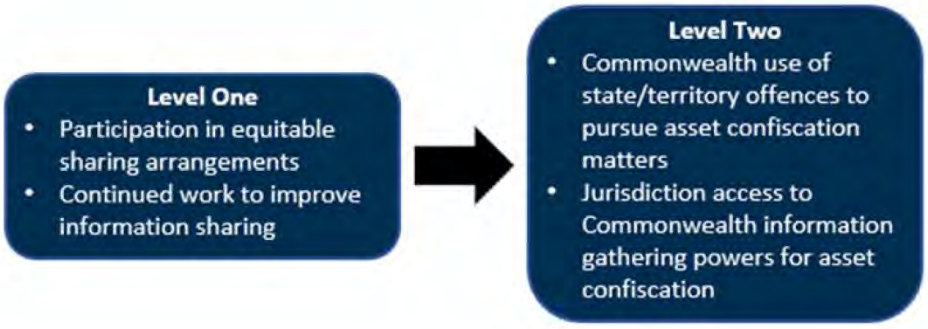
The objectives of the reframed Scheme should continue to focus on supporting interjurisdictional collaboration to remove the proceeds, instruments and benefits from serious and organised crime.

A reframed Scheme provides the opportunity to reset the relationships between the Commonwealth and states and territories. Currently there is a divide between those jurisdictions participating in the Scheme and those operating independently. This has created unintended barriers to achieving the Scheme's primary objective of collaborative interjurisdictional action on unexplained wealth and proceeds of crime.

When considering the structure of the reframed Scheme it is proposed that it should be built up from the most successful element of the current Scheme as per Figure 4 below. The equitable sharing arrangements have worked well and have been a catalyst to collaborative action and as such

would be the first level of the reframed Scheme. This would provide a platform for all jurisdictions to participate. Additional components of the reframed Scheme would make up level two and include expanded access to Commonwealth information gathering powers and the Commonwealth's use of state-based offences to pursue criminal asset confiscation matters. These additional components would be open to jurisdictions participation, at their discretion.

Figure 4: Proposed structure of the reframed Scheme



Recommendation 2

It is recommended that all jurisdictions be engaged in the process of reframing the Scheme and be invited to participate in a truly national effort to tackle serious and organised crime. Currently there is a divide between those jurisdictions participating in the Scheme and those operating independently. A reframed Scheme provides an opportunity to re-engage all Australian jurisdictions in a national collaborative effort.

It is proposed that the reframed Scheme be structured with two levels of involvement. The first level would cover the equitable sharing arrangements. The second level would be for those jurisdictions that wish to go further and access the information gathering powers of the Commonwealth and enable the Commonwealth to utilise state-based predicate offences to pursue criminal asset confiscation matters. The two-level structure of the reframed Scheme will enable all jurisdictions to participate at a level that best works with their own asset confiscation framework.

The reframing of the Scheme would require a number of legislative amendments. The existing unexplained wealth provisions of the POCA should be retained.[43] Legislative amendments to the POCA should be made to expand state and territory access to the relevant information gathering powers from unexplained wealth matters, to asset confiscation matters generally.

Additionally, participating states and territories should consider undertaking a referral of powers to enable the Commonwealth to utilise state offences to undertake asset confiscation matters, rather than only unexplained wealth matters. As the referral of powers has previously been a pivotal issue, any advancement of this action should be preceded by an assessment of the need for, and benefits from, an extension of powers to cover asset confiscation, as this may vary between jurisdictions.

The administrative requirements of the reframed Scheme could be simplified by overcoming the need for updating the Agreement every time there is additions or amendments to jurisdictions proceeds of crime legislation that impacts equitable sharing arrangements. This could be achieved by the replacement of Appendix A and B of the Agreement with a general or 'catch all' provision that could cover all asset confiscation provisions.

[43] *POCA* (n 1), Division 2 – The National Unexplained Wealth Provisions.

Recommendation 3
It is recommended that the main legislative components of the Scheme be reframed and/or amended as follows:

1. The information gathering provisions under the *Proceeds of Crime Act 2002* (Cth), which may be utilised by participating jurisdictions for unexplained wealth matters, should be amended to enable utilisation for all asset confiscation matters.

2. The Commonwealth's ability to rely on relevant participating jurisdiction's offences to pursue unexplained wealth matters could be extended to allow for their use in asset confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth). An extension of this nature would require a referral of powers from the States and Territories to the Commonwealth. An assessment of the need and potential utility of such powers should be undertaken prior to any action to advance a referral of powers.

Recommendation 4
It is recommended that the Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth be amended to reflect the scope and structure of the reshaped Scheme and to cover all Australian asset confiscation legislation for the purposes of equitable sharing arrangements.

Presently, amendments must be made to Appendix A and B to the Agreement to capture any new or amended proceeds of crime legislation from participating jurisdictions. It is proposed that Appendix A and B to the Agreement be removed and replaced with a 'catch all' clause. This will support the expansion of the Scheme to cover asset confiscation and, in so doing, support cross-jurisdictional collaboration on a wider range of matters.

Information Gathering Powers

The Scheme provides participating states and territories with access to information gathering powers under the POCA. Such powers, include the ability to issue production orders, notices to financial institutions and access to interception of communications for the purposes of unexplained wealth investigations.[44] Each participating jurisdiction is required to report their usage of these information gathering powers annually. If Recommendation 3 is adopted, and access to the information gathering powers is expanded to include access for all asset confiscation matters, the reporting requirements should be retained as an important transparency measure.

Recommendation 5
It is recommended that the Scheme's current public reporting requirements on each participating jurisdictions' use of the Commonwealth information gathering powers under the *Proceeds of Crime Act 2002* (Cth), be retained.

To date no jurisdiction has reported any use of these powers. This is in part, a reflection of the states and territories being satisfied with their current information gathering powers, and the relatively low level of unexplained wealth matters being undertaken across Australia. Some participating jurisdictions noted that guidance on the procedures to be undertaken to access these powers would be of assistance, if access is needed in the future. To support the implementation of

[44] Ibid Parts 3-2, 3-3.

Recommendation 3, a detailed 'user manual' should be prepared to assist jurisdictions in the application and scope of the provisions in the POCA.

Recommendation 6

It is recommended that a detailed 'user manual' be developed for jurisdictions, to support the use of the Commonwealth information gathering powers. The 'user manual' should detail the application of, procedures required to access and the scope of, the Commonwealth information gathering powers available under the Scheme.

Information Sharing

The Scheme rightly identified the importance of '*endeavours to maintain effective information sharing arrangements that minimise legislative, cultural, and administrative barriers wherever possible*.'[45] A fundamental contributor to the length of time that it takes for investigations of asset confiscation matters in particular, is the information sharing between government agencies and law enforcement agencies. The ATO, Services Australia, AUSTRAC and the ABF are often asked for relevant information during investigations. Law enforcement agencies, noted during consultation that the time in which their requests for information are processed can vary greatly between agencies, and on a case-by-case basis. They also noted the different procedures for requesting information from different agencies can add to the time taken for their requests to be made and then processed. For example, the ATO has an online system for information requests to be made, and a dedicated information disclosure team which has performance targets. Whereas, requests made to Services Australia are made usually through signed PDFs sent via e-mail, and not all jurisdictions have a designated officer who internally coordinates these requests for Services Australia. It is clear that each agency or jurisdiction has separate arrangements and procedures. This is in contrast to the objectives of the Scheme to create nationally consistent approaches to information gathering and sharing.

This is but one example of the many administrative, legislative and procedural issues that impact the effectiveness of the pursuit of proceeds of crime. The reframed Scheme if it is to be successful needs to deal with overcoming barriers to cooperation between law enforcement agencies and other agencies. It is for this reason that the reframed Scheme should have the responsibility to identify, and in partnership with all relevant agencies, resolve barriers to information sharing. A reframed Scheme could extend the information gathering and sharing improvement obligations to agencies that provide relevant information for asset confiscation matters.

Recommendation 7

It is recommended that further work be undertaken through the reframed Scheme to improve information sharing between jurisdictions in the pursuit of criminal asset confiscation matters.

Information sharing is critical to supporting the objectives of the Scheme and the effective detection, investigation and litigation of asset confiscation matters. Where there are procedural or operational barriers to the appropriate sharing of information there needs to be focused national effort to explore how they can be overcome. Under the reframed Scheme the Cooperating Jurisdictions Committee should be given responsibility for identifying and pursuing information sharing improvements.

Recommendation 8

It is recommended that the reframed Scheme work with key law enforcement and intelligence agencies, such as the Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian

[45] Intergovernmental Agreement (n 23), Clause 5.1.3.

Taxation Office (ATO), Australian Border Force (ABF), and Services Australia to create nationally consistent procedures for requesting, accessing relevant information from these agencies.

Equitable Sharing

The benefits of the Scheme have been most apparent in the successful implementation of the equitable sharing arrangements. However, as not all jurisdictions participate in the Scheme the equitable sharing arrangements are limited. This limitation is a barrier to furthering the objectives of the Scheme, which are to improve cross-jurisdictional collaboration. Extending the equitable sharing arrangements to all jurisdictions, will provide more opportunities for cross-jurisdictional matters to be undertaken and improve cooperation between law enforcement agencies. To support this, all jurisdictions should be appropriately represented on the CJC and its sub-committees, in order to fully participate in the equitable sharing decision making.

The effective establishment of equitable sharing arrangements are due in large part to the AFP led CJC. However, participating jurisdictions raised a number of improvements that could be made to the equitable sharing arrangements to ensure the arrangements are inclusive of all asset confiscation matters and support administrative efficiency.

These include:

- removing Appendix B of the Agreement and inserting a 'catch all' provision to capture all forms of asset confiscation legislation in the equitable sharing arrangements
- Reducing the administrative workload by increasing the threshold for reporting substantive orders from $100,000 to $500,000
- enabling non-participating jurisdictions to partake in the equitable sharing arrangements by way of a Memorandum of Understanding, and
- funding the AFP to develop an online portal for reporting and record keeping purposes.

Recommendation 9

It is recommended that the equitable sharing mechanisms be retained as a primary part of the reframed Scheme.

The current equitable sharing arrangements have proven to be successful in encouraging interjurisdictional collaboration. Building on this success, all jurisdictions should be invited to participate in these arrangements. As such, all jurisdictions would have appropriate representation on the Cooperating Jurisdictions Committee.

Recommendation 10

It is recommended the notification threshold under the equitable sharing arrangements of the Scheme be lifted from $100,000 to $500,000. This will reduce administrative reporting requirements and help focus collaborative efforts on the more serious matters.

Recommendation 11

It is recommended that consideration be given to funding the Australian Federal Police to develop an online portal to support the reporting of equitable sharing notifications by jurisdictions and the administration of the Cooperating Jurisdictions Committee under a reframed Scheme.

Supporting the Reframed Scheme

The CJC has the responsibility for overseeing the functioning of the equitable sharing arrangements and is the only mechanism supporting the current Scheme's operations. There is no body or group charged with explicitly furthering the Scheme's objective of supporting national cooperative action between law enforcement agencies in proceeds of crime matters. There have been many examples raised during consultations of procedures and processes that could improve collaborative action on unexplained wealth and other asset confiscation matters. It is proposed that the CJC take on a broader role and have responsibility for the following;

- the promotion and pursuit of the objectives of the reframed Scheme
- the oversighting of the equitable sharing arrangements
- the collaboration with agencies to actively improve information sharing arrangements, and
- improving practices, procedures and policies in support of cross-jurisdictional criminal asset confiscation matters.

The CJC should be asked to report regularly on the progress of these tasks. This should help keep focus and momentum on improving collaborative action.

Recommendation 12

It is recommended that the functioning of the reframed Scheme continue to be supported by the Cooperating Jurisdictions Committee.

The Committee would, in addition to its oversighting of the equitable sharing provisions, be charged with driving the objectives of the Scheme, promoting and improving information sharing and improving procedures in support of cross jurisdictional criminal asset confiscation matters. Reporting on the progress of these responsibilities would assist in maintaining focus and momentum on improving collaborative action.

In recognition of the complex nature of the investigation of unexplained wealth and other criminal asset confiscation matters, consideration should be given to the development of specialised capabilities needed to conduct these matters. This could include the training, retention and application of forensic accountants and financial investigators, as well as asset confiscation and litigation specialists. The increasing sophistication of means used to hide, disguise and launder proceeds of crime, including cryptocurrency and digital assets has to be matched by the development of specialist investigative skills. Those skills are in short supply and can act as a hand-brake on the efforts to tackle organised crime. Most jurisdictions have the capacity to reinvest recovered criminal assets into crime prevention initiatives. Given the ability of successful asset confiscation cases to act as a strong deterrence to serious and organised crime it is worth considering the funding of programs that can train, retain and focus skilled personnel.

Recommendation 13

It is recommended that consideration be given to further the development of specialised capabilities, such as forensic accounting, that support the investigation and litigation of asset confiscation matters.

This initiative could include investment in training, retention and the application of specialised personnel across jurisdictions. There is also scope for jurisdictions to collaborate in the development and/or funding of specialised qualifications. The increasing sophistication of means used to hide, disguise and launder the proceeds, benefits and instruments of crime must be matched by the development of specific skills. These skills are in short supply and their lack of availability can act as a hand-brake on efforts to tackle serious and organised crime.

Recommendation 14
It is recommended that consideration be given by the governments of each jurisdiction to utilising confiscated criminal assets to fund the development and deployment of specialised personnel from asset confiscation matters.

Utilising confiscated funds in this way would recognise the significant benefits to the Australian community in removing the proceeds, benefits and instruments of serious and organised crime.

There are numerous legislative schemes supporting unexplained wealth and other asset confiscation action across Australia. Each jurisdiction's legislation is unique resulting in a multitude of differentiated provisions, procedures, definitions, interpretations and powers. In the absence of single harmonised legislation in this area interjurisdictional collaboration is often challenging. During consultations a number of stakeholders raised the need to work towards commonality in definitions used in asset confiscation actions. An example of this are the differing definitions used by jurisdictions to describe financial institutions and digital assets. The gathering of information by law enforcement bodies from government agencies as well as banks and other financial institutions is made all the more difficult by having varying definitions and procedures. There are a number of national forums, such as the Australian Transnational and Serious Organised Crime Committee or similar, which can be leveraged to discuss such matters in an environment that includes representation from all Australian jurisdictions and the Commonwealth. The implementation of the reframed Scheme can be a catalyst to continuing work towards reducing barriers to interjurisdictional action.

Recommendation 15
It is recommended that the reframed Scheme explore opportunities to harmonise key procedural and definitional legislative provisions where possible, through a relevant forum such as the Australian Transnational, Serious and Organised Crime Committee or similar.

An example of potential harmonised definitions includes that of financial institutions, digital and crypto assets. Harmonising definitions where possible, will reduce procedural and operational barriers to cross-jurisdictional collaboration.

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Appendices

Appendix A: Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth

Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth

Contents

This Agreement is entered into on by:

The Commonwealth of Australia
The State of New South Wales
The Australian Capital Territory
The Northern Territory
The State of South Australia

Recitals

1) The parties to this Agreement recognise that serious and organised crime is a threat to Australia's national well-being, and has far-reaching and significant impacts upon Australia's society and economy. Modern technologies have enabled criminal syndicates to operate in an increasingly fluid manner across State, Territory, and national borders. This has necessitated an enhanced focus on cooperative, cross-jurisdictional responses by Australian governments. Mechanisms that target criminal wealth and assets are important tools that can provide an additional strategy to complement traditional law enforcement responses to serious and organised crime. Unexplained wealth laws provide a mechanism to confiscate money and assets where a person who has been linked to criminal activity cannot demonstrate that such money and assets have been lawfully obtained.

2) The parties recognise that effective and continuing cooperation between jurisdictions on unexplained wealth will provide national benefits by allowing more effective and comprehensive targeting of serious and organised crime suspects. In particular, this cooperation will assist where suspects have wealth and assets across multiple jurisdictions within Australia and overseas.

3) Accordingly, the parties have agreed to establish a national scheme on unexplained wealth to assist in disrupting and undermining serious and organised crime in Australia.

4) To enable all parties to increase the effectiveness with which they can respond to serious and organised crime the national scheme will:

    a) amend the *Proceeds of Crime Act 2002* (Cth), with the support of a limited text-based referral of powers from participating State Parliaments to the Commonwealth Parliament, or the later adoption of the relevant laws by participating State Parliaments, together with a reference supporting subsequent amendments, to allow the Commonwealth's unexplained wealth provisions to operate in relation to relevant State offences and relevant Territory offences in addition to offences with a link to a Commonwealth head of power

    b) provide for adoption of the relevant laws, together with a reference supporting subsequent amendments, by participating State parties after the amending legislation has been enacted by the Commonwealth on the basis of at least one State's referral

    c) expressly provide for the continued operation of existing participating State and Territory confiscation legislation

d) provide parties with access to participating jurisdiction information gathering provisions under the *Proceeds of Crime Act 2002* (Cth)

e) improve information sharing between the Commonwealth and State and Territory parties in relation to unexplained wealth proceedings and organised crime investigations

f) create a legislated process to equitably share proceeds of crime forfeited as a result of collaborative action between parties, starting from a presumption that proceeds are to be shared equally

g) allow participating and cooperating States and Territories to share in forfeited amounts when the Commonwealth has relied on a relevant State offence or a relevant Territory offence, starting from a presumption that proceeds are to be shared equally

h) amend the terms of reference of Joint Management Groups and Operational Coordination Groups to specifically identify actions relating to proceeds of crime as an option to be considered in tactical decision-making, in order to avoid operational conflicts

i) provide for amendments to relevant aspects of the *Proceeds of Crime Act 2002* (Cth) to be made collaboratively, with the express consent of the parties

j) entrench a number of protective mechanisms in the legislation which allow participating States and Territories to leave the national scheme should there be a breakdown of collaboration

k) allow participating States to terminate their references or adoption of the relevant laws at any time

l) be subject to review as soon as practicable after the fourth anniversary of the commencement of the *Unexplained Wealth Legislation Amendment Act 2018* (Cth) , and

m) sunset automatically after six years (see subsection 9(1) of the *Unexplained Wealth (Commonwealth Powers) Act 2018* (NSW)), unless parties elect to continue.

5) An independent Panel on Unexplained Wealth, comprising Mr Mick Palmer AO APM, and Mr Ken Moroney AO APM (the Panel), was appointed in June 2013 to develop an understanding of State and Territory concerns with national laws and recommend options for ministerial consideration. The Panel provided its final report to the then Commonwealth Minister for Justice, the Hon Michael Keenan MP, on 10 February 2014 and the report was circulated to State and Territory Police and Justice Ministers.

6) The key recommendation of that report was "that all Australian governments agree to a referral of powers from the States and Territories to the Commonwealth to enable the unexplained wealth provisions in the *Proceeds of Crime Act 2002* (Cth) to be broadened to also apply where a link to a suspected State or Territory offence can be established."

7) The national scheme will operate as a cohesive package and be implemented through amendments to Commonwealth legislation. It will be supported by a limited text-based referral of powers from participating State Parliaments to the Commonwealth Parliament, or the later adoption of the relevant laws by participating State Parliaments, together with a reference supporting subsequent amendments. This will allow the Commonwealth's unexplained wealth provisions to operate in relation to relevant State offences, in addition to offences with a link to a Commonwealth head of power, in accordance with subsection 51(xxxvii) of the *Constitution*. The national scheme will apply to the Territories and relevant Territory offences by virtue of section 122 of the *Constitution*.

8) Recognising that a national scheme will provide benefits across Australia to assist in disrupting and undermining serious and organised crime, the Australian Capital Territory and the Northern Territory are parties to this Agreement although they will not refer powers in accordance with subsection 51(xxxvii) of the *Constitution*.

9) This Agreement is to be given full effect through legislation passed through the respective Parliaments of all participating State parties (and Territory parties in relation to equitable sharing) and the Commonwealth. All parties will use their best endeavours to have that legislation introduced before signing this agreement, within six months of signing this Agreement or by a date agreed by the parties.

Part 1—Preliminary

1.1 Objectives

1) The primary objectives of the arrangements contained in this Agreement are to support cooperation between law enforcement agencies and assist them to:

   a) deprive persons of profits associated with serious and organised crime

   b) prevent illicit funds being reinvested to support further criminal activity

   c) deter, disrupt, and dismantle criminal syndicates, and

   d) reduce the harm caused by serious and organised crime to the community.

1.2 Citation

1) This Agreement may be referred to as the Agreement on the National Cooperative Scheme on Unexplained Wealth.

1.3 Definitions

1) In this Agreement:

Amending legislation means the *Unexplained Wealth Legislation Amendment Bill 2018* (Cth);

CJC means the Cooperating Jurisdiction Committee established under clause 7.1 of this Agreement;

Commonwealth means the Commonwealth of Australia;

Commonwealth proceeds of crime authority means an authority designated under the *Proceeds of Crime Act 2002* (Cth);

Cooperating jurisdiction means the Commonwealth, a participating State, a cooperating State, or a Territory party;

Cooperating State includes a non-participating State that is a cooperating State under section 14F of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation;

Corresponding law means a law of a participating State or of a Territory that is declared by the *Proceeds of Crime Regulations 2002* (Cth) to be a law that corresponds to the *Proceeds of Crime Act 2002* (Cth);

Designated authority means any authority, agency, or body capable of seeking orders under the unexplained wealth provisions or special confiscation legislation of a party;

National scheme means the national cooperative scheme on unexplained wealth which is reflected through this Agreement;

Non-Cooperating jurisdiction means a Commonwealth, State or Territory jurisdiction that is not a Cooperating Jurisdiction;

NCS threshold means the National Cooperative Scheme threshold, which is $100,000AUD;

Participating jurisdiction information gathering provisions means provisions of the *Proceeds of Crime Act 2002* (Cth) conferring on authorised State or Territory officers of participating jurisdictions powers in relation to production orders and notices to financial institutions in a manner similar to the conferral of such powers on Commonwealth officers under Parts 3-2 and 3-3 of that Act;

Participating State has the meaning given to the term in section 14C of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation;

Party means the Commonwealth, a State, or a Territory that is a party to this Agreement;

Post amended version 2 has the same meaning as subsection 14C(6) of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation;

Relevant State offences means offences of a kind that are specified by the referral Act or adoption Act of a State;

Relevant Territory offences means offences against the law of a Territory;

Relevant law 1 and ***relevant law 2*** have the meanings given by subsection 14C(11) of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation;

SOCCC means the Serious and Organised Crime Coordination Committee;

Special confiscation legislation means a corresponding law of a State while the State is a participating State and a party to this Agreement or of a Territory while a party to this Agreement;

State means a State of the Commonwealth;

Substantive order means a restraining order or a confiscation or forfeiture order listed in Appendix A;

Territory means a self-governing Territory, including Australian Capital Territory and the Northern Territory;

Text reference 1 and ***text reference 2*** have the meanings given by subsections 14C(2) and 14C(3) of the *Proceeds of Crime Act 2002* (Cth) respectively, as amended by the amending legislation;

Unexplained wealth means property or wealth that might not have been lawfully acquired.

The meaning of lawfully acquired, property and wealth includes, but is not limited to, the meaning of those terms in the *Proceeds of Crime Act 2002* (Cth), as amended immediately prior to the assent date of the first State Bill referring powers under this Agreement;

Unexplained wealth provisions means:

a) section 20A and Part 2-6 of the Commonwealth *Proceeds of Crime Act 2002* (Cth)

b) the other provisions of that Act in so far as they relate to section 20A and Part 2-6 of that Act, and

c) instruments made under that Act for the purposes of a provision referred to in paragraph (a) or (b).

2) In this Agreement, a reference to an Act, whether of the Commonwealth, a State or a Territory includes a reference to:

a) that Act as amended and in force for the time being; and

b) an Act passed in substitution for that Act.

Part 2—Effect and Operation of Agreement

2.1 Commencement

1) This Agreement comes into operation on the day that it is signed by the Commonwealth and one State.

2) A party which signs this Agreement after this date will operate under this Agreement from the date it signs.

2.2 Amendment of Agreement

1) This Agreement may be varied only by the unanimous decision of all the parties to it.

2) Without limiting clause 2.2.1, the parties may make a unanimous decision to vary this Agreement prior to the enactment of legislation by the Commonwealth and State parties.

2.3 Effect of Agreement

1) This Agreement is not intended to create legal relations between the parties.

2) Clause 6.2 to clause 6.5 of this Agreement on equitable sharing apply to the Commonwealth, participating States, Territory parties, and cooperating States that have enacted legislation in accordance with clause 6.1.5.

3) The parties note that the national scheme, as outlined in the *Proceeds of Crime Act 2002* (Cth) as amended by the amending legislation and related State legislation, operates by reference to certain matters dealt with in this Agreement. In particular, the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation, adopts the definitions of the terms 'shareable', 'corresponding proceeds', 'decision-making period', 'contribution', and 'payment period' outlined in this Agreement for the purposes of the equitable sharing arrangements.

Part 3—Legislation

Division 1—Preliminary

3.1 Purpose of this Part

1) The purpose of this Part is to implement, preserve, and promote the legislative scheme set out in this Agreement which will assist in disrupting and undermining serious and organised crime in Australia by:

    a) amending the *Proceeds of Crime Act 2002* (Cth), with the support of a limited text-based referral of powers from participating State Parliaments to the Commonwealth Parliament, or the later adoption of the relevant laws by participating State Parliaments, together with a reference supporting subsequent amendments, to allow the Commonwealth's unexplained wealth provisions to operate in relation to relevant State offences and relevant Territory offences in addition to offences with a link to a Commonwealth head of power; and

    b) amending the *Proceeds of Crime Act 2002* (Cth) and enacting State and Territory provisions to make provision for information gathering and sharing and the equitable sharing of proceeds of crime in accordance with the terms of this Agreement.

2) This Part commits parties to introduce the legislation required for the national scheme and establishes procedures for consultation and agreement between the parties before the enactment, amendment or repeal of any legislation that would amend or alter the national scheme.

3.2 Nature of the legislative scheme

1) The legislative scheme agreed to by the parties involves:

    a) enactment by State Parliaments of legislation referring certain matters to the Commonwealth Parliament or the later adoption of relevant laws by State Parliaments in accordance with subsection 51(xxxvii) of the *Constitution* and this Agreement

b) enactment by the Commonwealth Parliament of legislation to amend the *Proceeds of Crime Act 2002* (Cth) to give effect to this Agreement, and

c) the subsequent amendment from time to time of the State and Commonwealth laws that are the subject of this Agreement, in accordance with the requirements of this Agreement.

2) The Commonwealth recognises that sections 14G, 14H, 14J, and 14K of the amending legislation (dealing with rollback of particular express amendments) are integral to the cooperative nature of the national scheme and that amendment of sections 14G or 14J other than by the means outlined in clause 3.5 may result in State parties terminating either or both their text or amendment references, which may result in termination of the national scheme in respect of that State.

3) The Commonwealth recognises that the referral of powers or adoption of relevant laws by participating State Parliaments is intended to permit the Commonwealth to extend the operation of the unexplained wealth provisions to relevant State offences. The Commonwealth recognises that, at the time of negotiations, the term "matters relating to unexplained wealth" as used in paragraph 4(1)(c) of the *Unexplained Wealth (Commonwealth Powers) Bill 2018* (NSW) and the amending legislation was understood by the parties to include:

a) investigating whether property or wealth was lawfully acquired, including by the gathering of information and the tracing of property or wealth

b) prohibiting the disposal of, or dealing with, property if a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired and either the person has committed a relevant offence or the whole or any part of a person's property or wealth was derived from a relevant offence, and

c) a court requiring a person to pay an amount if the court is not satisfied that the whole or any part of the person's property or wealth was not derived from a relevant offence.

4) The Commonwealth does not intend to alter the fundamental nature of the unexplained wealth provisions of the *Proceeds of Crime Act 2002* (Cth) as set out in clause 3.2.3.

3.3 Concurrent operation of State and Territory legislation

1) The unexplained wealth provisions as amended by the amending legislation, will not exclude the concurrent operation of State and Territory special confiscation legislation (whether enacted before or after the commencement of the amending legislation).

2) Nothing in this Agreement affects the Commonwealth Parliament's power to legislate where to do so would be within the legislative power of the Commonwealth without the referrals or adoptions referred to in this Part.

Division 2—Enactment and Alteration of Laws under the National Scheme

3.4 Enactment of the legislative scheme

1) The Commonwealth and State parties agree, subject to Cabinet or Prime Minister approval (whichever is appropriate), to introduce the legislation outlined in clause 3.2.1 within their respective Parliaments before signing this Agreement, within six months of signature of this Agreement or by a time agreed by the parties on signing this Agreement.

3.5 Approval of certain amendments to *Proceeds of Crime Act 2002* (Cth)

1) The government of the Commonwealth will not introduce an amending Bill or make subordinate legislation that expressly amends the following provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation in accordance with this Agreement (**the amendment**) without the unanimous approval of the parties:

    a) section 20A and Part 2-6

    b) Schedule 1 – the participating jurisdiction information gathering provisions

    c) Subdivision C of Part 1-4 dealing with the interaction of the national unexplained wealth provisions and orders with State and Territory laws and orders

    d) Division 2 of Part 4-3 dealing with equitable sharing arrangements for the national scheme

    e) other provisions of the Act that specifically refer to unexplained wealth, particularly:

        i. subsections 45(6A) and (7) – cessation of a restraining order and charges relating to unexplained wealth orders

        ii. section 45A – cessation of restraining orders relating to unexplained wealth

        iii. section 282A – direction by a court to the Official Trustee in relation to unexplained wealth orders

        iv. section 29A – excluding property from a restraining order made under section 20A, and

    f) the definition in section 338 of 'thing relevant to unexplained wealth proceedings', 'unexplained wealth amount', 'unexplained wealth order', and

'preliminary unexplained wealth order', except in accordance with the requirements of clause 3.5.7 and clause 3.5.8.

2) The Commonwealth will not introduce the amendment if it would expressly amend the following provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation in accordance with this Agreement without the unanimous approval of the State parties:

    a) section 14G, or

    b) section 14J.

3) The Commonwealth will not introduce the amendment if it would expressly amend the following provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation in accordance with this Agreement without the unanimous approval of the Territory parties:

    a) section 14H, or

    b) section 14K.

4) Approval for the amendment referred to in clauses 3.5.1-3 must be sought through the responsible Commonwealth Minister. Responses from other parties must be provided through the Minister or Ministers responsible for the special confiscation legislation in that State or Territory.

5) The Commonwealth will provide the parties with the proposed text of the amendment and provide parties with a reasonable time to consider and comment on the amendment.

6) The government of the Commonwealth is not obliged to introduce, make, or support any legislation or proceed with any legislative proposal with which it does not concur.

7) If the amendment includes amendments nominated by the Commonwealth Minister as urgent amendments, the government of the Commonwealth may introduce the amendment before the requirements set out in clause 3.5.1 are fulfilled but must not seek the making of the amendments unless those requirements are fulfilled.

8) If a Bill is not principally concerned with proceeds of crime and contains amendments to the provisions specified in clauses 3.5.1-3 which are consequential in nature, the Commonwealth may introduce the Bill without the unanimous approval of the parties (as set out in clause 3.5.1) but must not seek the making of the amendments without the unanimous approval of the parties.

9) If approval is sought by any party to this Agreement for amendments to a Bill that is at that time before the Commonwealth Parliament, then:

a) the Commonwealth will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed amendments, and

b) parties will use their best endeavours to respond within the timeframe nominated by the Commonwealth.

10) If amendments to a Bill are or are to be moved in the Commonwealth Parliament (whether or not on behalf of the government of the Commonwealth), and either before or after the proposed amendments, the Bill expressly amends any of the provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation, set out in clause 3.5.1, the government of the Commonwealth will use its best endeavours to ensure adequate consultation with the parties has occurred on those amendments.

3.6 Amendments to the *Proceeds of Crime Act 2002* (Cth) without required approval

1) If the Commonwealth has made express amendments to section 14G, 14J or Division 2 of Part 4-3 of the *Proceeds of Crime Act 2002* (Cth) without the approval of a participating State required under clause 3.5, that State may terminate its text reference 1, adoption of relevant law 1, or amendment reference by proclamation.

2) That State will be a cooperating State unless it is declared not to be under section 14F of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation.

3) A State that terminates its text reference 1, adoption of relevant law 1, or amendment reference in accordance with clause 3.6.1 will only be a cooperating State if its text reference 2 or adoption of relevant law 2 remains in force.

4) Parties acknowledge that a State's ongoing participation in the equitable sharing regime as a cooperating State is intended to facilitate continued good faith negotiations regarding the national scheme.

3.7 Consultation on certain amendments to *Proceeds of Crime Act 2002* (Cth)

1) This clause operates in addition to, and does not limit, requirements under clause 3.5.

2) The Commonwealth must, for the purposes of consultation, provide parties with a draft of any Bill introduced by the government of the Commonwealth which would expressly amend the following provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation in accordance with this Agreement:

a) information gathering powers available under the *Proceeds of Crime Act 2002* (Cth) in Parts 3-2, 3-3, and 3-5 – if these apply to section 20A, Part 2-6 and wealth derived from relevant State offences

b) Division 2-6 of Part 2-1 – if this applies to section 20A, Part 2-6 and wealth derived from relevant State offences, and

c) section 338 definitions that apply to section 20A and Part 2-6 – If these also apply to wealth derived from relevant State offences.

3) It is sufficient compliance with clause 3.7.2 if the Commonwealth sends to parties a draft copy of the relevant provisions of the Bill prior to introduction.

4) If a Bill contains amendments nominated by the Commonwealth Minister as urgent amendments, the Commonwealth will provide copies of the Bill to parties and indicate the extent to which comments made by them may be able to be taken into account.

5) If a Bill is not principally concerned with proceeds of crime and contains amendments to provisions in clause 3.7.2 which are consequential in nature, the Commonwealth will provide copies of the Bill to parties and indicate the extent to which comments made by them may be able to be taken into account.

6) Ministers of State and Territory parties will use their best endeavours to provide comments within the timeframe nominated by the Commonwealth.

7) The government of the Commonwealth is not obliged to introduce, make, or support any legislation or proceed with any legislative proposal with which it does not concur.

8) If amendments to a Bill are or are to be moved in the Commonwealth Parliament (whether or not on behalf of the government of the Commonwealth), and either before or after the proposed amendments, the Bill expressly amends any of the provisions of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation, set out in clause 3.7.2, the government of the Commonwealth will use its best endeavours to ensure adequate consultation with the parties has occurred on those amendments.

3.8 Consultation – State legislation and instruments affecting the national scheme

1) A State or Territory party will provide, for the purposes of consultation, parties with a draft of any Bill that would amend the State referral legislation, or any proposed instruments or declarations (including proclamations) that would alter the scope or operation of the national scheme.

2) For the purposes of clause 3.8.1, a proposed instrument or declaration includes, but is not limited to, a proclamation made under section 14G and section 14J of the *Proceeds of Crime Act 2002* (Cth).

3) It is sufficient compliance with clause 3.8.1 if the State or Territory sends to parties a draft copy of the relevant provisions of the Bill, subordinate legislation, or declaration prior to introduction of the Bill or subordinate legislation or making of the instrument.

4) Parties will use their best endeavours to provide comments within the timeframe nominated by the State or Territory.

5) If amendments to such a Bill are or are to be moved in a State Parliament (whether or not on behalf of the government of the State), the government of the State will use its best endeavours to ensure adequate consultation with the parties has occurred on those amendments.

3.9 Consultation and approval not required

1) Consultation with, or approval of, the State and Territory parties is only required for an amending Bill or subordinate legislation which amends or affects the *Proceeds of Crime Act 2002* (Cth) and falls within the scope of clauses 3.5 and 3.7. All other amendments do not require consultation with, or approval of, the State and Territory parties.

2) Subject to clauses 3.5 and 3.7, consultation with, or approval of, State and Territory parties by the Commonwealth is not required for an amendment so far as it relates to any of the following matters:

    a) conflict of laws matters in relation to the laws of Australia and the laws of other countries

    b) any subject matter in relation to which the Commonwealth Parliament could make laws without the referrals referred to in this Part, and

    c) other subject matters agreed upon unanimously by the parties.

Part 4—Operational Processes

4.1 Investigations

1) Parties recognise that strategies to target unexplained wealth will rarely be considered in isolation from a broader investigation into serious and organised crime. Parties also recognise that effective coordination and management of cross-jurisdictional unexplained wealth investigations is critical to supporting the national scheme.

2) Under the national scheme, Commonwealth, State, and Territory law enforcement agencies will retain autonomy for investigating relevant matters within their jurisdiction.

3) Parties agree to cooperate where there is a genuine operational need for, and value in, a cross-jurisdictional approach, but that otherwise the extent of collaboration may be limited to joint consideration of issues of priority and who is best placed to pursue proceedings.

4) Parties will endeavour to use the existing structures for joint operational decision-making to participate in strategic prioritisation and alignment of investigative responses to serious and organised crime.

5) Where the Commonwealth proposes to take action in respect only of a State or Territory offence, the Commonwealth will consult with, and obtain the consent of, an officer nominated by a State or Territory at an operational level.

6) Parties agree to update terms of reference for relevant Joint Management Groups or other operational coordination groups to ensure that proceeds of crime—and unexplained wealth in particular—is specifically considered in tactical decision-making.

4.2 State access to certain investigative powers under Commonwealth unexplained wealth legislation

1) The Commonwealth agrees to enact, in the amending legislation, the participating jurisdiction information gathering provisions.

2) As soon as practicable after 30 June each year, relevant participating State or Territory party agencies must provide an annual report to the responsible State or Territory Minister on the use (if any) by the agency of the investigative powers under the participating jurisdiction information gathering provisions.

3) The report must contain the number of times that the powers were used by that agency.

4) As soon as practicable after receipt of the report from the agency, the State or Territory Minister must provide a copy of the report to the Commonwealth Minister.

5) As soon as practicable after receipt of the report from the State or Territory Minister, the Commonwealth Minister must table that report in the Commonwealth Parliament.

4.3 Future amendments to current AFP access to certain powers under the Commonwealth *Proceeds of Crime Act 2002*

1) If the Commonwealth proposes to extend the use of monitoring orders in the *Proceeds of Crime Act 2002* (Cth) for the purposes of unexplained wealth investigations undertaken by the Australian Federal Police, the Commonwealth will consult with parties based on a presumption that this investigative power will similarly be extended to parties if parties desire this investigative power.

2) The Commonwealth agrees to consult with parties to consider extending the search and seizure powers in the *Proceeds of Crime Act 2002* (Cth) to law enforcement agencies of parties for the purposes of unexplained wealth investigations under their corresponding laws.

3) Parties agree that this consultation will occur once feedback is received from State and Territory law enforcement about the operational need for this investigative power within one year of the date of this Agreement.

4.4 Litigation

1) Subject to clause 4.5:

   a) nothing in this Agreement affects the ability of designated authorities of State or Territory parties to bring new proceedings under their own laws, and

   b) Commonwealth proceeds of crime authorities may bring unexplained wealth proceedings under the *Proceeds of Crime Act 2002* (Cth):

      i. where the relevant conduct or wealth is associated with offences covered by the *Proceeds of Crime Act 2002* (Cth) (other than relevant State offences and relevant Territory offences); or

      ii. where the relevant conduct or wealth is associated with relevant State offences or relevant Territory offences covered by the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation, and the proceedings arise out of an investigation by the Commonwealth; or

      iii. as otherwise agreed between the parties.

4.5 Coordination of unexplained wealth action

1) Parties acknowledge that the intention of the national scheme is that parties will collaborate in order to effectively target unexplained wealth and remove it from suspected criminals.

2) Parties agree that the overarching justification for coordinating unexplained wealth action is to allow law enforcement agencies to choose to take action under the legislation and in reliance on the offence (be it State, Territory, or Commonwealth) which will be most effective in a particular instance, and to resolve operational inconsistency issues through negotiations between agencies.

3) Parties acknowledge that instances of operational inconsistency will be resolved, to the extent possible, through existing operational mechanisms.

4) Where a designated authority of a State or Territory party seeks and/or obtains a substantive order under the special confiscation legislation of a party, and this substantive order is made in relation to an amount above the NCS threshold, the designated authority will notify designated authorities of other parties in writing of the substantive order sought/obtained and its terms.

5) Notification under clause 4.5.4 will be satisfied by the designated authority providing a copy of the order (whether proposed or made) and/or sufficient detail to enable parties to identify any actual or potential operational inconsistency.

6) Notification under clause 4.5.4 is not required where the State or Territory designated authority determines that it is not, or will not become, a cross-jurisdictional matter and is satisfied that it will not give rise to operational inconsistency with any other jurisdiction.

7) Where a Commonwealth designated authority seeks and/or obtains a Commonwealth substantive order, and this substantive order is made in relation to an amount above the NCS threshold, the Commonwealth designated authority seeking the order will notify designated authorities of parties in writing of the order sought and its terms.

8) Notification under clause 4.5.7 will be satisfied by the Commonwealth designated authority providing a copy of the order (whether proposed or made) and/or sufficient detail to enable parties to identify any actual or potential operational inconsistency.

9) Where operational conflict or inconsistency is identified, the relevant parties agree to resolve the conflict by taking appropriate cooperative action to maximise the prospects of successful confiscation proceedings and criminal prosecutions on a case-by-case basis.

10) For the purposes of clause 4.5.9, cooperative action may include amending orders or discontinuing proceedings, having regard to matters including:

    a) which party commenced action first

    b) which party has greater likelihood of success

    c) the estimated value of the assets restrained by each of the jurisdictions and the estimated amount of proceeds constituting unexplained wealth

    d) the nature of offending which gave rise to the proceedings

    e) the effect on proceedings of any related criminal action being undertaken by a party

    f) the objects of relevant legislation of each party, and

    g) the interests of justice in the case.

11) Where an overlapping interest in an asset is identified following a court order, the assets that are forfeited are to be shared between the two jurisdictions (and others that contributed to the unexplained wealth matter) in accordance with the equitable sharing arrangements set out in Part 6 of this Agreement.

4.6 Interstate recognition of orders

1) State and Territory parties commit to ensuring that the provisions of their special confiscation legislation dealing with registration and enforcement of interstate restraint of assets (whether by court order or operation of statute or otherwise) remain current so that the provisions of the legislation in force from time to time in other States and

Territories providing for restraint and forfeiture of assets (whether by court order or operation of a statute or otherwise) are enforceable in their jurisdiction.

Part 5—Information Sharing

5.1 Guiding Principles

1) Parties recognise that effective information sharing is critical to supporting the objectives of this Agreement and broader strategies to address serious and organised crime in Australia.

2) Parties agree that any information that relates to the detection, investigation, and litigation of proceeds of crime should be shared between one another, where lawful and possible.

3) Parties agree to use their best endeavours to maintain effective information sharing arrangements that minimise legislative, cultural, and administrative barriers wherever possible.

5.2 Measures to address information-sharing barriers

1) The Department of Home Affairs has implemented the following measures:

    a) confirmed that relying on section 44 of the *Australian Border Force Act 2015* (Cth), 'permitted purposes' under section 46 exists to permit the disclosure to State and Territory police, prosecutors and proceeds of crime authorities of Immigration and Border Protection information for the purposes of unexplained wealth investigations and proceedings in particular circumstances

    b) confirmed that section 488 of the *Migration Act 1958* (Cth) does not prevent disclosure of movement records to State and Territory police, prosecutors or proceeds of crime authorities for the purposes of law enforcement or prescribed legislation

    c) confirmed that a disclosure under section 44 of the *Australian Border Force Act 2015* (Cth) of Immigration and Border Protection information will also authorise the disclosure of any accompanying personal information under the *Privacy Act 1988* (Cth), and

    d) provided copies of current instruments prescribing State and Territory employees, State and Territory agencies and prescribed purposes for the purposes of paragraph 488(2)(g) of the *Migration Act 1958* (Cth) to interested States and Territories.

2) The Australian Taxation Office, in consultation with Treasury, has implemented the following measures:

a) amended the *Taxation Administration Act 1953* (Cth) to clarify the ability of the Australian Taxation Office to share information with State and Territory law enforcement for the purposes of unexplained wealth matters

b) increased the number of Senior Executive Service (SES) staff who are able to sign off on the disclosure of taxation information to law enforcement, and

c) clarified the operation of the secondary purpose disclosure regime for law enforcement in relation to taxation information.

3) Services Australia (previously the Department of Human Services) and the Department of Social Services have implemented the following measure:

a) amended the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* (Cth) to release Centrelink information to State and Territory law enforcement agencies for proceeds of crime and unexplained wealth purposes.

5.3 Commonwealth commitments to address further information-sharing barriers

1) The Department of Home Affairs agrees to progress the following measures within six months of commencement of this Agreement:

a) introduce into Parliament amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) for participating State and Territory law enforcement agencies to access and use telecommunication interception information in unexplained wealth proceedings

b) consider expanding access and use of telecommunication interception information by the State and Territory law enforcement agencies of parties to all confiscation proceedings

c) update the information request form used by law enforcement agencies to ensure it reflects current information sharing laws and practices, and

d) provide a guidance note on the information request process for State and Territory officers.

2) The Australian Taxation Office, in consultation with Treasury, agrees to progress the following measures within six months of commencement of this Agreement:

a) if requested by jurisdictions, review existing memoranda of understanding with jurisdictions, and

b) if identified as necessary, propose amendments to the *Taxation Administration Act 1953* (Cth) to remove the requirement for SES sign off for disclosure of taxation information to law enforcement.

3) Services Australia (previously the Department of Human Services) agrees to progress the following measures within six months of commencement of this Agreement:

a) establish a Department of Human Services positional contact point for law enforcement information requests

b) consider, and notify participating jurisdictions, whether the system for making requests to the Department of Human Services by law enforcement can be done through electronic means (other than automated fax) to enhance efficiency

c) if required, provide additional supporting guidance documents on existing information release processes

d) host a meeting to discuss the feasibility of providing certain law enforcement officials of participating jurisdictions portal access to Centrelink information

e) consider, and notify participating jurisdictions, of the feasibility of a case file approach, to enable law enforcement to link relevant cases with linked individuals and/or conduct to particular operations, and

f) consider, and notify participating jurisdictions of, the feasibility of introducing a priority category system for law enforcement investigation requests.

4) Parties agree to continue to identify and develop appropriate measures to enhance information sharing arrangements between parties, as part of implementation of the national scheme, to support unexplained wealth and organised crime investigations.

Part 6—Equitable Sharing Arrangements

6.1 Guiding Principles

1) Parties agree that arrangements for equitable sharing of proceeds from joint criminal asset confiscation action reflect the aim of the national scheme to undermine criminal syndicates by removing criminal wealth and preventing the reinvestment of illegally obtained funds in further criminal activity.

2) Parties intend that these equitable sharing arrangements will be as simple as possible and will encourage cooperation between agencies involved in the investigation and litigation of proceeds of crime matters.

3) Parties acknowledge that it is not practicable for arrangements to exactly reflect the specific contributions of individual agencies in each particular case, but that allocations and contributions should 'even out' across jurisdictions over time.

4) Parties acknowledge that the equitable sharing arrangements provided for in this Agreement do not affect sharing between jurisdictions, nor between jurisdictions and a foreign country, that is outside the scope of this Agreement.

5) Parties commit to introducing amendments to insert these arrangements into the relevant legislation governing criminal asset confiscation schemes in their jurisdictions to ensure that the proceeds are paid out in accordance with the process at clause 6.3 either before signing this Agreement, within six months of signature of the Agreement or by a time agreed by the parties upon signing this Agreement.

6) Clause 6.2 to clause 6.5 of this Agreement on equitable sharing apply to the Commonwealth, participating States, Territory parties and cooperating States

6.2 Definitions that apply to these Part 6 Equitable Sharing Arrangements

1) Particular proceeds of confiscated assets are 'shareable' for the purposes of the national scheme if:

   a) in the case of the Commonwealth – they are proceeds of confiscated assets under the *Proceeds of Crime Act 2002* (Cth) paid to the Commonwealth in relation to orders or proceedings of the kind described in **Appendix B**,

   b) in the case of non-Commonwealth parties – they are corresponding proceeds of a State or Territory, and

   c) the amount specified (or the amount determined by the forfeiting jurisdiction if no monetary value is specified) in the final order, as part of a negotiated settlement, or that is otherwise forfeited under a corresponding law, exceeds the NCS threshold (whether or not the forfeiting jurisdiction realises, receives or holds the full amount specified for those proceeds).

2) An amount is 'corresponding proceeds' of a State or Territory, for the purposes of the national scheme, if the amount:

   a) is paid to that State or Territory under a corresponding law of the State or Territory, and

   b) it corresponds to, or is similar to, an amount that is proceeds of confiscated assets under the *Proceeds of Crime Act 2002* (Cth) and is paid in relation to orders or proceedings of the kind described for that State or Territory in **Appendix B**.

3) The 'forfeiting jurisdiction' for the purposes of the national scheme is the jurisdiction which obtains a final order, enters into a negotiated settlement, or receives any other amount that is proceeds of confiscated assets under the *Proceeds of Crime Act 2002* (Cth) or corresponding proceeds of a State or Territory.

4) The 'decision-making period' for the purposes of the national scheme, is

   a) six months from the date of notification by the forfeiting jurisdiction to the CJC of a final order or negotiated settlement, or

   b) a later period, if unanimously agreed by the members of the CJC in a particular matter.

5) Where a 'decision-making period' is unanimously agreed under paragraph 4(b), this will replace any other 'decision making period' in a matter, including a 'decision-making period' established under previous agreements or a decision-making period that has previously expired. Agreement under 4(b) can be reached at any time, including after the original 'decision-making period' has expired.

6) The 'payment period' for the purposes of the national scheme is

   a) six months from the date of realisation of the assets in their entirety; or

   b) if (a) does not occur, six months from the date when the forfeiting jurisdiction determines that the maximum amount from a final order or negotiated settlement likely to be realised has been realised; or

   c) any date unanimously agreed by the members of the CJC sub-committee in a particular matter.

7) Where a 'payment period' is unanimously agreed under paragraph 6(c), this will replace any other 'payment period' in a matter, including a 'payment period' established under previous agreements or a payment period that has previously expired. Agreement under paragraph 6(c) can be reached at any time.

8) A participating jurisdiction will be considered to have made a 'contribution' for the purposes of the national scheme when:

   a) a participating jurisdiction makes any form of contribution including, but not limited to, the provision of specific intelligence of relevance to the confiscation action, investigation action, criminal or civil legal proceedings, restraining assets for the purposes of an application, holding and managing restrained assets or recovering the debt created by the order; or

   b) a participating jurisdiction contributed to securing a conviction which can be considered to have contributed to the confiscation action and the recovery of proceeds; or

c) the Commonwealth has relied on the offences of that participating jurisdiction in an unexplained wealth matter (whether or not it has also relied on Commonwealth offences or offences of another jurisdiction).

6.3 Equitable Sharing Arrangement for National Scheme

1) Equitable sharing payments are to be paid out from the relevant Commonwealth, State, or Territory account in accordance with the following process:

a) The forfeiting jurisdiction is to notify the CJC within 60 days of a final order, negotiated settlement, or other forfeiture under a corresponding law that is 'shareable'.

b) Within the 'decision-making period', the CJC is to establish a CJC sub-committee consisting of:

i. the forfeiting jurisdiction, and

ii. any other CJC member that is unanimously agreed to by the CJC to be a contributing jurisdiction to the action and recovery of the proceeds.

c) Within the 'decision-making period', the CJC sub-committee decides unanimously if:

I. non-cooperating jurisdictions have contributed to the action, and

II. what proportion of the proceeds should be allocated in recognition of this contribution.

d) If unanimous agreement is not reached the relevant non-cooperating jurisdictions are not considered to have contributed to the action or to be entitled to a share of the proceeds.

e) The CJC sub-committee members' jurisdictions are entitled to equal shares of the proceeds, unless the CJC sub-committee decides unanimously to vary the presumption within the decision making period. If unanimous agreement is not reached, the equal shares presumption will prevail.

f) The relevant Minister of the forfeiting jurisdiction decides if a foreign jurisdiction has contributed to the action, and what amount of the proceeds should be allocated in recognition of that contribution.

g) Within the 'payment period', the forfeiting jurisdiction (with authority from its relevant Minister if required) makes the payment of:

I. court-ordered payments

ii. other payments specified in the special confiscation legislation or the *Proceeds of Crime Act 2002* (Cth) (for example, legal aid commissioners and examiner costs), and

iii. the remaining proceeds to the other contributing jurisdictions in accordance with the decisions of the CJC sub-committee.

2) Where possible, these principles and the intention of an agency to apply the equitable sharing arrangements should be reflected in any Joint Investigative Agreement prepared in accordance with the Memorandum of Understanding for Major Criminal Investigations.

6.4 Notification requirements relating to the Equitable Sharing Arrangements

1) The notification to the CJC at clause 6.3.1(a) must include sufficient information to enable all jurisdictions to determine if they have contributed to an order or negotiated settlement. This could include the amount of funds, the name of the person against whom proceedings were brought or proposed, the name of the person from whom money was recovered, the name of the police operation, and any known contribution to the operation or proceedings by participating jurisdiction/s.

2) The forfeiting jurisdiction is responsible for notifying members of the CJC as listed at **Appendix C**:

   a) within 60 days of obtaining a final order, negotiated settlement, or other forfeiture under a corresponding law that is shareable

   b) within 30 days of the decision of the CJC sub-committee whether a non-cooperating jurisdiction made a contribution in relation to the recovery of the proceeds and what proportion, if any, will be paid to that jurisdiction

   c) within 30 days of the decision of the CJC sub-committee whether to alter the presumption of equal shares, and if so, in what proportions

   d) within 30 days of the realisation of the assets in their entirety, or when the maximum amount from a final order, negotiated settlement or other forfeiture under a corresponding law has been realised, and

   e) within 30 days of the payment of funds by the forfeiting jurisdiction to other jurisdictions in accordance with CJC sub-committee determinations.

3) Members of the CJC are responsible for ensuring that all relevant agencies of their jurisdiction are advised of, and provided with an opportunity to raise instances of contribution to, the action.

4) A suggested timeframe for jurisdictions to notify the CJC of a claim for contribution is 21 days after receiving notice under 6.4.2(a).

6.5 Record keeping requirements

1) Parties agree to retain records of the manner in which the proceeds to which this Part applies are shared from their jurisdiction.

2) Records should include the following details:

    a) date the action commenced and sufficient details (eg party names) to enable identification of the matter

    b) date of restraint and value of restraint (good faith estimate)

    c) date of final order, negotiated settlement, or other form of forfeiture or confiscation and the relevant value

    d) which jurisdictions were involved in the action and recovery in accordance with the CJC decision, and

    e) date and amount of distribution of realised assets including payments to foreign jurisdictions, court-ordered payments and other orders authorised by special confiscation legislation or the *Proceeds of Crime Act 2002* (Cth).

3) These records are to be shared bi-annually to the CJC contacts at **Appendix C**.

4) Records must be provided for the purposes of the review of the national scheme under Part 8 of this Agreement.

5) Set out below is:

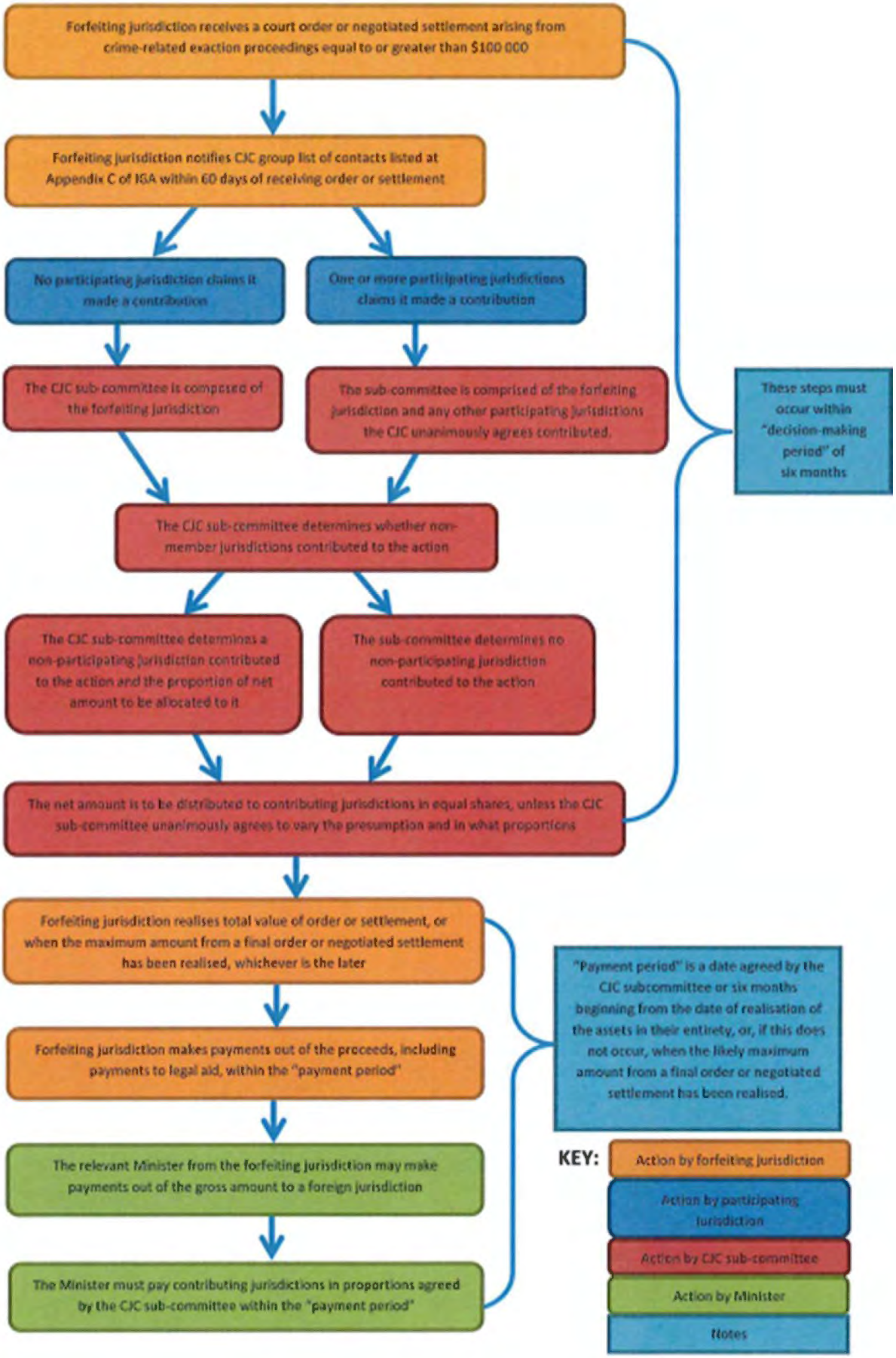
    a) an example of the operation of the equitable sharing arrangements, and

    b) a flow chart of the processes related to equitable sharing.

Example

Equitable sharing of $60 million following a joint proceeds of crime operation between the Commonwealth, a participating jurisdiction (e.g. NSW), a foreign jurisdiction (e.g. USA) and a non-cooperating jurisdiction (e.g. Qld).

1. *On 1 May 2018, AFP successfully obtains an unexplained wealth order under the Proceeds of Crime Act 2002* (Cth). *It has 60 days from that date to advise the CJC.*
2. *On 4 May 2018, AFP advises other members of the CJC of the final unexplained wealth order. The CJC has until 4 November 2018 (ie six months) to establish a sub-committee and have that committee decide the proportions to be distributed to contributing jurisdictions.*
3. *On 6 May 2018, the Minister for Home Affairs, as the Minister for the forfeiting jurisdiction, decides to allocate ten million dollars to the USA, to be paid once the allocation of the remaining funds ($50 million) is determined.*
4. *On 4 June 2018, the CJC meets and determines which party or parties to the national scheme were involved in the joint operation – in this case NSW and the Commonwealth. NSW and the Commonwealth form the CJC sub-committee.*
5. *The CJC sub-committee agrees that Qld (a non-cooperating jurisdiction) contributed to the joint investigation and that 10% should be allocated in recognition of this contribution.*
6. *For the remaining 90%, NSW and Commonwealth could then:*
   - *Agree that there are no exceptional circumstances which would warrant departure from the presumption of equal proportion. The remaining amount would be distributed in equal shares (45% each);*
   - *Agree that there were exceptional circumstances to vary the equal shares presumption and agree on a different proportion of allocation, such as 10% to the Commonwealth and 80% to NSW; or*
   - *Agree that there are exceptional circumstances to vary the equal shares presumption, however do not agree on a different allocation – revert back to equal shares between Cth and NSW.*
7. *The Department of Home Affairs brief the Commonwealth Minister on the outcome of the CJC sub-committee consideration in consultation with the AFP.*
8. *Two million dollars of the unexplained wealth amount is allocated to the respondent's spouse as hardship payment, as specified in the court order.*
9. *After the total value of the order has been realised by the Commonwealth, the Commonwealth Minister authorises the payment of:*
   - *ten million dollars to USA, and*
   - *the remaining amount ($48 million) distributed to NSW, Qld and retained by the Commonwealth in the proportions agreed by the CJC sub-committee.*


Forfeiting jurisdiction receives a court order or negotiated settlement arising from crime-related exaction proceedings equal to or greater than $100 000
Forfeiting jurisdiction notifies CJC group list of contacts listed at Appendix C of IGA within 60 days of receiving order or settlement
No participating jurisdiction claims it made a contribution
One or more participating jurisdictions claims it made a contribution
The CJC sub-committee is composed of the forfeiting jurisdiction
The sub-committee is comprised of the forfeiting jurisdiction and any other participating jurisdictions the CJC unanimously agrees contributed.
The CJC sub-committee determines whether non-member jurisdictions contributed to the action
The CJC sub-committee determines a non-participating jurisdiction contributed to the action and the proportion of net amount to be allocated to it
The sub-committee determines no non-participating jurisdiction contributed to the action
The net amount is to be distributed to contributing jurisdictions in equal shares, unless the CJC sub-committee unanimously agrees to vary the presumption and in what proportions
Forfeiting jurisdiction realises total value of order or settlement, or when the maximum amount from a final order or negotiated settlement has been realised, whichever is the later
Forfeiting jurisdiction makes payments out of the proceeds, including payments to legal aid, within the "payment period"
The relevant Minister from the forfeiting jurisdiction may make payments out of the gross amount to a foreign jurisdiction
The Minister must pay contributing jurisdictions in proportions agreed by the CJC sub-committee within the "payment period"
These steps must occur within "decision-making period" of six months
"Payment period" is a date agreed by the CJC subcommittee or six months beginning from the date of realisation of the assets in their entirety, or, if this does not occur, when the likely maximum amount from a final order or negotiated settlement has been realised.
KEY:
Action by forfeiting jurisdiction
Action by participating jurisdiction
Action by CJC sub-committee
Action by Minister
Notes

29

Part 7—Administration

7.1 The Cooperating Jurisdiction Committee (CJC)

1) There is to be a CJC to exercise functions under this Agreement.

2) Each party will nominate an individual or position-holder to be its representative on the CJC. Initial members of the CJC are identified at **Attachment C.**

3) The CJC and its sub-committee are responsible for deciding matters in relation to the equitable sharing for the national scheme, as set out in Part 6 of this Agreement.

4) If a State party ceases to be a participating State, then that State party will cease to be a member of the CJC, unless that party is a cooperating State.

Part 8—Review

8.1 Review of Agreement

1) In consultation with State and Territory parties, the Commonwealth will review the operation of this Agreement as soon as practicable after the fourth anniversary of the commencement of the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). .

2) All jurisdictions, including those jurisdictions which are not a party to this Agreement, will be invited to consider and provide comment on the outcomes of the review.

8.2 Terms of reference

1) The Terms of Reference for the review will be agreed to by all parties.

2) The review will consider, amongst other issues:

    a) whether the Agreement has facilitated greater cooperation between the parties, including consideration of information sharing in unexplained wealth and organised crime matters, and equitable sharing in the context of the national scheme

    b) whether processes in accordance with the Agreement are working effectively

    c) compliance with obligations to consult and obtain consent before amending relevant legislation

    d) progress on the commitments to enhance information sharing under Part 5 of this Agreement

e) consideration of providing State and Territory law enforcement with additional investigative powers under the *Proceeds of Crime Act 2002* (Cth)

f) whether any cooperative investigations that have not resulted in unexplained wealth litigation have been successfully pursued through other action—for example, under taxation laws

g) whether parties have been appropriately compensated through equitable sharing under the national scheme, and

h) whether parties should commence negotiations to consider whether participating and cooperating State Parliaments refer powers to the Commonwealth Parliament to enable the amendment of the *Proceeds of Crime Act 2002* (Cth) to allow Commonwealth law enforcement agencies to take action under other parts of that Act (beyond unexplained wealth) in relation to State proceeds of crime offences.

8.3 Appointment of reviewer

1) The Commonwealth Minister will seek approval from the relevant Ministers of each party to this Agreement on the appointment of the person/s to undertake the review ('the reviewer').

8.4 Consultation on the review

1) The reviewer is responsible for consulting with all parties to this Agreement in undertaking the review.

2) Once the review is finalised, a copy of the report will be provided to the Commonwealth and all States and Territories simultaneously and at the earliest opportunity.

8.5 Payment for the review

1) The parties will each provide a share of the funding to meet the costs of the review. Funding will be shared by the parties as follows:

a) the Commonwealth will provide 50 per cent of the funds, and

b) the State and Territory parties will, together, provide 50 per cent of the funds with the contribution of each State and Territory proportional to its population. Proportions will be calculated using the *Estimates of State populations* in Appendix A of the most recently published Federal Budget Paper 3.

Part 9—Ceasing to be a Party

9.1 Ceasing to be a Party

1) A participating State will not terminate a reference without providing three months' notice to the other parties.

2) A Territory party will not withdraw from the Agreement without providing three months' notice to the other parties.

3) Subject to clause 9.1.4 of this Agreement, a State party that ceases to be a participating State ceases to be a party

4) A State party will remain a party for the purposes of equitable sharing as set out in Part 6 of this Agreement if:

    a) the State party is a cooperating state, or

    b) the State party terminates a reference, other than text reference 2 (or it terminates an adoption, other than the adoption of post amended version 2), and shareable proceeds are received by the Commonwealth after the termination through reliance on the transitional provisions in Schedule 2 of the *Proceeds of Crime Act 2002* (Cth), as amended by the amending legislation.

9.2 Agreement continues with remaining parties

1) If a State or Territory ceases to be a party, this Agreement will remain in force in relation to the remaining parties.

2) If a State or Territory ceases to be a party, the Commonwealth will, within three months, hold a meeting of the remaining parties for the purpose of negotiating such variations to this Agreement as are necessary or convenient to take account of that fact.

Part 10—Sunset and Termination

10.1 Sunset

1) Subject to 10.1.2 and 10.3.2, the Agreement will cease to have effect following the sunset of the State referral of powers.

2) The Agreement will continue for the required time period if the sunset of the State referral of powers is extended.

10.2 Continuation of legal proceedings

1) Parties agree to enact legislative provisions, in the form of text reference 2, and relevant law 2 to enable ongoing legal proceedings to continue unaffected by later changes to the reference.

2) Parties agree that, where a State party terminates text reference 1, its adoption of relevant law 1, or its amendment reference, and investigations by Commonwealth law enforcement agencies have commenced on the basis of that referral or adoption, the authorities of the Commonwealth and that State will work collaboratively to continue the investigations or refer investigation to that relevant State.

10.3 Continuation of proceeds sharing provisions

1) Parties agree to enact legislative provisions to enable the ongoing operation of the equitable sharing legislation enacted in accordance with 6.1.5 of this Agreement, to support the sharing of any shareable proceeds paid to the Commonwealth as a result of ongoing legal proceedings continued after the sunset or other termination of the State referrals of power or adoptions of the Commonwealth law, as referred to in clause 10.2.

2) Part 6 of this Agreement will continue to apply to such shareable proceeds.

Appendix A – "Substantive Orders" which require notification under Part 4.5 of this Agreement

Australian Capital Territory

- Restraining orders under Part 4 of the *Confiscation of Criminal Assets Act 2003* (ACT)
- Forfeiture orders under Part 5 of the *Confiscation of Criminal Assets Act 2003* (ACT)
- Penalty orders under Part 7 of the *Confiscation of Criminal Assets Act 2003* (ACT)
- Unexplained wealth orders under Part 7A of the *Confiscation of Criminal Assets Act 2003* (ACT)

Commonwealth

- Restraining orders made under section 20A of the *Proceeds of Crime Act 2002* (Cth)
- Preliminary unexplained wealth orders made under section 179B of the *Proceeds of Crime Act 2002* (Cth)
- Unexplained wealth orders made under section 179E of the *Proceeds of Crime Act 2002* (Cth)

New South Wales

- Restraining orders made under Part 2 of the *Criminal Assets Recovery Act 1990* (NSW) (CARA)
- Assets forfeiture orders made under Division 1 of Part 3 of CARA
- Proceeds assessment orders and unexplained wealth orders made under Division 2 of Part 3 of CARA
- Assets forfeiture orders, proceeds assessment orders and unexplained wealth orders made under Division 2A of Part 3 of CARA
- The following orders under Part 2 of the *Confiscation of the Proceeds of Crime Act 1989* (NSW):
    - Confiscation Orders under Division 1
    - Forfeiture Orders under Division 2
    - Pecuniary Penalty Orders under Division 3
    - Drug Proceeds Orders under Division 4

Northern Territory

- Restraining orders made under section 44(1)(b)(ii) of Part 4, Division 2 of the *Criminal Property Forfeiture Act 2002* (NT)
- Forfeiture orders made under Part 7, Division 3 of the *Criminal Property Forfeiture Act 2002* (NT) as follows:
    i. Sub-Division A, section 94;
    ii. Sub-Division B, section 95 as it relates to section 97; and
    iii. Sub-Division C, section 98 as it relates to section 100
- Application for a declaration that a person is a drug trafficker under section 36A of the *Misuse of Drugs Act 1990* (NT)

South Australia

- Restraining orders made under section 20 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)
- Unexplained wealth orders made under Part 2 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)

Appendix B - Forfeitures, confiscations and settlements which are "shareable" under Part 6 of this Agreement.

Australian Capital Territory

- Forfeiture orders under Part 5 of the *Confiscation of Criminal Assets Act 2003* (ACT)
- Penalty orders under Part 7 of the *Confiscation of Criminal Assets Act 2003* (ACT)
- Unexplained wealth orders under Part 7A of the *Confiscation of Criminal Assets Act 2003* (ACT)

Commonwealth

- Forfeiture orders made under Division 1 of Part 2-2 of the *Proceeds of Crime Act 2002* (Cth)
- Forfeiture on conviction of a serious offence under Division 1 of Part 2- 3 of the *Proceeds of Crime Act 2002* (Cth)
- A pecuniary penalty order made under Part 2-4 of the *Proceeds of Crime Act 2002* (Cth)
- A literary proceeds order made under Part 2-5 of the *Proceeds of Crime Act 2002* (Cth)
- An unexplained wealth order made under Part 2-6 of the *Proceeds of Crime Act 2002* (Cth)
- Amounts paid to the Commonwealth in settlement proceedings connected with the *Proceeds of Crime Act 2002* (Cth)

New South Wales

- Assets forfeiture orders made under Division 1 of Part 3 of CARA
- Proceeds assessment orders and unexplained wealth orders made under Division 2 of Part 3 of CARA
- Assets forfeiture orders, proceeds assessment orders and unexplained wealth orders made under Division 2A of Part 3 of CARA
- The following orders under Part 2 of the *Confiscation of the Proceeds of Crime Act 1989* (NSW):
    - Confiscation Orders under Division 1
    - Forfeiture Orders under Division 2
    - Pecuniary Penalty Orders under Division 3

- Drug Proceeds Orders under Division 4

Northern Territory

- Forfeiture of property under Part 7, Division 3 of the *Criminal Property Forfeiture Act 2002* (NT)
- Restraining orders made under sections 43 and 44 of Part 4, Division 2 of the *Criminal Property Forfeiture Act 2002* (NT)
- Forfeiture orders made under Part 7, Division 3 of the *Criminal Property Forfeiture Act 2002* (NT) as follows:
  - Sub-Division A;
  - Sub-Division B; and
  - Sub-Division C
- Application for a declaration that a person is a drug trafficker under section 36A of the *Misuse of Drugs Act 1990* (NT)

South Australia

- Unexplained wealth orders made under Part 2 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)
- The following orders made under the *Criminal Assets Confiscation Act 2005* (SA):
  - Forfeiture orders made under Part 4, Division 1, Subdivision 1;
  - Deemed forfeiture orders made under Part 4, Division 1, Subdivision 1A;
  - Pecuniary penalty orders made under Part 5, Division 1; and
  - Literary proceeds orders made under Part 5, Division 2
- Forfeiture on conviction of a serious offence under Part 4, Division 2 of the *Criminal Assets Confiscation Act 2005* (SA).

Appendix C—Contact List for the Cooperating Jurisdiction Committee

Members of the CJC

Australian Capital Territory

- Deputy Chief Police Officer – Response, ACT Policing, or
- A member of the agency performing the duties of, or nominated/authorised by, the Deputy Chief Police Officer or the Chief Police Officer to attend the CJC

Commonwealth

- National Manager Criminal Assets Confiscation, Australian Federal Police, or
- A member of the agency performing the duties of, or nominated/authorised by, National Manager Criminal Assets Confiscation, the AFP Commissioner or a Deputy Commissioner to attend the CJC

New South Wales

- Executive Director Financial Investigations, NSW Crime Commission, or
- A member of the agency performing the duties of, or nominated/authorised by, the Executive Director, the Assistant Commissioner (Legal) or the Commissioner to attend the CJC

Northern Territory

- Assistant Commissioner, Crime, Intelligence & Capability, Northern Territory Police, Fire and Emergency Services, or
- A member of the agency performing the duties of, or nominated/authorised by, the Assistant Commissioner or Commissioner to attend the CJC

South Australia

- Commissioner for Police, South Australia Police, or
- A member of the agency performing the duties of, or nominated/authorised by, the Commissioner to attend the CJC

Additional contacts for the CJC

Australian Capital Territory

- Superintendent, Criminal Investigations, ACT Policing
- Officer in Charge, Ministerial, Policy and Performance, ACT Policing
- Deputy Director General, Justice, Justice and Community Safety Directorate

- Executive Branch Manager, Legislation, Policy and Programs, Justice and Community Safety Directorate
- Senior Director, Criminal Law Team, Legislation, Policy and Programs, Justice and Community Safety Directorate
- A member of one or more of the above agencies performing the duties of, or nominated/authorised by, a relevant officer identified above to attend the CJC on his or her behalf

Commonwealth

- First Assistant Secretary, National Security and Law Enforcement Division, Department of Home Affairs
- Manager Criminal Assets Litigation, Australian Federal Police
- Commander Criminal Assets Confiscation, Australian Federal Police
- A member of one or more of the above agencies performing the duties of, or nominated/authorised by, a relevant officer identified above to attend the CJC on his or her behalf

New South Wales

- Assistant Commissioner, Commander NSW Police Force State Crime Command
- Detective Superintendent, State Crime Command, Organised Crime Squad
- Executive Director, Criminal Investigations, NSW Crime Commission
- Lawyer, Crime Disruption and Special Inquiries Law, Office of General Counsel
- A member of one or more of the above agencies performing the duties of, or nominated/authorised by, a relevant officer identified above to attend the CJC on his or her behalf

Northern Territory

- Chief of Staff, Office of the Commissioner, Northern Territory Police, Fire and Emergency Services
- Commander, Organised Crime, Intelligence & Capability, Northern Territory Police, Fire and Emergency Services
- A member of the agency performing the duties of, or nominated/authorised by, the Commander or Chief of Staff to attend the CJC on his or her behalf

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Appendix B: National Asset Confiscation Frameworks

Commonwealth

The *Proceeds of Crime Act 2002* (Cth) (the POCA) provides a scheme to trace, restrain and confiscate the proceeds of crimes against Commonwealth law. Part of the principal objectives of the Act are to deprive persons of the proceeds, the instruments and benefits derived from offences, and to deprive persons of unexplained wealth that the person cannot prove to the satisfaction of a court were not derived or realised, directly or indirectly from certain offences. The POCA scheme operates in the civil jurisdiction.

Chapter 2 of the POCA provides for the Commonwealth confiscation scheme. A number of orders may be sought by an authorised authority, being the Commonwealth Director of Public Prosecutions or the AFP, under the scheme including:

- Freezing orders which authorise notices to be issued to financial institutions to prevent withdrawals from specified accounts held with the institution.
- Restraining orders that prevent specified property from being disposed of or otherwise dealt with by any person, except in the manner and circumstances specified in the order.
- Forfeiture orders which provide that specified property is forfeited to the Commonwealth.
- Pecuniary penalty orders that require a person to pay an amount to the Commonwealth where the court is satisfied that either the person has been convicted of an indictable offence and has derived benefits from the offence, or the person has committed a serious offence. The court's power to make a pecuniary penalty order is not affected by the existence of another confiscation order in relation to that offence.

The *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010* (Cth) introduced unexplained wealth provisions into the POCA. The amendments were introduced in response to the recommendations to the *Report of the Independent Review of the Operation of the Proceeds of Crime Act* tabled in Parliament in October 2006. The purpose of the unexplained wealth provisions was to improve the ability of law enforcement agencies to target upper-echelon organised crime figures that derive the greatest financial benefit from offences, but are seldom linked by evidence to the commission of an offence.

Part 2-6 of the POCA now provides for the Commonwealth unexplained wealth orders framework. Under this framework a proceeds of crime authority can apply for a preliminary unexplained wealth order, requiring a specified person to appear before the court to assist the court in deciding whether to make an unexplained wealth order. An unexplained wealth order requires a specified person to pay an amount to the Commonwealth if the court is not satisfied that the whole or part of the person's wealth was not derived or realised, directly or indirectly, from a criminal offence.

Additionally, an unexplained wealth restraining order may be sought under section 20A of the POCA. This order prevents specified property from being disposed of or otherwise dealt with, where there are reasonable grounds to suspect that a specified person's total wealth exceeds the value of the person's wealth that was lawfully acquired.

Investigating authorities can, in specified circumstances have access to certain telecommunications content and data in Australia through the TIA Act. The TIA Act regulates access to telecommunications content and data in Australia. It permits access to communications content for law enforcement purposes. Law enforcement agencies can access communications for their investigations after obtaining a court issued warrant.

Commonwealth unexplained wealth and proceeds of crime matters are undertaken by the Criminal Assets Confiscation Taskforce (CACT). The CACT was formed in 2012 and is led by the AFP, with the support of the ACIC, ATO, AUSTRAC and ABF. The resources and expertise of these agencies are utilised to trace, restrain and confiscate criminal assets. With the formation of the CACT, the AFP Commissioner was empowered through amendments to the POCA, to commence and conduct proceeds of crime litigation on behalf of the Commonwealth. In practice, this function has been undertaken by in-house criminal assets litigators.

New South Wales

The NSW asset confiscation framework is split across two pieces of legislation: the *Confiscation of Proceeds of Crime Act 1989* (NSW) administered by the NSW Police and the *Criminal Asset Recovery Act 1990* (NSW) administered by the NSW Crime Commission (NSWCC).
The *Confiscation of Proceeds of Crime Act 1989* (NSW) (CPOC Act) outlines the conviction-based asset recovery framework for NSW. It aims to deprive persons of the proceeds of, and benefits derived from the commission of offences against laws of the state. It provides for law enforcement powers to enable the effective tracing of proceeds and benefits of criminal activity. Amendments were introduced in 2008 to include drug trafficking proceeds orders and freezing notices.

The *Confiscation of Proceeds of Crime Legislation Amendment Act 2022* (NSW) (CPCLA Act) made amendments to the CPOC Act, including:

- The inclusion of automatic forfeiture of property which is subject to a restraining order or freezing notice if the person is convicted of the serious offence which the restraining order/freezing notice is based on.
- Allowing the DPP or a police prosecutor to apply to court for a drug trafficker declaration against a person convicted of a serious drug offence. The declaration authorises an appropriate officer to apply to the court for a forfeiture order in relation to the person's property which the court must make unless the person proves their property was lawfully acquired.
- Allowing NSW Police or an appropriate officer to apply *ex parte* to the Supreme Court for a restraining order in relation to property belonging to a person against whom a drug trafficker declaration has been made, or may be made.

The *Criminal Asset Recovery Act 1990* (NSW) (CARA) forms the other part of the NSW asset confiscation framework. The principal objectives of the CARA are:

- To provide for the confiscation, without requiring a conviction, of property of a person if it is more probable than not that the person has engaged in serious crime related activities, and
- To enable the current and past wealth of a person to be recovered if there is a reasonable suspicion that the person has engaged in serious crime related activity, the person has acquired proceeds from criminal activity of another person or the person's wealth significantly exceeds the value of their lawfully acquired wealth.
- To enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and
- To provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and
- To enable law enforcement agencies to effectively identify and recover property.

Part 2 of the CARA enables the NSWCC to apply to the Supreme Court for restraining orders. A restraining order is an order that no person is to dispose of, or to otherwise deal with, or attempt to deal with, an interest in property to which the order applies except in specified circumstances.

The CPCLA Act also made amendments to CARA, including:

- A new scheme for administrative forfeiture without a court order, under which the NSWCC can issue an Assets Forfeiture Notice in relation to property seized by law enforcement agencies (other than land), if reasonably satisfied the property belongs to a person suspected of engaging in serious criminal activity, or the property is suspected to be connected to serious criminal or illegal activity.
    - The property will be forfeited unless a person with an interest in the property demonstrates that they have lawfully acquired the property.
- New grounds for an unexplained wealth order where the Supreme Court finds there is a reasonable suspicion that a person's current or former wealth exceeds their lawfully acquired wealth by $250,000 in cash, or $2 million in assets.

The *Unexplained Wealth (Commonwealth Powers) Act 2018* (NSW) was enacted and commenced in 2018, referring certain matters relating to unexplained wealth to the Commonwealth Parliament. This referral authorised the Australian Federal Police to use certain NSW offences as a basis for confiscation of unexplained wealth from criminals under the POCA. The Act was passed to support the National Cooperative Scheme on Unexplained Wealth.

South Australia

The *Criminal Assets Confiscation Act 2005* (SA) (CAC Act) is the principal legislation utilised in SA to forfeit the proceeds and instruments of crime, and the property of certain drug offenders. It does not contain unexplained wealth provisions. The CAC Act provides for a range of asset confiscation orders including:

- Freezing orders which, once issued to a financial institution prevents any transfers or withdrawals from a specified account for a period of 72 hrs.
- Restraining orders which prevent specified property from being disposed of or otherwise dealt with by any person.
- Forfeiture orders which orders that specified property is forfeited to the Crown, where a person has been convicted of a serious offence, or where a restraining order has been in place for at least six months and the property is the proceeds of a serious offence, or the property is suspected of being the proceeds of a serious offence and no application has been made for its exclusion from a restraining order.
- Pecuniary penalty orders which require a person to pay a specified amount to the Crown if the person has been convicted of, or has committed a serious offence, and they derived benefits from the commission of the offence, or their property includes an instrument of the offence.
- Instrument substitution declarations which substitutes property that was an instrument of an offence which a person is convicted of, for property of the same nature or description of that property.

The *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) (SOCUW Act) provides for the making and enforcement of unexplained wealth orders; and for other purposes. Under the SOCUW Act, the DPP may authorise the Crown Solicitor to make an application to the District Court for an unexplained wealth order where it is reasonably suspected a person has wealth that has not been lawfully acquired. The unexplained wealth order requires a person to pay a specified amount to the Crown.

The *Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Act 2016* (SA) amended the CAC Act to provide for the confiscation of property of certain drug offenders as an additional punishment for their offending. A person is a prescribed drug offender if they have been convicted of a serious drug offence and the conviction is of a commercial drug offence or the person has at least two other convictions for prescribed drug offences within a period of ten years.[40] Immediately on a person becoming a prescribed drug offender, a forfeiture order will be taken to have been made by the convicting court. The order applies to all property owned, or under the effective control of the prescribed drug offender on the conviction day, other than protected property or property excluded from a restraining order under the Act.

The *Unexplained Wealth (Commonwealth Powers) Act 2021* (SA) enacted state legislation to facilitate SA joining the Scheme, in accordance with Division 2, Part 3.4 of the Intergovernmental Agreement. The Act commenced on the 1st September 2021.

Northern Territory

The objective of the *Criminal Property Forfeiture Act 2002* (NT) (CPF Act) is to target the proceeds of crime in general and drug-related crime in particular, in order to prevent the unjust enrichment of persons involved in criminal activities. The CPF Act provides for a range of asset confiscation orders including:

- Interim restraining orders which provide that the Local Court can issue an order to restrain specified property for 3 working days, where a restraining order application is to be made as soon as reasonably practicable and the circumstances justify making the order,
- Restraining orders which prevent specified property from being dealt with,
- Forfeiture orders which provide for specified property to be forfeited to the Territory. An application for forfeiture can be made whilst a restraining order is in effect,
- Unexplained wealth declarations which order the respondent to pay to the Territory a specified amount, that is generally the difference between their total wealth and their wealth that is lawfully acquired, as assessed by the court,
- Crime used property substitution declaration which, if it is more likely than not the respondent has made criminal use of property, and that property is not amenable to forfeiture, substitutes that property for property of equivalent value owned or effectively controlled by the respondent.

The *Criminal Property Forfeiture Amendment Act 2020* (NT) (CPFA Act) enacted legislation to facilitate the NT joining the Scheme, in accordance with Division 2, Part 3.4 of the Intergovernmental Agreement. The CPF Act commenced on the 8th March 2020.

There are three NT Government (NTG) bodies involved in the initiation and litigation of CPFA Act matters including, the Northern Territory Police Force (NTPF), specifically the Assets Forfeiture Unit (AFU), the Solicitor for the Northern Territory (SFNT), and the Director Public Prosecutions (DPP). The NT Public Guardian and Trustee is charged with the management of restrained and forfeited property.

The jurisdictional limits as provided for by the CPFA, determine which court a CPFA matter must be commenced in. Currently the majority of CPFA matters litigated in the NT are commenced in the Supreme Court. This requires agreement from the DPP. In the Local, Court either NTPF or DPP can commence proceedings. Historically, CPFA matters are commenced in the Local Court by NTPF, with SFNT providing legal advice to police and conducting the litigation on behalf of police.

Australian Capital Territory

The *Confiscation of Criminal Assets Act 2003* (ACT) (CCA Act) aims to give effect to the principle of public policy that a person should not be enriched because of the commission of an offence, whether or not anyone has been convicted of the offence. The CCA Act provides for a number of asset confiscation orders including:

- Restraining orders which prevent persons from dealing with specified property so that it remains available for confiscation action under the CCA Act.
- Civil forfeiture orders which provide for the forfeiture to the Territory of restrained property in relation to a serious offence.
- Conviction forfeiture orders which provide for the forfeiture to the Territory of tainted property in relation to a relevant offence.
- Automatic forfeiture-conviction orders which provide for the forfeiture of specified property to the Territory upon conviction of a serious offence where a restraining order has been made either before or after the conviction. The forfeiture order applies 14 days after the conviction if the restraining order was made prior to conviction, or 14 days after the restraining order is in force, if it was made after a conviction.
- Penalty orders which require payment by an offender equal to the value of benefits derived by that offender from the commission of a relevant offence.

The *Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020* (ACT) (CCA Amendment Act) amended the CCA Act and provides for the relevant court to issue two types of orders:

- An unexplained wealth restraining order, which is an interim order that restricts a person's ability to dispose of, or otherwise deal with property, until the court considers and decides on an application by the DPP (ACT) for an unexplained wealth order in relation to the property, and
- An unexplained wealth order, which is a final order that makes payable to the Territory an amount which, in the court's opinion, constitutes the difference between a person's total wealth and the value of the person's wealth that was lawfully acquired.

The Amendment Act was reviewed in 2022. The review made no substantive recommendations in relation to the amendments and the Scheme. It noted the varying opinions of different stakeholders and recommended another review be conducted in three years' time to consider the operational effectiveness. A further review is required to commence as soon as practicable after 3 August 2025.

Queensland

The *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA) is the main legislative instrument for asset confiscation in Queensland. The main objective of the CPCA is to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.[52] With the introduction of the CPCA in 2002, the criminal conviction-based asset confiscation scheme, previously provided for in the *Crimes (Confiscations) Act 1989* (Qld) was retained in the newer legislation.

The CPCA provides for a range of asset confiscation orders including:

- Restraining orders which prevent any person from dealing with specified property if the Supreme Court is satisfied there are reasonable grounds for suspicion of the person having engaged in serious crime related activities, or of the stated property being crime derived property due to a serious crime related activity.
- Forfeiture orders which require specified property under a restraining order to be forfeited to the state.
- Proceeds assessment orders which requires a person to pay to the state the value of the proceeds derived from a person's illegal activity that took place within six years before the day of application to the Supreme Court.
- Pecuniary penalty orders which if a person is convicted of a confiscation offence, require the person to pay to the state the amount of the benefits derived from the commission of the offence.
- Tainted property substitution declaration which substitutes specified property for property that a convicted person used, or intended to use in the commission of the offence and that property is unavailable for forfeiture.

The *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) introduced provisions to the CPCA for unexplained wealth confiscation orders and serious drug offender confiscation orders. These orders are briefly outlined below:

- Unexplained wealth orders require a person to pay to the state an amount assessed by the Supreme Court to be the value of the person's unexplained wealth. Unexplained wealth is an amount that may be equivalent to a person's current or previous wealth less any wealth that the person proves was lawfully acquired.
- Serious drug offender restraining orders which prevents any person from dealing with specified property. If the respondent is about to be charged with a qualifying drug offence, an application for a drug offender restraining order may be made without notice.
- Serious drug offender confiscation orders which forfeits to the state all property of the respondent other than protected property, and all property that was a gift given by the respondent to someone else within six years before the respondent was charged with the relevant offence.

Responsibility for administering Queensland's asset confiscation framework is distributed across four agencies:

- The Queensland Police Service (QPS) is the typical source of investigation and referrals for asset confiscation matters.
- The Crime and Corruption Commission administers the non-conviction-based confiscation scheme under Chapter 2 of the CPCA, and the serious drug offender confiscation scheme under Chapter 2A.
- The Director of Public Prosecutions administers a conviction-based asset confiscation scheme under Chapter 3 of the CPCA. The DPP presents applications to court on behalf of the state, for all orders under the CPCA.
- The Public Trustee of Queensland is responsible for collecting, storing, maintaining, and disposing of assets that are the subject of an order under the CPCA.

In November 2023, the Queensland Crime and Corruption Commission released a discussion paper as part of the Review of the CPCA. A final report is due to be released in March 2024.

Western Australia

The main legislative instrument for asset confiscation in Western Australia, is the *Criminal Property Confiscation Act 2000* (WA) (CPC Act). Under the CPC Act, property can be confiscated to satisfy a liability under an unexplained wealth declaration, a criminal benefits declaration or a crime used property substitution declaration.

An unexplained wealth declaration requires the respondent to pay to the state an amount equal to what the court has assessed as the value of their unexplained wealth. This value is equal to the difference between the total value of the respondent's wealth and their lawfully acquired wealth.[62]

A criminal benefits declaration requires the respondent to pay to the state an amount equal to what the court has assessed as the value of the criminal benefit the respondent has acquired. The court must make this declaration if it is more likely than not that the benefit derived is a constituent of the respondent's wealth, the respondent was involved in the commission of a confiscation offence and the benefit was not lawfully acquired or it was acquired, directly or indirectly, as a result of the respondent's involvement in the confiscation offence.[63]

A crime used property substitution declaration requires the respondent to pay to the state an amount equal to the amount specified in the declaration as the assessed value of the crime-used property.[64] The court must declare that property owned by the respondent is available for confiscation instead of crime-used property if, the crime-used property cannot be confiscated, and it is more likely than not the respondent made criminal use of the crime-used property.[65] Crime-used property may not be available for confiscation in circumstances such as, where the respondent does not have effective control of the property, or the property has been sold or otherwise disposed of.[66]

The powers contained within the CPC Act permit the state to apply to have all assets of a convicted drug trafficker seized regardless of whether they have been lawfully obtained. The drug trafficker section of the CPC Act is conviction based. A person is declared to be a drug trafficker under the *Misuse of Drugs Act 1981* (WA), if they are convicted of a serious drug offence and has during a period of ten years, been convicted of two or more serious drug offences.[67]

The *Criminal Organisations Control Act 2012* (WA) amended the CPC Act to enable the confiscation of crime-derived or unlawfully acquired property if a person who is a controlled person or a member of a declared criminal organisation is involved in the commission of an offence.[68]

The *Corruption, Crime and Misconduct Criminal Property Confiscation Amendment Act 2018* (WA) amended the *Corruption, Crime and Misconduct Act 2003* (WA) and the CPC Act to confer powers on the Corruption and Crime Commission WA with respect to the confiscation of unexplained wealth and criminal benefits.[69]

Tasmania

The *Crime (Confiscation of Profits) Act 1993* (Tas) (CCP Act) allows for the confiscation of the proceeds of crime. The CCP Act provides for a range of asset confiscation orders including:

- Restraining orders which prevents specified property or all of the property of a defendant from being disposed of or otherwise dealt with.
- Forfeiture orders which if a person has been convicted of a serious offence, requires specified tainted property be forfeited to the state.
- Pecuniary penalty orders which if a person has been convicted of a serious offence, requires a person to pay to the state the value of the benefits derived by the person from the commission of the offence.

Part 9 of the Act deals with unexplained wealth, which is wealth that has not been lawfully acquired. Part 9 of the Act commenced on 1st March 2014. Under Part 9 of the CCP Act the DPP may apply for a range of unexplained wealth orders including:

- Interim wealth-restraining orders which can require specified property be seized, retained or guarded if the court is satisfied that an application is to be made for a wealth-restraining order as soon as reasonably practicable.
- Wealth restraining orders which if an unexplained wealth declaration has been made or is to be made against a person within a reasonable time that is not less than 21 days, requires specified property is not to be dealt with and may be seized, or secured for the duration of the order.
- Unexplained wealth declarations which requires the respondent to pay to the state the value of their unexplained wealth, which is the difference between their total wealth and their lawfully acquired wealth as determined by the Supreme Court.
- Wealth forfeiture orders which enable restrained property to be used to satisfy an unexplained wealth declaration.

Part 9 also includes section 85, which provides that any property or benefit that is a constituent of a person's wealth is presumed not to have been lawfully acquired by the person unless the person proves otherwise.

The *Crime (Confiscation of Profits) Amendment Bill 2018* (Tas) implemented majority of the recommendations made by Mr Damian Bugg AM QC in his review of Part 9 of the CCP Act in 2017. The key amendments made were:

- The Bill clarified that Part 9 of the CCP Act applies to clubs and associations.
- Provided that the court may refuse to make an interim wealth restraining order if the DPP refuses or fails to give an appropriate undertaking as to costs and damages.
- Provided that the Supreme Court can only make a wealth restraining order if the court is satisfied that the DPP intends to make an application for an unexplained wealth declaration or production order within a reasonable period.
- The Bill made a number of improvements to the existing information gathering powers contained in the CCP Act.

Victoria

The *Confiscation Act 1997* (Vic) (Confiscation Act) is the main legislative instrument for asset confiscation in Victoria. The Confiscation Act provides for a range of asset confiscation orders, including:

- Restraining orders which require that no property, or interest in property is to be disposed of, or otherwise dealt with by any person. The legislation provides for conviction-based and non-conviction-based restraining orders.
- Freezing orders which require that a financial institution must not allow a person to transact in relation to a specified account, that is held in the person's name or in which they have an interest.
- Exclusion orders which require specified property subject to a restraining order be excluded to a person if they can satisfy the court of certain statutory matters.
- Forfeiture orders which require specified property be forfeited to the Minister. The legislation provides for conviction-based forfeiture and non-conviction-based forfeiture.
- Tainted property substitution declarations, which must be made in conjunction with a conviction-based forfeiture order and require that specified property of the accused be substituted for property used or intended to be used in commission of an offence, upon their conviction.
- Automatic forfeiture of property subject to a restraining order to the Minister, upon conviction of certain offences or upon a tainted property substitution declaration.
- Serious drug offence restraining orders which require that property is not to be disposed of, or otherwise dealt with by any person. The court must make a restraining order if the accused has been charged with or convicted of a serious drug offence.
- Serious drug offender automatic forfeiture of property subject to a serious drug offence restraining order to the Minister, upon a person's conviction of a serious drug offence.
- Pecuniary penalty orders which apply to specified offences and require an accused to pay to the state a pecuniary penalty equal to the value of the benefits derived by the accused in relation to the offence.

The *Justice Legislation Amendment (Confiscation and Other Matters) Bill 2014* (Vic) introduced an unexplained wealth framework to Victoria. The purpose of introducing unexplained wealth provisions was to provide for the forfeiture of property of a person who is unable to satisfy a court that the property was lawfully acquired. The legislation introduced the following types of orders:

- Unexplained wealth restraining orders which require that no property or interest in property, is to be disposed of, or otherwise dealt with by any person.
- Unexplained wealth forfeiture orders which require property subject to an unexplained wealth restraining order be forfeited to the Minister on the expiry of 6 months after the restraining order is made (unless otherwise excluded by an exclusion order).

The *Major Crime and Community Safety Legislation Amendment Bill 2022* made several amendments to the Confiscation Act to enhance law enforcement's powers to address organised crime's growing use of cryptocurrencies, including powers to gather information, restrain property and enforce confiscation outcomes.

The *Confiscation Amendment (Unexplained Wealth) Bill 2024* is currently before the Victorian Parliament. If passed, it will strengthen Victoria's existing unexplained wealth laws by introducing a new unexplained wealth order that does not require any connection to criminal activity when targeting unlawfully acquired wealth.

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Appendix C: List of Agencies Consulted

Commonwealth

- Australian Federal Police
    - Cooperating Jurisdictions Committee Secretariat
    - Criminal Assets Confiscation Taskforce
    - Criminal Assets Litigation
- Services Australia
- Australian Tax Office

New South Wales

- NSW Department of Communities and Justice
- NSW Crime Commission
- NSW Police

South Australia

- SA Police
- SA Attorney-General's Department

Northern Territory

- NT Police, Fire and Emergency Services
- NT Department of the Attorney-General and Justice

Australian Capital Territory

- ACT Policing
- ACT Justice and Community Safety Directorate

Victoria

- Vic Police
- Vic Department of Justice and Community Safety
- Vic Office of Public Prosecutions

Queensland

- Qld Police
- Qld Crime and Corruption Commission

Western Australia

- WA Police
- WA Office of the Director of Public Prosecutions
- WA Corruption and Crime Commission

Tasmania

- Tas Police
- Tas Director of Public Prosecutions

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