

## Second Reading

**The Hon. MICHAEL VEITCH** (Parliamentary Secretary) [8.00 p.m.], on behalf of Mr Roozendaal: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

### Leave granted.

- This bill provides the Supreme Court with the capacity to make an unexplained wealth order in those cases where there is reasonable suspicion a person has engaged in a serious crime related activity, and that person cannot lawfully account for the sources of their wealth.
- However, the court has the discretion to not make the order or to reduce the amount payable, if it considers it is in the public interest to do so.
- This bill takes New South Wales law enforcement agencies one step closer to dismantling the iniquitous enterprises of those criminals who are avoiding confiscation and capture under the current law.
- Because the criminal marketplace adapts and changes to comprise not just traditional vices like drug importation and supply, but other high profit crimes like money laundering, motor vehicle theft, car rebirthing, fraud, and internet crime; the law needs to be able to punish in a way that is the most limiting; the most hurtful and the most effective—the seizure of criminally obtained wealth.
- This bill does so by amending the Criminal Assets Recovery Act 1990 so that the New South Wales Crime Commission can apply to the court for such an order when they have reasonable suspicions the person is involved in serious criminal activity; or
- Where they hold reasonable suspicions the person's wealth is derived from the serious criminal activity of another person or persons.
- The court must be satisfied on the balance of probabilities that the wealth is not or was not, illegally acquired property.
- The Criminal Assets Recovery Act or CARA has proven to be a highly successful mechanism for asset confiscation in New South Wales and provides a logical basis for the inclusion of an unexplained wealth regime.
- Those suspected criminals who have, so far, evaded confiscation within the existing framework can now be targeted.
- And their money will be provided to victims of crime through the Victims Compensation Fund.
- The national movement towards adoption of unexplained wealth confiscation regimes to assist in combating organised crime was confirmed by national senior officers meetings on 5 June 2009, 17 July 2009 and 5 February 2010.
- Two Commonwealth parliamentary reports have also commented favourably upon unexplained wealth provisions.
- The Commonwealth Senate Standing Committee on Legal and Constitutional Affairs supported unexplained wealth confiscation, stating the Committee "wholeheartedly endorses the purpose of the unexplained wealth provisions: namely targeting the people at the head of criminal networks, who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences".
- The New South Wales Crime Commission at present can usually take no action against persons about whom:
  - they hold highly developed suspicions regarding serious criminal activity;
  - only minor offences, if any, can be proved against them; and
  - that person has insufficient lawful sources to justify their wealth, accumulation of assets or expenditure.
- The new regime will close that loophole.
- These amendments will be In addition to existing powers already available to the New South Wales Crime Commission to commence confiscation proceedings relating to restraining orders, assets forfeiture orders, and proceeds assessment orders. The Government is not proposing to alter those powers with this bill.
- However, the new unexplained wealth regime will differ in some significant aspects:
  - The threshold about which the court must be satisfied concerning criminal activity In respect of an unexplained wealth order will be changed from a balance of probabilities (the civil burden) to a reasonable suspicion test.
  - It is not proposed to change the definition of serious criminal activity already contained in the Act.

- Once the court accepts that there are reasonable grounds to suspect that a person has engaged in serious criminal activity, the court will then hear evidence from both the Crime Commission and the person involved, in order to determine whether wealth has been lawfully obtained.
- If the court is not satisfied, on the balance of probabilities, that wealth has been lawfully obtained, the court will be able to make an unexplained wealth order and the amount payable pursuant to the unexplained wealth order will become a debt due to the Crown.
- Unlike existing assets forfeiture orders and proceeds assessment orders, the new unexplained wealth orders will not include a requirement to establish that the serious criminal activity occurred in the past six years.
- Furthermore, the period over which the unexplained wealth order may be calculated will not be time limited.
- This is consistent with the recent Commonwealth unexplained wealth legislation.
- Our new provisions for unexplained wealth will not affect ordinary citizens who are not criminals and are lucky enough to experience a financial windfall.
- The proposals are clearly aimed at those suspected criminal persons, or their family members and associates, who law enforcement discovers have wealth well in excess of that which their legitimate occupations could explain.
- The court will only consider wealth about which the Crime Commission has presented evidence.
- The public interest test includes that the court may reduce the amount payable under the order.
- This is intended to ensure that the court may provide for the hardship imposed on dependents, such as young children, so that they may not suffer unduly.
- While only the New South Wales Crime Commission has standing to make applications under the Criminal Assets Recovery Act, nothing in this bill affects the role of a New South Wales police officer acting as an authorised officer, nor the vital role of both agencies in joint operations or task forces in bringing persons before the court.
- Now to the details of the bill:
- The objects of the Act will include concepts of unexplained wealth, and distinguish these from proceeds assessment orders.
- The definitions will be made consistent with the new unexplained wealth regime and define unexplained wealth orders.
- References to proceeds assessment orders throughout the Act will now also refer to unexplained wealth orders.
- Interstate proceeds assessment orders will now include unexplained wealth orders to ensure that where other jurisdictions also have the new unexplained wealth orders the provisions in this Act apply.
- The bill clarifies that a person in the broader meaning includes a corporation, however the provision relating to proceeds assessment orders whereby a child under the age of 18 years cannot have an order made against them, is retained.
- Unexplained wealth orders will also apply to restraining orders.
- The restraining order may apply to all the interests in property, not just specified interests, of a person suspected of deriving property from serious crime related activity as a consequence of the application.
- The bill also clarifies that the suspicion of the authorised officer may also attach to the serious crime related activities of another person.
- This will mean an unexplained wealth order may be obtained for persons who are suspected of having derived their wealth from the crimes of their family or associates regardless of whether they have been able to keep their own noses clean.
- These provisions will ensure that when serious criminal's attempt to hide their money by giving it away to family or allies (who may be well aware of the source of that wealth) those persons are still made to account for it.
- This new regime targets the current practice of criminals or their allies using expensive cars or living in large mansions which, on paper, they do not own, but which are clearly not accounted for by their income.
- A new unexplained wealth order will be created to complement the existing orders in the Criminal Assets Recovery Act.
- The Crime Commission may apply for an unexplained wealth order or a proceeds assessment order, or both.
- However, the court is to only make one order, whichever is the greater amount.

- These orders are located within the existing confiscation regime.
- This introduces unexplained wealth orders under an existing, well proven process.
- Three new sections of the Act provide for the application by the Crime Commission for an unexplained wealth order.
- The court must make the order if it finds there is a reasonable suspicion that the defendant has engaged in serious crime related activity or has derived the proceeds of the serious crime related activity of another person.
- The bill does not affect the capacity of the New South Wales Crime Commission to apply to the court to confiscate the assets of persons who would previously have been targeted under asset forfeiture orders.
- For example, the six-year limitation may prevent the Crime Commission from seeking to confiscate wealth from 10 years ago under an assets forfeiture order, but they could now commence unexplained wealth proceedings for that additional wealth.
- The court may refuse to make an order, or may reduce the amount payable under the order, if it thinks it is in the public interest to do so.
- This is a critical safeguard to the regime, designed to ensure that the court has to be fully satisfied as to the suspicions of the serious criminal activity and the lawfulness of the sources of the person's wealth.
- Furthermore, the court may exclude a portion of the wealth from the order to provide for dependents and ensure they do not suffer any undue hardship as a result of the confiscation.
- The assessment of a person's unexplained wealth includes the total current or previous wealth other than that part of the wealth the court is satisfied, on the balance of probabilities was not lawfully acquired.
- The bill sets out the things included in the current and previous wealth of a person.
- Wealth that has been expended, disposed of or consumed and wealth provided to others as a service, advantage or benefit are included in the calculations.
- This is to ensure that where a criminal has provided a service or been living the high-life, the expenses for this lifestyle is accounted for.
- The Crime Commission will be required to present evidence on this expended wealth as well as any assets or property.
- And the court will only consider wealth that is subject to such evidence.
- The court is also to include in the assessment any wealth that is outside New South Wales as well as in the State.
- The value of current property will be whichever is the greater: the value at the time of application or the value when the property was acquired.
- The value of consumed or disposed of property will be whichever is the greater: the value at the time the property was acquired; or the value immediately before the property was consumed or disposed of.
- This ensures that criminals cannot have a mate make a dodgy evaluation of the car or house and claim that as the true worth.
- Current general provisions in the Act are retained for proceeds assessment orders.
- Most of these will also apply to unexplained wealth orders.
- These provisions relate to such matters as: ancillary orders; the effect of confiscation orders or action taken by other jurisdictions; the setting aside of convictions; actions to be taken when a person has died or is not present; and evidence in relation to drugs or drug plants.
- In addition, when assessing the amount to be paid under an unexplained wealth order, the court must deduct the value of any interests in property already forfeited under the Criminal Assets Recovery Act, a similar interstate order or orders made under the Confiscation of Proceeds Of Crime Act.
- The person subject to the order must still be given notice of the application to the Court for an unexplained wealth order.
- As currently applies, the person is provided a statement of facts and circumstances outlining a summary of the commission's case.
- The Crime Commission will then present to the court the suspicions regarding the criminal activity and that the wealth is illegally acquired.
- At a hearing on unexplained wealth the person who is subject of the application will have the opportunity to rebut the evidence of the Crime Commission on the reasonable suspicion of serious criminal activity and to provide evidence of

the lawful sources of their wealth.

- The making of an assets forfeiture order does not prevent the making of a proceeds assessment order or an unexplained wealth order.
- However, an unexplained wealth order may exclude any assets forfeited or that are subject to other confiscation orders.
- This ensures that the debt due to the Crown does not include wealth already confiscated by another order or confiscated under another Act including from other jurisdictions; even though those assets may be included in the calculation of the wealth.
- It will depend on the circumstances of each case, under which order the New South Wales Crime Commission will elect to take action: assets forfeiture, proceeds assessment or unexplained wealth.
- The unexplained wealth order differs from a proceeds assessment order in the following significant ways:
  - As I have already mentioned, the threshold to which the Crime Commission must satisfy the court on application for the new unexplained wealth order will be a reasonable suspicion that the defendant has engaged in serious crime related activity, as opposed to the balance of probabilities.
  - This reasonable suspicion includes that the crime related activity occurred at any time.
  - The six-year time limit which applies to other orders under the Act is therefore not applicable for unexplained wealth.
  - To ensure that the wealth may include any, or all, of the ill-gotten gains, the suspicion attached to the unexplained wealth being derived from criminal activity, is also over any period of time.
  - The six-year time limit, in similar federal legislation, was also considered at length by the Commonwealth Senate Legal and Constitutional Affairs Legislation Committee.
- They concluded and I quote:
  - "The committee accepts the evidence it received that the six year limitation period on non-conviction based confiscation causes significant difficulties where the DPP is pursuing confiscation in matters involving complex and ongoing offences. The committee therefore supports the removal of this limitation period".
  - However, the court will make the single final confiscation order based on the balance of Probabilities that the wealth is not or has been not illegally acquired.
- The burden of proof will rest with the person to prove to the court that the wealth was not illegally acquired.
- The Government has not taken this particular step lightly nor are we alone in considering the import of such a significant amendment.
- The Commonwealth Senate Legal and Constitutional Affairs Legislation Committee stated in their report on the Commonwealth Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009, and I quote:
  - "The placing of the onus of proof on a respondent in proceedings where the respondent faces a penalty of forfeiting property is an exceptional step because it represents a departure from the axiomatic principle that those accused of criminal conduct ought to be presumed innocent until proven guilty. Despite this, the committee accepts that it would defeat the purpose of the provisions if the onus was not on the respondent: the purpose of unexplained wealth orders is to require the respondent to explain the source of his or her wealth".
- These are serious amendments with serious consequences and the Government have ensured that there are safeguards to these provisions.
- Of course the primary safeguard of the right of appeal is not altered by the amendments.
- Importantly, the Supreme Court will have the discretion to decline to make an unexplained wealth order, or to reduce the amount payable under the order, if it considers it is in the public interest to do so.
- Examples of such interest may include: to relieve any undue hardship on dependent children under the age of 18 years or dependents with a severe disability.
- And the bill is clear that the court does not have to consider wealth about which the Crime Commission has not provided evidence.
- So that while the onus is on the person to provide the lawful sources of their wealth, it is only that wealth which the Crime Commission suspects are the takings of serious criminal activity.
- These new provisions will force a suspected criminal to account for the wealth or expenditure and the sources of that wealth or face having that wealth removed by court order.
- Remember, these are serious and often highly organised criminals with complex accounting systems and business

practices. These are not the small fry of a criminal organisation.

- The Crime Commission is careful in its targeting—which in part accounts for the success of the confiscation regime so far—and is not going to waste its resources frivolously chasing the lightweights in the criminal world.
- The last amendments in the bill relate to the allocation of the confiscated wealth.
- The amendments will provide that fifty per cent of all proceeds assessment confiscations and/or unexplained wealth confiscations, which would otherwise be paid into the confiscated proceeds
- Account will be allocated to the Victims Compensation Fund.
- This allocation will occur after all court orders, disbursements or sharing of proceeds with other law enforcement agencies in other jurisdictions has been accounted for.
- In this way we are ensuring that those who endure the worst at the hands of serious and organised criminals—the long suffering (and often faceless) victims—have some way of redressing the balance.
- The New South Wales Crime Commission, the New South Wales Police Force and the Office of the Director of Public Prosecutions will continue to fight the good fight against criminals, especially those involved in organised and serious crime, by taking from them that which they desire most—their money.