



Joint Standing Committee on the Corruption and Crime Commission

**Proceeds of crime and unexplained wealth:
A role for the Corruption and Crime Commission?**

**Report No. 28
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Parliament of Western Australia

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Joint Standing Committee on the Corruption and Crime Commission

*Proceeds of crime and unexplained
wealth: A role for the Corruption
and Crime Commission?*

Report No. 28

Presented by

Hon Nick Goiran, MLC and John Hyde, MLA

Laid on the Table of the Legislative Council on 28 June 2012

Laid on the Table of the Legislative Assembly on 7 August 2012

Chairman's Foreword

Money laundering – the process of concealing the source of criminal proceeds – is increasingly regarded as the Achilles heel of organised crime. It is, in 2012, an accepted tenet of law enforcement that the fight against organised crime is significantly augmented by efforts to target the money laundering aspect of criminal activity, so as to ensure that crime does not pay.

In Western Australia, the *Criminal Property Confiscation Act 2000* provides avenues by which the WA Police, in conjunction with the Office of the Director of Public Prosecutions, may confiscate criminally-acquired property and financial profits, irrespective of whether criminal activity can be established.¹ Yet while this Act was regarded as ground-breaking when passed into law in 2000, the provisions of the Act that pertain to the investigation and confiscation of unexplained wealth have been generally under-utilised – and indeed, have effectively not been used at all since early 2010.

The main impetus for this inquiry was a meeting between the Committee and the Commissioner of the New South Wales Crime Commission, Mr Philip Bradley, in November 2010. At that time, the Committee was in Sydney² for a series of briefings by key law enforcement and anti-corruption agencies in aid of its inquiry into the corruption risks of controlled operations and informants.³ Mr Bradley explained the role and work of the New South Wales Crime Commission, and the way that the Commission approached the task of fighting organised crime in New South Wales by investigating unexplained wealth.

Though the Committee was and still is opposed to the Government's stated intention of increasing the jurisdiction of the CCC so as to enable it to directly investigate organised crime (while concurrently oversighting the WA Police), subsequent to meeting with Mr Bradley the Committee resolved to inquire into how criminal wealth is investigated in Western Australia, to ascertain whether this specialist area might benefit the operations of the CCC. Notionally at least, it appeared to the Committee that the investigation of criminal wealth may have been an avenue by which the CCC could aid the WA Police in the fight against organised crime in Western Australia, without compromising the CCC's authentic independence from – and accordingly, its ability to objectively oversight – the WA Police.

Prior to informing itself of the specific situation in Western Australia, the Committee conducted investigative travel to the United States of America and to Canada where, in the course of a series of meetings, the Committee was briefed by representatives of the United States Federal Bureau of Investigation, the Proceeds of Crime Branch of the Royal Canadian Mounted Police, and the Financial Transactions Reports and Analysis Centre of Canada. These briefings confirmed the Committee's preliminary view that the

¹ See section 12(2) of the *Criminal Property Confiscation Act 2000*.

² The Committee would later travel to Melbourne for the same purpose.

³ That inquiry is detailed in the Committee's fifteenth report in the current Parliament, entitled *Corruption risks of controlled operations and informants*, which was tabled on 21 June 2011.

investigation and seizure of unexplained wealth and proceeds of crime is a significant tool in the fight against organised crime.

The Committee also noted the fact that in July 2011 the Federal Parliamentary Joint Committee on Law Enforcement initiated an inquiry into “Commonwealth unexplained wealth legislation and arrangements,” and, in the course of that inquiry, convened public hearings attended by officers of the WA Police and (separately) the CCC in Fremantle in September 2011. In the course of those hearings, WA Police Assistant Commissioner (Specialist Crime), Mr Nick Anticich, asserted that “legislative impediments... [and] philosophical differences,” continued to hamper the successful investigation of unexplained wealth by the WA Police. Assistant Commissioner Anticich explained the frustration of the WA Police thus: “Where [the WA Police] strike the major difficulty is that we develop cases, which we forward to the DPP, that we cannot proceed on without his approval.” During that hearing, it was also asserted by another WA Police officer that “there are some serious legislative impediments which prevent [the WA Police] from realising the full potential [of the Criminal Property Confiscation Act 2000 in the fight against organised crime].”⁴

For the purpose of gathering formal evidence in aid of this inquiry, the Committee convened a series of closed hearings attended by the Deputy and Assistant Commissioners of the WA Police, the Director of Public Prosecutions and the Director of Confiscations from his Office, before finally convening something of a round-table discussion with the CCC Commissioner and Parliamentary Inspector (along with senior CCC staff and the Assistant to the Parliamentary Inspector), to discuss whether there may be a role for the CCC in investigating unexplained wealth and/or recovering proceeds of crime.

With respect to recovering the proceeds of crime – which is to say the confiscation of assets of persons convicted for certain criminal offenses – it is clear to the Committee that there is absolutely no basis for expanding the jurisdiction of the CCC. The present discharge of this function is handled well by the WA Police and the Office of the DPP. Unfortunately, however, the same cannot be said for the investigation and confiscation of unexplained wealth.

Where the recovery of proceeds of crime is tied to a criminal conviction, the investigation and confiscation of unexplained wealth is a non-conviction based civil proceeding. At present – insofar as the DPP has implemented a moratorium on the further processing of any applications made by the WA Police for unexplained wealth declarations – this tool would indeed appear to be underutilised in the fight against organised crime in Western Australia.

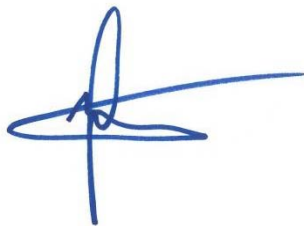
Making such a statement is, however, based entirely upon anecdotal evidence only. The Committee has not been offered any firm evidence as to the existence of criminal

⁴ Parliamentary Joint Committee on Law Enforcement, *Commonwealth unexplained wealth legislation and arrangements*, Transcript of evidence taken in Perth on 9 September 2011, pp 1-2. available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/unexplained_wealth/hearings/index.htm> (accessed 21 June 2012).

venture-capitalists in Western Australia who, despite living off of the profits of criminal activity, are themselves never involved in any other criminal act. It is the view of the Committee that there is nothing stopping the WA Police from providing more evidence to the DPP than they presently do in supporting an application for an unexplained wealth declaration. Though the *Criminal Property Confiscation Act 2000* purportedly reverses the onus of proof onto the person who is alleged to possess unexplained wealth, the reality is that the successful confiscation of unexplained wealth requires more than simply asking a criminal target to explain their financial situation. The fact that the WA Police have preferred in the past to have the Office of the DPP conduct what are resource-intensive financial investigations – work for which the Office of the DPP is not properly or adequately resourced – indicates, in part, that investigations of this nature are a low priority for the WA Police.

The Committee believes that any current problems are unlikely to be rectified solely by expanding the jurisdiction of the CCC. Noted deficiencies in the present CCC Act would need to be addressed if the CCC is to prove more effective than the current WA Police/Office of the DPP model.

Furthermore, any role undertaken by the CCC will require either an initial increase in the CCC's resources, or else an abrogation of duties presently performed by the CCC. That is, any solution offered by the CCC will necessarily come at a cost to the state of Western Australia.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' intertwined, with a horizontal line extending to the right.

Hon Nick Goiran, MLC
Chairman

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Ministerial response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Standing Committee on the Corruption and Crime Commission directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee, within not more than three months, or at the earliest opportunity after that time if the Assembly is adjourned or in recess, from the date of tabling of this report in the Assembly.

Findings and Recommendations

Finding 1 (page 8)

Face-to-face interaction with criminal targets significantly heightens the risk of corruption within law enforcement agencies.

Finding 2 (page 9)

The risks associated with the investigation of organised crime are such that officers engaged in this vocation must be subject to regular and stringent security measures.

Finding 3 (page 9)

The CCC's role of combating misconduct and corruption in the public sector is a vital component of the overall fight against organised crime in Western Australia.

Finding 4 (page 11)

Law enforcement strategies that target criminal proceeds are complex and as such require a multi-disciplinary investigative approach, so as to ensure that diverse arrays of specific skills are able to be deployed in the investigative effort.

Finding 5 (page 12)

The viability of organised criminal activity is contingent upon the ability of criminal enterprises to successfully launder ill-gotten profits. As such, financial intelligence must form an integral component of any contemporary organised crime investigation.

Finding 6 (page 12)

Investigating organised criminal activity is an inherently challenging and time-consuming process, and as such demands resolute leadership within law enforcement agencies that are engaged in this endeavour.

Finding 7 (page 21)

The majority of Criminal Property Confiscation Act 2000 confiscations in Western Australia are obtained through drug trafficker declarations applied for by the Director of Public Prosecutions.

Finding 8 (page 21)

The recovery of "proceeds of crime," under the provisions of the *Criminal Property Confiscation Act 2000* is a function of government that the WA Police and the Office of the Director of Public Prosecutions are performing extremely well.

Finding 9 (page 24)

At present, examinations in support of unexplained wealth investigations under the provisions of the *Criminal Property Confiscation Act 2000* are regarded as ineffective by the Office of the Director of Public Prosecutions, owing to the need for these examinations to be conducted as part of a court process.

Finding 10 (page 27)

The optimum model for conducting investigations of unexplained wealth in Western Australia under the provisions of the *Criminal Property Confiscation Act 2000* would require the creation of a new “confiscations agency,” which would operate independently from both the WA Police and the Office of the Director of Public Prosecutions.

Finding 11 (page 31)

In line with Finding 8, there is absolutely no reason to expand the jurisdiction of the Corruption and Crime Commission – or, indeed, any other government agency – into the area associated with recovering conviction-based “proceeds of crime,” under the provisions of the *Criminal Property Confiscation Act 2000*.

Finding 12 (page 31)

If the jurisdiction of the Corruption and Crime Commission is to be increased, so as to allow the CCC to investigate “unexplained wealth,” under the provisions of the *Criminal Property Confiscation Act 2000*, the *Corruption and Crime Commission Act 2003* would need to be amended to give the CCC the power to initiate civil proceedings, to freeze property, and to maintain custody over frozen property for the duration of these investigations.

Recommendation 1 (page 49)

The *Criminal Property Confiscation Act 2000* should be amended so as to invest the functions conferred upon the Director of Public Prosecutions in sections 11-14 upon the Commissioner of the Corruption and Crime Commission. This would allow the CCC to conduct – on application by the WA Police Commissioner – investigations of unexplained wealth into targets identified by the WA Police. These functions could then be removed from the ambit of the DPP.

Recommendation 2 (page 49)

The *Corruption and Crime Commission Act 2003* should be amended to give the CCC the power to initiate civil proceedings, and to freeze and maintain custody over property, so as to enable the CCC to investigate unexplained wealth in line with the provisions of sections 11-14 of the *Criminal Property Confiscation Act 2000*.

Chapter 1

Investigating unexplained wealth and recovering the proceeds of crime

Prefer loss to the wealth of dishonest gain; the former vexes you for a time; the latter will bring you lasting remorse.

Chilon of Sparta, 6th Century B.C.

The New South Wales Crime Commission

In September 2010, the Joint Standing Committee tabled a report in Parliament entitled *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*. In that report, the Committee recommended against increasing the jurisdiction of the CCC, and against allowing the CCC to directly investigate organised crime; it was – and indeed, remains – the view of the Committee that any such extension of the CCC’s jurisdiction would compromise the authentic independence of the CCC with respect to the WA Police, and therefore the CCC’s important police oversight role.

Even in the process of preparing the report, however, it was clear to the Committee that there remained a distinct possibility that the jurisdiction of the CCC may in fact be increased, which would result in the CCC being empowered to directly investigate organised crime. As such, subsequent to tabling its report on this matter, the Committee set out to familiarise itself with some of the challenges faced by agencies that are engaged directly in the fight against organised crime in Australia, so as to ensure that the Committee would remain properly equipped to adequately oversight the work and role of the CCC. To this end, the Committee visited and received briefings from a number of senior officials from key law enforcement agencies in Victoria and New South Wales in November 2010.

One of the persons who met with the Committee was Mr Philip Bradley, who was then the Commissioner of the New South Wales Crime Commission. In hosting the Committee at a meeting convened at the NSW Crime Commission headquarters in Sydney, Mr Bradley explained the role and work of the NSW Crime Commission, and the way that its officers approach the task of fighting organised crime in New South Wales by investigating unexplained wealth.

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Subsequent to this briefing, during a meeting on 24 November 2010 the Committee resolved to undertake an inquiry with the following terms of reference:

- how proceeds of crime and unexplained wealth are presently recovered in Western Australia: and
- whether the Corruption and Crime Commission should have the jurisdiction to recover proceeds of crime and unexplained wealth here.

Investigative enquiries

Prior to being able to devote its full attention to this inquiry, the Committee invested itself into a separate inquiry into the use of public examinations by the CCC, the outcome of which was reported to Parliament on 27 March 2012.⁵ In October 2011 the Committee undertook investigative travel to Chicago and Ottawa where it was briefed by a number of law enforcement and anti-corruption agencies on a range of topics pertaining to this inquiry, the aforementioned inquiry into the use of public examinations by the CCC, and the Committee's ongoing inquiry into how the CCC handles allegations and notifications of police misconduct. Of particular relevance to this inquiry were briefings by the Chicago Division of the Federal Bureau of Investigation, the Proceeds of Crime Branch of the Royal Canadian Mounted Police, and the Financial Transactions Reports Analysis Centre of Canada. As a result of these briefings – and prior to convening any formal hearings with any West Australian agency in aid of this inquiry – the Committee formed the preliminary view that the investigation and seizure of unexplained wealth is a significant tool in the fight against organised crime.

In preparation for this investigative travel, the Committee informed itself of the provisions of the *Criminal Property Confiscation Act 2000*, paying particular attention to Part 3 of that Act, which deals with the identification and recovery of confiscable property. Especially of interest to the Committee were sections 11 through 14 of that Act, which sections enable the investigation and seizure of “unexplained wealth.”

⁵ See the Committee's twenty-fifth report in the current Parliament, entitled *The use of Public Examinations by the Corruption and Crime Commission*, which was tabled on 27 March 2012.

Section 144 of the *Criminal Property Confiscation Act 2000* defines unexplained wealth as follows:

144. Term used: unexplained wealth

(1) For the purposes of this Act, a person has unexplained wealth if the value of the person's wealth under subsection (2) is greater than the value of the person's lawfully acquired wealth under subsection (3).

(2) The value of the person's wealth is the amount equal to the sum of the values of all the items of property, and all the services, advantages and benefits, that together constitute the person's wealth.

(3) The value of the person's lawfully acquired wealth is the amount equal to the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired.⁶

Furthermore, by the provisions of section 12(2) of the Act if, subsequent to an application by the DPP, a court makes an unexplained wealth declaration against a person, it is assumed that the unexplained wealth was acquired unlawfully and the burden of proving otherwise falls upon the respondent. That is, the onus of proof is reversed when an unexplained wealth declaration is made, and it is left to the respondent to prove her or his innocence.

From this cursory consideration of the *Criminal Property Confiscation Act 2000*, it seemed to the Committee the legislation to enable the investigation of criminal proceeds was in place. The Committee was also aware, however, that by June 2009 – more than eight years after the Act was passed – only 24 such declarations had been made against persons in Western Australia.⁷

Parallel inquiry by the federal Parliamentary Joint Committee on Law Enforcement

Parallel to this inquiry, the Committee became aware the federal Parliamentary Joint Committee on Law Enforcement had embarked upon its own very similar inquiry into Commonwealth unexplained wealth legislation and arrangements. As a component of this inquiry, on 9 September 2011 the PJCLE convened a public hearing attended by

⁶ *Criminal Property Confiscation Act 2000*, p 90.

⁷ A fact that is detailed in a document produced in July 2010 by the Australian Institute of Criminology entitled *Unexplained wealth laws in Australia*, which is available at <http://www.aic.gov.au/documents/2/0/D/%7B20D3B223-C146-4E10-B05F-B30D9E8F59D4%7Dtandi395_001.pdf> (accessed 21 June 2012).

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several senior WA Police officers, including Assistant Commissioner (Specialist Crime) Nick Anticich.

In the course of this hearing, Assistant Commissioner Anticich gave some context to the apparent under-utilisation of the unexplained wealth provisions in the *Criminal Property Confiscation Act 2000*. In his evidence, Mr Anticich referred to “legislative impediments... [and] philosophical differences,” as having hampered the successful investigation of unexplained wealth by the WA Police. Assistant Commissioner Anticich also suggested that this issue might be alleviated by expanding the jurisdiction of the Corruption and Crime Commission, a suggestion that was, of course, at the heart of this inquiry.

The general tenor of the evidence given by the WA Police before the PJCLE was that though unexplained wealth legislation exists in Western Australia as a component of the *Criminal Property Confiscation Act 2000*, the investigation of unexplained wealth in Western Australia has not significantly benefitted the fight against organised crime in Western Australia, and indeed the relevant provisions of the Act have lay relatively dormant since being passed into law in 2000. Acting Detective Inspector Hamish McKenzie expressed the view that the legislation itself was restricting the WA Police from using the unexplained wealth provisions as a tool in the fight against organised crime:

The WA police, in consultation with the state DPP confiscation team, work in partnership to target individuals who we believe may have unexplained wealth. It is the role of the WA Police to identify those targets and prepare a file which we then refer to the DPP. I have been the officer in charge of the police Proceeds of Crime Squad for about three and a half years now. In that time there has been very little progress in relation to unexplained wealth for a number of matters. Some of those are in relation to legislative impediments that I believe prevent us from applying the full intent of the Criminal Property Confiscation Act, and others relate to the separate model of the police investigating and then the DPP doing the litigation as such.

...in relation to the civil confiscation, which is what we are working at here with the Criminal Property Confiscation Act, there needs to be that one continuous group or body that is investigating it. We find, from a police point of view, that the model of two agencies is not the best model to use for unexplained wealth. As a result, in my experience there have been very few unexplained wealth matters that have been finalised in the state courts. The WA Police have a number of matters at the moment that are sitting with the state DPP and that we are

Investigating unexplained wealth and recovering proceeds of crime

*trying to progress, and for other reasons—legislative reasons being among them—we have been unsuccessful.*⁸

Assistant Commissioner Anticich went further, explaining that “philosophical differences,” between the WA Police and the DPP were also restricting the ability of the WA Police to make use of the unexplained wealth provisions of the Act:

*Whilst we think there are legislative impediments I think there are also some philosophical differences... Where we strike the major difficulty is that we develop cases, which we forward to the DPP, that we cannot proceed on without his approval. It is at that particular point that we tend to get into the morass of being able to advance these things. We very much take the view that it is an inquisitorial process with a reverse onus on those people we seek this information from, yet we are being fundamentally driven by requirements to say that we need to answer these questions before we ask them of these individuals. That process of putting together in-depth financial profiles and answering all the questions before we ask them consumes enormous amounts of time for us. We do not believe that was the intent of the legislation. Our belief is that it was a case of being able to pull these people in to examine them and ask them to answer those questions. It is not for us to develop those answers.*⁹

Assistant Commissioner Anticich explained to the PJCLE that the view taken by the WA Police as to the discharge of the provisions of the *Criminal Property Confiscation Act 2000* differed to the view taken by the DPP, and that this was problematic in Western Australia:

*It is as simple as this. In part of the process it would be trying to determine an individual's wealth. We take the view that it is simply a case of summoning that person before a hearing, obviously getting all the right processes and asking that person to provide the details of what they are and what their worth is. To date, the process has largely been the DPP coming back to us and saying: 'No. You put together that information before we conduct the investigation.' They are two quite philosophically different approaches to the same result at the end of the day.*¹⁰

⁸ Parliamentary Joint Committee on Law Enforcement, *Commonwealth unexplained wealth legislation and arrangements*, Transcript of evidence taken in Perth on 9 September 2011, pp 1-2. available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=le_ctte/unexplained_wealth/hearings/index.htm> (accessed 21 June 2012).

⁹ *Ibid.*, p 2.

¹⁰ *Ibid.*, p 4.

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The Assistant Commissioner then offered three possible options for resolving what had essentially amounted to an impasse:

We think that there are three possible ways to resolve the issue. One would be for, as is proposed in the Commonwealth legislation, that the Police Commissioner be given the right to initiate proceedings

The other would be the creation of a specialised court or agency to deal with such matters independent of all. Thirdly, perhaps we could enhance some of the capacities within the estate of some other agencies. We have a Corruption and Crime Commission, for example, that is currently under review [in] terms of its role and function, and that could be a role and function that we could ask them to look at.¹¹

The Committee considered this evidence both prior and subsequent to its briefings in Chicago and Ottawa and, after returning to Perth, resolved to seek the attendance of relevant officers of the WA Police, including Assistant Commissioner Anticich, before a closed hearing in aid of the inquiry. Having determined that the investigation of unexplained wealth is a key tool in the fight against organised crime, that this tool appeared to be completely dormant in Western Australia, and giving regard to the fact that one of the “main purposes” of the CCC Act is “to combat and reduce the incidence of organised crime,” the Committee was keen to pursue the notion put by Assistant Commissioner Anticich that the CCC could provide assistance in the process of pursuing criminal proceeds in this state.¹²

¹¹ *Ibid.*

¹² See section 7A of the *Corruption and Crime Commission Act 2003*.

Chapter 2

Examining other jurisdictions

Members of the mob will go to almost any lengths to carry out their criminal activity... Typically they get into running restaurants and other legal businesses that they can use to hide money gained from their illegal activities... As long as there is money to be made from criminal activity, these guys will never stop.

Special Agent Ted McNamara, United States Federal Bureau of Investigation, 2011.

Inquiries in Chicago and Ottawa, October 2011

In October 2011 the Committee undertook investigative travel to Ottawa and Chicago where, among other topics, the Committee was briefed on law enforcement strategies centred around the investigation of criminal proceeds by representatives of the United States Federal Bureau of Investigation, the Proceeds of Crime Branch of the Royal Canadian Mounted Police, and the Financial Transactions Reports Analysis Centre of Canada.¹³ As a result of these briefings, the Committee formed the preliminary view that the investigation and seizure of unexplained wealth is a significant tool in the fight against organised crime. The Committee was also informed of some of the challenges inherent to this strategy, and some of the measures that these agencies have implemented to mitigate the corruption risk associated with what is an emerging field of law enforcement.

Briefing by the Chicago Division of the Federal Bureau of Investigation

In Chicago the Committee was met by the Special Agent in Charge of the Chicago Division of the Federal Bureau of Investigation, Mr Robert D. Grant, and two senior FBI Chicago Division officers, Special Agents Ted McNamara and Chris Mackey.

The primary reason for visiting Chicago and meeting with these gentlemen was for the Committee to receive a briefing regarding the use of the *Racketeering Influenced and Corrupt Organisations Act* – a United States federal law that essentially allows law enforcement agencies to target criminal organisations as opposed to individuals. Prior to the meeting, the Committee had familiarised itself with the long and proven track record of success of the FBI in making use of the RICO Act in the fight against organised crime; in particular, the Committee was impressed by the spectacular success of the

¹³ In particular, these briefings enhanced the Committee's report regarding the use of public hearings by the CCC, and will be further drawn upon in the course of the Committee's ongoing inquiry into how the CCC handles allegations and notifications of police misconduct.

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Chicago Division of the FBI in 2009 and 2010, when the RICO Act was an integral component of “Operation Family Secrets,” an investigation that had seen a significant number of members of the “Chicago Outfit,” brought to justice.

Special Agents Grant, McNamara and Mackey delivered an impressive and thorough briefing, and although any direct insight into successful law enforcement strategy was necessarily limited by the jurisdictional disparity between the United States and Australia, the Committee found discussion regarding the investigation of organised criminal activity and the heightened risk of corruption associated with this endeavour to be particularly beneficial.

Special Agent Grant informed the Committee that the ability of the FBI to impact upon organised criminal activity in the United States was significantly enhanced by the fact that FBI officers had no patrolling responsibility – a fact that benefits the work of the FBI in multiple ways. According to Special Agent Grant, face-to-face interaction with criminal targets – a traditional component of police work – significantly heightens the risk of corruption associated with law enforcement efforts. This is so – as the Committee has previously reported – because of two broad reasons.¹⁴ On the one hand, those who are most interested in corrupting law enforcement officers may well have little to lose and a lot to gain from bribery and other forms of corrupt influence (having, as they often do, access to substantial sums of money or other benefits); conversely, it is an established phenomenon that law enforcement officers can become cynical with respect to the perceived effectiveness of their role in the law enforcement process, particularly when these officers continually find themselves in close proximity to persons who exemplify the difficulties faced by law enforcement agencies. Left unchecked, cynicism of this nature is potentially very damaging to law enforcement efforts, as it often leads to process corruption, whereby protocols are ignored in favour of ‘getting the job done.’

Finding 1

Face-to-face interaction with criminal targets significantly heightens the risk of corruption within law enforcement agencies.

Special Agent Grant explained that the FBI approached its role by consciously operating at a distance from direct criminal activity. Despite this, however, the Committee learned that FBI staff members are subjected to extremely stringent security measures, measures that are significantly more thorough than regular police departments, including having detailed records of their personal lives recorded, stored, and regularly subjected to strong oversight. The Committee was impressed by the resolve of Special Agents Grant, McNamara and Mackey in relation to these measures: it was clear to the

¹⁴ See Appendix Two of the Committee’s tenth report in the current Parliament, entitled *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, which was tabled on 9 September 2010.

Committee that these gentlemen strongly believed in the importance of these security measures as a component of the overall national security of the United States. Certainly this information served to significantly strengthen the Committee's belief that no security measure is too great relative to the risks associated with the investigation of organised crime.

Finding 2

The risks associated with the investigation of organised crime are such that officers engaged in this vocation must be subject to regular and stringent security measures.

With respect to the RICO Act, the Committee was informed by Special Agent McNamara that this Act had changed the idea that the FBI ought to pursue individuals in the fight against organised crime: instead, the pursuit of criminal enterprises had become the focus of most organised crime investigations. This strategy was employed to significant effect in "Operation Family Secrets," which had resulted in the successful conviction of a significant number of interconnected criminals by the Chicago Division of the FBI.

Under the RICO Act, the guilt of an individual in committing a particular crime does not need to be established; rather, what needs to be established is that a person possessed knowledge that a particular crime was to be committed. According to Special Agent Mackey, prior to "Operation Family Secrets," organised crime had become a significant problem in Chicago because lawbreakers had become very successful at corrupting officials in each of the arms of government. This information served to reiterate the Committee's strong belief that the CCC's public sector misconduct role – to improve the integrity of the Western Australian public sector, to help public sector agencies minimise and manage misconduct, and to investigate allegations of corruption – is a very important component in the overall fight against organised crime in Western Australia.

Finding 3

The CCC's role of combating misconduct and corruption in the public sector is a vital component of the overall fight against organised crime in Western Australia.

Organised crime, the Committee was informed, is very indirect in its effect – and as such city police forces in the United States were moving away from major organised crime investigations, preferring to focus instead on more visible crimes while leaving these major investigations to specialist agencies like the FBI. As a consequence of this, the need for there to be clearly defined roles and objectives for each specific law enforcement agency was of paramount importance. This notion resonated strongly with the Committee, as it reinforced the Committee's belief that if the role of the CCC is to be amended, any such amendment should be clearly defined and very specific. Simply increasing the jurisdiction of the CCC to enable the CCC to 'investigate organised

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crime,' would create the significant problem of having the WA Police and the CCC, not to mention the Australian Federal Police and others, competing in the same law enforcement space – an outcome that the Committee would regard as most undesirable.

The Committee appreciated the briefing provided by Special Agents Grant, McNamara and Mackey: their dedication was obvious and impressive, and the Committee came away from the briefing energised and optimistic as to the role being played by law enforcement agencies in the international fight against organised crime.

Briefing by the Proceeds of Crime Branch of the Royal Canadian Mounted Police

While in Ottawa the Committee was graciously hosted by a number of representatives of the Royal Canadian Mounted Police, and Committee Members enjoyed a series of briefings convened at RCMP National Headquarters. In aid of this particular inquiry, the Committee was briefed by Superintendent Jeff Adam and Inspector Jean Cormier of the RCMP Proceeds of Crime Branch; contributions were also made by a number of other senior officers from that Branch, as well as representatives from associated RCMP branches and other federal Canadian agencies, including the Department of Finance and the Financial Transactions Reports Analysis Centre of Canada.

The Committee was informed that the ultimate goal of the Proceeds of Crime Branch is to remove the financial incentive that drives organised criminal activity.

Superintendent Adam stressed the importance of implementing a multi-disciplinary approach in working toward this goal: according to Superintendent Adam, the success of the RCMP Proceeds of Crime Branch is a credit to a number of federal Canadian agencies. Though a key facet of this law enforcement strategy in Canada is that proceeds of crime investigations are ultimately headed by the RCMP, the successful targeting of criminal proceeds is contingent upon a number of agencies each contributing their own particular area of expertise to the fight. Indeed, the importance of a “multi-disciplinary approach,” would be continually emphasised to the Committee as this inquiry progressed.

Of particular interest to the Committee was a description of the “expert witness program,” run by the RCMP Proceeds of Crime Branch. In essence, this program sees RCMP officers, whose knowledge enables them to describe in detail the financial activities conducted by criminals (such as money laundering), called upon to give context to evidence in court so as to enhance the prospect of securing criminal convictions. By its very existence, this program further reinforced to the Committee the notion that the investigation of criminal proceeds is a highly-complex area of law enforcement, and one in which very specific and developed skills are required.

Finding 4

Law enforcement strategies that target criminal proceeds are complex and as such require a multi-disciplinary investigative approach, so as to ensure that diverse arrays of specific skills are able to be deployed in the investigative effort.

Echoing the sentiments expressed to the Committee by the FBI in Chicago, the Committee was informed that the investigation of criminal proceeds was an area of law enforcement that was likely to be less susceptible to corruption, because officers working in this area maintain a distance from criminal targets, and the work itself was by necessity intelligence-led (and thus driven proactively by investigators). It was stressed to the Committee that the relationship between FINTRAC and the RCMP was absolutely critical, as the value of FINTRAC intelligence was wholly contingent upon the diligence of RCMP investigators. Having earlier informed itself of the role played by FINTRAC, and having developed an awareness of the sensitivity of FINTRAC intelligence, the Committee was impressed with the resolve expressed by both Superintendent Adam and Inspector Cormier in this regard.

Also on the topic of balancing powers of investigation with overseeing the use of those powers, Inspector Cormier explained to the Committee that the RCMP believed that it was important that the role of prosecuting a charge associated with an unexplained wealth investigation was conducted by persons separate from those who do the investigating. This would later be revealed to the Committee as perhaps the major flaw in the current legislation in place in Western Australia, which in effect requires the Office of the Director of Public Prosecutions to conduct significant investigations of their own if they are to successfully prosecute a charge relating to the possession of unexplained wealth. According to Inspector Cormier, this separation of authority is an important safeguard – a sentiment with which the Committee agrees.

As the briefing drew to a close, Superintendent Adam said to the Committee that one of the greatest challenges faced by the Proceeds of Crime Branch of the RCMP is that success in the field of investigating criminal proceeds is very difficult to gauge, and as such resolute leadership is a vital component of this law enforcement strategy.

Briefing by the Financial Transactions Reports Analysis Centre of Canada

The final briefing received by the Committee in Ottawa took place in the headquarters of the Financial Transactions Reports Analysis Centre of Canada, where the Committee met the Director of FINTRAC, Ms Jeanne M. Flemming, and a number of senior FINTRAC officers. During the briefing, the Committee learned about the role played by FINTRAC both in combating money laundering in Canada, and in augmenting the RCMP's fight against organised crime.

Chapter 2

The central message of this briefing was that financial intelligence – which is one of the most recent initiatives in law enforcement – must form an integral component of any organised crime investigation. In essence, this is so because of the significant advantages inherent to deploying modern communications technology in the fight against organised crime. As Ms Flemming explained to the Committee, it is critically important investigators take advantage of the fact that contemporary information technology allows the flow of money associated with criminal activity to be followed.

Finding 5

The viability of organised criminal activity is contingent upon the ability of criminal enterprises to successfully launder ill-gotten profits. As such, financial intelligence must form an integral component of any contemporary organised crime investigation.

The Committee was informed, however, that despite the advantages inherent to contemporary information technology – and even in the face of the most stringent of government-imposed financial regulations – money laundering investigations typically take a very long time to come to fruition. As such, strong resolve is vital to the success of FINTRAC.

Finding 6

Investigating organised criminal activity is an inherently challenging and time-consuming process, and as such demands resolute leadership within law enforcement agencies that are engaged in this endeavour.

Chapter 3

The investigation of criminal proceeds in Western Australia

Always follow the money. Inevitably it will lead to an oak-panelled door and behind it will be Mr Big.

Advice of former Assistant Deputy Commissioner James Crane to all new officers joining the Metropolitan and City of London Police Fraud Department, c1970.

Formal hearings in aid of this inquiry

Having formed the preliminary view that the investigation and seizure of unexplained wealth is a significant tool in the fight against organised crime, the Committee resolved to seek the attendance of relevant senior officers of the WA Police, including Assistant Commissioner Anticich, and the Office of the DPP, including the DPP, Mr Joseph McGrath SC, in order to establish exactly the status of unexplained wealth examinations in Western Australia. Accordingly, Assistant Commissioner Anticich and the Deputy Commissioner (Operations), Mr Chris Dawson, attended before a closed Committee hearing on 9 December 2011. Subsequent to this the DPP, along with Mr Ian Jones, who is the Practice Manager of the Confiscations Team within the Office of the DPP, attended before a closed Committee hearing on 2 May 2012.

Closed hearing with the WA Police Deputy and Assistant Commissioners

The Committee began the process of gathering formal evidence in aid of this inquiry with a closed hearing on 9 December 2011 attended by Deputy Commissioner Dawson and Assistant Commissioner Anticich of the WA Police. The Committee advised these two gentlemen that one of the purposes of the closed hearing was for the Committee to explore the apparent difficulties in making use of the provisions of the *Criminal Property Confiscation Act 2000*.¹⁵

¹⁵ The Committee also took the opportunity afforded by the attendance of the Deputy and Assistant Commissioners to discuss the assistance provided by the CCC to the WA Police in conducting the security operation in support of the 2011 Commonwealth Heads of Government Meeting in Perth, and the technological legacy of that security operation. These lines of inquiry formed the basis of the Committee's twenty-second and twenty-third reports in the current Parliament: *The Role Played by the Corruption and Crime Commission in Aiding the Security Operation During the 2011*

Chapter 3

In explaining that the Committee was inquiring into whether there may be a role for the CCC in investigating unexplained wealth and recovering proceeds of crime, the Chairman indicated that this was a notion driven by the stated desire of the government to increase the engagement of the CCC in the fight against organised crime in Western Australia:

...the genesis of this is in essence for the committee to say: clearly the government would like the CCC to be involved in the fight against organised crime, is there a niche area in that fight against organised crime that is perhaps less susceptible to internal corruption thereby not creating that conflict of interest that the committee is very concerned about and yet might still be of benefit to the fight against organised crime? In that respect, the committee has found it quite instructive to have noted the evidence that was provided before a federal committee on 9 September this year. As I understand it, having read that transcript, unexplained wealth legislation has existed in this state but has effectively not been a resounding success and has in large part laid relatively dormant since it was passed into law in 2000. I noted in particular that Inspector Hamish McKenzie on that day advised that committee of the following —

I have been the officer in charge of the police Proceeds of Crime Squad for about three and a half years now. In that time there has been very little progress in relation to unexplained wealth for a number of matters.

He went on to say —

In relation to the unexplained wealth, there are some serious legislative impediments which prevent us from realising the full potential.

After that, Assistant Commissioner Anticich, you provided quite a number of pieces of evidence to that committee unpacking that.¹⁶

The Chairman then asked Assistant Commissioner Anticich if he would be “supportive of the CCC taking on a role in this area,” to which Mr Anticich replied in the affirmative:

...it is my firm belief that it is an area because of the current dysfunction and some of the powers and capabilities that the CCC have

Commonwealth Heads of Government Meeting, which was tabled on 23 February 2012, and *The post-CHOGM Technological Capability of the WA Police*, which was tabled on 1 March 2012.

¹⁶ Mr Chris Dawson APM, Deputy Commissioner, and Mr Nick Anticich APM, Assistant Commissioner (Specialist Crime), WA Police, *Transcript of Evidence*, 9 December 2011, p 12.

that it would be an enormous strength and a very good fit, I would think, for the Commission to take on that role. It is a subset of what the New South Wales Crime Commission does. It has hobbled our efforts in the top end of serious and organised crime because we have the “Mr Bigs” which this unexplained wealth provision was designed, many years ago, to target that effectively has not been into play. We are I think suffering as a consequence of that. I can tell you in terms of addressing it, I have met with the DPP personally on a number of occasions, we have written as an agency to the Attorney flagging some of the issues, and I am of the belief that the legislation is being reviewed. Recently, we have become aware of it and again written to the Attorney asking that we may have some input into any requirements or considerations of any legislative reform. I am hoping it is back on the agenda for the government because I see it as an enormously powerful tool with very positive benefits that we can apply in the serious and organised crime space, which we have been unable to do.¹⁷

The Chairman then sought to clarify some of the terminology with Assistant Commissioner Anticich:

The CHAIRMAN: *Is it the case that the criminal confiscation aspect, as compared to the civil confiscation aspect, is generally referred to as “proceeds of crime” versus “unexplained wealth”?*

Mr Anticich: *Correct. There are a couple of components to it and a couple of subsets. We talk about crime-used and crime-derived, and there have been some philosophical debates about that... there are some philosophical differences and interpretations that are largely based on the internal interpretation of the law and not tested cases.¹⁸*

The Chairman then explored whether the *Criminal Property Confiscation Act 2000* was totally dormant, or whether it was only the unexplained wealth provisions that were problematic. In responding to this line of questioning, Mr Dawson and Mr Anticich informed the Committee that while the confiscation of “proceeds of crime,”¹⁹ was functioning well, as of 2011, the DPP had placed a moratorium on making any further applications under the provisions of section 11 of the *Criminal Property Confiscation Act*:

¹⁷ *Ibid.*, pp 12-13.

¹⁸ *Ibid.*, p 13.

¹⁹ “Proceeds of crime,” is property that meets with the definition of “confiscable,” as described by sections 142 of the *Criminal Property Confiscation Act 2000*. See also Part 12 of that Act.

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The CHAIRMAN: *Is it fair to say then that the proceeds of crime area is working reasonably well, albeit there can always be room for improvement?*

Mr Anticich: *Very well.*

The CHAIRMAN: *But in comparison, the unexplained wealth provisions, which is the civil jurisdiction, is not working well at all.*

Mr Anticich: *Not at all. It is not working—full stop. In fact, if I can interject, Mr Chair, late last year the DPP declared a moratorium on the processing of any such applications, so we do not do them.*

The CHAIRMAN: *Is it an indefinite moratorium?*

Mr Anticich: *I have no clarification as to when it will recommence.*²⁰

This was clearly an important revelation that would later be explored more fully by the Committee during a subsequent closed hearing with the DPP on 2 May 2012.

As the hearing continued, the Committee sought to clarify the corruption risks associated with the investigation of unexplained wealth:

The CHAIRMAN: *Are there integrity misconduct risks associated with officers working in the area of unexplained wealth? Would you say that the risks are less, as compared to other crime fighting areas?*

Mr Dawson: *I think history tells us... that the core areas that deserve attention in terms of corruption within the police are those that involve the large movement of money and/or illicit commodities. They are the traditional areas that deserve the attention because of the opportunities that get presented... I would not want to particularise to say that unexplained wealth is a particular area that you can distinguish from others—for instance, crime-derived asset seizures. I would not see that there is any distinction there, but I would agree that the traditional areas where officers are exposed to the seizure of large, particularly moveable commodities—mainly cash—are the areas that we must remain vigilant on, and any oversight bodies external from us as well.*²¹

The Chairman explored this response further:

²⁰ Mr Chris Dawson APM, Deputy Commissioner, and Mr Nick Anticich APM, Assistant Commissioner (Specialist Crime), CCC, *Transcript of Evidence*, 9 December 2011, p 13.

²¹ *Ibid.*, p 14.

The CHAIRMAN: *If I understand that correctly, you are saying that there are risks in all areas, but particularly where there are high volumes of money involved. Unexplained wealth clearly would be an area where high levels of money are involved. However, again, this is a layman's perspective of how one investigates this, but I understand that it is an almost forensic accounting-type activity. So if the types of investigators you are going to have in this area are predominantly super accountants, would they be less susceptible to corruption, and what might be the impact even if they were susceptible to corruption, as compared to someone who was involved in investigating drug seizures?*

Mr Dawson: *You may well have the same targets because if we, for instance—yes, it is correct that we would have forensic accounting-types of skilled officers that would do, for instance, an unexplained wealth investigation, but in exercising that, you still have to search the premises to get the necessary evidence that you would want to support such an application. If you were going to a “Mr Big’s” property because you wanted to try to get evidence to support how that property, for instance, was obtained by legitimate or illegitimate means, those premises may well spawn large caches of cash, so you may well be executing a search warrant for an active drug dealer and still have large amounts of cash there, but you may well also have officers exposed to searching premises for unexplained wealth and have the same sorts of opportunities present themselves.²²*

The evidence of Deputy Commissioner Dawson and Assistant Commissioner Anticich was then summarised, with the Chairman putting the evidence into the context of an existing proposal as to how the CCC might be engaged directly in the investigation of organised crime:

The CHAIRMAN: *I think what we have heard this morning in this area is that proceeds of crime is working reasonably well, unexplained wealth is very dysfunctional and, in fact, there is a moratorium on it at the moment. Also, it is not necessarily the case that the corruption risks in this area are less than in other areas; it is risky everywhere. It is an area that requires specialist expertise, and, therefore, in that respect, because it is a niche area, it could be suitable to the CCC, but it would not circumvent the overall concern about corruption risks and the conflict with the oversight function.*

²² *Ibid.*

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Mr Anticich: *Mr Chair, something that emanates from the comments and perhaps the conception around what the CCC may do in a model like this as opposed to police is that, generally speaking, I would be correct in saying I do not think the CCC has the arms and legs to deploy operationally as we do. They have 160 people and we can draw on 7 000 officers, and in some of our operations and in certainly one recently we have deployed 200 officers concurrently at one time. The CCC would in no way be able to rally that type of operational capability. It would be the case that, even in a possible model, we would still be the troops on the ground. I could not see the CCC, even in an organised crime role or function, executing multiple warrants, deploying operationally and taking on some of the things that we would do. More so, I would suggest—this is an important aspect of serious, top-end organised crime—it is probably 90 per cent intelligence gathering and covert operations, where in fact the villains do not even know that they are subject of interest. They would be at arm’s length—would not even be dealing with any of the criminals—more likely than not, tying together some sort of intelligence package that they would hand to police and then we would actuate on the road. Perhaps there is a bit of misconception that they would be somehow out on the road, executing warrants. I am not saying they would not, but it could not be their core function, because I know you need to have hundreds of people in order to do some of this work. They would not have that capability.*

The CHAIRMAN: *Might that be a tangible example of where the reference group model might come into play?*

Mr Anticich: *Yes.*

The CHAIRMAN: *The reference group model would be the Police Commissioner says to the CCC Commissioner, “We really need some intelligence gathering under this unexplained wealth provision. Can you please prepare us a brief, and we will then make it happen?”*

Mr Anticich: *Absolutely.*²³

The resource implications associated with a possible expansion in the CCC’s jurisdiction was then raised, with Mr Frank Alban MLA asking “If the CCC was given a role in relation to the Criminal Property Confiscation Act,” and were to investigate unexplained wealth, “would the WA Police then divert resources away from that

²³ *Ibid.*, pp 14-15.

particular area?” Responding to this, Assistant Commissioner Anticich asserted that the investigation of unexplained wealth was not necessarily a drain on police resources:

Mr Alban, might I suggest, we currently have 28 specialist officers who work within that particular area. If it was the case that unexplained wealth would generate funds that would go into the confiscated asset trust fund from which we could draw, one of the provisions we have is the availability to engage specialists to do such work. I would suggest to you rather the opposite. It would be a growth area, because where we are currently seizing sometimes in the amounts of millions, if we get into this space, we will be taking tens of millions from individuals. The return into that fund, if that is the way it will track, will return enormous funds back into the fund, which we could then reinvest into employing additional contractors to do this work.²⁴

Finally, Assistant Commissioner Anticich was asked about the relationship between the WA Police and AUSTRAC (the Australian equivalent to Canada’s FINTRAC), to which he responded:

My experience with AUSTRAC is this. Generally speaking, it is a database that records suspicious and significant transactions. There is a whole raft of more refined reporting that has emerged over time. In the past, I have had experience where in fact we have gone and used data and reports that come from that that have been the lead into major crime investigations. I do not think we do that. Effectively what happens is I think we use it as check base. If we are doing our job and we have a number of targets that have come to note through an alternate means, we will go to AUSTRAC as a potential intelligence source. But we do not use it particularly well, I do not think, as a proactive intelligence tool. As to the relationship, I could not tell you with any detail.²⁵

Closed hearing with the Director of Public Prosecutions

Subsequent to the hearing with the Deputy and Assistant Commissioners of the WA Police, the Committee sought the attendance of the DPP, Mr Joseph McGrath SC, before a closed hearing on 2 May 2012. In requesting Mr McGrath’s attendance, it was explained that though the Committee had not formed any direct views in relation to the terms of reference of the inquiry, the Committee regarded the apparent dormancy of the unexplained wealth provisions of the *Criminal Property Confiscation Act 2000* as most undesirable.

²⁴ *Ibid.*, p 16.

²⁵ *Ibid.*, p 17.

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Prior to the hearing, the Committee provided a copy of the transcript of the WA Police's evidence of 9 December 2011 to Mr McGrath, and explained that the Committee would be seeking to enhance its understanding of how the functions of the *Criminal Property Confiscation Act 2000*, including the recovery of proceeds of crime and the investigation of unexplained wealth, were being discharged. In addition, the Committee would seek to unpack the evidence of Assistant Commissioner Anticich, that "philosophical differences," between the WA Police and the Office of the DPP were an impediment to the investigation of unexplained wealth in Western Australia, and indeed that in 2010 a moratorium had been placed by the DPP upon the making of any further unexplained wealth applications. Finally, the Committee also foreshadowed its intention to explore, with the benefit of Mr McGrath's experience, the notion that the investigation of unexplained wealth in Western Australia could be enhanced by extending the jurisdiction of the CCC into this area. In responding to the Committee's request, Mr McGrath indicated that attendance of the Practice Manager of the Confiscations Team within the Office of the DPP, Mr Ian Jones, would enhance the discussion, and accordingly Mr Jones attended alongside Mr McGrath before the Committee.

The Committee Chairman began the hearing by asking the DPP to confirm the evidence of Assistant Commissioner Anticich, that a moratorium on the further processing of unexplained wealth investigations had been imposed, to which Mr McGrath replied that this had indeed been the case, owing to "difficulties in respect of pursuing unexplained wealth in Western Australia." This prompted the Chairman to ask the DPP to explain these "difficulties," to which Mr McGrath replied that:

...what we mean by "unexplained wealth" in the provisions in Western Australia may be of some assistance... a significant amount of the unexplained wealth is taken through the drug-trafficker declarations... a significant amount of unexplained wealth in WA is taken in that way.²⁶

Mr McGrath explained that the dormancy of the unexplained wealth provisions of the *Criminal Property Confiscation Act 2000* represented an over-simplification of how that Act is engaged by the WA Police and the DPP:

If you did not have drug-trafficker declarations, you would be using section 12 of the [Criminal Property] Confiscation Act. As you are aware, in Western Australia there is a first strike that if a person has possession of a certain amount of a prohibited drug, they will lose their entire assets—a declaration is made. The second way is a third strike.

²⁶ Mr Joseph McGrath SC, Director of Public Prosecutions, and Mr Ian Jones, Practice Manager (Confiscations Team), Office of the Director of Public Prosecutions for the State of Western Australia, *Transcript of Evidence*, 2 May 2012, p 2.

If a person has a third strike in respect of a serious drug offence, then a declaration is made. My office makes those applications for the declaration in respect to every occasion. The effect of that is that significant unexplained wealth in this state is taken through drug-trafficker declarations. The other states and any other territory that does not have “drug trafficker” you would be pursuing it through unexplained wealth provisions, which is section 12. So when you look at what my office has done, you can look at it in broad figures. In the last 10 or 11 years since the Act has been in, \$59.5 million has been taken through confiscation. Of that, \$40.5 million has been through drug-trafficker declarations, which is something like 66, 67 per cent.²⁷

Finding 7

The majority of Criminal Property Confiscation Act 2000 confiscations in Western Australia are obtained through drug trafficker declarations applied for by the Director of Public Prosecutions.

Finding 8

The recovery of “proceeds of crime,” under the provisions of the *Criminal Property Confiscation Act 2000* is a function of government that the WA Police and the Office of the Director of Public Prosecutions are performing extremely well.

Mr McGrath said that his office disputed the fact that “unexplained wealth” was not being pursued in Western Australia, explaining that:

A great deal, or at least part, of every drug-trafficker declaration’s assets will be unexplained wealth, in that the person is involved with a drug. On top of that, \$6.1 million over the last 10 or 11 years has been taken through the unexplained wealth provision—the specific section 12 of the Act. So, when you look at that, tracking over 10 or 11 years, 10 per cent has been taken through this unexplained wealth, but really another 70 per cent is taken through drug-trafficker declarations. Over the 10 years that Mr Jones has been involved in various capacities, there have been approximately 27 unexplained wealth applications in respect to 15 matters under section 12 of the Act, and of those, 21 resulted in declarations leading to the confiscation of property. Two did not proceed because it was against the partner of the man, the male target who lost his assets anyway. So

²⁷ *Ibid.*

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*there has been that success. So, in this state it is important that I reiterate that it is the drug-trafficker declaration that is usually used.*²⁸

Mr McGrath then addressed the “philosophical differences,” referred to by Assistant Commissioner Anticich; he explained that the differences did not relate to any criticism of the law enforcement strategy of investigating unexplained wealth:

*What I wish to stress is that the philosophical differences should not be understood to mean in any way that there is any difference between the Director of Public Prosecutions and the Assistant Commissioner in respect to the critical importance of unexplained wealth proceedings in fighting organised crime and other criminal activity; that is, I do not join with the critics of unexplained wealth provisions.*²⁹

The specific “philosophical differences,” were then addressed: according to the DPP, the problem with progressing unexplained wealth investigations in Western Australia is that under the present legislation the Office of the DPP is required to be both investigator and prosecutor, which would serve to compromise the independence of that Office:

*What I would say as the Director is that there are significant difficulties in the Office of the Director of Public Prosecutions conducting unexplained wealth investigations, and then conducting subsequent proceedings. We have an appreciation of the practical difficulties in this state of conducting Section 12 unexplained wealth proceedings, and that is what underlines our differences. The first thing I would refer to is the legislative provisions. It would appear as though the police have a different view of the effectiveness of that legislation.*³⁰

According to Mr McGrath, the supposed effectiveness of the unexplained wealth provisions of the *Criminal Property Confiscation Act 2000*, which was tied to the fact that the onus of proof in unexplained wealth investigations fell upon the respondent (as opposed to the State) – represented an over-simplification of how those provisions were discharged in actuality:

There is the occasional referral to reversal of onus, where the onus is on the target to explain where the wealth came from. It is really no more than an evidentiary burden. What is required is a full blown brief of evidence to prepare, where the assets of the target are properly inquired into. A person, if he is a target, can simply say he got the

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, p 3.

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*wealth from x or y, or from gambling, and then it falls to the state to conduct a full hearing to show that there is a difference between lawfully acquired wealth and the unlawful, and what is left is unexplained wealth. In short, as many of you would know, it is this asset betterment inquiry that requires substantial forensic work. The court requires witnesses to be called. It is not a matter of just summoning a witness to a courtroom and asking them where they got the \$100 000 from, and then taking the money. It requires this: the Act could be strengthened, maybe, by a provision that says that wealth can be taken if it is reasonably suspected of being unexplained.*³¹

Mr McGrath then described some other “difficulties,” encountered by his Office in making unexplained wealth applications:

...what we do not have in this state is a multidisciplinary approach to the Office of the Director of Public Prosecutions—the prosecution agency for serious crime. It is not for us to be immersed in investigations but what is quite clear is that the police require legal teams, forensic teams, to do it, and when I say police, I mean the state of Western Australia.

The other aspect of the practical difficulty is the question of resources. It is always a difficulty, and this is the difficulty with the state of WA, not the Office of the Director of Public Prosecutions, that you need to recruit and retain the necessary expertise, and it needs to be done in this multidisciplinary approach. It is of no use to strengthen, for example, the police proceeds of crime squad without equally strengthening forensic accountants, or the legal staff to back that up.

[...]

*A final aspect, which is difficult, is the settlement of proceedings. The New South Wales experience is that when there is an asset betterment inquiry, the parties, including the state, will negotiate a settlement, and it becomes difficult for the Director of Public Prosecutions to be involved with those sorts of civil settlements. We are better placed to be involved with the actual prosecution of serious criminal offences.*³²

The Chairman followed up Mr McGrath’s evidence by asking for confirmation that the investigation of unexplained wealth “is a complex area, it requires specialist expertise,

³¹ *Ibid.*

³² *Ibid.*

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particular personnel, and that requires resourcing.” In response, the DPP summarised his belief as to the best model for investigating unexplained wealth:

Assistant Commissioner Anticich determined, quite rightly, that unexplained wealth... investigations could be a useful area [for] dealing with organised crime. What it requires is a state response to that. It requires a multidisciplinary approach. It is not that we are in a position to create a large-scale civil law firm to support that. Our view is that it requires an immersion of legal staff with investigators, along with forensic staff to properly conduct that.

[...]

However, my considered view is that the only way to progress, if there is to be large-scale unexplained wealth cases under Section 12 of the Act, is for another agency to investigate and then commence the unexplained wealth proceedings.³³

Mr Jones added the following comments:

The compulsory examinations under the CPCA as they presently are, are largely ineffective to achieve what I think needs to happen.

[...]

we have conducted a number of examinations in aid of unexplained wealth applications and they have largely been limited in their effectiveness in a way that is different to, say, the New South Wales Crime Commission, which conducts its own sorts of examinations outside the purview of the court process. That seems to motivate people apparently to come to the party and talk to the Crime Commission and lead to a settlement.³⁴

Finding 9

At present, examinations in support of unexplained wealth investigations under the provisions of the Criminal Property Confiscation Act 2000 are regarded as ineffective by the Office of the Director of Public Prosecutions, owing to the need for these examinations to be conducted as part of a court process.

Questioned as to whether legislative reform would help to alleviate the described difficulties, Mr McGrath said that:

³³ *Ibid.*, p 4.

³⁴ *Ibid.*

With respect to legislative change, currently the Office of the Director of Public Prosecutions is the sole body that can commence unexplained wealth proceedings and yet we are not best placed, by far, to undertake that. The body that investigates that at the moment—the police—do not have the right to conduct their own proceedings, and we want a particular standard when we commence. As I noted, at the moment the onus of proof still falls upon the state to do an asset inquiry. Thought could be given, for example, to having the test being whether the property is reasonably suspected of being unexplained wealth. The second aspect of the change is whether there is a better body or agency that could more properly undertake this work.³⁵

Mr Jones advised the Committee that in the investigation of unexplained wealth, having access to a wide range of skills and powers would greatly enhance the prospect of successfully confiscating criminal proceeds:

In my experience of confiscation matters, and from what I understand of the experience in other jurisdictions in this area, a multidisciplinary team with additional investigative powers is probably the best model for effectively progressing unexplained wealth matters. For example, the examination power as it currently exists in the Criminal Property Confiscation Act is inadequate. A better model would be the one used in New South Wales whereby a notice is issued by a forensic accountant requiring people to produce documents and attend examinations.

[...]

Then there are all the other associated powers such as the ability to intercept telecommunications, listening devices and those sorts of things.

[...]

The ability to access that type of investigation in respect of unexplained wealth matters would be significantly beneficial, as would the capability to undertake surveillance, where appropriate, and other investigative techniques that at the moment are largely confined to criminal investigations.³⁶

³⁵ *Ibid.*, p 6.

³⁶ *Ibid.*

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Mr Jones also warned that successful unexplained wealth investigations were neither quick nor simple, and as a result the current model, in which responsibility is split between the WA Police and the Office of the DPP, was inherently flawed:

Unexplained wealth investigations, in my experience, can be lengthy processes. An investigation will commence at a particular time and it may last 12, 18 months or two years before the investigation team is in a position to put together sufficient material to commence an action to freeze property on the basis of a proposed unexplained wealth application. That is, in part, because the process of investigation has to be covert; you cannot go off and start talking to real estate agents and settlement agents about transactions because you will tip off your target, so there is a limited amount of work you can do. By that stage, after the investigation has been running for a year or so, decisions have been made in the course of the investigation process that impact on how that litigation will ultimately result. The Office of the Director of Public Prosecutions comes in at the end of the process when a whole range of decisions and actions have already been taken which prescribe how we will manage that litigation once it has commenced. In my view, a better model would involve input of a legal nature at the very start of the investigation during the course of the investigation to allow the investigation to be shaped with a view to what will happen in the confiscation proceedings.³⁷

To this, Mr McGrath added his own perspective to Mr Jones' advice:

What Mr Jones referred to as the setting up of a multidisciplinary approach is an agency that has these multiskills. It is fair to say that in the last 10 to 15 years there has been a trend towards the adoption of a multidisciplinary approach to civil confiscation; for example, the Criminal Assets Bureau in Ireland. That administers civil forfeiture and comprises elements of police, tax, social security, customs and forensic accounts. In Australia, the New South Wales Crime Commission adopts a similar multidisciplinary approach in the administration of the Criminal Assets Recovery Act 1990. One thing I would say is that my view is that the Director of Public Prosecutions as a prosecution agency cannot properly operate in the context of a multidisciplinary office because to do so would compromise the very independence that is the hallmark of the Director of Public Prosecutions in that the lawyers who would be working along with the forensic accountants, and along with those monitors who are doing the telephone intercepts and the police

³⁷ *Ibid.*

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*officers, are conducting an investigation. It cannot be that the lawyers who are involved in the prosecution agency are involved at that stage of the investigation. We are not best placed to do it.*³⁸

In light of this evidence, the Chairman then moved the discussion onto the benefits of the model that presently exists in New South Wales, asking the DPP if that model is “currently the best practice model,” and whether the legislation in Western Australia could be improved “if it was based more heavily on the New South Wales model.” Mr McGrath replied in the affirmative:

*Certainly my view as a preferred model is a multidisciplinary approach model. That could be done in a number of ways. One way is for the state to create a standalone director of confiscations—an agency that conducts confiscations in Western Australia. The result of that is that the Office of the Director of Public Prosecutions would cease to be involved in confiscations, certainly in the civil non-conviction based. I appreciate that setting up a director of confiscations agency would require considerable planning and resources. But that would be, as I say, a standalone agency. The second alternative is the adoption of a New South Wales Crime Commission model using the Corruption and Crime Commission. A third would be the Commissioner of Police being given “unexplained wealth” powers and functions.*³⁹

Of these options, the Committee Chairman asked, if resources were not an issue, the option of creating an independent “confiscations agency,” represented what the DPP would regard as the optimum model, to which Mr McGrath said:

*Yes, an independent director of confiscations.*⁴⁰

Finding 10

The optimum model for conducting investigations of unexplained wealth in Western Australia under the provisions of the *Criminal Property Confiscation Act 2000* would require the creation of a new “confiscations agency,” which would operate independently from both the WA Police and the Office of the Director of Public Prosecutions.

Mr McGrath added, however, that there was an alternative to creating a new government agency:

³⁸ *Ibid.*, p 7.

³⁹ *Ibid.*, p 8.

⁴⁰ *Ibid.*

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The alternative obviously in this state is the Corruption and Crime Commission. They should be given the type of investigatory powers delegated to the New South Wales Crime Commission... we really know the CCC in this state operates through a multi-disciplinary structure. It is an investigative agency with wide powers. [The CCC Act at present] enables the CCC to identify appropriate [misconduct] targets and utilise a range of compulsive powers. It seems to me that for these reasons, the CCC may be well placed to become involved in civil confiscations action under the Act and, in particular, unexplained wealth. There are obviously other issues...⁴¹

The Committee Chairman then sought to unpack this advice:

Let us explore that for a moment because you may be aware that this committee has the very strong view that the CCC's jurisdiction ought not to be changed so that it becomes an organised crime fighter. We are on the record as repeatedly having said so, and it remains for the government to indicate in the fullness of time what it is going to do. However, the committee has established this particular inquiry because it seems that if there is going to be any change in the CCC's jurisdiction, this area—the confiscation of unexplained wealth—is an area in which one could say that the CCC would be assisting the fight against organised crime without diluting its independence in terms of its oversight of police.⁴²

The DPP was reticent to engage on this point, stressing to the Committee that he was not familiar enough with the operations of the CCC to venture his opinion. He did say, however, that from a purely theoretical perspective, the notion of engaging the CCC in unexplained wealth investigations did appear to have some merit:

One may have thought that of all the particular tasks that may be imposed upon the Corruption and Crime Commission in respect of organised crime, the unexplained wealth would be the most comfortable that it would sit within its role acting as a police integrity commission. It is a balancing act because you have at the moment set up a commission that has a mix of forensic accountants, lawyers and investigators who would be well placed to undertake the unexplained wealth proceedings. To the extent to which the police integrity

⁴¹ *Ibid.*

⁴² *Ibid.*

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commission role would be compromised, [however,] it is difficult to provide an answer.⁴³

Drawing upon the DPP's experience, the Chairman then moved the discussion onto practical matters that might arise if the Government were minded to increase the CCC's jurisdiction so as to enable the CCC to investigate unexplained wealth:

The CHAIRMAN: *I just want to go back to that issue of the distinction between unexplained wealth and recovering proceeds of crime. I just need to get clarity as to what your view is on that—as to whether the CCC should have the jurisdiction just on unexplained wealth or in relation to the two.*

Mr McGrath: *They should have the powers in respect of what I refer to as non-conviction-based confiscations.*

The CHAIRMAN: *Okay.*

Mr McGrath: *So to that necessary—and that would include criminal benefits, unexplained wealth. Mr Jones reminds me—crime used and crime derived. They could have those powers equal with what we have. It may just be necessary to back up the unexplained wealth powers. But the conviction-based powers—I would not see a need to transfer to the Corruption and Crime Commission.*

The CHAIRMAN: *If they did have this jurisdiction, would they then necessarily need to have the power to lay charges?*

Mr McGrath: *The laying of charges is not necessary in respect, as you know, to bring unexplained wealth —*

The CHAIRMAN: *Unexplained wealth because it is under the civil jurisdiction.*

Mr McGrath: *Yes.*

The CHAIRMAN: *So to use the correct terminology: would they need to have the ability to initiate the proceedings?*

Mr McGrath: *Yes, they should. In my view it would be—it could not be the position that the Corruption and Crime Commission has the function to investigate unexplained wealth and then seek to use the Office of the Director of Public Prosecutions as solicitor to conduct their*

⁴³ *Ibid.*, p 9.

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proceedings. All that would do would cause another layer of difficulty of what we already have. We have a long relationship with the police and we work well. If we then saddled-on the CCC doing exactly what they are trying to do but separately and then briefing us, it would be untenable.

The CHAIRMAN: Yes—okay.

Mr McGrath: *In my view, it would be necessary to make sufficient amendments to the [Corruption and Crime Commission] Act to provide that the CCC can investigate the function and power to commence the proceedings, can freeze property and can care for or have custody of that property until the end of the proceedings; so they are a stand-alone agency conducting unexplained wealth power.*

The CHAIRMAN: *In a very lay explanation, would it be fair to say that if the government went ahead with this type of reform the CCC would become like a civil DPP and the DPP would retain the criminal aspects?*

Mr McGrath: *I would not say that it is a civil DPP in this way. The Director of Public Prosecutions' fundamental role is to prosecute criminals through criminal proceedings. We have been given some non-conviction-based proceeding rights such as unexplained wealth. Should the unexplained wealth powers be transferred or given in conjunction to the CCC I do not believe that they would be described as a DPP: rather they would be a New South Wales Crime Commission-type body.⁴⁴*

⁴⁴ *Ibid.*, p 11.

In respect of this evidence, the Committee makes two findings:

Finding 11

In line with Finding 8, there is absolutely no reason to expand the jurisdiction of the Corruption and Crime Commission – or, indeed, any other government agency – into the area associated with recovering conviction-based “proceeds of crime,” under the provisions of the *Criminal Property Confiscation Act 2000*.

Finding 12

If the jurisdiction of the Corruption and Crime Commission is to be increased, so as to allow the CCC to investigate “unexplained wealth,” under the provisions of the *Criminal Property Confiscation Act 2000*, the *Corruption and Crime Commission Act 2003* would need to be amended to give the CCC the power to initiate civil proceedings, to freeze property, and to maintain custody over frozen property for the duration of these investigations.

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Investigating unexplained wealth: a complex proposition

Through my appearance here today, I hope that police officers in the future will not experience the same frustration and anxiety that I was subjected to for the past five years at the hands of my superiors because of my attempt to report corruption. I was made to feel that I had burdened them with an unwanted task... Police corruption cannot exist unless it is at least tolerated at higher levels in the department. Therefore, the most important result that can come from these hearings is a conviction by police officers that the department will change. In order to ensure this an independent, permanent investigative body dealing with police corruption, like this commission, is essential

Former New York Police Department officer Frank Serpico,
giving evidence to the Knapp Commission in 1971.

Exploring the evidence

After having heard and considered the evidence of the WA Police, the Committee determined that it would conclude the formal evidence-gathering process in aid of this inquiry by convening a closed hearing attended simultaneously by the Parliamentary Inspector, the Honourable Chris Steytler QC, and his assistant, Mr Murray Alder, as well as the CCC Commissioner, the Honourable Roger Macknay QC, and senior CCC officers deemed appropriate by the Commissioner. In preparation for this hearing, both the Parliamentary Inspector and the CCC Commissioner were advised that:

Though the Committee has not formed any direct views in relation to the above terms of reference, the Committee regards the apparent dormancy of the unexplained wealth provisions of the Criminal Property Confiscation Act 2000 as most undesirable.⁴⁵

In addition, the Committee provided copies of the transcripts of evidence given by both the WA Police and the DPP, and made the intended outcome of the hearing clear:

⁴⁵ Hon Nick Goiran MLC, Chairman, Joint Standing Committee on the Corruption and Crime Commission, *Letter to the Parliamentary Inspector and CCC Commissioner: Committee inquiry into whether there may be a role for the CCC in investigating unexplained wealth and recovering proceeds of crime*, 27 March 2012, p 2.

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The Committee understands that any direct insight into the provisions and discharge of the Criminal Property Confiscation Act 2000 by either the CCC or the Parliamentary Inspector will likely be limited; any such insight, however, is not the focus of Committee in seeking your attendance. Rather, it is the intention of the Committee to explore with both the Parliamentary Inspector and the CCC Commissioner the evidence of the WA Police on 9 December 2011... and Mr McGrath on 2 May 2012... so that the Committee will be able to provide a report to Parliament that properly incorporates the views of both the CCC and the Parliamentary Inspector, particularly in relation to any prospect of legislative amendment.⁴⁶

The closed hearing duly took place on 23 May 2012.

Closed hearing with the CCC and the Parliamentary Inspector

The closed hearing began with a statement from Commissioner Macknay, who informed the Committee that:

Drug-related crime in particular is productive of large sums of illicit money which can finance further crime. Action which deprives criminals of resources of that kind can both diminish and prevent offending as well as depriving offenders of incentive by attacking their gains. Unexplained wealth inquiries have been shown to be a very effective form of action in relation to those matters. There has been legislation in Western Australia since 2000 which permits that course—the relevant agency being the Director of Public Prosecutions—but only 13 declarations have been obtained in the last seven years. The legislation would, therefore, seem under-utilised. That being the case, in January this year I wrote to the Attorney General suggesting the government consider giving the Corruption and Crime Commission a role in this area in the event that the Commission is given an organised crime capability. I am not in a position to say more about that particular course than that, clearly, and would refer the committee to the government if more be sought. The Commission, of course, would have the ability to create a multidisciplinary group for investigation of matters of this kind and to conduct investigations over a protracted period. Although any application would necessarily have to be determined by a court based in part on oral evidence of witnesses, there might be a role for compulsory examinations in the preliminary stage of an investigation as a fact-gathering tool. That, of

⁴⁶ *Ibid.*

course, is a facility that currently exists under the Criminal Property Confiscation Act 2000, the court being the tribunal before which such examinations are currently conducted. The relevant Act would appear to need amendment according to the evidence of Mr Anticich. I note it would appear that the WA Police some time ago put forward some suggestions in relation to amendments. I am unaware as to the nature of those amendments. The Commission would not, however, envisage a role for itself in relation to prosecution or crime-related forfeiture, but rather in the area of unexplained wealth only.⁴⁷

These opening remarks were then followed by an opening statement from the Parliamentary Inspector:

My position in respect of the Corruption and Crime Commission's foray into organised crime investigations of any kind is well known. I agree with what was said by Commissioner of Police Dr O'Callaghan some time ago in a submission to the Archer inquiry where he said in this very respect that it is less than desirable to have the Commission occupy the role of oversight body in addition to working with police in an investigative capacity. He said that self-evidently the two roles are contradictory. But subject to that general statement, if the Commission is to have an organised crime role, it seems to me that this [investigating unexplained wealth] is one that would make more sense than any other.⁴⁸

The Committee Chairman then addressed the statement by Commissioner Macknay that he had independently written to the Attorney General in January 2012 to suggest that the jurisdiction of the CCC be increased to allow it to investigate unexplained wealth:

The CHAIRMAN: *Thank you both for your introductory remarks. Commissioner, your initial statement perhaps makes my first two questions somewhat redundant, but for the sake of completeness for the evidence gathering process, you indicated this morning that in January you wrote to the Attorney General recommending a role for the Corruption and Crime Commission in terms of unexplained wealth investigations.*

⁴⁷ The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, Office of the Parliamentary Inspector of the Corruption and Crime Commission; and The Honourable Roger Macknay QC, Commissioner, Mr Paul O'Connor, Director (Legal Services), Mr Robert Sutton, Acting Director (Operations), and Mr Paul White, Principal Financial Investigator, CCC, *Transcript of Evidence*, 23 May 2012, p 2.

⁴⁸ *Ibid.*

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Mr Macknay: *In the event that the government carries through on its stated intention to confer a capability on the Commission of organised crime generally.*

The CHAIRMAN: *That being the case, I assume it is fair to say that you would then hold the view that the investigation of unexplained wealth by some arm of government, whether that be the Corruption and Crime Commission or any other arm, is a valuable exercise in the fight against organised crime.*

Mr Macknay: *I can only speak as a former judge, but certainly in my view based on that necessarily narrow experience, it would seem to be something that would be worthy of very serious consideration, yes, to devote perhaps greater resources to that area given the extent of the illicit drug problem in Western Australia.⁴⁹*

The opinion of the Parliamentary Inspector was then sought as to the veracity of this assertion:

The CHAIRMAN: *Parliamentary Inspector, on that same topic, would you also concur that the fight against organised crime would be aided by greater investigation in terms of unexplained wealth?*

Mr Steytler: *Yes, it would, Mr Chair. One always has to be a bit careful in terms of legislation. I would not support any amendments making it easier to obtain an unexplained wealth declaration, but on the legislation as it stands I do believe that more use can be made of it than has been and it is an effective weapon. I am not sure I agree with the Commissioner that it is necessarily an effective weapon against drug money because we already have forfeiture of assets when people are declared drug traffickers and that has been effectively policed by the DPP. Unexplained wealth tends to arise in situations where it is harder to prove where the money came from. It may be drug money; it may be other money.*

[...]

The CHAIRMAN: *Parliamentary Inspector, in a sense you have touched on this—that is, whether the CCC should have a role in this area. If I have heard your comments this morning correctly, you have indicated that the ideal position would be that the CCC did not have a role in investigating organised crime, but if there is an insistence that that be*

⁴⁹ *Ibid.*, pp 2-3.

a policy decision through the government and through the Parliament, this might be an area that they could undertake.

Mr Steytler: *That is a fair summary of my view, yes.*⁵⁰

Discussion then moved to the most significant practical concern associated with any extension of the CCC's jurisdiction, being the associated heightened risk of corruption within the CCC. The Committee Chairman first sought the opinion of the Parliamentary Inspector as to the magnitude of this concern, by asking what might be some of the corruption risks could be foreseen in the event that the CCC was investigating unexplained wealth, to which the Parliamentary Inspector replied:

*Whenever you get to investigate organised crime, sums of money involved make corruption a real risk in any capacity. I would have thought that this is no different. As I think you have pointed out, Mr Chair, in one of the hearings it is the fact that some of the work is done at a level of forensic accounting which is a bit more distant from the ordinary crime, if I can call it that, and therefore minimises the risk of corruption. But I think that the experience of the police, just going on the evidence that they gave before this committee and before the federal committee, is that you cannot entirely compartmentalise the two aspects. If you are involved in the investigation of unexplained wealth, you are also necessarily involved in the investigation of organised crime. So, I think the corruption risk is still there. It may be less in some aspects, but in others it is going to be the same as it would be with the police.*⁵¹

The Committee Chairman then put a similar question to Commissioner Macknay:

The CHAIRMAN: *Commissioner, if we assume for a moment that the jurisdiction is granted to the CCC by way of legislative amendment, what steps would you envisage that you would need to take in the organisation to mitigate against these corruption risks?*

Mr Macknay: *Can I just say by way of explanation initially, Mr Chair, I would not envisage the Commission having a role in relation to unexplained wealth without a wider role in relation to organised crime, because it seems to me that the existence of a body of intelligence within the organisation would be essential to effectively conduct unexplained wealth investigations. The Commission clearly does not currently have that kind of information arising from its current*

⁵⁰ *Ibid.*, p 3.

⁵¹ *Ibid.*

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activities because it has a very limited role, as you are aware, in relation to organised crime, that being simply to hear applications by the Commissioner of Police for exceptional powers orders. So, in the event that the Commission was given a wider jurisdiction in relation to organised crime, no doubt it would build holdings of intelligence which would then be an aid and would be a necessary backdrop to the identification of targets and conducting investigations of that kind.

I note that the former chairman, I think, of the Crime and Misconduct Commission in Queensland referred to the organisation of that body, when police oversight and matters of this kind came under the same roof as the creation of two silos. I think that is probably an apt description based on my understanding of what would be required. I think it would be necessary to have divisions, if you like, within the organisation with people working in one or the other. The information would have to be isolated within one or the other. Obviously, whenever there is an investigation of organised crime there are risks in relation to those involved in the investigation being tempted by the large sums of money on offer. Now, that would exist whatever the position be. The concern, as I understand it, is that those who are charged with the responsibility of oversight in relation to the police might also be required to deal with the police in an investigative capacity. If that is the problem, clearly the solution to that is to isolate those two functions so those involved in oversight are not involved in investigations.⁵²

Notwithstanding the Commissioner's comments, the Committee believes that there is no reason why the investigation of the apparent unexplained wealth of target individuals could not take place on application by the WA Police Commissioner. Such a regimen would be exactly in line with the CCC's current role in enhancing the power of the WA Police to investigate organised crime by way of granting the use of exceptional powers of investigation to the police.

Accordingly, the Chairman asked Commissioner Macknay to clarify what he had said to the Committee. A response was provided by both Commissioner Macknay and by Mr Robert Sutton, the CCC's Acting Director (Operations):

The CHAIRMAN: *Can I get some clarification on that? I heard you indicate that in order to be successful in a jurisdiction to investigate unexplained wealth, one needs to also be able to build up a database of intelligence.*

⁵² *Ibid.*, p 4.

Mr Macknay: *Yes. With your leave, Mr Chairman, I would refer that to Mr Sutton. Just to restate, the Commissioner's position is it has, as I say, suggested to the government that it receive that jurisdiction. That is predicated on the Commission receiving the jurisdiction in relation to organised crime. The government has spoken about that as part of its policy. Absent the second, the Commission would not seek the first. Having said that, perhaps if I can pass the buck to Mr Sutton.*

The CHAIRMAN: *Just before we go to Mr Sutton, can I just get clarification because that is where I am a little bit confused. I just want clarification of why is it necessary to have the two together. Mr Sutton, if you can perhaps answer that for me, because what is not clear to me is that, as I understand it at the moment, effectively it is the DPP that has the jurisdiction in terms of unexplained wealth. I do not understand that they have the jurisdiction in relation to organised crime as is mentioned by the government. That is the context of the question, if you could perhaps just clarify that for me.*

Mr Sutton: *Sure. I think to best explain it, I could put it this way: organised crime just about invariably is about making money, so there is a very close link between confiscation of illicit gains and organised crime; they run hand in hand. The issue at the moment is that unexplained wealth investigations are not just the processing of an application. Really, that is all that the DPP is capable of at this stage. I think Mr McGrath in his evidence identified that what was really required was the application of a multidisciplinary team to then conduct an investigation into the unexplained wealth side of it. So, really, one goes in hand with the other. As Mr McGrath said, they are not an investigative agency and they do not have the multidisciplinary structure to actually be able to complete those investigations.⁵³*

This evidence prompted the Parliamentary Inspector to offer his own perspective on the issue at hand:

It seems to me that there are a number of problems which the DPP has experienced which have made it, by its own admission, ineffective in this area of unexplained wealth. One is that it is inappropriate for it to be doing that kind of work because experience elsewhere has shown that often the most effective way of dealing with it is to do deals with the person you are investigating and it is inappropriate for a DPP to be doing that. Secondly, there has been a resourcing problem in that, as

⁵³ *Ibid.*

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the Commissioner has said, these things are highly resource intensive and the DPP has not had the resources, or particularly wanted to apply its resources to that function. The third thing is that the DPP has said that it lacks some of the powers—for example, that the Commission has—which could be brought to bear during the phase of even prosecuting an unexplained wealth application, if that is the correct description to use in civil proceedings. The Commission would be able to do that better than the DPP simply because it has better powers and better facilities available to it to investigate matters at that stage. The fourth problem that the DPP had was with respect to decisions being made by police at a time when lawyers were not involved and therefore were detrimental to the ultimate bringing of proceedings.

Now, a lot of these problems could be overcome by having the Corruption and Crime Commission take that role. But the difficulty is—I believe even on any basis it is likely to be more effective than the DPP was—that for it to be completely effective, it would need to have one of two things happen: either it would need to be in a position itself to investigate unexplained wealth, which necessarily means investigating organised crime; or it would need to get intelligence from the police, which was given on an open basis in the sense that whatever was needed was given. Now, experience—I am relying on evidence which was given before this committee and the federal body—is that even within the police where there is the proceeds of crime squad and there is the organised crime squad, there is not a passage of information between the two, or not a sufficient passage of information. That is because of the risk of compromise of operations, and I would expect that exactly the same thing would happen if the Commission has this role. I understand what Mr Sutton has been saying and I can see the force of what he says, but I would have thought that even allowing for the fact that the Commission does not itself get involved in criminal investigation in the sense of investigation into organised crime proper, it would still be more effective than the DPP has been, for the reasons that I have given.⁵⁴

Discussion then returned to the heightened risk of corruption associated with the investigation of organised crime, following a two-part question put by Committee Member Frank Alban MLA:

Mr F.A. ALBAN: *Commissioner, my concern was touched on earlier but I have not quite grasped the matter of increased corruption. The CCC,*

⁵⁴ *Ibid.*, p 6.

should it take on an increased role with expanded capacity, would, I think, have a greater risk of corruption within the body that is supposed to be overlooking corruption. My question is: can you foresee what capacity the CCC would have internally to contain this? My second question is to the Parliamentary Inspector who has the oversight role: with your expanded capacity, does the Parliamentary Inspector with the oversight role of the CCC also have capacity to monitor the extra capacity of the CCC with a view to keeping an eye on corruption?

[...]

Mr Steytler: *On the second, I think the answer is no. The Parliamentary Inspector can oversight processes and procedures really, but does not have the capacity to oversight potential corruption or to conduct his own investigations. I am not sure that it would be desirable for him to have that power in any event. I think the answer is that if there was an increased risk in the Corruption and Crime Commission, which I think would inevitably be so in any body investigating any aspect of organised crime, there would be no increased capacity for the Parliamentary Inspector to discover that corruption.⁵⁵*

Commissioner Macknay asked Mr Sutton to respond on behalf of the CCC:

Mr Sutton: *In my view, the only increased corruption risks come from economies in scale. At the moment, if you like, with our misconduct function, to a certain extent we are exposed to all the risks that we would be exposed to if we were to take on these extra functions. For example, and I am just thinking straight off the top of my head now, I am aware of searches that we have conducted in which we have found large quantities of cash; that is, in the tens and tens of thousands of dollars. I know of a number of instances of that. We deal with informants at the moment: we have registered informants. They, to me, seem to be the main areas for concern of increased corruption risk. But as I say, we are faced with those situations every day anyway in our current role. I can say that to mitigate that risk we have very stringent [standard operating procedures] around the conduct of searches; the taking of exhibits, including money; the handling of informants; and those sorts of things. As far as any increase, as I said, it would be because on the economy of scale we would be out there more often. But I think, in general terms, there would not be any*

⁵⁵ *Ibid.*, p 10.

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*change to the actual risk because we are actually faced with that at the moment. It would just be on more occasions, probably.*⁵⁶

The Committee subscribes to the view put by the Parliamentary Inspector on this matter. The assertion that undertaking investigations into organised crime would have little to no impact upon the risk of corruption within the CCC is inconsistent with the briefings received by the Committee from the other jurisdictions mentioned earlier in this report. Though it is doubtless true that there presently exists a risk of internal CCC corruption by virtue of its current investigative capacity with respect to public sector misconduct, that risk would clearly be significantly less than the risk of corruption within, for example, the Specialist Crime Portfolio of the WA Police. As has been noted by the Committee previously, there are a wide range of factors that lead to corruption, the most significant among them being the proximity that the staff of a particular organisation has to lawbreakers.⁵⁷ This fact was perhaps best expressed by the Parliamentary Inspector later during the hearing:

*Mr Chair, the first comment related to the issue of corruption and if I can, I will put on my university hat for a moment. My reading tells me that wherever you get organised crime, the risk of corruption increases dramatically. I understand what Mr Sutton says, in that there is a risk of corruption in any form of an investigation for all the normal reasons. However, the sums of money available and the resources available to organised crime are so great that the risk of infiltration and lesser forms of corruption becomes very much increased. I do not think it is even debatable.*⁵⁸

As to how this increased risk of internal CCC corruption might be mitigated, Commissioner Macknay offered the following observation:

I will just add, and this is not something that I have given a great deal of thought to, that the fact that the organisation was divided into compartments would actually perhaps create a facility for the use of one department to conduct an oversight of the other in the event that there was a concern. But ultimately, I suppose, as with any other organisation, it would depend on their being appropriate structures,

⁵⁶ *Ibid.*, pp 10-11.

⁵⁷ See Appendix Two of the Committee's tenth report in the current Parliament, entitled *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, which was tabled on 9 September 2010.

⁵⁸ The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, Office of the Parliamentary Inspector of the Corruption and Crime Commission; and The Honourable Roger Macknay QC, Commissioner, Mr Paul O'Connor, Director (Legal Services), Mr Robert Sutton, Acting Director (Operations), and Mr Paul White, Principal Financial Investigator, CCC, *Transcript of Evidence*, 23 May 2012, p 12.

*appropriate training and selection of officers, and, ultimately, on the integrity of individuals.*⁵⁹

The Committee Chairman, however, expressed dissatisfaction with this notion:

*The difficulty I have with [the notion that one department may oversight the other] is that, in essence, that is the problem with police internal affairs. The community of Western Australia wants an independent body to oversight police complaints; otherwise there would really be no need for a body like the Commission in terms of its oversight of the police because one would just be happy with the police's internal department overseeing the rest of the department. I think that significant weight needs to be given to the notion of an independent body oversighting the police.*⁶⁰

This prompted the Parliamentary Inspector to offer his own thoughts as to the importance of there existing a government agency capable of exerting authentically independent oversight upon the WA Police:

What we are looking at here is competing priorities: the Commission getting involved in applications for confiscation of profits and investigating organised crime to that extent; albeit it certainly would be a more limited form of investigation. What we are looking at is long, resource-intensive applications, which are likely to produce a return—maybe even a significant return. What we are looking at, on the other hand, is the importance of police supervision. In my opinion, that is the most important function this commission has because that is where the risk of corruption is greatest and that is where the risk of corruption does the greatest damage. It just seems to me that one should never lose sight of those competing priorities; and that for this committee in its report, the evidence establishes overwhelmingly that if you have police working hand in hand with the oversight body you jeopardise the worth or the validity of that oversight. And that is what we are talking about here. For me, what we need to be looking at is in some way limiting the role that the Commission plays in investigating unexplained wealth applications. I would see it playing a role similar to that played by the DPP presently. In other words, the police identify the targets, make the information available, and the Commission then uses its strength, which would be to further investigate the information provided to it by the police, organising the information,

⁵⁹ *Ibid.*, p 11.

⁶⁰ *Ibid.*

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and then bringing the application and conducting the inquiries and those kinds of things. There is still an increased risk for its police oversight function in doing that because it will be working with police to a greater extent than it is now but it still seems to me that that would be more easily managed than a joint investigation function.⁶¹

The Committee concurs entirely with the sentiments expressed by the Parliamentary Inspector.

⁶¹ *Ibid.*, p 12.

Chapter 5

Investigating unexplained wealth: a role for the CCC?

We are not to expect perfection in this world; but mankind, in modern times, have apparently made some progress in the science of government.

George Washington, letter to the Marquis de Lafayette, 1788.

The current role of the Corruption and Crime Commission

At present, the CCC works to improve the integrity of the Western Australian public sector and helps public sector agencies minimise and manage misconduct. An absolutely vital component of this role is the ability to exercise authentically independent oversight on the work and role of the WA Police. The Committee concurs completely with the Parliamentary Inspector's stated opinion that the role of "police supervision... is the most important function this commission has because that is where the risk of corruption is greatest and that is where the risk of corruption does the greatest damage."⁶²

The Committee has reported previously that it is clearly inappropriate to consider officers of the WA Police as being, in terms of the functions of the CCC, equivalent to other public servants. The Committee does not suggest that WA Police officers are any more or less corrupt or corruptible than any other public servants; rather, the Committee strongly believes that WA Police officers are incident to a far greater corruption risk than other public servants, simply by virtue of the significant powers that Western Australian society has vested in its police force, and the duties that we ask our police officers to perform.

Furthermore, police officers are to most citizens in any society the most visible component of the executive arm of government: police officers provide the public that they serve with the enforcement of law and order in society. It is clear, therefore, that police corruption poses an especially serious challenge for any society: it is essential for democracy that police officers are seen to not only uphold, but indeed to exemplify, the law. Yet, as has been observed, "Law enforcement, by its very nature, attracts illicit

⁶² The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, Office of the Parliamentary Inspector of the Corruption and Crime Commission; and The Honourable Roger Macknay QC, Commissioner, Mr Paul O'Connor, Director (Legal Services), Mr Robert Sutton, Acting Director (Operations), and Mr Paul White, Principal Financial Investigator, CCC, *Transcript of Evidence*, 23 May 2012, p 12.

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forms of attempted influence against prosecution.”⁶³ That is, the role of enforcing law and order in society puts police squarely in the sights of those who would rather that law and order not be enforced. It is on this basis that the Committee concurs with the sentiments expressed by the Parliamentary Inspector: the single most important role performed by the CCC is the ongoing, vigilant oversight of the WA Police.

Organised crime

Section 7A of the *Corruption and Crime Commission Act 2003* establishes one of its own “main purposes,” as being “to combat and reduce the incidence of organised crime.” It seems to be somewhat underappreciated that this is a purpose of the CCC Act – it is not one of the stated purposes of the CCC. It is with this purpose in mind, however, that the importance of the police oversight can be best appreciated: it is by ensuring that the WA Police remains free of corruption that the CCC makes a very strong contribution to the overall fight against organised crime in Western Australia.

In spite of this, it is continually asserted that more could be done in the fight against organised crime in Western Australia – and certainly this inquiry has revealed that assertion to be correct. In the course of conducting this inquiry, the Committee has learned that law enforcement efforts to target criminal proceeds – a component of which is the investigation of unexplained wealth – is a vital component of any successful organised crime-fighting strategy. Unfortunately, the Committee has also learned that the provisions of the *Criminal Property Confiscation Act 2000* that permit the investigation of unexplained wealth could be discharged to a far greater extent than has historically been – and is presently – the case.

The Committee is acutely conscious of the fact that it is essentially impossible to quantify the impact that a more vigorous pursuit of unexplained wealth would have in fighting organised crime in Western Australia. All of the evidence that the Committee has heard in aid of this inquiry, however, has strongly indicated that the law enforcement strategy of targeting the financial stimulus that drives organised criminal activity is a vital component of 21st century law enforcement.

Investigating unexplained wealth: a role for the CCC?

On this basis, and mindful of the fact that problems inherent to the present legislation have seen the unexplained wealth provisions of the *Criminal Property Confiscation Act 2000* lay essentially dormant since 2010, it is the view of the Committee that the role envisaged in that Act for the Office of the DPP in respect of unexplained wealth investigations ought to be vested in a different authority. Whether this authority ought to be the CCC, or an entirely new authority (as was suggested by the DPP, something along the lines of an “office of confiscations,”) clearly turns upon the resource

⁶³ Tim Prenzler, “Civilian oversight of police,” *The British Journal of Criminology*, Vol. 40, 2000, p 659.

implications of any such move. In an ideal world, where resources were infinite, it would clearly be preferable that an independent authority with the sole purpose of investigating unexplained wealth be created.

The evidence heard by the Committee in aid of this inquiry has generally suggested that the corruption risk associated with the investigation of unexplained wealth – as long as the discharge of this function is limited to the way in which legislation would see the Office of the DPP discharge this function at present – is far less than the risk associated with the investigation of organised crime generally. In the main, this arises out of the fact that there need be very little if any direct interaction between persons who investigate unexplained wealth and the criminal targets of these investigations. Though there would clearly remain a corruption risk associated with the investigation of unexplained wealth, this risk would be far smaller than the risk that would emerge if the jurisdiction of the CCC were simply increased to allow general investigation of organised crime.

Mindful of the repeated evidence both in Western Australia and internationally that the investigation of unexplained wealth requires the application of a wide array of skills from within a multi-disciplinary agency, as well as the stated purpose that the CCC Act ought to help reduce the incidence of organised crime in Western Australia, the Committee believes that – on balance – the present role of the DPP as described in sections 11-14 of the *Criminal Property Confiscation Act 2000* should be transferred to the CCC. This would address what is at present a deficiency in the sphere of law enforcement in Western Australia, as well as better facilitate the aforementioned stated purpose of the CCC Act.

The Committee is, however, extremely reticent to make a broad recommendation in this regard. This is so because it is the experience of the Committee that the CCC has historically chosen to implement a very restrictive interpretation of the CCC Act in discharging its functions. In the recent past, both Commissioner Macknay and Acting Commissioner Herron have emphasised that the role of the CCC is limited by Parliament and legislation:

Of course the Commission is an instrument of Parliament, created by an act of Parliament, and the Corruption and Crime Commission Act 2003 acts, in the first place, by adherence to that Act. Perhaps it is necessary to make this point publicly: the Commission has not itself invented its method of operation for its own purposes. The Act prescribes that method of operation.⁶⁴

Commissioner Macknay, 29 February 2012

⁶⁴ The Honourable Roger Macknay QC, Commissioner, Mr Mike Silverstone, Executive Director, and Mr Paul O'Connor, Director (Legal Services), CCC, *Transcript of Evidence*, 29 February 2012, p 3.

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*We will do what the government requires us to do, and whatever form any amendment to the Act takes, we will obviously discharge the functions that we are required to discharge.*⁶⁵

Acting Commissioner Herron, 9 November 2011

With this in mind, the Committee would be strongly opposed to any move aimed at implementing broad, undefined changes to the CCC's role: if Parliament is to make amendments to the CCC Act, the functions that are intended to be discharged by the CCC should be made explicit and not open to interpretation. That is, a clear definition of any intended new role will eliminate confusion and ensure that the interests of the community – as determined by Parliament – are best served.

The Committee believes that the investigation of unexplained wealth represents a niche – albeit absolutely vital – function in the fight against organised crime that the CCC could discharge without unnecessarily being exposed to a substantially increased risk of internal corruption. Furthermore, a strictly defined amendment that would allow the CCC to deploy its skills to investigate unexplained wealth need not in any way compromise the CCC's ability to oversight the WA Police with authentic independence – because any investigation of unexplained wealth should be conducted solely by the CCC on application by the WA Police Commissioner. That is, the Committee believes that the investigation of unexplained wealth ought to be made a function of the CCC, equal to the present ability of the CCC to confer exceptional powers of investigation upon the WA Police, so as to enhance the organised crime fighting capacity of the WA Police.

⁶⁵ Mr Mark Herron, Acting Commissioner, Mr Mike Silverstone, Executive Director, Ms Peta Mabbs, Director (Corporate Services), Mr Paul O'Connor, Director (Legal Services), Mr Robert Sutton, Acting Director (Operations), and Mr Roger Watson, Director (Corruption Prevention), CCC, *Transcript of Evidence*, 9 November 2011, p 4.

Accordingly, the Committee makes the following recommendations:

Recommendation 1

The *Criminal Property Confiscation Act 2000* should be amended so as to invest the functions conferred upon the Director of Public Prosecutions in sections 11-14 upon the Commissioner of the Corruption and Crime Commission. This would allow the CCC to conduct – on application by the WA Police Commissioner – investigations of unexplained wealth into targets identified by the WA Police. These functions could then be removed from the ambit of the DPP.

Recommendation 2

The *Corruption and Crime Commission Act 2003* should be amended to give the CCC the power to initiate civil proceedings, and to freeze and maintain custody over property, so as to enable the CCC to investigate unexplained wealth in line with the provisions of sections 11-14 of the *Criminal Property Confiscation Act 2000*.

Appendix One

Briefings

Date	Name	Role	Organisation
10 October 2011	Mr Robert D Grant	Special Agent in Charge	United States Federal Bureau of Investigation, Chicago Division
	Mr Ted McNamara	Special Agent	
	Mr Chris Mackey	Special Agent	
12 October 2011	Superintendent Jeff Adam	Director	Royal Canadian Mounted Police, Proceeds of Crime Branch
	Inspector Jean Cormier	Officer in Charge	
14 October 2011	Ms Jeanne M. Flemming	Director	Financial Transactions Reports and Analysis Centre of Canada
	Mr Frank LoFranco	Manager, Program Coordination and Integration	
	Ms Darlene Boileau	Deputy Director, Strategic Policy and Public Affairs	
	Mr Barry MacKillop	Deputy Director, Financial Analysis and Disclosures	
	Mr Denis Meunier (Ret.)	(Former) Deputy Director, Financial Analysis and Disclosures	
	Mr Paul Debrule	General Counsel	
	Mr Stephen John	Senior Policy Officer, International Relationships	

Appendix Two

Hearings

Date	Name	Role	Organisation
9 December 2012	Mr Chris Dawson APM	Deputy Commissioner	WA Police
	Mr Nick Anticich APM	Assistant Commissioner (Specialist Crime)	
2 May 2012	Mr Joseph McGrath SC	Director of Public Prosecutions	Office of the Director of Public Prosecutions for the State of Western Australia
	Mr Ian Jones	Practice Manager (Confiscations Team)	
23 May 2012	The Honourable Chris Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the Corruption and Crime Commission
	Mr Murray Alder	Assistant to the Parliamentary Inspector	
	The Honourable Roger Macknay QC	Commissioner	Corruption and Crime Commission of Western Australia
	Mr Paul O'Connor	Director (Legal Services)	
Mr Robert Sutton	Acting Director (Operations)		
	Mr Paul White	Principal Financial Investigator	

Appendix Three

Inquiry terms of reference

On 24 November 2010 the Joint Standing Committee resolved to conduct an inquiry with the following terms of reference:

The Joint Standing Committee on the Corruption and Crime Commission will inquire into, and report upon:

- *how proceeds of crime and unexplained wealth are presently recovered in Western Australia: and*
- *whether the Corruption and Crime Commission should have the jurisdiction to recover proceeds of crime and unexplained wealth here.*

Appendix Four

Committee's functions and powers

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.