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Sweden's Forfeiture Regime in a Time of Change

- A comparative study of Swedish and Australian law
regarding forfeiture of unexplained wealth

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Summary

Internationally, the concept of "follow the money trail" has gained ground, and more efficient forfeiture provisions are considered an important measure in the fight to track down and return the proceeds of crime. Forfeiture provisions are designed to deter crime by preventing criminals to benefit from crime and reinvest the proceeds of crime in new criminal activity. Furthermore, forfeiture has as a purpose to compensate the society and reimburse the state for the costs of combating crime. The international development of asset recovery has led to a pressure on countries to introduce more efficient forfeiture legislation, which has led to a movement away from traditional conviction based (criminal) forfeiture towards new models of non-conviction based (civil) forfeiture. A new concept of non-conviction based forfeiture is unexplained wealth provisions, allowing confiscation of property not resulting from a specific crime and which cannot be declared legally obtained.

Questions have been raised in doctrine and in courts around the world, whether or not the legislators have found a good balance between the need for efficient laws and the security of individual's rights. This essay aims at highlighting the complexity and contested problems of a broader forfeiture legislation. In doing so, a comparison of Australia's forfeiture legislation on unexplained wealth have been made. An overall purpose with this thesis has been to facilitate an understanding of civil forfeiture and to investigate Sweden's legislation on extended forfeiture in relation to the development of asset recovery and the rule of law.

In conclusion, forfeiture sanctions are based on a middle-ground philosophy: floating between criminal and civil law, meaning it can contain both criminal and civil elements. Depending on the severity of the sanction different measures and safeguards may be needed to secure the individual's privacy and rights and to decrease the possibility for arbitrary intrusions by the state. Seen in light of the motive of a more efficient forfeiture regime, Sweden may go further in the development of its forfeiture legislation without greatly compromising the rule of law. Finally, the paper shows that further investigation of the forfeiture laws should be considered in Sweden. There is a need in the Swedish discourse of forfeiture to raise the different forms of confiscation of criminal assets, and to clarify the function of these different measures. Knowledge and recognition of the tools will lead to a greater use of them.

Sammanfattning

Internationellt har begreppet "gå på pengarna" vunnit mark och mer effektiva förverkandebestämmelser anses vara en viktig åtgärd i kampen för att spåra och återföra utbytet av brott. Förverkande vid brott har till avsikt att verka avskräckande genom att förhindra brottslingar att dra nytta av brott samt återinvestera utbytet av brott i ny brottslig verksamhet. Vidare har förverkande som syfte att kompensera samhället för brottets skada samt ersätta staten för kostnaderna för brottsbekämpning. Den internationella utvecklingen av tillgångsinriktad brottsbekämpning har lett till ett tryck på länder att införa mer effektiva förverkandebestämmelser. Detta har i sin tur lett till en rörelse bort från traditionellt straffrättsligt förverkande mot nya modeller av civilt förverkande. Ett nytt koncept inom ramen för civilt förverkande är bestämmelser om utvidgade förverkande av oförklarligt införskaffade tillgångar. Dessa bestämmelser möjliggör förverkande av egendom som inte härrör från ett särskilt brott och som inte kan förklaras lagligen införskaffat.

I doktrin och domstolar runt om i världen har frågan ställts om lagstiftarna har hittat en bra balans mellan behovet av effektiva lagar och rättssäkerheten för individen. Uppsatsen syftar till att lyfta fram komplexiteten och de omtvistade problemen med denna nya typ av förverkandet lagstiftning. Varför en jämförelse med Australiens förverkande lagstiftning rörande oförklarligt införskaffade tillgångar gjorts. Ett övergripande syfte med uppsatsen har varit att bidra till en ökad förståelse för civilt förverkande, samt att undersöka Sveriges lagstiftning om utvidgat förverkande i förhållande till utvecklingen av den tillgångsinriktad brottsbekämpning och individens säkerhet.

Sammanfattningsvis är förverkandesanktioner baserade på en medelvägsfilosofi: placerade mellan straffrätten och civilrätten, vilket innebär att den kan innehålla både straff- och civilrättsliga inslag. Beroende på hur ingripande sanktionen är desto fler säkerhetsåtgärder och straffrättsliga principer kan behövas för att säkra den enskildes integritet och rättigheter samt för att minska möjligheten för godtycklig rättsutövning av staten. Sett i ljuset av motivet till en mer effektiv förverkanderegim, bör Sverige kunna utveckla sin förverkande lagstiftning utan att ett större avkall på rättssäkerheten ska behöva göras. Avslutningsvis visar uppsatsen att ytterligare utredning av förverkande lagstiftningen bör övervägas i Sverige. Det finns ett behov i den svenska diskursen om förverkandet att lyfta fram de olika formerna av förverkande av kriminella tillgångar och tydliggöra dess funktioner. Kunskap och förståelse av konfiskeringsverktygen kommer att leda till en ökad användning av dem.

Preface

When I started my postgraduate studies in criminal law at Lunds University in Sweden, my attention was drawn to the forfeiture regime and the problems of efficiently forfeit criminal assets. During my exchange semester at University of New South Wales in Sydney, Australia in 2011, I learned that the complexity of forfeiture is an international issue. Many countries around the world, including Australia has tried to solve the problem with inefficient forfeiture laws by implementing civil forfeiture legislations. However, the different types of civil forfeiture are questioned to stand in proportion to the rule of law and the individual's fundamental human rights. Based on these influences, the topic of my thesis developed. I came to wonder if Sweden from a rule of law perspective could go further in streamlining its forfeiture legislation.

While writing this thesis, the European Parliament and Council proposed a Directive, laying down minimum rules for Member States to adopt, regarding e.g. extended confiscation and non-conviction based confiscation. In regards to this proposal, I believe my question on the subject of a potential development of the Swedish forfeiture regime has gained in importance.

I would like to thank Jim Jolliffe¹ for introducing me to Australia's asset recovery and confiscation scheme and of sharing your valuable knowledge in the field of asset recovery and forfeiture. I would also like to thank my supervisor Helén Örnemark Hansen and Karin Hallett for your important inputs and help during the course of my writing.

Finally, I would like to thank friends and family for invaluable support during my studies and for making my time in Lund so memorable.

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Ida Ulfsson

¹ Jim Jolliffe, Deputy Director at the Sydney office of the CDPP and lecture in Money Laundering and the Proceeds of Crime at University of New South Wales, Sydney Australia and.

Abbreviations

AFP	Australian Federal Police
ALRC	Australian Law Reform Commission
Brå	The Swedish National Council for Crime Prevention
CDPP	Commonwealth Director of Public Prosecutions
Ds.	Ministry publications series (Departementsserien)
ECHR	European Convention on Human Rights
E.g.	For example
FATF	Financial Action Task Force
GDP	Gross Domestic Product
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJC-LE	Parliamentary Joint Committee on Law Enforcement
POCA	Proceeds of Crime Act 2002 (Cth)
Prop.	Government Bill (Proposition)
SOU	Swedish Government Official Report (Statens offentliga utredningar)

1 Introduction

1.1 Background

The driving force behind many crimes is the possibility of financial gain, particularly regarding serious and organised crime. It is therefore on a criminal policy ground important not only to prosecute these criminals but also to deprive them of their ill-gotten gains.

Serious and organised crime has increased in recent years and expanded across state borders. Organised crime heads tend to use their resources to keep themselves distant from the crime, which they are controlling, and to mask the criminal origin of their assets. As a result, it has proven difficult to conduct effective criminal investigations against them that will result in a conviction and confiscation of their assets. According to UN estimates, the total of criminal proceeds in 2009 was to be approximately USD 2.1 trillion or 3, 6% of the worlds GDP.² Hence, a need for more efficient criminal asset recovery has been recognized by the international community as an important measure, alongside the regular law enforcement to combat the increasing development of serious and organised crime.

"Follow the money trail" is a phrase that has gained ground, and more efficient forfeiture provisions are considered an important measure in the fight to track down and return the dirty money and proceeds of crime. Forfeiture provisions are designed to prevent criminals to benefit from crime and prevent the reinvestment of proceeds of crime in new criminal activity. Many criminals expect that they may be penalized because of past criminal offenses, but they are not prepared to lose their criminal profit. It is the opinion of those who advocate a stronger asset recovery that losing the profit of their crime is far worse punishment than imprisonment for these offenders.

The international pressure on countries to introduce more efficient forfeiture legislation has led to a movement away from traditional conviction based (criminal) forfeiture towards new models of non-conviction based (civil) forfeiture.³ A new concept of non-conviction based forfeiture is unexplained wealth provisions, allowing confiscation of property not resulting from a specific crime and which cannot be declared legally obtained.

Due to these recent international developments, Sweden introduced a new extended form of forfeiture in 2008. This new provision allows the forfeiture of property of an individual convicted of certain serious crimes, even if the property in question cannot be associated with that specific offense.

² United Nations Office on Drugs and Crime, Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime, October 2011.

³ For a definition of criminal and civil forfeiture see chapter 2.2.

However, Sweden still requires a conviction to be made before forfeiture is possible.

In contrast to Sweden's cautious approach, Australia has been one of the leading countries in the development of a new forfeiture system, and was one of the first countries in the world to introduce a non-conviction based forfeiture system in 2002. To further streamline its forfeiture legislation the Commonwealth Government introduced a new regime of unexplained wealth orders in 2010. This new provision is civil based and allows confiscation of assets of particular individuals who cannot explain how they acquired their assets.

In March 12 this year the European Parliament and Council also came with a proposal for a new Directive⁴, including a demand on Member States to implement limited forms of non-conviction based forfeiture and a new clearer form of extended forfeiture.

The main intention of these new provisions is to target organised crime heads who tries to shield themselves from the law and to streamline the asset recovery approach. But questions have been raised whether the legislators have found a good balance between the need for efficient laws to target the profits from organised crime and the security of individual's rights.

1.2 Purpose and Subject

“Following the money trail” and the need for a more efficient asset recovery is, from a practical implementation point of view, a topic of much discussion in Sweden. On the other hand, there is next to no discussions regarding the technical and legal regulations in the area of forfeiture. It is easy to be swept away by the winds of change without taking the necessary time to stop and reflect of the actual objectives and purposes behind the change. I believe it is time to stop and look at the technical legal elements concerning Sweden's extended forfeiture provision and the potentials of a civil forfeiture regime. In doing so, I wish to highlight the potentials, but also the complexity and contested problems with a civil based forfeiture.

The objective of comparing the Swedish and Australian legal systems is to demonstrate an alternative technical and legal solution to the development of the Swedish forfeiture regime. Contrary to Sweden, Australia has a much broader forfeiture legislation allowing for both civil and criminal forfeiture. It is my opinion that Sweden can learn a lot from Australia's journey in creating its new streamlined forfeiture regime.

⁴ Proposal for a Directive of the European parliament and the council on the freezing and confiscation of proceeds of crime in the European Union, COM (2012) 85 final of 12.3.2012.

Before a study of the new forfeiture regime can be made, a clarification regarding some well-used conceptions in the area is needed. In Sweden, there are discussions about streamlining the criminal asset recovery scheme. However, what exactly do we want to combat and what specific variables do we include in the terms “efficiency” and “criminal asset recovery”. Is it specifically the organised crime heads we want to target, or, if we cannot get them, do we want to target the small time criminals instead? To achieve a well-sustained analysis and conclusion, I believe it is desirable to start by trying to clarify these conceptions first.

An overall purpose of this thesis is to investigate the possibility for Sweden to develop its forfeiture system and to facilitate an understanding of civil forfeiture: its legal possibilities and straits. To accomplish this task, the following questions will be raised:

1. What distinguishes civil and criminal forfeiture?
2. What is the legal situation in Sweden and Australia concerning forfeiture of unexplained wealth?
3. What legal problems has been recognised in Australia relating to civil forfeiture and unexplained wealth?
4. In what way do Sweden and Australia’s forfeiture provisions of unexplained wealth diverge?
5. How far should Sweden go in the development of its forfeiture system: is civil forfeiture a potential way forward or does a wider legislation threatens the rule of law?

1.3 Method and Materials

A classic jurisprudential method will be used, which entitles a description of the applicable law through an analysis of existing legal sources, such as legislation, case law, preparatory work and doctrine. This method will be used to determine the conditions required under Swedish and Australian law and to illustrate some of the technical and legal flaws of each country's new extended forfeiture provisions. In addition, a comparative study of Sweden and Australia's forfeiture systems will be done focusing on the new extended forfeiture provisions of the two countries. Empirical data in the form of an interview will also be used to achieve a greater depth of the understanding of the essay topic.

Foremost, this thesis is based upon two perspectives. First, an efficiency and rule of law perspective will be applied when answering the questions raised in this thesis. Second, a European perspective will be used, taking into account the European influences on Sweden and Australia in the area of forfeiture.

The Australian forfeiture system and its design caught my interest because of its different approach compared to the Swedish system. Australia is far more advanced in the forfeiture area than Sweden, and has several different

forms of forfeiture. Just as Sweden look abroad for inspiration and ideas, Australia has done the same, by studying European solutions. Australia, like Sweden, has signed many of the major international conventions regarding the law enforcement on proceeds of crime. They were for instance the first country outside Europe to sign the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Thus, Australia is bound to the same international obligations as Sweden. Australia has also looked at European countries such as the UK, Ireland and Italy in the development of its confiscation system. Like Australia, these countries are well advanced in the forfeiture area.

However, in the comparison of Sweden and Australia, it is important to take into account the geographical and demographic differences of the two countries. Australia is not only a country and a state but also a continent. Australia is, due to its size, a federation containing six states together forming the Commonwealth of Australia⁵. Both Australia and its states have their own constitutions and laws. The federal law covers all persons in Australia while state law only applies to persons within the State. The federal law covers only certain areas, such as defence, taxation, customs, immigration, international issues and cross-border crime.

Another important difference is that the Australian legal system is based on common law, while the Swedish legal system is mainly based on civil law. Australia's federal law on forfeiture is nevertheless based on written, statute, law. Common law is an old tradition of British law. Common law means that it is the judge who, by his or her judgments, forms new laws. Nowadays, this can only be done in areas not covered by written law. The written law prevails over common law in Australia, and it is only the High Court of Australia that can challenge the validity of a written law. Even so, the court may still interpret legislation and its decisions are precedents that other courts may later use. This is called the doctrine of precedents.⁶ Hence, courts precedents in the forfeiture area cover only interpretations of the written law. Based on this, I believe the differences between Australia and Sweden are not too extensive so that an enlightening comparison of the two countries is still possible.

The empirical data consists of a qualitative interview with Jim Jolliffe, prosecutor and deputy director of the CDPP's office in Sydney, Australia. I first came in contact with Jim Jolliffe during my exchange at UNSW, where he lectured in Money Laundering and the Proceeds of Crime. Jim Jolliffe has worked in the CDPP with confiscation of property since its inception and has extensive knowledge regarding the asset recovery scheme in Australia. The interview has been used to gain insight and knowledge of how the Australian forfeiture provisions and particularly the provisions relating to unexplained wealth are interpreted and used in practice.

⁵ I will hereon refer to the Commonwealth of Australia as Australia

⁶ The Law Handbook (2009): *Your practical guide to the law in New South Wales*, 11 uppl., Thomas Reuters, s. 2-4.

Preparatory work will mainly be used as a source of data in the part regarding the Swedish system. The reason for this is that there is only one High Court case concerning extended forfeiture and next to no Swedish literature or articles discussing the subjects extended and civil forfeiture. Since Sweden foremost is a civil law country, preparatory work is used as a highly reliable source since it enlightens the purpose and objective of the legislator. In Australia however, there are relevant case laws and articles on civil forfeiture and unexplained wealth which will be used to gain a greater depth of the essay topic. In this part it is also relevant to look at preparatory work since the forfeiture regime is built upon statute law. In common law countries, the preparatory work is not always used as a source since it is case law that interprets the law or enacts new laws. In addition to the Swedish and Australian case law, a few other international decisions will be used in order to show the international arguments of civil forfeiture as a proportional measure in relation to the legal security of the individual.

Finally, a translation always deviates to some extent from the original text. This applies especially to legal texts. It is sometimes particularly difficult to translate legal terms and concepts. Hence, the meaning of a legal term may vary somewhat between the various legal systems. For the purpose of used non-English sources I am personally fully responsible for the translations made and any linguistic errors are mine alone.

1.4 Determination of Concepts

1.4.1 Efficiency vs. The Rule of Law

“Efficiency” is a concept in law that is very vague and is applied most often in poor general terms. There is talk of the rules’ “efficiency” and “impact on” etc, but detailed information on exactly what is referred to is rarely given. Efficiency as a concept has been developed in areas of Social science and in Economics. In Economics research, a distinction is usually made between efficiency in the sense of effectiveness, internal efficiency and relevance (efficacy). By using this division of the concept of efficiency, the jurisprudential analysis gains distinctiveness and precision.⁷

Care must also be given to the choice of theory when analyzing the concepts “rule of law” and “efficiency.” It is understandable that the choice of theories and concepts have important implications for the study’s features and results. The clarity of the definition of the term “efficiency” is therefore crucial to the success of the investigation.⁸

This thesis is build upon a jurisprudential theory and a rule of law v. efficiency perspective is used. The term “efficiency” will therefore, in this thesis be used as interpreted in relation to criminal asset recovery. This

⁷ Claes Sandgren (1995/96): ”Om empiri och rättsvetenskap”, Juridisk tidskrift Nr. 3 p. 88.

⁸ Claes Sandgren, 1995/96 p. 89.

means that forfeiture laws should be as efficient as possible to prevent new criminal activity by forfeiture of individuals illegally acquired assets. The need for efficiency will be tried against the rule of law and the need of procedural safeguards, protecting the individual from injustice and arbitrary intrusion.

1.4.2 Criminal Asset Recovery

The focus on the actual proceeds of crime is based on a few main assumptions. The first is of a moral nature; that society will not allow anyone to profit from criminal activity. Profit of crimes is considered to be against the general sense of justice. The second and third assumption concerns efficiency. The strategy behind this is to attack the main driving force behind criminal activity – the money. The idea is that if it becomes harder to make money from crime, the motivation to commit crime reduces. It also prevents the funding of new crime. The fourth assumption is that forfeiture of the proceeds of crime can prevent criminals from infiltrating and corrupting the legal economy. The fifth and final assumption is that the state generates income through the focus on the proceeds of crime.⁹

In Sweden there is no comprehensive, general term on focusing the law enforcement on the proceeds of crime. The general expression used in Sweden is “to track down and return the proceeds of crime”. However, this is a long and complicated sentence and a new term has been proven necessary.

Internationally, "Asset Recovery" and "Criminal Asset Recovery" has been used as terms for the recovery of criminal assets. Internationally, a principle on asset recovery (The return of assets) was acknowledged with the implementation of 2004 of *United Nations Convention against Corruption*. Through this convention, countries agreed to work on asset recovery, and several provisions of the convention specifies how countries will cooperate and assist each other in this field.¹⁰

Due to the international development in this area, Sweden chose to adopt the concept “Criminal Asset Recovery” (*tillgångsinriktad brottsbekämpning*) which is defined by Brå (The Swedish National Council for Crime Prevention) as follows:

A comprehensive term for all forms of activities that generally are directed against “dirty money” and proceeds of crime. The term also includes financial measures against target criminals with the purpose of, by legitimate means, reducing their income of allowance from the state and increasing their expenditures by corporate fines.¹¹

According to Brå, criminal asset recovery has a broader meaning than only recovering the proceeds of crime. The basic idea of the strategy is to focus

⁹ Brå 2008:10, *Tillgångsinriktad brottsbekämpning: Myndigheternas arbete med att spåra och återföra utbyte av brott*, p. 12-13.

¹⁰ <http://www.unodc.org/unodc/en/treaties/CAC/>.

¹¹ Brå, 2008:10 p. 17.

on the driving force behind crime, i.e. criminal profits. This has led to that the criminal asset recovery has been reduced to be mostly about returning the assets to the state. The crime prevention effect has thus come to be measured in purely monetary terms. The more asset the state can confiscate, the greater the success. This is not meant to be the primary object. Criminal asset recovery is more about economic crime in general than on criminal asset in specific, especially in connection with organised crime. Criminal asset recovery is primarily intended as a tool in the process; making it difficult for criminals to profit from crime and engage in new criminal activity. The counter-strategies that criminals will have to implement to protect their criminal income, such as money laundering and other protective measures, increase the cost of their criminal activities. Ultimately, this results in that the criminals may have more difficulty to monetize their business, which means that law enforcement, to some extent has been successful.¹²

1.4.3 Confiscation

The term “confiscation” is not used in Swedish legislation. Instead Sweden uses the term “forfeiture”.¹³ Forfeiture and confiscations is closely linked, both terms describes the withdrawal of certain legal rights.¹⁴ The term confiscation is often used internationally in legislation and at conventions, and has a broader concept than forfeiture.

Forfeiture orders are traditionally linked to a specific property immediately connected with the commission of an offence. Linguistically, forfeiture refers to the loss incurred by the parties affected by it. The loss, however, corresponds to a reimbursement for someone else, usually the state. From this point of view, forfeiture sometimes is called confiscation (after the Latin phrase *Fiscus = exchequer*).¹⁵ Confiscation is a more modern term and is often used, in contradistinction to forfeiture, to denote deprivation of an offender of assets being the benefits, proceeds or profits of crime. Hence, confiscation includes other forms than traditional forfeiture. For instance, the Australian term “confiscation order” includes both criminal and civil forfeiture, pecuniary penalty orders and confiscation of literary proceeds from the commercial exploitation of the person's criminal notoriety.¹⁶

The term confiscation, which includes forfeiture, means a permanent deprivation of funds or other assets by order of a competent authority or court. Confiscation or forfeiture takes place through a judicial or administrative

¹²Brå 2011:20, Bekämpning av organiserad brottslighet: Utvärdering av den myndighetsgemensamma satsningen mot grov organiserad brottslighet, p. 128.

¹³ Grahn, T, (2010): *Åtgärder mot penningvävt mm: En praktisk vägledning och kommentar*, Stockholm: Nordstedts Juridik, p. 301.

¹⁴ Freiberg, A, and Fox, R (2000): “*Fighting crime with forfeiture: Lessons from History*”, *Austl. J. Legal Hist*, Vol. 6, p. 4.

¹⁵ Berg, U, et al (2012): *Brottsbalken: en kommentar, Kap. 25-38*, Stockholm: Nordstedts juridik, p. 36:6-7.

¹⁶ Freiberg, A, and Fox, R, 2000 p. 4, and POCA s. 388 and <http://www.assetrecovery.org/kc/node/ab17b696-c28c-11dc-a692-cd2879868628.4>.

procedure that transfers ownership of specified funds or other assets from private or legal persons to the state. The private or legal person loses all rights, in principle, to the confiscated or forfeited funds or other assets.¹⁷

1.5 Delimitations

The essay is limited to investigate the technical and legal elements of the law rather than the practical deficiencies. Focus will be on Sweden's and Australia's new forfeiture provisions on unexplained wealth and the concept of civil forfeiture. In many ways, this provides a natural delimitation in terms of the material selection. For instance, the countries new Asset Recovery Taskforces are an interesting subject with its coordinated actions against the proceeds of crime, but to assess these organisations would be to go beyond the scope of this thesis.

Sweden has not gathered their confiscation scheme in one law or code. Instead the provisions concerning freezing orders (*kvarstad och förvar*) and restraining orders (*beslag*) can be found in the Swedish Code of Judicial procedure (*Rättegångsbalken (1942:740)*) while the forfeiture provisions are gathered in the Swedish Penal Code (*Brottsbalken (1962:700)*)¹⁸. Due to the specific objective and scope of the essay, the study will foremost be limited to the forfeiture provisions in the Swedish Penal Code. Other forfeiture provisions outside the code will be left aside, as well as other alternative administrative confiscation methods like penalty tax.

Another interesting area concerning confiscation that falls outside the scope of this thesis is the combined cooperative between the National Tax Board and the police. In Malmö, Sweden, operation Alfred started earlier this year, targeting organised crime and criminal assets by using police investigations together with the tax board's proceedings.¹⁹

The Australian part will focus on the federal laws on forfeiture of criminal assets, primarily the new provisions relating to unexplained wealth. These provisions are found in the POCA (Proceeds of Crime Act 2002). There is

¹⁷ United Nations Conventions against Transnational Organized Crime, United Nations Against Corruption, <http://www.assetrecovery.org/kc/node/ab17b696-c28c-11dc-a692-cd2879868628.4>, and <http://www.ne.se/konfiskation>.

¹⁸ The Swedish Penal Code was adopted in 1962 and entered into force on 1 January 1965. The code contains provisions on most of the actions that constitute a crime in Sweden. The provisions on other offences are to be found in special legislation. The code also contains general provisions of all crimes, the penalties and the applicability of Swedish law. The Penal Code is part of the Swedish Code of Statutes (*Sveriges rikets lag från 1734*). The Swedish Code of Statutes is divided into smaller sections or beams (*balkar*) containing different areas of law, such as the Penal Code, Inheritance Code, The Children and Parents Code and Land Code etc. The system of beams is a heritage from Sweden's medieval laws. (See Bernitz, U (2007): "*What is Scandinavian Law? Concept, Characteristics, Future*", Scandinavian Studies in Law, Vol. 50, p. 20, and Zweigert, K and Kötz, H 1998: *An introduction to comparative law*, 3edn, Oxford University Press, New York, pp. 277-280.)

¹⁹ <http://www.sydsvenskan.se/malmo/jakten-gar-pa-gangpengarna/>.

no case law concerning unexplained wealth on a federal level. The lack of precedents in this area makes an extension relevant and therefore case law from the Commonwealth and states regarding civil forfeiture will be used, discussing the interpretation of elements which can also be found in the unexplained wealth provision.

1.6 Outline

The first chapter gives an overview of the recent international developments affecting Sweden's forfeiture legislation. In spite of being a mere overview the chapter gives an essential introduction of the overall purpose with this thesis.

Chapter two gives a basic background on criminal, as oppose to civil, forfeiture and the dividing line between the two. The purpose is to broaden the reader's knowledge of civil forfeiture and on which principles it is based upon. The last subsection gives an overview of the international development regarding forfeiture. The international and especially the European development in the area of forfeiture have a broad impact on Sweden why a short introduction is necessary.

The third chapter consists of a survey of the Swedish forfeiture legislation and particular of its extended forfeiture. With the introduction of extended forfeiture, Sweden made its first cautious movement towards a civil forfeiture. The aim of this chapter is to distinguish the civil elements in the provision and highlight the new changes.

The following chapter consists of the Australian legislation on forfeiture and a survey of the unexplained wealth provision and its legal elements. The final subsection in this chapter highlights the contested legislative problems with the unexplained wealth provision and civil forfeiture.

The penultimate chapter contains an analysis that aims to answer the problem raised and the questions asked under subsection 1.2. The special character of forfeiture raises questions of the historical background of forfeiture, on which legal principles it is laid upon, and what distinguish the civil and criminal forfeiture. These questions will be answered under section 5.1.

Under section 5.2 the Swedish and Australian new provisions will be viewed and a comparison will be made between extended forfeiture and unexplained wealth. An examination will also be made of the problems raised in doctrine regarding the Australian unexplained wealth provision and

civil forfeiture. In the final section, 5.3, the possibility and straits of a broader Swedish forfeiture regime is examined.

The final chapter contains a summary of the conclusion made within this thesis.

2 Forfeiture

2.1 Background and the legal ground which forfeiture is based upon

Forfeiture sanctions have existed and do exist in most legal systems. Reference to it can be found as early as in the Bible and in customary law.²⁰ The origin of English forfeiture laws can be traced back to antiquity, and today it is a well-accepted common law principle that the crown may confiscate assets derived from wrongful actions.²¹ Also Swedish forfeiture legislation can be traced back in time, and can for instance be found in Sweden's early medieval provincial laws.²² Examples of this from medieval English and Swedish laws are the confiscation of a person's total wealth if convicted of treason or felony (a more serious type of crime, such as murder or abduction) or sentence to death.²³ There are also traces of civil forfeiture in England for example, proceedings against ships and goods to enforce the rule requiring only English ships to be used in importing goods to the Commonwealth nations.²⁴

Historically, forfeiture has been closely linked to criminal proceedings, most often being a supplement to a conviction. For instance, in Swedish legislation criminal forfeiture is said to be a "specific legal effect of crime" (*Särskild rättsverkan av brott*). Forfeiture is in Sweden and in most countries not considered to be a pure criminal penalty, even though it has the form of a sanction. Instead forfeiture can be said to be a middle-ground jurisprudence lying between criminal and civil law.²⁵

As mentioned in the introduction, forfeiture and the focus on proceeds of crime are based on a few ground assumptions. Some of these assumptions are deduced from the historical development of forfeiture. Forfeiture legislation has long since been based on a *public policy ground*, that persons shall not profit from criminal activity. Forfeiture has also been motivated being both preventative and reparative. It is *preventive (deterrent)* because it aims to reduce crime by remove the criminal's working capital and decreases the risk for others adopting a criminal lifestyle. It is also *reparative* in the way that it removes from individuals what was never legally owned by them.²⁶

²⁰ Freiberg, A, and Fox, R, 2000, p. 6.

²¹ Australian Law Reform Commission (1999): *Confiscation That Counts: A review of the Proceeds of Crime Act 1987*, Report No 87, p. 19.

²² SOU 1960:28, pp. 25-26.

²³ SOU 1960:28, pp. 25-26, and Freiberg, A, and Fox, R, 2000, p. 5 and 11-12.

²⁴ Davidson Gray, A (2012): "Forfeiture provisions and the criminal/civil divide", New Crim. L. Rev. Vol. 15 pp. 36-38.

²⁵ Mann, K (1991-1992): "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law", Yale L.J., p. 1799.

²⁶ Kennedy, A (2006): "Designing a civil forfeiture system: an issue for policymakers and legislators", Journal of Financial Crime, Vol.13, No. p. 10, Bartels, L (2010): *A review of*

In recent years, with the enhanced focus on the proceeds of crime, two civil remedies have been emphasized in the justification of a civil forfeiture. Firstly, forfeiture is said to provide a remedy to requiring a return to the way things were, *the status quo ante*. The purpose of this is to restore the position of an injured party. Secondly, it provides a remedy to *compensate* an injured party from harm done to him. Hence, forfeiture aims to compensate the society for the adverse criminal activity and to reimburse the state for its cost in combating crime.²⁷ Forfeitures main purpose is therefore on this ground not to punish but to compensate and repair the harm being made and deter further criminal activity.

2.2 The distinction between civil and criminal forfeiture

It can be hard to determine what is criminal, as opposed to civil, proceedings. The distinction between criminal and civil proceedings has decreased worldwide in recent years. Criminal cases nowadays often involve civil or quasi-civil proceedings and some civil litigation has become quasi-criminal.²⁸

To determine whether a forfeiture procedure should be criminal or civil one must first separate sanctions from penalties. This is important for the applicability of criminal fundamental principles and procedural safeguards. It has been argued in doctrine that if you hold that special safeguards should apply to criminal penalties, there is a need to distinguish these penalties from each other. One can also argue that procedural safeguards should not only apply to penalties, but also for sanctions of a criminal nature. In that case, the problem is to separate those sanctions from other types of sanctions. A reference can here be made to the European Court of Justice and article 6 of ECHR, in which the Court's cases shows that criminal procedural safeguards have been invoked in civil proceedings in regards to the sanctions criminal character.²⁹

The European Courts have tended to consider three matters in determining whether a proceeding is in fact criminal or civil: 1) the classification of the proceeding in domestic law, 2) the nature of the offence, and 3) the nature and degree of severity of the penalty/sanction that the defendant risks incurring. In sum, courts have found that a proceeding can be deemed criminal even though the only punishment consists of a fine. These elements are

confiscation schemes in Australia, Technical and background paper no. 36, Australian Institute of Criminology, Canberra, p 10, POCA s. 5, prop. 1948:80, p. 74, and Thornton, J (1994): "*The Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia - an Overview*", Canberra L. Rev, p. 45-48.

²⁷ Kennedy, A, 2006 pp. 8-10, and Bartels, L, 2010 p. 10.

²⁸ Kennedy, A (2004): "*Justifying the civil recovery of criminal proceeds*", JFC, Vol. 12 No. 1, p. 8-9.

²⁹ Asp, P (1998): *EG:s sanktionsrätt: Ett straffrättsligt perspektiv*, Uppsala: Iustus förlag AB, pp. 245-246.

alternative, which means it is enough that one of them is fulfilled for the court to apply criminal procedural safeguards in civil proceedings.

The first element simply states that an investigation is needed whether the infringement in question is classified as a criminal offence in the state in question. The second element, the nature of the offence, is more complicated. A lot of different factors may be considered. For example; whether or not the sanction is substantial or not; if the scheme is general in nature, rather than specifically directed towards particular groups, if it is made general it more likely to be found criminal; the normal meaning of the word "offence"; the interest protected by the norm; the purpose of the provision, if the purpose is only compensatory (civil) or includes punishment or deterrence (criminal) principles; and if the offence involves an element of dishonesty or blameworthiness by the person affected it is also more likely to be deemed criminal in nature. Finally, the last element is the nature and severity of the sanction. As a rule of thumb imprisonment of more than a few days will generally trigger the criminal procedural rules. There are proceedings which are deemed civil in nature but where the court may insist on the application of convention rights in relation to such a trial, including a fair hearing.³⁰

In sum, the severity of the sanction can effect and have an impact on the proceeding and vice versa.³¹

Civil forfeiture is, as criminal forfeiture, undoubtedly a repressive state measure, which has the nature of a sanction and forfeiture proceedings clearly belongs to the sphere of public law. From a theoretical perspective, civil forfeiture can be seen as a kind of public law proceeding in addition to the criminal proceeding or as a criminal and administrative³² law proceeding.³³

Firstly, the main difference between criminal and civil forfeiture is the burden and standard of proof. Criminal forfeiture requires a criminal conviction, on the evidentiary threshold "beyond a reasonable doubt", being made to recover the property associated with a crime. Civil forfeiture, on the other hand, is based on the civil standard "balance of probabilities" and does not require a prior conviction to forfeit property. A civil procedure also allows for a shared burden of proof, which enables to reverse the onus of proof and put it not only on the prosecutor but also on the defendant.³⁴ In sum, the main purpose of recover criminally tainted assets under civil law is to render

³⁰ Davidson Gray, A, 2012 pp. 58-59, Kennedy, A, 2004 pp. 11-12 and Asp, P pp. 415.

³¹ Asp, P, 1998 pp. 391-392.

³² In generally, administrative sanctions are based on public law and ordered by a government authority rather than by a public court. The administrative procedure is said to be simplified in comparison to court proceedings and the sanction less severe then a criminal sanction or penalty. See Asp, P, 1998.

³³ Nikolov, N (2011): "*General characteristics of civil forfeiture*", J.M.L.C., Vol. 14, No. 1, p 17-18.

³⁴ Nikolov, N, 2011 p 23.

the burden and standard of proof of criminal guilt inapplicable to forfeiture proceedings to simplify the recovery of assets.³⁵

Secondly, civil law is not interested in *mens rea*, and that element of intent that is so important in criminal law. This means that the court does not need to look at the particular conduct and try to find an appropriate sanction for the property owner. It is the property not the person which is subject of the proceedings. Civil law in general disregards the mental element or at the most only requiring neglect. The civil forfeiture reflects this with its focus on the origin of the property concerned instead of the offender.³⁶

Thirdly, the civil forfeiture is justified having a compensatory and reparative purpose instead of a punitive purpose. Because, the purpose of forfeiture is compensatory and reparative there is no reason for special procedural safeguards which would be needed if the purpose was punitive.³⁷

The Australian Law Reform Commission stated in its review from 1999 that:

The concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and vice-versa.³⁸

Accordingly, the diverse purpose is a strong justification to use civil forfeiture legislation with a lower civil standard of proof. On this ground it has become an increasing global trend to use civil forfeiture to combat organised crime.³⁹

2.3 International impact on the development of the forfeiture legislation

During the 1990s, the international cooperation in criminal matters developed rapidly and both Sweden and Australia has ratified several conventions related to the area of asset recovery.

³⁵ Minson, J (2006): “*Civilprudence, sovereignty and citizenship in the justification of civil forfeiture*”, UNSWLj. Vol. 29, p. 64.

³⁶ Kennedy, A, 2006 pp. 8 and 16.

³⁷ Mann, K, 1991-1992 p. 1823 and 1830.

³⁸ ALRC Report No 87, para. 2.78.

³⁹ Croke, C (2010): “*Civil forfeiture: Forfeiting Civil Liberties? A Critical Analysis of the Crimes Legislation Amendment (Serious and Organised Crime) act 2010 (Cth)*”, Current Issues in Criminal Justice, Vol 22, No. 1, p. 149.

2.3.1 International Legislation

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This convention was adopted in 1988 and ratified by both Sweden and Australia in the beginning of the 1990's. The convention recognizes the international dimension of the drug trade and its association to money laundering activities. It also contains what could be termed as mini extradition and mutual assistance treaties. The convention also obliges the parties to trace, restrain, and ultimately confiscate proceeds of drug trafficking, both domestically and at the request of other party states.⁴⁰

The United Nations Conventions against Transnational Organized Crime, adopted in 2000. These conventions require the parties to criminalize a certain range of conduct, namely participation in an organised criminal group, money laundering and corruption. They require Member States to adopt measures to confiscate the proceeds from such crime and enable the liability of legal persons either by criminal, civil or administrative means.⁴¹

The United Nations Convention against Corruption, adopted in 2004.

By adopting this convention, countries agreed on cooperation on asset recovery. Asset recovery is stated explicitly as a fundamental principle of the Convention, and the convention specifies how countries will cooperate and assist each other in this work.⁴²

The Council of Europe's *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime*, approved in 1990,⁴³ hereon called the Confiscation Convention. The Confiscation Convention is established with the UN Drug Convention from 1988 as a model. The goal was to develop and strengthen judicial cooperation, e.g. in order to confiscate the proceeds of crime derived from organised and economic crime. For the first time a demand was made on Member States to enable the forfeiture of proceeds and instruments of *any type* of crime.⁴⁴ The convention also lay the ground for a civil forfeiture, by clarifying that confiscation can be either a penalty or administrative measure. Further, it introduced a preliminary investigation to identify illegally acquired property which does not have to be carried out by judicial authorities.⁴⁵

Sweden signed the convention, but had one dissenting opinion and reserved the right to forfeit only the proceeds and instrument of certain crimes.⁴⁶ Australia was also invited by the Council of Europe to participate in the

⁴⁰ ALRC Report No 87, para 2.21

⁴¹ United Nations Convention against Transnational Organized Crime, article 10 and 12.

⁴² United Nations Convention against Corruption, Chapter V.

⁴³ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No.141.

⁴⁴ Prop. 1995/96:49, p. 5.

⁴⁵ ETS No 141, article 1 and 3, and Nikolov , 2011 p. 5.

⁴⁶ SOU 1999: 147, pp. 102 and 197-198.

development of the convention, and Australia was the first country outside Europe to become a member of the convention.⁴⁷

2.3.2 EU Legislation

The Amsterdam Treaty⁴⁸ was a springboard in the Member States' united fight against organised crime. This has led to a more international criminal cooperation between Member States concerning forfeiture, and the forfeiture scheme importance has been emphasized in combating organised crime, money laundering and terrorism.⁴⁹

As a result of the Confiscation Convention, EU adopted a new framework decision in 2005, *the Council Framework Decision 2005/212/JHA*⁵⁰. The framework decision was primarily meant as a supplement to the Convention, providing a limitation of the reservations made in the Convention. The framework requires Member States' to adopt the necessary measures to enable themselves to confiscate, either wholly or partly, instruments and proceeds and value from criminal offences punishable by imprisonment or a detention order of a maximum of more than one year.⁵¹

The framework decision also introduced *extended forfeiture* of certain serious offences, when committed within the framework of a criminal organisation. Extended forfeiture involves the forfeiture of assets, which goes beyond the direct proceeds of a crime so that there is no need to establish a connection between suspected criminal assets and the specific crime.⁵²

Article 3.2 of the Framework Decision sets out three alternative models, to enable confiscation of proceeds of criminal activity from a person convicted of a serious offence. The *first model* provides an opportunity to confiscate property, if the court, based on specific facts, is *fully convinced* that the property in question has been *derived from criminal activities* of the convicted person during a period prior the conviction of the serious offence.

The same conditions are imposed in the *second model*. But in addition, the second model requires that the property in question has been derived from similar criminal activity of the convicted person, making this model more restrictive.

The *third model* states that forfeiture should be possible if it is determined that the value of the property is disproportionate to the lawful income of the

⁴⁷ ALRC Report No 87, para 2.22

⁴⁸ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, Germany: European Communities, 1997.

⁴⁹ Berg, U, et al, 2012 p. 36:14.

⁵⁰ OJ L 68/49 of 15.3.2005.

⁵¹ Council Framework Decision 2005/212/JHA of 24 February 2005, article 2.

⁵² COM(2012) 85 final of 12.3.2012, p. 4.

convicted person and if a national court, on the basis of specific facts, is fully convinced that the property in question has been derived from the criminal activity of that convicted person.⁵³

The Member States were also free to choose procedures other than criminal to deprive the perpetrator of the property in question. This makes it possible for the property to be forfeited wholly or partly. Allowing for *third-party confiscation* of property acquired by the closest relatives of the person concerned, property transferred to a legal person in respect of whom the person concerned — acting either alone or in conjunction with his closest relations — has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.⁵⁴

*The Council Decision 2007/845/JHA*⁵⁵. This decision emphasizes the significance of the Camden Assets Recovery Inter-Agency Network (CARIN) and obliges Member States to establish national assets recovery offices. CARIN is an informal network of contacts in 50 countries, including members and observers from EU, other state jurisdictions and 3rd parties, dedicated to improving cooperation in all aspects of tackling the proceeds of crime. Both Australia and Sweden are members of the network.⁵⁶

The EU has set up Asset Recovery Offices (ARO) in Member States as a complement to CARIN, strengthening the cooperation between countries. In Sweden since 2008, ARO contains of the Proceeds of Crime Unit (*Brottsutbytesenheten*) alongside with the Swedish Financial Police (*Finanspolisen*).⁵⁷

*The Proposal for a Directive of the European parliament and the council on the freezing and confiscation of proceeds of crime in the European Union*⁵⁸. Mach 12 this year the European Parliament and the Council published a proposal for a new directive in the area of asset recovery in the purpose to protect the licit economy from criminal infiltration. The proposal aims to make it easier for Member States' authorities to confiscate and recover the profits that criminals make from cross-border serious and organised crime. Organised crime groups are illegal enterprises designed to create profit. The engage in multitude cross-border crimes, such as drug trafficking, human trafficking etc. which generates very large earnings. Thereafter, these illicit earnings are laundered and reinvested into licit activities.⁵⁹

The proposed Directive lay down minimum rules for Member States concerning direct confiscation, value confiscation, extended confiscation, non-

⁵³ OJ L 68/49 of 15.3.2005, p. 51.

⁵⁴ OJ L 68/49 of 15.3.2005, pp. 50-51, and prop. 2007/08:68, pp. 50-51.

⁵⁵ OJ L 332/103 of 18.12.2007.

⁵⁶ <http://www.assetrecovery.org/kc/node/baf520a5-fe6d-11dd-a6ca-f1120cbf9dd3.2>.

⁵⁷ <http://www.ekobrottsmyndigheten.se>

⁵⁸ COM (2012) 85 final of 12.3.2012.

⁵⁹ COM (2012) 85 final of 12.3.2012, pp. 2-4.

conviction based forfeiture (in limited circumstances) and third-party confiscation.

The proposal *inter alia* states a new clearer option of extended forfeiture instead of the three options in Directive 2005/212:

That extended forfeiture can take place where a court finds, based on specific facts, that a person convicted of a serious offence covered by the Directive is in possession of assets which are *substantially more probable* to be derived from other criminal activities of similar nature or gravity than from any other activities.⁶⁰

This proposal only provides for one option and the proposed burden of proof is lowered from fully convinced to substantial more probable. This is considered necessary for the streamlining of the mutual recognition of confiscation orders. Though, a definition of the lowered burden has not been given. The three alternative options in Directive 2005/212 have shown to be unclear which has hampered the cooperation between the Member States. This because a Member State only will execute confiscation orders from other Member States if these are based on the same alternative options applied in that Member State.⁶¹

Another new option proposed is *non-conviction based confiscation*. Allowance for civil forfeiture in limited circumstances, where a criminal prosecution cannot be exercised because the suspected person cannot stand trial because of death, illness or flight. The proposal concerns confiscation in relation to a criminal offence, but allows the Member State to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.

In order to respect the principle of proportionality and fundamental human rights the proposal limited the non-conviction based option to a few specific circumstances. There is also a suggestion on an additional demand on Member States to incorporate safeguards to guarantee the respect of these principles and human rights.⁶²

2.3.3 FATF's 40 Recommendations

The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. In 2003, the *FATF on Money Laundering* was revised for the second time with special recommendations on Terrorist Financing. The 2003 recommendations have been endorsed by over 180 countries, and are today universally recognised as the international standard for anti-money laundering and countering the financing of terrorism (AML/CFT).

⁶⁰ COM (2012) 85 final of 12.3.2012, pp. 10-11. The italic I have added myself.

⁶¹ COM (2012) 85 final of 12.3.2012, pp. 10-11.

⁶² COM (2012) 85 final of 12.3.2012, pp. 9-13.

In February 2012 the recommendations were revised for the third time, recommending countries to adopt measures laid out in the conventions above, including confiscation without conviction which requiring persons to demonstrate the lawful origins of property.⁶³

4 Recommendation – Confiscation and provisional measures:

Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: (a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value. Such measures should include the authority to: (a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.⁶⁴

The adoption of these international conventions has led to an international pressure on countries to implement more efficient forfeiture legislation, which has led to a movement from a punishment model of justice to a more preventive model of justice.⁶⁵

⁶³ Parliamentary Joint Committee on Law Enforcement: *Inquiry into commonwealth unexplained wealth legislation and arrangements*, Discussion paper 2011 p. v, and FATF 40 Recommendations, October 2003, FATF/OECD 2010, pp. 114-115. FATF recommendations: International standards in combating Money Laundering and the Financing of Terrorism & Proliferation, February 2012, FATF/OECD 2012, pp. 7-10, For more information about FATF see; www.fatf-gafi.org.

⁶⁴ FATF recommendations, February 2012, p. 10.

⁶⁵ ALRC Report No 87, para 2.23, and Sherman, T (2006): *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*, Canberra, p. 10.

3 The Swedish Forfeiture Regime

3.1 Overview

The general forfeiture provisions are located in Chapter 36 of the Swedish Penal Code, on Forfeiture of Property, Corporate Fines and Other Special Legal Effects of Crime. There are also additional forfeiture provisions in other criminal laws which are not incorporated in the Penal Code. These provisions supplement or partially replace the provisions in Chapter 36 of the Penal Code. This may allow forfeiture to be made on other grounds than those stated in the Penal Code.⁶⁶

Forfeiture is a Special Legal Effect of Crime. Chapter 1, section 8 of the Penal Code stipulates that offenses under the code, in addition to a criminal sanction,⁶⁷ are forfeiture, corporate fines, other legal effects of crime and obligations to pay damages. The Penal Code separates the concepts; criminal penalty, special legal effect of crime and may also entail liability for the payment of damages. The concept “special legal effect of crime” is not specified further in the Penal Code, but the concept appears to be legally regulated as a special effect of crime; being neither a criminal sanction nor a payment of damages. Forfeiture and corporate fines are said to be examples of special legal effect of crime. But special legal effects of crime can also be deportation and revocation of licenses. The concept is thus a generic term and the only positive determination of the different acts which come under the concept is that they are regulated as special effect of crime.⁶⁸

Forfeiture in Sweden is generally based on the idea that the property in question actually is forfeited as soon as the offense occurs. However, for the recovery to be realized a forfeiture order made out by the court is required. In reality this means that forfeiture does not take place until after the offence and after an order has been made out.⁶⁹

Chapter 36 contains five different forms of forfeiture (section 1-6). In Sweden forfeiture provisions require a criminal conviction, including any of the penalties provided for in Chapter 1, section 3 of the Penal Code.

Chapter 36, section 1 stipulates that the proceeds of crime (*utbyte av brott*) are to be forfeited, unless it is manifestly unreasonable. This allows the

⁶⁶ Prop. 2007/08:68, p. 36.

⁶⁷ In the Penal Code a penalty of a offence includes; the punishments of fines, imprisonment, conditional sentence, probation and committal for special care (Chapter 1 s. 3)

⁶⁸ Berg, U, et al, 2012 pp. 36:3-36:4.

⁶⁹ Berg, U, et al, 2012 pp. 36:6-36:7, Apart from the Freedom of the Press Act (*Tryckfrihetsförordningen*), in which confiscation has a special meaning.

court to make a discretionary decision. The same shall apply to anything a person has received as payment for costs incurred in conjunction with a crime, provided that such receipt constitutes a crime under this Code. The value of the article (property) received may be declared forfeited instead of the article itself. In general, the provision shall also apply to offenses in accordance to criminal laws located outside the Penal Code, and for which the offense prescribes an imprisonment of more than 1 year.⁷⁰

Chapter 36, section 1b contains the new extended forfeiture order, which enables forfeiture of proceeds, if the offender is convicted of a certain serious offence, of not only the proceeds from the specific crime, but additional assets (wealth) which the court determines are the proceeds from similar criminal activity.

Chapter 36, section 2 explains that property used or intended to be used as an auxiliary (instrument) to facilitate crime, or which is the product of such a crime may be declared forfeited if it is called for in order to prevent crime or for other special reasons. This also applies to property the use of which constitutes a crime under this Code or which is otherwise used in a manner which constitutes such a crime.

Chapter 36, section 3 extends the possibility in section 2 to include objects (instrument) that are likely to be used in crime against human life or health or damage to property. Thus, the provision is intended for specific objects which by reason of their special nature and other circumstances, give rise to a fear that they may be put to criminal use. This paragraph does not require that a crime has been committed, which means it is not a special legal effect of crime.

Forfeiture orders can also be made out in accordance to *Chapter 36 section 4*, if a crime is committed in the course of business and the entrepreneur has gained financial advantage (benefits). The financial benefits forfeited are the estimated difference in value between the company's wealth before and after the committed crime.

Chapter 36, section 5 governs against whom forfeiture according to section 1, can be exacted of, e.g. the offender or an accomplice in the crime; the person whose position was occupied by the offender or an accomplice; the person who profited from the crime or the entrepreneur described in Section 4; or any person who after the crime acquired the property through the division of jointly held marital property, or through inheritance, will or gift, or who after the crime acquired the property in some other manner and, in so doing, knew or had reasonable grounds to suspect that the property was connected with the crime.

According to section 6, the court may, when forfeiture of property is considered unreasonable, instead provide for a specific action to be taken in-

⁷⁰ Berg, U, et al, 2012 pp. 36:3-36:4.

stead to prevent abuse of the property. An example of this is the removal of signature on a forged painting.⁷¹

The concept “proceeds of crime” (*utbyte av brott*) contains both property and value, meaning that both specific property and an estimated value of the property can be forfeited. Forfeiture of property (*Sakförverkande*) means that certain property is declared forfeited, meaning that a person loses his right to the property to the state. Value forfeiture (*Värdeförverkande*) refers to the value of an amount or money equivalent to the value of the proceeds of crime. In this case it obliges the person or company to pay a sum to the state. In general, forfeiture of value is seen as an alternative to forfeiture of property.⁷²

The term “proceeds” (*utbyte*) does also include; property derived directly or indirectly from an offence and benefits derived, directly or indirectly from the proceeds of crime. It is the net assets of the proceeds that are forfeited, which means that expenses of the proceeds are deducted to the extent they do not violate any law or morality.⁷³ The prosecutor must here show a clear causation between the property in question and the originated proceeds of criminal activity.⁷⁴

Forfeiture rules can also be defined as *mandatory or optional*. Regarding the former, forfeiture is to be applied whenever the conditions of the provision are met. The provisions of Chapter 36 in the Penal Code are optional and may not always be used, only providing certain conditions are present. This is evident from Chapter 36, section 16 of the Penal Code which stipulates that the forfeiture order may be omitted where legal action is manifestly unfair.⁷⁵ The Court may also explain only part of the proceeds to be forfeited, meaning that forfeiture of both property and value can be partial.⁷⁶ In these cases, the courts are here given the power of judicial discretion if the case appears manifestly unfair.

3.2 Development Towards an Extended Forfeiture

The number of issues regarding economic and organised crime has continuously increased in recent years, partly because the significantly increasing number of criminal investigations with international connections. To meet this development, more efficient forfeiture laws have proven necessary.⁷⁷

⁷¹ Berg, U, et al, 2012, 36 :51.

⁷² Prop. 1968:79, pp. 16 and 76, and Prop. 2007/08:68, p. 36.

⁷³ The Swedish Penal Code, chapter 36 kap s. 1c.

⁷⁴ Berg, U, et al, 2012 p. 36:26 e.

⁷⁵ Prop. 2004/05:135, p. 72, and SOU 1960:28, pp. 25-26.

⁷⁶ Prop. 1968:79, pp. 60-61.

⁷⁷ SOU 1999:147, p. 119.

3.2.1 The Ministry of Justice report on an efficient forfeiture legislation (SOU 1999:147)

This inquiry was set up to investigate whether or not the Swedish forfeiture provisions were efficient enough to combat economic and organised crime, especially regarding drug offenses. The inquiry was a response to the obligations under the Confiscation Convention from 1990 to streamline the regulations on confiscation of the proceeds and instruments of crime. The forfeiture legislation is undisputable instrumental to combat crime. Unfortunately, the investigation showed that the existing regulation was less effective and in practice only applied to a limited extent. In addition to uncertainties and lack of knowledge about the regulation, the main problem was the required investigations to show a connection between the crime in question and a specific property. New legislation was considered necessary to overcome the evidentiary and investigative problems existing in the area and facilitate the prosecutor's burden of proof.⁷⁸

The investigation led to legislative changes in 2005. The amendments meant that the forfeiture of proceeds and instruments of crime now cover all offenses under the Penal Code which stipulates an imprisonment of more than 1 year. The provisions were made generally applicable to criminal laws outside the Penal Code. The concept “proceeds of crime” was also extended to include property derived indirectly from an offence.⁷⁹

3.2.2 European Council’s Framework Decision (2005/212/JHA)

To prevent and combat organised crime across the border, the Framework Decision states that focus must be on tracing, freezing, seizing and confiscating the proceeds of crime. Therefore, the aim of this Framework Decision is to ensure that all Member States have effective rules governing the confiscation of proceeds of crime, inter alia, in relation to the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.⁸⁰

The Framework Decision obliges all Member States to adopt regulations enabling forfeiture of a person’s property if convicted of a serious offence, even if the property cannot be tied to that specific offense. It is enough that the property can be shown to be derived from similar criminal activities.⁸¹

Article 3.2 of the Framework Decision sets out three alternative models, to enable confiscation of proceeds of criminal activity from a person convicted

⁷⁸ SOU 1999:147, p. 119.

⁷⁹ SOU 1999:147, p. 119.

⁸⁰ OJ L 68, 15.3.2005, pp. 49-50.

⁸¹ OJ L 68, 15.3.2005.

of a serious offence. In conclusion, both the first and third model requires the court to be "fully convinced" that the property is derived from the offender's criminal activities. However, what the court needs to emphasize in its assessment to reach this standard of proof is unregulated. Furthermore, the first model requires a temporal connection between the property that should be forfeited and the criminal activity. While the third model focuses primarily on the offender's financial circumstances.⁸² The Framework Decision also allows Member States to introduce a "reversed burden of proof" (*omvänd bevisbörda*) in criminal cases. This allows a person's financial assets being a basis for a presumption that a crime has been committed, whereby it will be up to the suspect to prove that he or she has legally obtained the assets. This possibility has been criticized for weaken the basic idea that penalties and other legal effect of crime shall constitute a reaction to a committed offense.⁸³

Sweden adopted the main part of the Framework Decision as early as in 2005, but decided that further investigation was needed considering the third article on extended forfeiture. In 2008, Sweden introduced its new reform and provision on extended forfeiture. Sweden chose to use the first model formulated in the Framework Decision. The second model was considered too restrictive and the third model was judged to be part of the first model. By the adoption of this framework, Sweden abandoned its strict approach that forfeiture of proceeds of crime requires a direct connection between a specific crime and proceeds derived from that offense.⁸⁴

3.3 Extended Forfeiture

Extended forfeiture is currently regulated in Chapter 36, section 1b of the Penal Code. The provision stipulates that; if convicted of a certain serious offence, forfeiture should be possible, not only of the proceeds of that specific crime, but also of the assets from he convicted person's, which by the court is determined being the proceeds of similar criminal activity. For the connection between what is to be forfeited and the criminal activity, the legislature choose the lower standard of proof, "clear and convincing evidence" (*klart mera sannolikt*), instead of "beyond reasonable doubt" (*bortom allt rimligt tvivel*) which is the general burden of proof applicable in criminal proceedings.⁸⁵

The provision has been made subsidiary to the other forfeiture provisions. This means it can only be used if none of the other provisions are applicable. Forfeiture under this section may also apply if the person is sentenced to attempt, preparation or conspiracy to commit a serious crime. Also this form of forfeiture can be waived or made partial on grounds of fairness. The provision is neither limited to time nor amount. Hence, Sweden to some extent went be-

⁸² Prop. 2007/08:68, p. 51.

⁸³ Ulväng, M (2010): "Utvidgat förverkande och skattebrott", Ny juridik, Vol. 4, p. 87.

⁸⁴ Prop 2007/2008:68, p. 35, and Berg, U, et al, 2012 p. 36:3.

⁸⁵ The Swedish Penal Code, chapter 36 s. 1b.

yond the Framework Decision, with the purpose of creating the most effective tools possible for pursuing criminal assets.⁸⁶

3.3.1 Prerequisite

A fundamental prerequisite for application of extended forfeiture is that the person is convicted of a crime. A presumption of a crime to trigger extended forfeiture is that the offense is committed in the purpose of financial gain and prescribes an imprisonment of 6 years or more. This element has been formulated in general terms to make it more useful. The use of the prerequisite scale of imprisonment sentences of 6 years or more as a safeguard makes the provision more predictable and therefore more secure than if the actual penalty of the individual would apply.⁸⁷

In addition to the previous prerequisite there is a catalog of crime listing offenses punishable by imprisonment less than 6 years, but still with the intent to generate financial gain. This crime catalog focuses on the more serious crimes which typically generate large profits. These crimes are committed in more or less organised forms, and are by nature particularly social dangerous or otherwise harmful socially, e.g. human trafficking, people smuggling and certain drug offenses.⁸⁸

The burden of proof is on the prosecutor to establish that the offense was committed in the purpose of financial gain or that the nature of the offense is to generate financial gain (*ge utbyte av brott*).⁸⁹

3.3.2 Financial Gain

The reason for the requirement that the purpose of the offense must be to generate financial gain is because the offense that triggers extended forfeiture must, to some extent, be qualified. The purpose of extended forfeiture is to forfeit the proceeds of crime. If all crimes that meet the sentencing scale of imprisonment of 6 years or more would be subject to forfeiture the provision would become too wide. Crimes without the purpose to generate financial gain would be included, such as serious crimes of violence and sex offenses.⁹⁰

3.3.3 Property Being Proceeds of Criminal Activity

Chapter 36, section 1b states that:

⁸⁶ Prop. 2007/08:68, pp. 64-65.

⁸⁷ Prop. 2007/08:68, pp. 56, 94-95.

⁸⁸ Prop. 2007/08:68, pp. 56-58.

⁸⁹ Prop. 2007/08:68, pp. 56, 94-95.

⁹⁰ Prop. 2007/08:68, pp. 59-60.

If a person is convicted of a serious offence which purpose is to generate financial gain, the property should be forfeited if it is proven by clear and convincing evidence that the property is proceeds of criminal activity.⁹¹

Property which may be subject to extended forfeiture is either property acquired by the proceeds of criminal activity or the value of the offender's assets that could be matched by the increase in wealth resulting from the criminal activity. Instead of property, its value may be declared forfeited in accordance to the provision, which calls for forfeiture of both property and value.⁹²

There has been an uncertainty about the wording “property being *proceeds* of criminal activity” chosen by the legislature. Instead, in the Framework Decision and in the preparatory work, the wording “property *derived* from criminal activity” is used. The question about the different wordings were raised in the High Court Decision from the 18 June 2010.⁹³ According to the Court the Swedish wording “property being proceeds of crime”, gives the impression that it is foremost forfeiture of an actual property that is considered, alternately property taken the place of the property being proceeds of crime. This interpretation would exclude money and monetary assets being regarded as a mere monetary value. However, proceeds of crime are acknowledged in the preparatory work as being both property and abstract value or profit from crime.⁹⁴ Seen together with the meaning and objective of the Framework Decision, the High Court ruled that proceeds of criminal activity must include both property and monetary value derived from an unspecified criminal activity. This means, for instance, that proceeds from tax offences may be forfeited even though the proceeds hardly can be said to be property in its fundamental meaning.

In accordance with traditional forfeiture provisions, this provision does not require that a specific person is designated as responsible for the criminal activity. It is discussed in the preparatory work that it would lead to unsatisfactory results if sufficient criminal assets are found and cannot be forfeited because, the property cannot necessarily be linked to the crime for which the person is convicted, but where there is sufficient evidence that the property is derived from criminal activity. The objective of the new provision is not to investigate and determine someone's guilt, but to forfeit profits from unspecified criminal activity. This means that there is no proof required that the person convicted of a serious offence has been involved or even is aware of the criminal activity for which the property in question arose from. It is enough that the prosecutor can show that property is *derived* from an unspecified criminal activity. This means that the investigation whether the property is proceeds of criminal activity or not is made by an assessment of the accused financial situation. The relieve of the prosecutor's burden of proof in this area is intended to facilitate the prosecutor's investigation.⁹⁵

⁹¹ The Swedish Penal Code Chapter 36 section§ 1 b.

⁹² Ds. 2006:17, p. 117.

⁹³ NJA 2010 p. 374.

⁹⁴ Prop. 1968:79, p. 79 and Ds. 2006:17, p. 36.

⁹⁵ Prop. 2007/08:68, p. 63, Ds. 2006:17, pp. 112-116 and Ulväng, M, 2010 pp. 93-94.

3.3.4 “Clear and Convincing Evidence”

The objective of extended forfeiture is to be an effective instrument in the pursuit of criminal assets. From this perspective a lower standard of proof was considered necessary by the legislator. To prove “beyond reasonable doubt” that the property in question represents the proceeds of criminal activity, was considered a too high an evidential burden for the prosecutor. The Framework requirement of “fully convinced” was also considered too high, being too close to “beyond reasonable doubt”. In the preparatory work the civil burden of proof, “probable”⁹⁶ (*sannolikt*) was proposed but was in the end considered a too low a standard of proof. The idea was that the burden of proof would represent a balance between the need for effective law enforcement and security for the individual.⁹⁷

Finally, the legislators found a middle path, the civil evidential burden “clear and convincing evidence” (*klart mera sannolikt*). It imposes a greater burden than “probable”, but less than the criminal standard “beyond a reasonable doubt”. This evidentiary burden is commonly used in civil law practice on insurance and tort law. In most civil cases the plaintiff must prove on the balance of probabilities that the defendant was “more likely than not” responsible for the damage or injuries, by being shown to have probable cause. Some cases, however, requires the plaintiff to provide additional evidence to make the case stronger than “most likely than not”. In these cases, the plaintiff must prove more than his version of events is “more likely than not” true. Rather, plaintiffs who face a “clear and convincing evidence” standard must prove that it is “substantially more likely than not” their claims are true. Clear and convincing evidence is evidence establishing the truth of a disputed fact by a higher probability than “probable”.⁹⁸

The Law Council voiced criticism that the evidence requirement was associated with uncertainties regarding the level of evidence to be provided. The explanation given in the preparatory work states that a claim must first be “more probable than not” in itself, then it should be “substantially more likely than not” than the other party's claim. Because of this, the Prosecutor's claim must first reach the standard of proof “probable” after which his or her evidence in a clear way must be “substantially more likely” than the evidence provided by the defendant.⁹⁹

The Prosecutor's investigations will largely focusing on the defendant's financial circumstances, which differs slightly from an ordinary criminal investigation. By the investigation, the prosecutor must show that the assets

⁹⁶ “Probable” is a Swedish concept similar to the English standard of proof, “balance of probabilities” or “preponderance of the evidence”.

⁹⁷ Prop. 2007/08:68, pp. 65-67 and 95.

⁹⁸ Prop. 2007/08:68, pp. 65-67 and 95, and <http://www.rotlaw.com/legal-library/what-is-clear-and-convincing-evidence/>.

⁹⁹ Prop. 2007/08:68, pp. 65-67 and 95.

are not likely to have been legally earned, because of the sufficient difference between the individual's earning capacity and the possession of the assets in question. Important in such an assessment is the condition of the property, the circumstances under which it was found, and how all this relate to the persons personal and financial situation.

It should also be investigated whether or not there are grounds on fairness which suggest that the forfeiture should be omitted or made partial.¹⁰⁰

3.3.5 Against whom may forfeiture of proceeds of criminal activity be made?

The provisions relating to the persons against whom forfeiture may be made changed with the introduction of extended forfeiture. To whom forfeiture of proceeds of criminal activity can be made against is regulated in chapter 36, section 5a of the Penal Code. Forfeiture may apply to both natural and legal persons and includes the forfeiture of; the offender or an accomplice in the crime; any person who after the crime acquired the property through the division of jointly held marital property, or through inheritance, will or gift, whether or not the recipient was in bad faith; or who after the crime acquired the property in some other manner and, in so doing, knew or had reasonable grounds to suspect that the property was connected with the crime.¹⁰¹

There is a requirement to prove that the property acquired by the offender represents the proceeds of criminal activity. Due to this, the legislators did not dare to make the provision wider though it was considered causing difficulties in providing enough evidence. An example of this was that if the activity lasted for a long time, it could be difficult to prove in whose place the offender may have been carrying out the criminal activity since the activity does not need to be specified.¹⁰²

¹⁰⁰ Prop. 2007/08:68, pp. 71-72, and Berg, U, et al, 2012 p. 36:26.

¹⁰¹ Prop. 2007/08:68, pp. 67-70, and Berg, U, et al, 2012 pp. 36:48-49.

¹⁰² Prop. 2007/08:68, pp. 67-70.

4 The Commonwealth of Australia's Forfeiture Regime

4.1 Overview

Today, in Australia there are two ways to recover the proceeds of crime; criminal and civil forfeiture. Conviction based forfeiture enables the recovery of assets associated with a crime, after a conviction for that crime has been made. The non-conviction based forfeiture allows the confiscation of assets suspected of criminal origins without the need of securing a criminal conviction. The Commonwealth of Australia and all its states and territories except for Tasmania, have forfeiture regimes allowing for both conviction and non-conviction based legislation. Some of the states also have introduced unexplained wealth provisions, e.g. Western Australia.¹⁰³

The financial cost to the community of serious and organised crime is conservatively estimated by the Australian Crime Commission to be around \$10 - 15 billion a year.¹⁰⁴ In the following the money approach, the Commonwealth Director of Public Prosecutions managed to obtain a total estimated value of confiscation orders (including automatic forfeiture) of \$24.18 million in 2011. During 2010-2011, a total sum of \$13.81 million was recovered only as a result of litigation under the *POCA 2002*. In 2009-2010, a number of long-running, complex proceeds of crime matters were resolved and \$18.31 million was recovered.¹⁰⁵

4.1.1 The Proceeds of Crimes Act 2002

The *POCA* contains laws regarding the seizure and confiscation on a Commonwealth level. The main objectives of the *POCA* is to punish and deter people from breaching laws of the Commonwealth; to prevent the reinvestment of proceeds, instrument, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and to give effects to Australia's obligation under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, and other international agreements relating to proceeds of crime. The court proceedings in confiscation matters under the *POCA* are civil not criminal, and this includes e.g. the rules of evidence.¹⁰⁶ The onus in any proceedings under this Act is on the applicant to prove the matters necessary to establish the grounds for making the order applied for. The standard of proof used by the

¹⁰³ Bartels, L, 2010 p. 5.

¹⁰⁴ Australian Crime Commission, Report on Organised Crime in Australia, 2011, p. 3.

¹⁰⁵ Commonwealth of Public Prosecutions, Annual Report, 2010-2011, pp. 150-151.

¹⁰⁶ *POCA* s. 5 and 315.

court to establish any questions of facts on an application under this Act is “*the balance of probabilities*”.¹⁰⁷

On a federal level, the CDPP is the responsible agency for applying for seizure and confiscation of proceeds of crime under the *POCA*.¹⁰⁸ But from the beginning of 2012 the newly formed Criminal Assets Confiscation Taskforce, led by the AFP will become responsible for litigating of all *POCA* actions relevant to investigations undertaken by the Taskforce, and all non-conviction based *POCA* matters referred by other agencies.¹⁰⁹

Under the *POCA* there are today four types of final confiscation orders; forfeiture orders, pecuniary orders, literary orders and unexplained wealth orders. In addition, it is also possible to make a statutory or automatic forfeiture of property if a person has been convicted of a “serious offence”.¹¹⁰

Forfeiture orders are used where the court orders that property which is the proceeds or an instrument of crime to be forfeited to the Commonwealth, if certain offences has been committed or if the property is suspected of being proceeds of indictable offences or serious offences;

Pecuniary penalty orders are used when the court orders an offender to pay an amount equal to the benefits derived by the person from the commission of an offence or the benefits that the person has derived from other unlawful activity. It is not always a requirement that the person has been convicted of the offence;

Unexplained wealth orders are used where the court orders a person to pay an amount calculated by reference to that part of the person’s wealth which the person cannot demonstrate was lawfully acquired; and

Literary proceeds orders are used when the court orders an offender to pay an amount calculated by reference to benefits the person has derived through commercial exploitation of his or her notoriety resulting from the commission of an offence. There is no requirement that a person has been convicted of the offence.¹¹¹

As can be noted above, the different forfeiture orders open ups for both conviction and non-conviction based forfeiture. Applications for these orders are made by the CDPP to State and Territory Courts with jurisdiction for criminal matters on indictment. The court can make any of these orders if it is satisfied, on the civil standard balance of probabilities, that the proceeds subject to the application are the proceeds of crime.¹¹²

Under the *POCA* property is *proceeds* of an offence if: it is wholly or partly derived or realised whether directly or indirectly, from the commission of an

¹⁰⁷ *POCA* s. 317.

¹⁰⁸ Bartels, L, 2010 p. 7.

¹⁰⁹ Parliamentary Joint Committee on Law Enforcement: *Inquiry into commonwealth unexplained wealth legislation and arrangements*, Discussion paper 2011, p. 14.

¹¹⁰ Bartels, L, 2010 p. 7.

¹¹¹ *POCA* Chapter 2, and Commonwealth Director of Public Prosecutions Annual Report 2010-2011, pp. 148-149.

¹¹² Sherman Report, p. 7.

offence; whether the property is situated within or outside of Australia. Property is an *instrument* of an offence if; the property is used in or intended to be used, in connection with, the commission of an offence, whether the property is situated within or outside Australia. Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.¹¹³

Property means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property. *Benefits* derived from the commission of an offence or from other unlawful activity may include service or advantage.¹¹⁴

4.1.2 Conviction Based Forfeiture and its Shortfalls

The Proceeds of Crime Act 1987 was the first Australian forfeiture act at federal level to introduce a concept of statutory, as opposed to judicially ordered forfeiture. The *POC Act* from 1987 relied on a conviction for an indictable criminal offence as a condition precedent to any confiscation action. The onus of proof was on the prosecution to prove beyond reasonable doubt that a crime had been committed. However, in 1999 the Australian Law Reform Commission reported in their review of the *POCA 1987* that the scheme only applies to a very limited range of offences and had fallen well short of depriving criminals of their ill-gotten gains. The Commission further stated that the *POCA* should be expanded to include a non-conviction based regime, which would greatly enhance the level of recovery of proceeds of unlawful activity.¹¹⁵

Conviction based laws has come to suffer primarily from two shortfalls. First, no freezing order can be made if the offender or the offence is not identified or if the offender and offence is identified but the evidence is insufficient to warrant laying a charge against the person. Secondly, it is not possible to confiscate property until the offender has been convicted, even though there would be sufficient evidence that the property was proceeds of crime. These two shortfalls give the criminal time to hide its assets and cover its tracks: making it impossible for the prosecutor to gain a conviction.¹¹⁶

The civil forfeiture regime was introduced on federal level in 2002 to facilitate the confiscation of criminal's ill-gotten gains. The civil forfeiture provisions are not based on the criminal standard of proof, but on a lower civil

¹¹³ POCA s. 329.

¹¹⁴ POCA s. 338.

¹¹⁵ ALRC Report No 87, pp. 61 and 77-78.

¹¹⁶ Lusty, D (2002): "*Civil forfeiture of proceeds of crime in Australia*", Journal of Money Laundering Control, Vol 5 No 4, p. 351.

standard of proof; the balance of probabilities. This provides the court to make an order restraining assets, if there are reasonable grounds to suspect that the assets are the proceeds of crime. Hence, no conviction is required, it is enough that the prosecution can prove on the balance of probabilities that the property is proceeds of an indictable offence for the Commonwealth to confiscate the property.¹¹⁷

4.2 The Unexplained Wealth Provision

4.2.1 Overview

The unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings. By reversing the onus and place the burden of proof on the respondent, the defendant or relevant third person is required to demonstrate that their property was lawfully acquired in order to avoid confiscation. This enables authorities to restrain assets that appear to be additional to an individual's legitimate income and requiring the individual to demonstrate that those assets were obtained legally.¹¹⁸

In practice, a covert financial investigation of an individual is made, and based on that financial information it is determined if the individual have wealth exceeding what would reasonably to be expected given an individual's lifestyle. Using this information a court may order an individual to prove the lawfulness of the unexplained amount of wealth. This reverses the onus of proof and places it on the individual. Hence, the jurisdiction does not have to prove on the balance of probabilities that the wealth has been obtained by criminal activity; instead it is up to the individual to prove that their wealth was acquired legally.¹¹⁹

4.2.2 The Development Towards an Unexplained Wealth Provision

In 2006 the compulsory statutory review of the *POCA 2002* was completed (the Sherman report). The review stated that the *POCA 2002* had shown to be more efficient than its predecessor, but the report also found areas needing reviewing to improve the effectiveness of the Act. The legislation could for example be more effective in the area of unexplained wealth. But Sherman did raise the question whether to introduce an unexplained wealth provision considering the current tension between the rights of the individual and the interests of the community, for instance by the reversed onus of proof.¹²⁰ However, Police and prosecutors were in favor of an introduction

¹¹⁷ POCA 2002 s. 315, PJC-LE, and Discussion paper 2011, p. 28.

¹¹⁸ POCA s. 179A and 179E, PJC-LE, Discussion paper 2011, p. 28.

¹¹⁹ PJC-LE, Discussion paper 2011, p. 28.

¹²⁰ Sherman Report, pp. 36-37.

of an unexplained wealth provision to facilitate the confiscation in cases where evidence is hard to secure:

Leaders of criminal enterprises are rarely close to the predicate criminal activities. Underlings can be paid to take those risks. Unexplained wealth provisions enable law enforcement to confiscate the illicit profits that are a number of steps removed but under the indirect control of organised crime leaders. The AFP has examples where criminal intelligence has identified individuals who have accumulated significant assets and wealth with no detectable legal means to account for it.¹²¹

Another review was made in 2009 by the Parliamentary Joint Committee on the Australian Crime Commission, which came to the conclusion that even though they recognized the contested problems with unexplained wealth, the provision appeared to offer significant benefits over other legislative means to combat organised crime. They believed that the raised problems could be dealt with successfully through different legislative safeguards.¹²² In the same year the Standing Committee of Attorneys-General agreed to generate a comprehensive national response to combat organised crime. These various legislative impulses led to the amending of the *POCA* in 2010 and the introduction of an unexplained wealth provision.¹²³

4.2.3 The Unexplained Wealth Legislation

The unexplained wealth provision came into force 2010 in Australia, through the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*¹²⁴ as a step to extend the confiscation regime under the *POCA 2002*.

The *Amendment Act* creates three new orders to deal with unexplained wealth; unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders.¹²⁵

A *restraining order* is used to ensure that the property suspected of being the proceeds or instrument of crime is preserved and cannot be dealt with to defeat an ultimate confiscation. This order can be made early in the confiscation process and should contain an application with an supporting affidavit evidence made by an authorized officer, such for example an AFP officer.¹²⁶

¹²¹ Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, p. 5.

¹²² Parliamentary Joint Committee on the Australian Crime Commission; *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, Commonwealth of Australia, p. 114-115.

¹²³ Croke, C, 2010 p. 150, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (cth)*, p. 15.

¹²⁴ Hereon called the Amendment Act.

¹²⁵ Tan, M (2003): "*Money laundering and the financing of terrorism*", Journal of Banking and Finance Law and Practice, Vol 14, p. 97, Croke, C, 2010 p. 151, Amendment Act 2010, s. 20A and 179A.

¹²⁶ POCA s. 20A and 338.

In the affidavit the officer needs to state that he or she has a reasonable suspicion that the suspects total wealth exceeds the value of the suspects wealth that was lawfully acquired; and that the person has committed an offence connected to Commonwealth power; or that the whole or part of a person's wealth is derived from an offence with connection to Commonwealth power. The affidavit must also contain the grounds for this suspicion.¹²⁷

There is a three step process for obtaining an *unexplained wealth order*. First, the DPP must first apply for an unexplained wealth order with a supporting affidavit from an authorized officer. Note that in a near future it will be the AFP led task force that conducts the activities. The authorized officer must in the affidavit show on reasonable suspicion that the suspects total wealth exceeds the value of the suspects wealth that was lawfully acquired; and which of the suspects property was lawfully acquired or owned or under the effective control of the suspect. This means that the officer does not need to identify property he or she suspects was unlawfully acquired, the officer only needs to show what property is lawful.

Second, based on the application and the supporting affidavit the court can make a *preliminary unexplained wealth order*, which requires a person to appear before the court. If the court is satisfied that an authorized officer has reasonable grounds to suspect that a person's total wealth exceeds the value of that person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power.¹²⁸

Third, if a person cannot prove this, then the court must thereon make an *unexplained wealth order*, and order them to pay to the commonwealth the difference between their total wealth and their legitimate wealth.¹²⁹

Unexplained wealth has a broad meaning and includes property owned by the person at any time, property that has been under the effective control of the person at any time, and property that the person has disposed of or consumed at any time.¹³⁰

¹²⁷ POCA s. 20A (3).

¹²⁸ POCA s. 179 B-D.

¹²⁹ POCA s. 179 E, and Croke, C, 2010 p. 151.

¹³⁰ POCA s. 179G.

4.3 Legaslative Issues with Unexplained Wealth Orders

4.3.1 The Evidentiary Threshold

For an unexplained wealth order to be issued, an authorized officer must sign an affidavit indicating that he or she believe there are “reasonable suspicions” that the value of the person’s wealth exceeds the value of the persons wealth that was lawfully acquired. This affidavit must also include the grounds on which the officer holds the suspicions.¹³¹ If this is done, the court must be satisfied that the authorized officer has reasonable grounds to support his or her suspicion.¹³²

Case law indicates that the authorized officer does need good grounds for her or his suspicion. In *International Finance Trust company Ltd. V NSW* the judge stated that the authorized officer must explain why the suspicion is held, by specifying the reasons, sources and basis for the suspicion. For instance, the deponent must state why he or she has the suspicion that the person in question has engaged in serious criminal activity. The important thing is to find relevant proof to base the suspicion on. Not until the grounds for this are clearly set out, the court can move on to ascertain whether the deponent’s suspicion is reasonable or not.¹³³

The crucial issue for the deponent is therefore to specify the reasons/source/basis for the suspicion; by specifying what the deponent have read, what conversations he or she had with relevant persons, what he or she observed, or was told as to how evidence was collected, in order to make out the grounds for the suspicion. It is not enough to merely state the assertions of facts (which are relevant for the charge) and that a joint investigation revealed certain issues, does not states how he or she had knowledge as to the assertions of facts or the source of any knowledge as to where the joint investigation lead.¹³⁴

Nevertheless, the evidentiary threshold has been criticized of being too low. The authorized officer only needs to show that there is a *possibility* rather than a *probability* that the assets were illegitimately acquired and this could lead to abuse of the provision. This criticism has been met with the argument that the CDPP will act as an effective gatekeeper to prevent frivolous claims to be made and also that the court will still also have the possibility

¹³¹ POCA s. 179B (2).

¹³² POCA s. 179B (1).

¹³³ *International finance Trust Company Ltd. V New South Wales*, Crime Commission (2008) 84 A Crim R 559, para. 23.

¹³⁴ Dobraszyk, C (2010):”Recent cases involving confiscation legislation”, Crim L.J, Vol 34, pp. 250-262, p. 252-253, *International finance Trust Company Ltd. V New South Wales*, Crime Commission (2008) 84 A Crim R 559, para 23-24, and *George v Rockett* (1990) 170 ALR 93 at 488.

to question the likelihood of the grounds for holding the suspicion.¹³⁵ How it will be in the future with the new Taskforce, removing the CDPP as gatekeeper and using their employed advocates for litigations, no one knows.

However, it has also been the subject of discussion how effective the CDPP can be as a gatekeeper when the law states that it is the authorized officer and not the CDPP that holds the suspicion. Also the court's capacity to interrogate is also limited, although the reasons behind a relevant suspicion in it self are narrowed by being just a mere suspicion. Suggestions has been made that the higher threshold, "reasonable belief" should be introduced instead. This would ensure that the unexplained wealth order is subject to a stricter legal test. Another suggestion made in the preliminary work, was that the formulation "suspect" only should apply to the restraining order and that the confiscation order would require a "belief".¹³⁶

The difference between suspicion and belief and the requirement of facts for grounding a suspicion has been discussed in case law. Suspicion and belief are different states of mind. Suspicion in its fundamental meaning is a state of conjecture or expectation where proof is lacking: "I suspect but I cannot prove". Even if the evidences for grounding a reasonable suspicion is lower than those for grounding a reasonable belief, some actual facts for the suspicion must be found. The factual basis for the suspicion must be sufficient to induce a state of mind in a reasonable person. It is not necessary to show proof of the actual elements in a crime; it is enough to identify the subject matter of the person's suspicion. "Statement of grounds is less than proof of facts." Hence, suspicion is a positive feeling of mistrust or actual concern which turns into a light opinion, e.g. that something actual will happen, but without clear evidence.¹³⁷

Belief on the other hand must relate more clearly to the subject matter of the belief. The deponent must in principle be able to answer the question why he or she thinks something is to happen. The wider and less specific the description is the harder it is to reach the standards for a reasonable belief.¹³⁸

4.3.2 Reversed Onus of Proof and the Presumption of Innocence

The initial onus is on the CDPP to establish an evidentiary foundation for an unexplained wealth application. Once this foundation is laid, the onus is on the respondent to demonstrate from the civil standard and the balance of probabilities, that he or she lawfully required the assets in question.¹³⁹

¹³⁵ Croke, C, 2010 p. 154.

¹³⁶ Croke, C, 2010 p. 154, and Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (cth), p. 18-19.

¹³⁷ *George v Rockett* (1990) 170 ALR 93 at 490.

¹³⁸ *George v Rockett* (1990) 170 ALR 93 at 490-492.

¹³⁹ Clarke, B (2004): "A man's home is his castle" - or is it?", *Criminal Law Journal*, Vol 28, p. 268. 267, and POCA s. 179E (3).

Courts in Australia and overseas have acknowledged the need and justification of a reversed onus provision in confiscation laws and recognized the difficulty to identify proceeds of crime. There are at least four practical factors that have been recognized for justification of the reversed onus of proof:

1. The general non-existence of direct evidence relating to the derivation of proceeds of crime
2. The increasing case with which the illicit origin of criminal proceeds can be concealed or disguised through Money Laundering, particularly as a result of globalization and advancement in technology
3. The fact that details about the actual acquisition of property, including the source of funds used to purchase the property, are likely to be peculiarly within the knowledge of the person who acquired the property.
4. The general case with which a lawful owner of property should be able to establish that his or her interest in the property was lawfully acquired.¹⁴⁰

Even though the reversed onus has been justified by judges around the world, it has been questioned in doctrine. For instance, in the Law Council of Australia inquiry of the Crimes Legislation Amendments (Serious and organised crime) Bill 2009¹⁴¹, the council stated that the burden on the respondent will increase by the broad definitions used in the unexplained wealth provision. Under section 336 of the *POCA*, the term “derived” includes wealth directly or indirectly derived from an offence. This means that under the unexplained wealth provision the person have to establish, to the satisfaction of the court, that his or her total wealth was not *indirectly derived* from unlawful means. This gives potential to confiscate property that cannot be directly connected to the commission of any offence. If these powers are used liberally this may result in that those who have failed to keep receipts or records of their property will lose their lawfully acquired assets.

For example, pursuant to section 179B *POCA*, a person could be required to spend significant resources and time attempting to prove the lawfulness of his or her activities, while there is no requirement on the State to collect evidence beyond that of reasonable suspicion that the person’s total wealth exceeds the value of wealth lawfully acquired. If a preliminary unexplained wealth order has been made the court must effectively confiscate the person’s unexplained wealth, unless the person can satisfy the court that the property was lawfully acquired. According to the Law Council the reversed onus in the unexplained wealth provision removes the safeguards which have evolved in common law to protect innocent parties from the wrongful forfeiture of their property.¹⁴²

¹⁴⁰ Lusty, D, 2002 p. 349.

¹⁴¹ Law Council of Australia (2009): *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth)*.

¹⁴² Law Council of Australia, 2009 pp. 16-17.

Further, the grave impact an unexplained wealth order have on a person's life increases by the broad meaning attributed to the term "unexplained wealth", which includes property owned by the person at any time, property that has been under the effective control of the person at any time and property that the person has disposed of or consumed at any time.¹⁴³ This broad definition offer little protection for third parties being exposed by an unexplained wealth order.¹⁴⁴

Case law in relation to exclusion applications regarding forfeiture of proceeds of crime shows that the burden of proving the lawful derivation of property may not be as hard for the respondent to discharge.

In *DPP (Cth) v Jeffery (1992)* the judge states that there is a reason why the onus of proof is placed upon an applicant, and that is because the facts in relation to the property in which he or she has an interest are usually peculiar within his or hers knowledge.¹⁴⁵ It is easier for the respondent to show proof of the lawfulness of the assets. But the court also noted that denial on oath by the applicant, if accepted as honest and accurate, could be enough to discharge the onus.¹⁴⁶

As stated in *Brauer v Director of Public Prosecutions (1989)* "all evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted." Depending on which party has the initial evidential burden, the amount and quality of evidence required to discharge the onus may be lessened, since it may be reasonable presumed that the adversary is in a better position to know and prove essential facts. This does not mean that the knowledge of one party spares the other of the burden of adducing evidence on the issue, although very slight evidence will often suffice in relation to a negative state of affairs.¹⁴⁷ "Accordingly, the court will take into account any difficulty which may exist in some cases in the proof of a negative and, in other appropriate cases, any difficulty in the person's capacity to lead suitable evidence to discharge his or hers onus of proof".¹⁴⁸

In *Commonwealth Director of Public Prosecutions v Diez (2003)* the judge acknowledges the discussion in *Brauer v Director of Public Prosecutions (1989)* and states:

I have regard when considering whether I am satisfied of the necessary matters the plaintiff under the Act has available property tracking, information gathering and examination powers as to investigate and test in cross-examination the applicant's assertions or notice from affidavits of what is contended, whereas the applicant, in confinement and concerned to preserve an asset easily dissipated in costs must do what he can, his property restrained to provide such evidence as he can from overseas.

¹⁴³ POCA s. 179G (1).

¹⁴⁴ Law Council of Australia, 2009 pp. 18-19.

¹⁴⁵ *DPP (Cth) v Jeffery (1992)* 58 A Crim. R 310, para. 4.

¹⁴⁶ *DPP (Cth) v Jeffery (1992)* 58 A Crim. R 310, para. 6.

¹⁴⁷ *Brauer v Director of Public Prosecutions (1989)* 45 A Crim R 109, pp. 498-499.

¹⁴⁸ *Brauer v Director of Public Prosecutions (1989)* 45 A Crim R 109, p. 502.

I consider the applicant has done all that could be reasonably expected to meet the burden on him with almost all amounts in issue.¹⁴⁹

It is possible that courts may take a similar approach to the onus of proof in unexplained wealth cases, taking into account the difficulties for the plaintiff to provide suitable evidence to discharge the onus.¹⁵⁰

The reversed onus of prove have also been questioned to threaten *the presumption of innocence* which is recognized as a fundamental human right¹⁵¹. The argument that it is the property and not the person that is subject of the proceedings has not been entirely convincing. For example there is no requirement in the unexplained wealth provision for the authorized officer or for the court to be satisfied, that the person subject to the order is even suspected of committing a specified criminal offence or that his or her wealth was derived from such specific offence. The burden is squarely placed on the respondent to adduce evidence that his or her total wealth was lawfully acquired.¹⁵² The pursuit of property do involve a direct or indirect finding of guilt on the part of the property holder or persons connected to the property and the persons will be “convicted” by the civil courts in the eyes of the public without the protection which would be available in criminal proceedings.¹⁵³

4.3.3 Safeguards to Protect the Individual

There are three main safeguards the court could consider in making an unexplained wealth order. According to section 179C POCA, the court can *revoke a preliminary unexplained wealth order* if the respondent separately applies for it separately within 28 days after being notified of the preliminary order. To revoke the preliminary order the court must be satisfied that there are no grounds on which an unexplained wealth order can be made or that it is not in the public interest or otherwise in the interest of the justice to do so.

Further, the court can also use its *discretion* and refuse to make an unexplained wealth order if the court is satisfied that it is *not in the public interest* to make such an order.¹⁵⁴ Finally, the court can *relieve certain dependents from hardship*. The dependents; partner, child, or member of household of a person who has been ordered to pay an unexplained wealth order, may seek

¹⁴⁹ *Commonwealth Director of Public Prosecutions v Diez* (2003) NSWSC 238, para. 49-50.

¹⁵⁰ Interview 1.3.12.

¹⁵¹ This presumption is for instance contained in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(2) of the International Covenant on Civil and Political Rights.

¹⁵² Law Council of Australia, 2009, p. 16.

¹⁵³ Kennedy, A, 2004 pp. 18-19.

¹⁵⁴ POCA s. 179E (6).

a payment from the commonwealth to relieve hardship caused by the unexplained wealth order once the order has been satisfied.¹⁵⁵

Another safeguard is the limitation of what person forfeiture orders can be made out to. For instance, “innocent owners” who as a third party acquired the proceeds or instrument without knowing that the property was proceeds or an instrument of an offence, and also doing so in circumstances that did not arouse a reasonable suspicion that this was the case.¹⁵⁶

It has been questioned whether these safeguards are enough to protect an individual from arbitrary intrusion by the state.

When the POCA was amended in 2002, it removed the *six years limitation* on civil forfeiture claims. This limitation meant that confiscation is precluded if the relevant offences are not detected and a restraining application is made within six years. Even though both the Law Council and the Sherman report acknowledge the need for a time limit to protect against unlimited interference with individual rights.¹⁵⁷

Critics have pointed out that the unexplained wealth provision has a potential risk of arbitrary application since the laws can be used for political purposes. This because the civil forfeiture legislation has removed *the judicial discretion*, and the unexplained wealth provision has been giving *too broad definitions*, such as the wide scope of “derived” and “wealth”. Together with the reversed onus of proof this legislation gives the Commonwealth a very wide ranging power to confiscate property, which increases the risk of arbitrary intrusion.¹⁵⁸

Such wide ranging powers could, according to the Law Council, be open for misuse, since the provision lack sufficient safeguards and could potentially result in significant monetary gains to the state. For example, such provision could be used as a method of harassing suspects who have been uncooperative with police or whom police have been unable to arrest due to lack of evidence. Police may also be motivated to bring unexplained wealth applications in order to gather evidence as testimony given by a respondent as to how his or her property was obtained which may be relevant to another line of enquiry. For example, it may provide the evidentiary basis for obtaining warrants to search and seize other properties or items that may in turn be the subject of subsequent unexplained wealth orders.¹⁵⁹

As noted above all of the person’s unexplained wealth must be confiscated, if the person cannot satisfy the court that their unexplained wealth is lawfully acquired. The lack of judicial discretion under section 179B and 179E means that the court cannot consider other relevant factors, such as the age,

¹⁵⁵ POCA s. 179L.

¹⁵⁶ POCA s. 330 (4).

¹⁵⁷ Law Council of Australia, 2009 p. 26.

¹⁵⁸ Law Council of Australia, 2009 pp. 18-19.

¹⁵⁹ Law Council of Australia, 2009 p. 18.

socio-economic or cultural background of the person, factors which might explain why he or she is unable to satisfy the court that the wealth was not derived from an offence, or the economic hardship that such an order would impose.¹⁶⁰

A prime example of what can happen was given by Mr Bill Rowlings, Civil Liberties Australia citing a case from the Northern Territory where a man was caught growing 20 cannabis plants in a shipping container:

The Supreme Court of the Northern Territory convicted him for a head sentence of two years suspended, with nine months home detention instead, which he served out. He was, and is, a welder by trade. Other than speeding offences and one assault about 15 years earlier he had no criminal record. He was by no means a Mr Big of crime; in fact, he would be barely described as a Mr Little of crime. But the Northern Territory DPP decided, on the basis of a suspended sentence for growing a relatively small amount of marijuana, that they would pursue the man under proceeds of crime legislation. The container he grew the marijuana in was housed on a large rural block about 25 kilometres out of Darwin. He was leasing the land for a legitimate reason—he and a few others were planning to establish a microbrewery but they had been held up by impediments in Northern Territory government departments and agencies because of the unusual nature of the business they were planning. The block was worth \$1.2 million. The man owned a house in town worth about \$300,000, which one of his children and their family lived in, and another small bush block worth about \$30,000. So the DPP pursued him for \$1.53 million for growing 20 marijuana plants. He is a welder. He has no other crime connections. He has no ongoing history of crime. This man and his wife, who had nothing whatsoever to do with the criminal offending, were put through more than two years of agony because the Northern Territory DPP was totally unreasonable. The wife, who is a very slim woman, ended up in hospital suffering stress and heart problems.

Eventually, because there was absolutely no wriggle room in the law, the Supreme Court judge hearing the case found against the man, but the judge himself was so upset by what he was forced to rule that he referred the matter to a full bench. After extensive delays because the man could not get legal aid, eventually the case was heard and the full bench of the Northern Territory Supreme Court creatively found that the man was liable for the value of the lease on the rural property on which the crime was committed, not for the value of the property on which the crime was committed. The worth of the lease was a negligible amount and so effectively the case was dropped.¹⁶¹

To ensure that unexplained wealth provisions were not to be used in such a manner, one of Civil Liberties Australia's recommendations was that they were to be limited to addressing serious and organised crime. Meaning that the provision should not be used to target the Mr and Mrs Littles of Australia. They believe the judges must be able to exercise discretion based on the seriousness of the crime.¹⁶²

¹⁶⁰ Law Council of Australia, 2009 p. 18.

¹⁶¹ Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 4 november 2011, p. 39.

¹⁶² PJC-LE, Discussion paper 2011, p. 29.

Even though safeguards are being put in, another question to be raised is whether or not more can be achieved with an unexplained wealth order, especially when it comes to a “serious offence” situation. The POCA does already provide for provisions relating to these types of offences. The “serious offence” provisions in the POCA also have a reversed onus and the pecuniary penalty order does already to some extent target the unexplained criminal “benefits”. To also take into consideration is that revenue and tax commissioners have wide ranging powers to seek to restrain property based on civil grounds. It may be relevant to ask what more unexplained wealth provisions may bring to the table.¹⁶³

4.3.4 Proportionality

From a liberal view the rule of law is more to do with duties of government than of citizens. The rule of law has three important aspects which are; government by law, government under law and individual rights. The rule of law is there to protect individuals from arbitrary intrusion by the state. A legal order must provide for, and protect zones of, individual freedom from interference from the state. This is often done by legal rights and protected entitlements.¹⁶⁴ Australia is a liberal democracy and even though they do not have a “bill of rights” in their constitution they do have to follow the principles adherent to the rule of law.¹⁶⁵

A crucial issue in respect of civil forfeiture is if the procedure is fair and does not fall below the minimum human rights standards. Every person has the right to a fair trial in accordance to article 6 of ECHR. For instance the article states the following; the presumption of innocence, the right to silence and the right to an effective judicial remedy before a court. Every natural or legal person does also have the right to the peaceful enjoyment of his or hers possessions. In accordance to article 1 of ECHR “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general provisions of international law.”¹⁶⁶

The question to ask here is if civil recovery is a proportional legislative response to the existing social problem of serious and organised crime. This question has been raised in other jurisdictions around the world. In the Irish case of *Gillian v The Criminal assets Bureau* the court came to the conclusion that as a matter of proportionality the legislature was justified by enacting civil forfeiture legislation. Thus to support a compelling public interest and because it was reasonable required by the common good as a tool to combat the sufficient threat of organised crime.¹⁶⁷ Similar conclusion was

¹⁶³ Interview 1.3.12.

¹⁶⁴ Krygier, M, *Marxism and the Rule of law: Reflections after the Collapse of Communism*, pp. 640-645.

¹⁶⁵ Clarke, B, 2004 p. 285.

¹⁶⁶ COM (2012) 85 final of 12.3.2012 pp. 8-9.

¹⁶⁷ *Gillian v The Criminal assets Bureau*, (1998) 3 IR 185.

reached in *South Africa* on the basis that “its community fabric was in danger of being torn asunder by the prevalence of crime”.¹⁶⁸ In *Raimondo v Italy* a decision concerning the compliance of the Italian civil forfeiture regime with the Convention, the European Court stated that it fully understood the Italian Governments difficulties in the fight against the Mafia. The Court recognized the civil forfeiture as an “effective and necessary weapon against this cancer”, and it appeared proportionate to the aim pursued.¹⁶⁹

Thus, even though civil forfeiture has been recognized around the world, the new unexplained wealth provision in Australia has been criticized for being too broad; giving the Commonwealth too wide ranging powers to confiscate property and by that risking the individual being exposed to arbitrary application. It has been argued that there should be a better balance in the new legislation, between the need for more aggressive law enforcement to combat organised crime and the protection of civil liberties. Different measures have been discussed in doctrine on how to protect the individual without decrease the efficiency of the confiscation provisions. Some examples given are:

1. To keep the six year time limit on civil claims,
2. To put in an asset threshold, or
3. Since the focus is on preventing organised crime, there could be a requirement of proof of some connection between the subject of the order and the gang or syndicate with which they are purported to be associated with.¹⁷⁰

These limitations have been put in by other countries with strong civil forfeiture laws. For example both UK and Ireland have put in an asset threshold. In Italy, Canada and Hong Kong, which laws are focused on particular classes of people, for example the mafia in Italy, proof of a connection between the subject to the order and the particular group needs to be established.¹⁷¹

Injustice done by the state could unbalance the public trust in the rule of law and make the public start questioning the law system and the authorities.¹⁷²

¹⁶⁸ *National Director of Public Prosecutions v Meyer*, High Court of South Africa, 29th July 1999.

¹⁶⁹ *Raimondo v Italy*, (1994) 18 EHRR 371.

¹⁷⁰ Croke, C, 2010 p. 153.

¹⁷¹ Croke, C, 2010 p. 153 and Kennedy, A, 2006 p. 150.

¹⁷² Clark, B, 2004 pp. 263-264.

5 Analysis

5.1 What distinguishes civil and criminal forfeiture?

5.1.1 The Concept of Asset Recovery and Civil Forfeiture

Criminal asset recovery is a concept acknowledged internationally. It has developed from conventions and treaties concerning organised and economic crime, money laundering, terrorist financing and corruption. The concept contains all forms of activities and measures to recover the proceeds of crime, both property and instrumentalities, but the concept is wider than that. According to Brå, criminal asset recovery has more to do with economic crime in general than on criminal assets in specific. Accordingly, the concept also includes crime preventive work. The main goal is therefore not to recover the proceeds of crime but to prevent new crime by following the money trail. This may include ensuring that criminals do not receive allowances from the state illegitimately or withhold to pay tax.

This approach is built upon the same principles as forfeiture: to prevent and deter, repair and compensate. However, I do not think one should consider the two to be the same. Foremost, criminal asset recovery is a broader term of which forfeiture is only one measure in the crime preventing work against organised crime.

The goal of the new forfeiture legislation is to deprive, not just any criminals, but the organised crime-heads, efficiently of their ill-gotten gains. To reach this goal legislators around the world have chosen to move from a conviction based legislation to a non-conviction based legislation. In Australia this has finally lead to the implementation of the unexplained wealth provision. Sweden has retained conviction based forfeiture but has moved away from its strict approach that forfeiture should require a direct connection between the specific crime and the proceeds.

Civil forfeiture is a relatively new invention in the confiscation of criminal assets, and has been developed as an answer to the growth of organised crime. The conviction based forfeiture has been proven to be ineffective in depriving these new types of criminals of their proceeds from crime. Today's criminal leaders have succeeded in deliberating themselves from the actual crime, due to globalization and new technology, which impedes conviction. Crime heads have significant unexplained wealth which goes far beyond what the law enforcement can detect as legally owned wealth. On this ground, courts internationally have justified the movement towards a civil forfeiture, with a civil burden of proof and a reversed onus, being a proportional measure to get the leaders of organised crime. The European

Court of Justice even compared the problem with organised crime as a cancerous growth on society.

Criminal asset recovery includes many forms of measures to follow the money and hinder criminal activity. Because of its wide range, I believe criminal asset recovery might acknowledge a quest to target the smaller criminals when the bigger ones are out of reach. Indirectly, getting a smaller criminal will hopefully affect the organisation as such: many small brooks will form a big river. Asset recovery is an approach that reaches various areas of law enforcement. I therefore believe that if targeting the smaller criminal means the organization could be affected, the approach falls within the purpose of asset recovery.

However, when it comes to civil forfeiture, caution must be taken to at least the purpose as the justification of civil forfeiture is closely linked to its purpose, which is to target the main leaders of organised crime. I am doubtful whether the regulation would be acknowledged as a proportional measure in regards to the protection of the individual if civil forfeiture should have as its purpose to also target the small time criminals.

In sum, asset recovery has been developed as a weapon in the fight against organised crime and I do not believe its uses are limited to catching the big fish only. As I see it, all measures that may shake a criminal organization are useful, even if using them could mean targeting smaller fishes within the scope of a larger plan. However, the justification of civil forfeiture is very much built upon the aim of the legislation and the aim is to target serious and organised crime and especially the leaders of such crime. Hence, it is doubtful if it should be possible to targeting small time criminals via extended forms of forfeiture.

5.1.2 Is Civil Forfeiture Truly Civil?

Many have asked the question if civil forfeiture is truly civil. My conclusion is that whatever label is put upon forfeiture, proceedings involving forfeiture of a person's property as an effect of crime is criminal by nature. Historically, forfeiture has been used for both civil and criminal purposes. However, forfeiture of a person's property in connection with a crime has foremost been based on criminal proceedings, especially in countries with a civil law history. In Sweden for instance, forfeiture is still seen as a special legal effect of crime, which I believe shows its strong connection with criminal law.

Let me give another example. Australia has a civil forfeiture and its proceedings are civil. However, the introduction chapters of the POCA states that the act has a purpose both to punish and deter by prevent criminals to reinvest their proceeds in new crime. Also, in Australia at least the unexplained wealth provision has been made very general in nature. A general legislation with an intrusive, punitive nature may indicate that the proceed-

ing should rather be criminal than a civil. To me, this indicates that thresholds and safeguards are needed in the provisions to secure that the individual is not being subject to arbitrary intrusions by the state.

In sum, from a general look at the Australian scheme it appears not to be truly civil. The scheme targets persons who have committed criminal acts. Its purpose is in many ways built upon criminal principles. Finally, part of the legislation has been formulated in very general terms and is of an intervening character. This implies that the Australian legislation should enact greater safeguards in the provision to protect the individual.

I am of the opinion that forfeiture sanctions has a more intrusive nature than other civil and administrative sanctions due to its historical close connection to criminal offences and the severe impact that forfeiture laws today have on the individual. Forfeiture lacks the character of a pure penalty and is not seen as a penalty by law. However, the sanctions' character ought to determine which fundamental principles and procedural rules that should be applied.

It is my understanding that in many countries forfeiture is seen as a middle-ground jurisprudence, floating between civil and criminal law, often being a supplement to the criminal proceeding or a mix between a criminal and civil or administrative proceeding. I believe that whether forfeiture proceedings are classified as civil or criminal depends on the specific country's attitude towards forfeiture and on what principles it rest its legislation. My conclusion is that forfeiture being based on a middle-ground philosophy does mean that it can be civil with criminal elements and vice versa. And one must also keep in mind that forfeiture is not a criminal penalty but an legal effect of crime.

A main dividing line between civil and criminal proceedings is the purpose of the legislation. This is a tricky one since forfeiture has both civil and criminal purposes. It is compensatory, reparative but also deterrent and preventative. Which one of these purposes weighs the most? Advocates of a civil forfeiture claim the purpose is mainly compensatory and therefore justified in being civil. As mention above, I am not sure one can say the main purpose really is compensatory and reparative. Even Australia stated in the introduction chapter of the POCA that the purpose is to punish and deter.

Further, civil forfeiture has been justified by its purpose to target organised crime heads and this purpose has been acknowledged to stand in proportion to the restrictions of the protection of the individual and his or her rights. Therefore, it is important to keep in mind that the justification of a civil forfeiture rests upon the fact that the purpose and objective are to target the leaders of organised crime. If the legislation does not match this purpose, I think it is questionable if civil forfeiture still would be seen as a proportional measure.

A problem that can be discerned is whether or not forfeiture is deemed not having a punitive character or purpose. If the legislation is not believed being punitive the same legislative safeguards as in criminal law are not required. Hence, if the legislation is civil and justified by the jurisdiction in which it functions, no formal breach of the laws is made as long as the regulation is followed. The motives behind laws have justified the counter-balance of the reduction of the rule of law.

It has been pointed out that civil forfeiture may stand against article 6 of ECHR and the right to a fair trial, by breaching the presumption of innocent and the right to silence. The proceeding may also stand against the individual's right to the peaceful enjoyment of his or hers possessions in accordance to article 1 of ECHR.

It has been argued in doctrine and case law that procedural safeguards should not only apply to penalties, but also for sanctions of a criminal nature. For instance, does case law from the European court of Justice shows that criminal procedural safeguards have been invoked in civil proceedings in regards to the sanctions criminal character.

The European Courts have found that a proceeding can be deemed criminal even though the only punishment consists of a fine. These elements are alternative, which means it is enough that one of them is fulfilled for the court to apply criminal procedural safeguards. In sum, the severity of the sanction can effect and have an impact on the proceeding vice versa.

Civil forfeiture, especially unexplained wealth which reverses the onus and place the burden of proof on the defendant is criticized to stand against the individual's rights to a fair trial, by breaching the presumption of innocence and the right to silence. I wonder if the defendant is not already presumed guilty by the State and the public if given a civil forfeiture order without a prior conviction. In a way, a reversed onus does also breach the defendant's right to silence, since it is up to the defendant so defend and explain him or herself in order to hinder a forfeiture order being made.

In my opinion, the individual's rights are something the legislator must take into consideration when making new laws. Especially if forfeiture is regard as criminal by nature with a punitive purpose. Safeguards must be put in to secure the individuals rights and provide a good balance between the rule of law and efficient law enforcement. According to the middle-ground reasoning, the procedure required depends on not only, on whether the sanction is punitive, but also on how punitive it is. The more punitive the legislation is the more safeguards are needed to protect the individual from harm.

Even though forfeiture may rest upon civil grounds, there is a need to balance law enforcement imperatives with safeguards and respect for individual privacy and rights to minimize the possibility of arbitrary intrusions by the state. Depending on the design of the legislation different measures and safeguards may be needed to secure the individual's rights. Civil forfeiture

can be, if not formally than theoretically breached if it lacks necessary safeguards.

I agree with Ben Clarke that injustice done by the state could unbalance the rule of law and make the public start questioning the law system and the authorities, leading to devastating results for the community as whole.

5.2 A Comparison Between Sweden and Australia

5.2.1 The Extended Forfeiture Provision in Sweden

The biggest problem for the prosecutor has been to show a connection between the illicit assets and the crime in question. To ease the prosecutor's burden of proof, the Extended Forfeiture Provision lowered the level of proof needed to "clear and convincing evidence". In addition, the legislator also abolished the requirement of a connection between the illicit assets and the specific crime. This means that the prosecutor now only needs to show a connection between the assets and similar criminal activity as the person was convicted of. However, if the proceeds are converted into other forms of assets the prosecutor must still show a connection between the property that has replaced the original proceeds and the criminal activity. This may still be a tricky one for the prosecutor to follow up. A lower burden of proof does also, in contrast to "beyond reasonable doubt", require the defendant to explain him or herself to dismiss the prosecutor's evidence.

In the preparatory work, the legislator stated that the purpose of extended forfeiture is not to investigate someone's guilt but to recover the proceeds from criminal activity. It is therefore enough that the prosecutor can show that the property is derived from criminal activity. The assessment whether the property is derived from criminal activity is therefore based on an investigation of the accused's financial situation, e. g. whether the person has unexplained assets that cannot be shown to be legally obtained.

Extended forfeiture shows some similarities to Chapter 35, section 4 of the Penal Code which enables forfeiture of an estimated value of benefits (advantages) derived from a committed crime in the course of business. I believe this shows that it is not an uncommon or new idea to target unexplained wealth in Sweden through forfeiture. Furthermore, extended forfeiture as a form of confiscating unexplained assets is also similar to the recovery of property derived from tax offences in which a financial investigation also is made. I believe this, together with the objective of the provision, shows that extended forfeiture to a larger extent than though at first sight is an *in rem* (civil) proceeding.

When it comes to the provisions' safeguards, extended forfeiture is not limited in time regarding claims and does not contain a certain asset threshold. Hence, I recognize that the lack of these safeguards is outweighed by the prerequisite of a conviction of a serious offence. It is still up to the prosecutor to prove beyond reasonable doubt that a crime has been committed. The crime must be of a serious nature and be committed with the purpose of financial gain. This is due to the need to delimit the provisions area of use, to make it clearer and more predictable. In addition, the provision requires a sentencing scale of imprisonment of 6 or more years. As a further safeguard the legislator has kept the judicial discretion to be used if a case appears to be manifestly unfair.

5.2.2 The Unexplained Wealth Provision in Australia

Even if civil forfeiture in Australia was proved to be more efficient than conviction based forfeiture, the problem remained in the acquisition of the criminal's unexplained wealth. Therefore the unexplained wealth provision was introduced in 2010 on a federal level in Australia.

The unexplained wealth legislation goes a step beyond civil forfeiture by reversing the onus of proof in criminal assets confiscation proceedings. By reversing the onus and placing the burden of proof on the respondent, the defendant or relevant third person is required to demonstrate that their property was lawfully acquired in order to avoid confiscation. In contrast to the "serious offence" provisions, it does not require the offence to be of a certain character and also extends further as it enables the recovery of unexplained wealth.

First, the DPP must apply for an unexplained wealth order with a supporting affidavit from an authorized officer. In the affidavit, the authorized officer must show that, based on reasonable suspicion, the suspect's total wealth exceeds the value of the suspect's wealth that was lawfully acquired; and is part of the suspects property was lawfully acquired, or owned or under the effective control of the suspect. This means that the officer does not need to identify property he or she suspects was unlawfully acquired, the officer only needs to show what property is lawful. In the affidavit the officer also needs to state that he or she has a reasonable suspicion that the person has committed an offence connected to Commonwealth power; or that the whole or part of a person's wealth is derived from an offence with connection to Commonwealth power. The affidavit must also contain specified grounds for this suspicion.

Based on the application and the supporting affidavit the court can make a preliminary unexplained wealth order, which requires a person to appear before the court. The onus is then on the suspect to prove, on the balance of probabilities, that his or her wealth was not derived from offences with a connection to Commonwealth power. The reversed onus is placed on the

suspect because, in general, it is easier for the suspect to provide evidence of that the assets are lawfully acquired.

The main safeguards added are the possibility to seek an order to revoke the unexplained wealth order or an order of relieve from hardship. Furthermore, the court has a possibility to refuse to make an order if it is not in the public's interest to do so.

5.2.3 What legal problems has been recognised in Australia relating to civil forfeiture and unexplained wealth?

It has been questioned whether the limitations in the current Australian legislation are enough. The interference of both individual and third parties right's has increased with the unexplained wealth provision and its broad definitions, for example the reversed onus of proof together with the meaning of wealth. Especially, criticism has been directed at the evidentiary threshold "reasonable suspicion" and the reversed onus of proof. Furthermore, the six year time limit on civil forfeiture claims has been removed as has the judicial discretion. This year, the use of the prosecutor as a gate-keeper was also removed after the introduction of the new taskforce. On this ground, I recognize that injustice can be the result of the use of the unexplained wealth provision.

However, case law regarding a reversed onus shows that the burden of proof does not need to rest that heavy on the respondent. For example, a denial on oath has been regarded as enough evidence to switch the burden back to the applicant. The courts do also take into consideration the difficulties for the plaintiff to provide suitable evidence to discharge the onus. Likewise, case law regarding a "reasonable suspicion" shows that the burden on the applicant is larger than at first sight. It is not enough to state the assertions of facts; the authorized officer also need's to specify the reasons for having the suspicion and explain on what grounds the suspicion is based.

It is possible that the court s may take the same approach to the elements in an unexplained wealth order. But, as long as no unexplained wealth case has been tried in court, it is hard to know if the evidentiary threshold, "reasonable suspicion" and the reversed onus of proof will be of disproportionate character.

An example of injustice done due to broad legislation is the Northern territory case, with the old man and the marijuana plants. This example shows that an unexplained wealth provision lacking criminal safeguards can be used in an arbitrary way causing harm to individuals.

I believe that even if one accepts the validity of the unexplained wealth, measures should be taken to protect the citizen from injustice. Because, the

way it is today, you do have to have a great deal of confidence in the system and that the prosecutor will not take advantage of the powers given to them in this legislation.

I think it might be wise to introduce some of the proposed safeguards to gain a better proportionality between effectiveness and the individual's rights. Since the purpose of the unexplained wealth provision is to combat organised crime, I believe it would be a good idea to require a link between the respondent and the gang or syndicate with which they are purported to be associated with. This requirement would ensure that the focus would be on the organised crime heads at the top. In addition, it would be good to introduce an assets threshold, which also would direct the focus towards larger crimes. By introducing any of these two safeguards and reinitiating the judicial discretion, I believe the risk of arbitrary application of the unexplained wealth provision would reduce and ensure a higher safety for the ordinary citizen. By doing this I do not think there would be a need to change the evidentiary threshold or the burden of proof. Case law indicates that the reversed onus might not be of such a disadvantage for the individual as thought at first sight. According to case law in this area, the authorized officer must have good grounds for his or hers suspicion why the assets are not legally obtained. The limitations that are already in the provision will also protect the individual from wrong doing.

The ability to effectively confiscate property must still remain, but I believe it is important to consider not only the amount of proceeds that is recovered but also from whom it is recovered.

5.2.4 In what way do Sweden and Australia's forfeiture provisions of unexplained wealth diverge?

Both the Swedish and Australian provisions use a financial investigation to show what assets are lawfully acquired by the defendant. The provisions focus is on the assets that cannot be explained as legally obtained. Both provisions do also have a pronounced purpose of targeting the assets and not the person, requiring a connection between the property and a person's criminal activity. A civil burden of proof is also used by both countries, even if Australia has gone further. Apart from these fundamental similarities, the countries have largely chosen to go separate ways.

Extended forfeiture requires a prior conviction of a serious offence committed with the purpose of financial gain before a forfeiture order can be made. For the conviction the burden of proof is "beyond reasonable doubt". Then the burden of proof is on the prosecutor to show by "clear and convincing evidence" that the suspected assets have a connection to similar criminal activity as the person has been convicted of.

In Australia there is no requirement of a conviction, it is enough that the authorized officer can show a reasonable suspicion that the proceeds are not lawfully acquired and derived from an offence or that the person has committed a crime under Commonwealth powers. Thereafter it is up to the respondent to show from the balance of probabilities that his or hers assets are lawfully acquired.

When it comes to the safeguards, none of the countries have a time limit on claims or an asset threshold. Sweden has kept the judicial discretion for the judge to interfere if something appears to be manifestly unfair and has put in a threshold of a sentencing scale of an imprisonment of 6 years or more of certain serious offences.

Australia removed the judicial discretion, instead the judge have discretion to refuse to make an order if the court is satisfied that it is not in the public's interest to make such an order. The court may also relieve certain dependents from hardship.

Schedule over the similarities and differences:

Extended forfeiture (SWE)	Unexplained Wealth (AUS)
Conviction based	Non-conviction based
<p>Step 1: Prior conviction of a serious offense which generates financial gain.</p> <ul style="list-style-type: none"> - Burden of proof: beyond reasonable doubt - Onus on the prosecutor 	<p>Step 1: Prior affidavit of an authorized officer stating a suspicion that the suspect has assets that are not lawfully acquired and derived from an offence under commonwealth power.</p> <ul style="list-style-type: none"> - Burden of proof: reasonable suspicion - Onus on the applicant
Investigation of a person's financial situation	Investigation of a person's financial situation
<p>Step 2: Proof of a connection between the unexplained wealth (assets) and criminal activity.</p> <ul style="list-style-type: none"> - Burden of proof: Clear and convincing evidence - Onus on the prosecutor, but a requirement on the defendant to explain him or herself may arise. 	<p>Step 2: Proof of a connection between the unexplained wealth (assets) and criminal activity.</p> <ul style="list-style-type: none"> - Burden of proof: Balance of probabilities - Onus on the respondent to prove the assets are legal and not derived from crime.
<p>Safeguards:</p> <ul style="list-style-type: none"> - Conviction of a serious offence - Sentencing scale if imprisonment of 6 years or more, - Committed with the purpose of financial gain, - Judicial discretion if the case appears to be manifestly unfair, - The prosecutor as a gatekeeper, - The unexplained assets shall be shown, on clear and convincing evidence, to have a connection to similar criminal activity as the person was convicted for, 	<p>Safeguards:</p> <ul style="list-style-type: none"> - Possibility to revoke an UEW order within 28 days if there are no legal grounds for the order, or if its not in the publics interest, - Discretion not to make an order if it is not in the publics interest to do so, - The relieve of certain dependents from hardship, - Innocent owner.

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5.3 How far should Sweden go in the development of its forfeiture system: is civil forfeiture a potential way forward or does a wider legislation threaten the rule of law?

When I started to write this essay I was of the opinion that more was needed to be done in the legislative area of forfeiture. I still am, but I stand critical to whether we really need to go as far as e.g. Australia.

Depending on if forfeiture is considered civil, criminal or administrative depends on which principles the State builds its forfeiture scheme on. If one considers forfeiture to have a close connection to criminal law and/or that it is an effect of a crime, a wider civil forfeiture is not an option. Everything depends on which principles one believes forfeiture is built upon and which impact the legislation has on the individual. If one believes that forfeiture rests upon civil principles, formally there is no need for an equally strong protection of the individual rights as would be the case if built on a criminal ground. I believe the character of the sanction should have an affect on the need of procedural safeguards. The greater impact the sanction has on the individual, the higher the need of procedural safeguards is. No matter what, a law may never become arbitrary. It is therefore highly relevant to make sure that different safeguards are acknowledged and taken into consideration when making civil forfeiture laws.

As discussed above, a too wide legislation can threaten the rule of law. But of course things can be done to streamline the Swedish forfeiture legislation and still stand in good proportion to the rule of law.

In Sweden today, forfeiture rests on a strong criminal ground. As mentioned above, forfeiture in Sweden is classified as a special legal effect of crime and placed within the Penal Code, showing a close connection to the criminal proceeding. When it comes to Sweden's extended forfeiture it only applies to offenses with a purpose to provide financial gains. Thirdly, it only applies to severe offences, with few exceptions, demanding imprisonment of 6 or more years. On this ground, I believe that more civil elements may be taken into consideration in streamlining the criminal asset scheme without breaching the rule of law.

It is not to be forgotten that the Swedish forfeiture legislation is built on civil principles and the extended forfeiture is recognized in the preparatory work to target the proceeds of criminal activity and not to investigate the

person's guilt. The person is already convicted of an offence and the subsequent forfeiture provision is focused on returning the illicit assets.

Forfeiture is not a pure sanction but a special legal effect of crime which means that some civil elements would be justified and possible to put in the legislation. But as Magnus Ulväng pointed out; if forfeiture would be made civil then it would no longer constitute an effect of a crime. If introducing a pure civil forfeiture, Sweden would completely leave the historical ground on which forfeiture is based on; being a legal effect of a crime. I agree with Ulväng, that this would be a large step to take and caution must therefore be taken not to make forfeiture disproportional in the context of the rule of law and efficiency.

Forfeiture does not rest upon a punitive purpose and is not a criminal penalty. However, in my opinion a person is judged in the eyes of the public if given a civil forfeiture order without a conviction, and I do not believe there is a way around that. Forfeiture in Sweden is based on a criminal ground being closely connected to the criminal procedure. However, a few changes would be accounted for in the extended forfeiture provision. For example to ease the onus of proof on the prosecutor to prove that the proceeds do derive from an unspecified criminal activity. Removal of some of the safeguards is also possible without breaching the individual's rights, such as lowering the high sentencing scale of imprisonment of 6 or more years.

However, I do believe it is wise to keep the requirement that the offence must be made with the purpose of financial gain. I also believe it is good to keep the judicial discretion. The marijuana case in the Northern Territory, Australia shows just how important it is for the court to have a possibility to step in when something appears manifestly unreasonable.

Sweden is still far from many other States in their development of a more streamlined forfeiture legislation. Even though I was not to examine the practical issues in this area, I must point out the need of a united collection of the confiscation laws, similar to the Australian POCA. For example could a clarification of the process steps from a restraining order to a forfeiture order be possible if the laws were merged. This would give a better overview of different legislation and different available steps to forfeit the proceeds of crime. I really do believe this would help the prosecutor in his or hers to apply the legislation in practice.

I stand critical to the need of a too broad civil forfeiture. It is justified to ask what more might be achieved using an unexplained wealth provision, especially when it comes to "serious offence" situations and in areas where the revenue and tax commissioner operates. What new options and remedies does unexplained wealth bring to the table in the context of "serious offences"? Many situations are already covered by other provisions and I wonder if this may be one reason why no unexplained wealth case has yet been tried in court.

Similar questions might be asked if Sweden consider streamlining its forfeiture legislation, especially when it comes to targeting the small time criminal working as a front for the main leaders. We are starting to see the results from Operation Alfred in Malmö, and the results show that coordinated work of the National Tax Board and Police has lead to large amounts of restrained property and value which may later be confiscated by the enforcement service. This is done by the National Tax Board using a pure civil proceeding which only needs to show the “probable” standard of proof that the circumstances are those that the person needs to declare his or her profits to the tax board. If the person does not declare his or her income a penalty tax will be issued and the assets confiscated.

Going through the tax system might be an efficient way to target organised crime leaders but also the small time criminals and by that gain a greater deterrent effect. I believe young people that have not yet started out on their criminal path, can be more deterred than the crime leaders if the middle mans criminal assets are confiscated. However, getting the big shots might deter the big shot himself as well as the smaller criminal. It always comes back to what you relate to and who you compare yourself to. This subject reaches beyond the scope of my thesis but I believe it is an interesting area to investigate further. The legislator needs to ask what crime preventing measures fits Sweden and the criminal culture in Sweden.

6 Conclusion

Sweden is far behind the rest of the world in the development and use of its forfeiture legislation. In light of the motive of an efficient forfeiture regime, I believe Sweden can go further in streamlining its forfeiture legislation without compromising too much on the rule of law. For instance, by lowering the onus of proof of the prosecutor to prove a connection between the assets in question and similar criminal activity and lowering the high sentencing scale of imprisonment of 6 years or more. However, forfeiture is an intrusive state measure and caution must therefore be taken. Therefore, it could be wise to keep conviction based forfeiture if the intention is to recover the unexplained assets. I also believe it is wise to keep the judicial discretion enabling the court to intervene if the case appears to be manifestly unfair. Finally, to make the legislation even more effective I believe a united collection of the confiscation laws should be gathered in one unified code.

I recognize forfeiture is a complex area and it is important to have good knowledge about the purpose and structure of the law to be able, in a proper and efficient way, to use the legislation.

Further investigations in the legislative area of forfeiture need to be considered. There is a need in the discourse of forfeiture to promote a discussion on the different forms of confiscation of criminal assets, and clarify the function of these different measures. Knowledge and recognition of the tools will lead to a greater use of them.

Does the goal justify the means?

I am ambivalent to this new legislation. I believe that organised crime must be fought and I recognize the problem of the increasing globalization. On the other hand I am worried about the increasing control the state has gained as an effect of the need for more effective law enforcement against terrorism, money laundering and other forms of serious and organised crime. I can see a move from the rule of law in several areas, such as camera surveillance, wiretapping, and by the increasing possibility to confiscate property. The law enforcement has a great responsibility to ensure that the rules are not used improperly and one can question if the law enforcement should have this large amount of power.

It may still be too early to say what the effects of this new legislation will be. But there are already examples of what can happen if the laws are made too broad, e.g. the marijuana case in the Northern Territory, Australia. The law must ensure the protection of the little citizen. The graver impact a sanction has on a person the higher the safeguards must be.

With this essay I wanted to highlight this new complex and contested legislation. The rule of law is to protect us from injustice of the government and that must always be considered when making a new law. If the rule of law is

not considered, and the citizens start to question the law system and the authority, this could shake the foundations that our society is built upon. Because of this, I believe that the goal does not always justify the means and additional safeguards are needed to ensure the protection of the individual in the forfeiture provisions – civil law or not.

Supplement A – Interview questions

Interview questions asked to Deputy Director Jim Joliffe at the Commonwealth Director of Public Prosecutions, on the 1 March 2012 Sydney, Australia.

The aim of this interview is to gain a more practical view and understanding of the UEW regulation.

Questions:

1. In the Affidavit by an authorised officer; what level of proof would be needed to reach the level of “reasonable suspicion”? Can you give any example of any typically evidence supporting this suspicion?

The court needs to be satisfied, on the balance of probabilities, that the whole or any part of the person’s wealth was not derived from one or more of the following defences; a Commonwealth offence, a foreign indictable offence and a state offence with a federal aspect. In the making of an UEW order the onus lies on the individual to prove that the persons wealth is not derived from any of the offences referred to above. However, regard to the difference between a legal onus and an evidentiary onus is needed in considering the issue. The plaintiff/applicant has an evidentiary onus to discharge.

2. What kind of proof and what level of proof is required by the individual to put the onus back on the prosecutor?
3. What level of proof must the prosecutor show to satisfy this to the court? Is the evidence provided in the affidavit supporting the preliminary UEW order enough or does the court require any other evidence? And what type of evidence is used to prove a reasonable suspicion that the wealth is derived from any of the offences?
4. Critics say the provision can be misused because its broad definitions. The response to this has been that the prosecutor should work as a gatekeeper. In what way can you work as a gatekeeper and what will ensure that you do?
5. Can you tell me in a broader sense a little bit about the Criminal Assets Confiscation Task Force group? How it is constructed and what is the CDPP’s role in the group today. Is it only the Commonwealth group dealing with unexplained wealth today (e.g. investigations and collecting financial data)?

Supplement B – Extracts from the Proceeds of Crime Act 2002 (cth)

Extracts from:
Proceeds of Crime Act 2002
Act No. 85 of 2002 as amended 2012

Part 1-2—Objects

5 Principal objects

The principal objects of this Act are:

- (a) to deprive persons of the *proceeds of offences, the *instruments of offences, and *benefits derived from offences, against the laws of the Commonwealth or the *non-governing Territories; and
- (b) to deprive persons of *literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and
- (ba) to deprive persons of *unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and
- (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and
- (d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and
- (e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and
- (f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and
- (g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the *self-governing Territories to be enforced in the other Territories.

Part 1-3—Outline of this Act

6 General

This Act establishes a scheme to confiscate the proceeds of crime. It does this by:

- (a) setting out in Chapter 2 processes by which confiscation can occur; and
 - (b) setting out in Chapter 3 ways in which Commonwealth law enforcement agencies can obtain information relevant to these processes; and
 - (c) setting out in Chapter 4 related administrative matters.
- It concludes with miscellaneous provisions and with definitions and other interpretive material.

7 The confiscation scheme (Chapter 2)

Chapter 2 sets out a number of processes relating to confiscation:

- (aa) freezing orders limiting withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts (see Part 2-1A); and
- (a) restraining orders prohibiting disposal of or dealing with property (see Part 2-1); and
- (b) forfeiture orders under which property is forfeited to the Commonwealth (see Part 2-2); and
- (c) forfeiture of property to the Commonwealth on conviction of a serious offence (see Part 2-3); and
- (d) pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences (see Part 2-4); and
- (e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences (see Part 2-5); and
- (f) unexplained wealth orders requiring payment of unexplained wealth amounts (see Part 2-6).

8 Information gathering (Chapter 3)

(1) Chapter 3 sets out 5 ways to obtain information:

- (a) examining any person about the affairs of people covered by examination orders (see Part 3-1); and
 - (b) requiring people, under production orders, to produce property-tracking documents or make them available for inspection (see Part 3-2); and
 - (c) requiring financial institutions to provide information and documents relating to accounts and transactions (see Part 3-3); and
 - (d) requiring financial institutions, under monitoring orders, to provide information about transactions over particular periods (see Part 3-4); and
 - (e) searching for and seizing tainted property or evidential material, either under search warrants or in relation to conveyances (see Part 3-5).
- (2) Chapter 3 also authorises the disclosure, to certain authorities for certain purposes, of information obtained under that Chapter or certain other provisions (see Part 3-6).

9 Administration (Chapter 4)

Chapter 4 sets out the following administrative matters:

- (a) the powers and duties of the Official Trustee, which largely relate to property that is subject to restraining orders (see Part 4-1);
- (b) the provision of legal assistance (see Part 4-2);
- (c) the Confiscated Assets Account (see Part 4-3);
- (d) charges over restrained property for payment of certain amounts (see Part 4-4);
- (e) enforcement of interstate orders in certain Territories (see Part 4-5).

10 Miscellaneous (Chapter 5)

Chapter 5 deals with miscellaneous matters.

11 Interpreting this Act (Chapter 6)

Chapter 6 contains the Dictionary, which sets out a list of all the terms that are defined in this Act. It also sets out the meanings of some important concepts.

Part 2-6—Unexplained wealth orders

179A Simplified outline of this Part

This Part provides for the making of certain orders relating to unexplained wealth. A preliminary unexplained wealth

order requires a person to attend court for the purpose of enabling the court to decide whether to make an unexplained wealth order against the person. An unexplained wealth order is an order requiring the person to pay an amount equal to so much of the person's total wealth as the person cannot satisfy the court is not derived from certain offences.

Division 1—Making unexplained wealth orders

179B Making an order requiring a person to appear

(1) A court with *proceeds jurisdiction may make an order (a *preliminary unexplained wealth order*) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an *unexplained wealth order in relation to the person if:

- (a) a *proceeds of crime authority applies for an unexplained wealth order in relation to the person; and
- (b) the court is satisfied that an *authorised officer has reasonable grounds to suspect that the person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and
- (c) any affidavit requirements in subsection (2) for the application have been met.

Affidavit requirements

(2) An application for an *unexplained wealth order in relation to a person must be supported by an affidavit of an *authorised officer stating:

- (a) the identity of the person; and
- (b) that the authorised officer suspects that the person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and
- (c) the following:

- (i) the property the authorised officer knows or reasonably suspects was lawfully acquired by the person;
- (ii) the property the authorised officer knows or reasonably suspects is owned by the person or is under the *effective control of the person.

The affidavit must include the grounds on which the authorised officer holds the suspicions referred to in paragraphs (b) and (c).

(3) The court must make the order under subsection (1) without notice having been given to any person if the *responsible authority requests the court to do so.

179C Application to revoke a preliminary unexplained wealth order

(1) If a court makes a *preliminary unexplained wealth order requiring a person to appear before the court, the person may apply to the court to revoke the order.

(2) The application must be made:

(a) within 28 days after the person is notified of the *preliminary unexplained wealth order; or

(b) if the person applies to the court, within that period of 28 days, for an extension of the time for applying for revocation—within such longer period, not exceeding 3 months, as the court allows.

(4) However, the *preliminary unexplained wealth order remains in force until the court revokes the order.

(5) The court may revoke the *preliminary unexplained wealth order on application under subsection (1) if satisfied that:

(a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or

(b) it is in the public interest to do so; or

(c) it is otherwise in the interests of justice to do so.

179CA Notice and procedure on application to revoke preliminary unexplained wealth order

(1) This section applies if a person applies under section 179C for revocation of a *preliminary unexplained wealth order.

(2) The applicant may appear and adduce material at the hearing of the application.

(3) The applicant must give the *responsible authority:

(a) written notice of the application; and

(b) a copy of any affidavit supporting the application

(4) The *responsible authority may appear and adduce additional material at the hearing of the application.

(5) The *responsible authority must give the applicant a copy of any affidavit it proposes to rely on to contest the application.

(6) The notice and copies of affidavits must be given under subsections (3) and

(5) within a reasonable time before the hearing of the application.

179D Notice of revocation of a preliminary unexplained wealth order

If a *preliminary unexplained wealth order is revoked under section 179C, the *responsible authority must give written notice of the revocation to the applicant for the revocation.

179E Making an unexplained wealth order

(1) A court with *proceeds jurisdiction may make an order (an *unexplained wealth order*) requiring a person to pay an amount to the Commonwealth if:

(a) the court has made a *preliminary unexplained wealth order in relation to the person; and

(b) the court is not satisfied that the whole or any part of the person's *wealth was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;

(ii) a *foreign indictable offence;

(iii) a *State offence that has a federal aspect.

(2) The court must specify in the order that the person is liable to pay to the Commonwealth an amount (the person's *unexplained wealth amount*) equal to the amount that, in the opinion of the court, is the difference between:

(a) the person's *total wealth; and

(b) the sum of the values of the property that the court is satisfied was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;

(ii) a *foreign indictable offence;

(iii) a *State offence that has a federal aspect;

reduced by any amount deducted under section 179J (reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.).

(3) In proceedings under this section, the burden of proving that a person's *wealth is not derived from one or more of the offences referred to in paragraph (1)(b) lies on the person.

(4) To avoid doubt, when considering whether to make an order under subsection (1), the court may have regard to information not included in the application.

(5) To avoid doubt, subsection (3) has effect despite section 317.

(6) Despite subsection (1), the court may refuse to make an order under that subsection if the court is satisfied that it is not in the public interest to make the order.

179EA Refusal to make an order for failure to give undertaking

(1) The court may refuse to make a *preliminary unexplained wealth order or an *unexplained wealth order if the Commonwealth refuses or fails to give the court an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.

(2) The *responsible authority may give such an undertaking on behalf of the Commonwealth.

179EB Costs

If the court refuses to make a *preliminary unexplained wealth order or an *unexplained wealth order, it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

179F Ancillary orders

(1) A court that makes an *unexplained wealth order, or any other court that could have made the unexplained wealth order, may make orders ancillary to the order, either when the order is made or at a later time.

(2) A court that makes a *preliminary unexplained wealth order, or any other court that could have made the order, may make orders ancillary to the order, either when the order is made or at a later time.

Division 2—Unexplained wealth amounts

179G Determining unexplained wealth amounts

Meaning of wealth

(1) The property of a person that, taken together, constitutes the *wealth* of a person for the purposes of this Part is:

- (a) property owned by the person at any time;
- (b) property that has been under the *effective control of the person at any time;
- (c) property that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time; including property owned, effectively controlled, disposed of or consumed before the commencement of this Part.

Meaning of total wealth

(2) The *total wealth* of a person is the sum of all of the values of the property that constitutes the person’s wealth.

Value of property

(3) The value of any property that has been disposed of or consumed, or that is for any other reason no longer available, is the greater of:

(a) the value of the property at the time it was acquired; and

(b) the value of the property immediately before it was disposed of, consumed or stopped being available.

(4) The value of any other property is the greater of:

(a) the value of the property at the time it was acquired; and

(b) the value of the property on the day that the application for the *unexplained wealth order was made.

179H Effect of property vesting in an insolvency trustee

In assessing the value of property of a person, property is taken to continue to be the *person’s property if it vests in any of the following:

(a) in relation to a bankruptcy—the trustee of the estate of the bankrupt;

(b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement;

(c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement;

(d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.

179J Reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.

In determining the *unexplained wealth amount specified in an *unexplained wealth order in relation to a person, the court must deduct an amount equal to the following:

(a) the value, at the time of making the order, of any property of the person forfeited under:

- (i) a *forfeiture order; or
- (ii) an *interstate forfeiture order; or
- (iii) a *foreign forfeiture order;

(b) the sum of any amounts payable by the person under:

- (i) a *pecuniary penalty order; or

- (ii) a *literary proceeds order; or
- (iii) an order under section 243B of the *Customs Act 1901*; or
- (iv) an *interstate pecuniary penalty order; or
- (v) a *foreign pecuniary penalty order.

179K Varying unexplained wealth orders to increase amounts

(1) The court may, on the application of the *responsible authority, vary an *unexplained wealth order against a person by increasing the *unexplained wealth amount if subsection (2) or (3) applies. The amount of the increase is as specified in subsection (2) or (3).

(2) The *unexplained wealth amount may be increased if:

(a) the value of property of the person forfeited under a *forfeiture order, an *interstate forfeiture order or a *foreign forfeiture order was deducted from the unexplained wealth amount under paragraph 179J(a); and

(b) an appeal against the forfeiture, or against the order, is allowed.

The amount of the increase is equal to the value of the property.

(3) The *unexplained wealth amount may be increased if:

(a) an amount payable under a *pecuniary penalty order, a *literary proceeds order, an order under section 243B of the *Customs Act 1901*, an *interstate pecuniary penalty order or a *foreign pecuniary penalty order was deducted from the *unexplained wealth amount under paragraph 179J(b); and

(b) an appeal against the amount payable, or against the order, is allowed.

The amount of the increase is equal to the amount that was payable.

(4) The *responsible authority's application may deal with more than one increase to the same *unexplained wealth amount.

179L Relieving certain dependants from hardship

(1) The court making an *unexplained wealth order in relation to a person must make another order directing the Commonwealth, once the unexplained wealth order is satisfied, to pay a specified amount to a *dependant of the person if the court is satisfied that:

(a) the unexplained wealth order would cause hardship to the dependant; and

(b) the specified amount would relieve that hardship; and

(c) if the dependant is aged at least 18 years—the dependant had no knowledge of the person's conduct that is the subject of the unexplained wealth order.

(2) The specified amount must not exceed the person's *unexplained wealth amount.

(3) An order under this section may relate to more than one of the person's *dependants.

Division 3—How unexplained wealth orders are obtained

179M Proceeds of crime authority may apply for an unexplained wealth order

A *proceeds of crime authority may apply for an *unexplained wealth order.

179N Notice of application

(1) This section sets out the notice requirements if a *proceeds of crime authority has made an application for an *unexplained wealth order.

(2) If a court with *proceeds jurisdiction makes a *preliminary unexplained wealth order in relation to the person, the *responsible authority must, within 7 days of the making of the order:

(a) give written notice of the order to the person who would be subject to the *unexplained wealth order if it were made; and

(b) provide to the person a copy of the application for the unexplained wealth order, and the affidavit referred to in subsection 179B(2).

(3) The *responsible authority must also give a copy of any other affidavit supporting the application to the person who would be subject to the *unexplained wealth order if it were made.

(4) The copies must be given under subsection (3) within a reasonable time before the hearing in relation to whether the order is to be made.

179P Additional application for an unexplained wealth order

(1) A *proceeds of crime authority cannot, unless the court gives leave, apply for an *unexplained wealth order against a person if:

(a) an application has previously been made for an unexplained wealth order in relation to the person; and

(b) the application has been finally determined on the merits.

(2) The court must not give leave unless it is satisfied that:

- (a) the *wealth to which the new application relates was identified only after the first application was determined; or
- (b) necessary evidence became available only after the first application was determined; or
- (c) it is in the interests of justice to give the leave.

179Q Procedure on application and other notice requirements

(1) The person who would be subject to an *unexplained wealth order if it were made may appear and adduce evidence at the hearing in relation to whether the order is to be made.

(2) The person must give the *responsible authority written notice of any grounds on which he or she proposes to contest the making of the order.

(3) The *responsible authority may appear and adduce evidence at the hearing in relation to whether an *unexplained wealth order is to be made.

Division 4—Enforcement of unexplained wealth orders

179R Enforcement of an unexplained wealth order

(1) An amount payable by a person to the Commonwealth under an *unexplained wealth order is a civil debt due by the person to the Commonwealth.

(2) An *unexplained wealth order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.

(3) The debt arising from the order is taken to be a judgment debt.

(4) If an *unexplained wealth order is made against a person after the person's death, this section has effect as if the person had died on the day after the order was made.

179S Property subject to a person's effective control

(1) If:

- (a) a person is subject to an *unexplained wealth order; and
- (b) the *responsible 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 person;

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) The order under subsection (1) may be enforced against the property as if the property were the *person's property.

(3) A *restraining order may be made in respect of the property as if:

(a) the property were the *person's property; and

(b) there were reasonable grounds to suspect that:

(i) the person had committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;

(ii) the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

(4) If the *responsible authority applies for an order under subsection (1) relating to particular property, the authority must give written notice of the application to:

(a) the person who is subject to the *unexplained wealth order; and

(b) any person whom the authority has reason to believe may have an *interest in the property.

(5) The person who is subject to the *unexplained wealth order, and any person who claims an *interest in the property, may appear and adduce evidence at the hearing of the application.

179SA Legal expenses

(1) If the court considers that it is appropriate to do so, it may order that the whole, or a specified part, of specified property covered by an order under subsection 179S(1) is not available to satisfy the *unexplained wealth order and may instead be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.

(2) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property covered by an order under subsection (1) and may make any further or ancillary orders it considers appropriate.

179T Amounts exceeding the court's jurisdiction

(1) If:

- (a) a court makes an *unexplained wealth order of a particular amount; and
 - (b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount;
- the registrar of the court must issue a certificate containing the particulars specified

Chapter 5—Miscellaneous

315 Proceedings are civil, not criminal

- (1) Proceedings on an application for a *restraining order or a *confiscation order are not criminal proceedings.
- (2) Except in relation to an offence under this Act:
 - (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and
 - (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

317 Onus and standard of proof

- (1) The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.
- (2) Subject to sections 52 and 118, any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities.

Chapter 6—Interpreting this Act

Part 6-1—Meaning of some important concepts

Division 1—Proceeds and instrument of an offence

329 Meaning of *proceeds* and *instrument*

- (1) Property is *proceeds* of an offence if:
 - (a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or
 - (b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence; whether the property is situated within or outside *Australia.
- (2) Property is an *instrument* of an offence if:

- (a) the property is used in, or in connection with, the commission of an offence; or
 - (b) the property is intended to be used in, or in connection with, the commission of an offence; whether the property is situated within or outside *Australia.
- (3) Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence
 - (4) *Proceeds* or an *instrument* of an *unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

336 Meaning of *derived*

A reference to a person having *derived* *proceeds, a *benefit, *literary proceeds or *wealth includes a reference to:

- (a) the person; or
- (b) another person at the request or direction of the first person; having derived the proceeds, benefit, literary proceeds or wealth directly or indirectly.

336A Meaning of property or wealth being *lawfully acquired*

For the purposes of this Act, property or *wealth is *lawfully acquired* only if:

- (a) the property or wealth was lawfully acquired; and
- (b) the consideration given for the property or wealth was lawfully acquired.

337 Meaning of *effective control*

- (1) Property may be subject to the *effective control* of a person whether or not the person has:
 - (a) a legal or equitable estate or *interest in the property; or
 - (b) a right, power or privilege in connection with the property.
- (2) Property that is held on trust for the ultimate *benefit of a person is taken to be under the *effective control* of the person.
- (4) If property is initially owned by a person and, within 6 years either before or after an application for a *restraining order or a *confiscation order is made, disposed of to another person without *sufficient consideration, then the property is taken still to be under the effective control of the first person.

(4A) In determining whether or not property is subject to the *effective control* of a person, the effect of any order made in relation to the property under this Act is to be disregarded.

(5) In determining whether or not property is subject to the effective control of a person, regard may be had to:

- (a) shareholdings in, debentures over or *directorships of a company that has an *interest (whether direct or indirect) in the property; and
- (b) a trust that has a relationship to the property; and
- (c) family, domestic and business relationships between persons having an interest in the property, or in companies

of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and other persons.

(6) For the purposes of this section, family relationships are taken to include the following (without limitation):

- (a) relationships between *de facto partners;
 - (b) relationships of child and parent that arise if someone is the child of a person because of the definition of *child* in section 338;
 - (c) relationships traced through relationships mentioned in paragraphs (a) and (b).
- (7) To avoid doubt, property may be subject to the *effective control* of more than one person.

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