

Part X

Unexplained Wealth Orders

Drafting note: These provisions are based upon the unexplained wealth provisions enacted by the Australian Commonwealth (Proceeds of Crime Act 2002), Western Australia (Criminal Property Confiscation Act 2000), Northern Territory (Criminal Property Forfeiture Act 2002), New South Wales (Criminal Assets Recovery Act 1990) and South Australia (Serious and Organised Crime (Unexplained Wealth) Act 2009). They are included here for completeness, and some states may find them useful. However, they are not an essential part of the asset recovery arsenal and are optional.

The relevant authority may seek an unexplained wealth declaration against a person upon application.

The court must declare that the person has unexplained wealth if, on the balance of probabilities, the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth. This part will be of particular importance in the case of individuals whose wealth is unexplained by open source material relating to their income.

The unexplained wealth is assessed as the difference between the total value of the person's wealth and the value of the person's lawfully acquired wealth. If there is in relation to these provisions unexplained wealth, then the burden shifts to the respondent to establish that the wealth was lawfully acquired. The respondent is liable to pay the state an amount equal to the amount specified in the unexplained wealth declaration.

The state will have to determine which is the appropriate enforcement authority for such cases. It is likely to be an authority closely connected to the prosecution department; if there is civil forfeiture in the state, it could be the same authority that has responsibility for civil forfeiture.

Section 106 Making an Order Requiring a Person to Appear

- (1) The enforcement authority may apply to a court in writing for an order requiring a specified person [the respondent] to file declarations and answer questions as required in relation to his or her assets.
- (2) An application for an order under subsection (1) must be supported by [*variants: affidavit: evidence: verified statement*] of [a person authorised] stating:
 - (a) the identity of the respondent;

- (b) that the [person authorised] reasonably suspects that the respondent's total wealth exceeds the value of his or her lawfully obtained wealth;
 - (c) that any property the [person authorised] believes is held by the respondent was lawfully obtained;
 - (d) the property the [person authorised] reasonably suspects is owned by the respondent or is under his or her effective control.
- (3) A court may make an order, a preliminary unexplained wealth order, requiring the respondent to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order if:
- (a) the court is satisfied that the [person authorised] [enforcement authority] has reasonable grounds to suspect that the respondent's total wealth exceeds the value of his or her wealth that was lawfully obtained; and
 - (b) The evidential requirements in subsection (2) for the application have been met.

Drafting note: Unexplained wealth orders laws differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner, who must prove a legitimate source for his or her wealth and the forfeiture proceeding is instituted against a person rather than against the property.

- (4) The court may make an order without notice to the respondent under subsection (1), if the enforcement authority requests the court to do so and it appears necessary in the interests of justice.
- (5) For the purposes of this Part, 'lawfully obtained' means property that has been acquired by the respondent through legitimate activities and includes property acquired by inheritance, or by other legitimate transfer.

Section 107 Application to Revoke a Preliminary Unexplained Wealth Order

- (1) If a court makes a preliminary unexplained wealth order, the respondent may apply to the court to revoke the order within 28 days of notice of the order.
- (2) If such an application is made, the court may order an *inter parties* hearing date within 14 days [**variant:** at the first available date].
- (3) Where an application is made under this Section, the applicant must give the enforcement authority:
 - (a) written notice of the application; and
 - (b) a copy of any [**variants:** affidavit: evidence: verified statement] supporting the application.

- (4) Where an application is made under this Section, the applicant may appear and adduce evidence.
- (5) The enforcement authority may appear and adduce evidence at the hearing of any application made under this Section and must give the respondent a copy of any material it proposes to rely on to contest the application.
- (6) The notice and copies of any evidence or pleadings under this Section must be given no later than [seven days] before the hearing of the application.
- (7) The court may revoke the preliminary unexplained wealth order if satisfied that:
 - (a) there are no grounds on which the order could be made; or
 - (b) it is in the interests of justice to do so.

Section 108 Unexplained Wealth Order

- (1) The enforcement authority may apply to the court for an unexplained wealth order.
- (2) A court may make an unexplained wealth order requiring the respondent to pay an amount to [State] if:
 - (a) the court has made a preliminary unexplained wealth order, which has not been revoked, in relation to the respondent; and
 - (b) the court is satisfied on a balance of probabilities that any part of the respondent's wealth was not lawfully obtained or held.
- (3) The court must specify in the order that the respondent is liable to pay to [State] an amount (the respondent's 'unexplained wealth amount') equal to the amount that the court is satisfied does not represent the respondent's lawfully acquired property.
- (4) In proceedings under this Section, the burden of proving that the respondent's wealth is not lawfully acquired lies on the respondent.
- (5) When considering the issues under subsection (1), the court may have regard to information not included in the preliminary unexplained wealth order.
- (6) When considering the amount of an unexplained wealth order, the court must deduct an amount equal to the value, at the time of making the order, of any property of the respondent forfeited under a forfeiture, confiscation order or an extended benefit order, including any foreign forfeiture or confiscation order.

Drafting note: The burden of proving the legitimacy of the respondent's wealth lies with him or her, the rationale being that the task of establishing the lawful source of wealth is less onerous on the person who has acquired it. Drafters may want to consider definitions and techniques for the court to determine how and when property is valued for the purposes of an unexplained wealth order.

Section 109 Property Subject to a Person's Effective Control

- (1) If—
 - (a) the court has made an unexplained wealth order, and
 - (b) the enforcement authority applies to the court for an order under this Section, and
 - (c) the court is satisfied that particular property is subject to the effective control of the respondent, the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the unexplained wealth order.
- (2) An order under subsection (1) may be enforced against the property as if the property were the respondent's property.
- (3) An order that restricts the right of the respondent or any named person to deal with the property identified in this Section may be made, upon application of the enforcement authority, if the court is satisfied that the property would not be available to the enforcement authority without such a restriction.
- (4) If the enforcement authority applies for an order under subsection (1) relating to particular property, the authority must give written notice of the application to:
 - (a) the respondent who is subject to the unexplained wealth order; and
 - (b) any other person whom it has reason to believe may have an interest in the property.
- (5) The respondent, and any person who claims an interest in the property, may appear and adduce evidence at the hearing of the application.

Section 110 Enforcement of an Unexplained Wealth Order

- (1) An amount payable by the respondent to [State] under an unexplained wealth order is a civil debt due by the respondent to [State].
- (2) An unexplained wealth order against the respondent may be enforced as if it were an order made in civil proceedings instituted by [State] against the respondent to recover a debt due by him or her to [State].
- (3) An unexplained wealth order is for all purposes to be treated as a judgment debt.
- (4) If an unexplained wealth order is made after the respondent's death, this Section has effect as if the respondent had died on the day after the order was made.

Unexplained Wealth Order Procedural Requirements

Section 111 Procedure and Appeal

- (1) The procedure under this Part shall comply with the [civil procedure rules].
- (2) An appeal will lie to [insert name of relevant court] in relation to any order made by a court under this Part by any person affected.

- (3) The enforcement authority cannot, unless the court gives leave, apply for an unexplained wealth order against any person if:
 - (a) an application has previously been made for an unexplained wealth order in relation to that person; and
 - (b) the application has been finally determined on the merits.
- (4) The court must not give leave unless:
 - (a) it is satisfied that the wealth to which the new application relates was identified only after the first application was determined; or
 - (b) evidence became available only after the first application was determined; and;
 - (c) it is in the interests of justice to give the leave.