

41ST PARLIAMENT



Joint Standing Committee on the
Corruption and Crime Commission

Report 6

THE CORRUPTION AND CRIME COMMISSION'S UNEXPLAINED WEALTH FUNCTION

The review by The Honourable Peter Martino

Presented by
Mr M. Hughes, MLA and Hon Dr S.C. Thomas, MLC
March 2022

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**Joint Standing Committee on the Corruption
and Crime Commission**

**The Corruption and Crime
Commission's unexplained
wealth function**

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Report No. 6

Presented by

Mr M. Hughes, MLA and Hon Dr S. C. Thomas, MLC

Laid on the Table of the Legislative Assembly and Legislative Council
on 24 March 2022

Chair's Foreword

The Joint Standing Committee on the Corruption and Crime Commission monitors and reports to Parliament on the exercise of the functions of the Corruption and Crime Commission.

Since September 2018 the commission has had the power to investigate unexplained wealth and criminal benefits, and initiate and conduct confiscation proceedings.

In February 2022 the committee was provided with a copy of a report by The Honourable Peter Martino on his review of the commission's use of its unexplained wealth powers. This report attaches the report by Hon Peter Martino.

The commission has made a submission to government for funding over the next 5 years to expand its capacity to undertake this function.

The effective use of the commission's unexplained wealth powers requires significant resources. The commission should be appropriately funded to undertake its functions.



MR M. HUGHES, MLA
CHAIR

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The Corruption and Crime Commission's unexplained wealth function

The Joint Standing Committee on the Corruption and Crime Commission is responsible for monitoring and reporting to Parliament on the exercise of the functions of the Corruption and Crime Commission.

Since September 2018 the commission has had the power to investigate unexplained wealth and criminal benefits, and initiate and conduct civil confiscation proceedings in court under the *Criminal Property Confiscation Act 2000* (CPC Act).

The law seeks to deter crime, particularly organised crime, by reducing the profitability of illegal activities. It reverses the onus of proof and requires a person living beyond their apparent means to rebut the presumption that property has been acquired or is derived from criminal activity.

The commission has used its unexplained wealth powers to recover the financial benefits of serious misconduct by public officers and organised crime. The commission has developed strategies aimed at maximising its efficiency and effectiveness in exercising this function.¹ How the commission exercises its significant powers is important.

In May 2021 the commission engaged The Honourable Peter Martino to consider and report on:

- the effectiveness of the commission's processes in contributing to the aims of the referral of powers under the CPC Act, and
- what, if any, changes are required to policy, procedure or legislation to improve the effectiveness and efficiency of the commission's work under the CPC Act.

The report by Hon Peter Martino dated August 2021 is attached at Appendix 1.² Parliament and the public have an undeniable interest in how the commission exercises its unexplained wealth powers.

The commission has been undertaking its unexplained wealth function within current resourcing levels. In February 2022 Commissioner Hon John McKechnie QC told the committee that the commission cannot continue to undertake this function and properly fulfil its other functions within current resourcing.³ Commissioner McKechnie added that '[we] set out to prove the concept that [we] could make a difference ... we think we have proved the concept ... and it is work that we hope to continue to do'.⁴

1 Report by Hon Peter Martino, see Appendix 1, p 10.

2 The commission provided the committee with a copy of the report on 23 February 2022.

3 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2022, p 5. The broadcast video and transcript of the hearing are posted on the [committee's website](#), with the commission's presentation on unexplained wealth.

4 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2022, pp 3, 5.

Hon Peter Martino observes that the effective use of unexplained wealth and criminal benefits powers requires significant resources.⁵ Undertaking this function involves a range of expertise and skills including accountants and financial analysts, experienced financial investigators, experienced lawyers, surveillance officers and digital forensic officers; as well as specialised software, digital forensic tools and other technology.⁶

Hon Peter Martino says that adequately resourcing this function includes the need for there to be a Commissioner and Acting Commissioner at all times.⁷ It is 'highly desirable' that the commissioner who examines a person about confiscable property was not involved in earlier decisions to use the commission's investigative powers in same matter.⁸

Mr Scott Ellis is the only Acting Commissioner. In September 2021 Commissioner McKechnie told the committee that consideration should be given to appointing a second acting commissioner but the commission is at the stage where a deputy commissioner is required.⁹ This was said in the context of discussing the Department of Justice's current project to modernise the *Corruption, Crime and Misconduct Act 2003*. The power to appoint a deputy commissioner should be considered during that project.

The commission has made a submission to government for funding to undertake its unexplained wealth function over the next 5 years. It seeks funding just short of \$5 million a year to fund 20 full time equivalent officers (FTEs).¹⁰

In 2020–21 the commission's total cost of services was nearly \$28 million and it employed 116.2 FTEs (121 people).¹¹ If approved, the proposed funding will considerably expand the resourcing of the commission.

The commission should be appropriately funded to undertake its functions.



MR M. HUGHES, MLA
CHAIR

5 Report by Hon Peter Martino, see Appendix 1, p 16.

6 *ibid.*

7 *ibid.*, p 17.

8 *ibid.* See part 5, division 2, CPC Act (Examinations).

9 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 8 September 2021, p 17.

10 Hon John McKechnie QC, Commissioner, and Mathew Squires, Chief Financial Officer, Corruption and Crime Commission, *Transcript of Evidence*, 23 February 2022, p 5.

11 Corruption and Crime Commission, *Annual Report 2020–21*, pp 14, 17.

Appendix One

Review of the effectiveness of the Corruption and Crime Commission's processes in contributing to the aims of the referral of powers under the Criminal Property Confiscation Act 2000 by Hon Peter Martino

Review of effectiveness of the Corruption and Crime Commission's processes in contributing to the aims of the referral of powers under the *Criminal Property Confiscation Act 2000 (WA)*

The Honourable Peter Martino

August 2021

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Part I: INTRODUCTION

The Commencement of this Review

- 1.1. On 17 May 2021 I was engaged by the Corruption and Crime Commission (the CCC) to consider and report on:
 - (a) The effectiveness of the CCC's processes in contributing to the aims of the referral of powers under the *Criminal Property Confiscation Act 2000* (WA) (the CPC Act); and
 - (b) What, if any changes are required to policy, procedure or legislation to improve the effectiveness and efficiency of the CCC's work under the CPC Act.

- 1.2. Before I commenced this review I took, on 18 May 2021, an oath of secrecy in accordance with s 183 of the *Corruption, Crime and Misconduct Act 2003* (WA) (the CCM Act). In answer to my enquiries in the course of undertaking this review the CCC has provided me with confidential information and other official information. I have had regard to that information in the preparation of this review, but I have not included it in the contents of this review, so that the document may be provided to third parties if the CCC considers it appropriate to do so.

Part II: THE REVIEW PROCESS

Submissions

- 2.1. By letter dated 4 June 2021 I wrote to stakeholders informing them that the CCC had engaged me to undertake this review and inviting them to make submissions to me. I included with my letter a short background and list of issues on which the stakeholders might wish to make submissions. The list of stakeholders to whom I wrote, a copy of my letter and the background and list of issues are in the annexures to this review.

- 2.2. I received submissions from Mr Edward Greaves, barrister, Ms Samantha Nichol, Chief Counsel, Australian Federal Police, the CCC and a submission from Professor Natalie Skead, Associate Professor Hilde Tubex, Professor Sarah Murray and Dr Tamar Tulich, of the UWA Law School. The submission from the CCC incorporated the views of Mr Ray Warnes, Chief Executive of the CCC, Mr Scott Ellis, Acting Commissioner of the CCC and the Hon John McKechnie QC, Commissioner of the CCC. I also received acknowledgement of my invitation to make a submission from His Honour Mr Steven Heath, Chief Magistrate of the Magistrates Court of Western Australia, Her Honour Judge Wager, Chief Judge of the

District Court of Western Australia, Mr Nicholas Egan, State Solicitor and Mr Matthew Zilko SC, Parliamentary Inspector.

2.3. I also met with officers of the CCC.

Other Materials

2.4. In undertaking the review, I referred to other reviews and research materials including:

- the CPC Act;
- the CCM Act;
- the *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Act 2018* (WA) (the Amendment Act);
- explanatory memoranda, second reading speeches and Parliamentary debates concerning legislation;
- *Review of the Corruption & Crime Commission Act 2003*, Gail Archer SC, February 2008;
- Auditor General's report *Confiscation of the Proceeds of Crime Report 5*: May 2018;
- *Review of the Criminal Property Confiscation Act 2000* (WA), the Honourable Wayne Martin AC QC, May 2019;
- annual reports of the Office of the Director of Public Prosecutions for Western Australia (the DPP);
- annual reports of the CCC;
- annual reports of the New South Wales Crime Commission;
- Reports of the Parliament of Western Australia Joint Standing Committee on the Corruption and Crime Commission;
- Marcus Smith and Russell G Smith, *Exploring the procedural barriers to securing unexplained wealth orders in Australia* (2017) (Criminology Research Advisory Council Criminology Research Grant);
- Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences* (2020) (Australian Institute of Criminology Research Grant);
- Corruption and Crime Commission, *The Corruption and Crime Commission's functions under the Criminal Property Confiscation Act 2000*, Guidelines for the public; May 2021 (the CCC's Guidelines for the public); and
- documents and information provided to me by the CCC, including confidential information and other official information.

- 2.5. In undertaking this review I was particularly assisted by Mr David Robinson, Director Operations and Ms Brodie Skalko, of the CCC. I thank them for their very helpful assistance. Responsibility for the contents of the review is of course mine.

Part III: REVIEW OF THE CCC

Background

- 3.1. Drug related and other organised crime are of considerable risk to the Western Australian economy, to the safety of Western Australians and to Western Australian society generally. The confiscation of the proceeds of crime can deter and prevent crime, provide resources to be used in policing and crime prevention and provide compensation to the victims of crime.
- 3.2. Legislation for the confiscation of illicitly obtained property has existed in Australia since 1979. It was introduced as a tool in the fight against the drug trade. Australia's first confiscation of criminal proceeds scheme was introduced into the *Customs Act 1901* (Cth), which provided for the imposition of pecuniary penalties against those who engaged in defined drug dealings.
- 3.3. Provisions for the confiscation of property by authorising the confiscation of the proceeds of crime following a criminal conviction were introduced into Australian Federal, State and Territory jurisdictions in the 1980s. The aim of the legislation was to suppress criminal activity by attacking the profit derived from that activity and to prevent the re-investment of that profit in further criminal activity.¹
- 3.4. From the late 1980s all Australian jurisdictions introduced non-conviction-based civil confiscation schemes which allowed for the confiscation of property in the absence of a criminal conviction, on the civil standard of proof.
- 3.5. In 2000, with the introduction of the CPC Act, Western Australia became the first Australian jurisdiction to introduce legislation to provide for the confiscation of unexplained wealth. As was the case with the introduction of confiscation of profits legislation, the objective of unexplained wealth laws was to deter crime, particularly organised crime, by removing the primary financial motivation for it. By targeting unexplained wealth, the legislation targets figures in criminal organisations who play a key role in directing and financing criminal operations but arrange their affairs so that they can enjoy the proceeds of their crimes without personally taking part in them.²

¹ Commonwealth, Parliamentary Debates, House of Representatives, 1987, 2314 (Lionel Bowen, Attorney General) (Proceeds of Crime Bill 1987 Second Reading Speech).

² Western Australia, Parliamentary Debates, Legislative Assembly, 2017, 2894, (John Quigley, Attorney General) (Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017 Second Reading Speech).

3.6. There are five kinds of confiscable property under the CPC Act:

- unexplained wealth;
- criminal benefits;
- crime-used property;
- crime-derived property; and
- drug-trafficker property.

3.7. The CPC Act provides for the non-conviction-based confiscation of unexplained wealth, criminal benefits, crime-used property and crime-derived property and for the conviction-based confiscation of the property of a declared drug trafficker.

3.8. In the 2008 Review of the *Corruption & Crime Commission Act 2003* (WA) the Reviewer, Gail Archer SC, considered whether the CPC Act should be amended to transfer the confiscation of proceeds of crime function from the DPP to the CCC. The review recommended that:

- (a) the CPC Act be amended to give the CCC the same powers as were given to the Western Australian Police under that Act;
- (a) the CPC Act be amended to allow the CCC to apply for unexpected wealth declarations, criminal benefits declarations and crime-used property substitution declarations; and
- (b) the question of whether the DPP's functions under the CPC Act should be transferred to the CCC be reconsidered within five years.

3.9. In reports in 2012 and 2013 the Parliament of Western Australia Joint Standing Committee on the Corruption and Crime Commission recommended that the CCC be given powers under the CPC Act.³

3.10. Research published in 2016 by the Criminology Research Advisory Council⁴ revealed that a number of Australian law enforcement agencies considered the crime commission model as the most desirable and effective of Australia's approaches to unexplained wealth. The authors wrote that this model addresses procedural difficulties by integrating all functions into a single agency, it deals with evidentiary barriers by using coercive powers to obtain evidence and moving quickly to restrain unexplained wealth. Additionally, the crime commission model acknowledges that unexplained wealth matters entail highly complex financial investigations

³ Joint Standing Committee on the Corruption and Crime Commission, Reports No 28 of 2012 and No 1 of 2013.

⁴ Marcus Smith and Russell G Smith, *Exploring the procedural barriers to securing unexplained wealth orders in Australia* (2017) (Criminology Research Advisory Council Criminology Research Grant): <https://www.aic.gov.au/sites/default/files/2020-05/unexplained-wealth.pdf>.

of individuals, many of whom can afford to seek professional advice on how to circumvent traditional investigations.

- 3.11. In a comparative study undertaken in 2017 and 2018⁵ published in 2020, funded by the Australian Institute of Criminology and conducted by University of Western Australia researchers, into the effectiveness of the confiscation of proceeds of crime legislation in Western Australia, Queensland and New South Wales the authors wrote:

What clearly emerged from many interviews was that, while unexplained wealth confiscations have the potential to target sophisticated organised crime syndicates, to be successful they require significant resourcing and skills, specifically in forensic accounting. The jurisdictions in which the unexplained wealth provisions are operating most effectively are those where there is a dedicated and independent expert team—such as in New South Wales, within the [New South Wales Crime Commission]. This may be contrasted with, for example, Western Australia, where unexplained wealth confiscations have historically been enforced by WA Police and/or the WA ODPP. In that state, there were no unexplained wealth confiscations in the period from 2010 to 2015. In the same period in New South Wales, close to \$12m was confiscated by the NSW CC (page 71).

- 3.12. While Western Australia was the first jurisdiction to implement legislation providing for the confiscation of unexplained wealth, those powers had been seldom used by 2017, when the Attorney General gave the second reading speech for the *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017*. At that time, in the 16 years since the introduction of the CPC Act, a total of 28 applications for unexplained wealth declarations had been made, but since 2001 only one application had been made.⁶ The Amendment Act granted the CCC powers under the CPC Act with respect to the confiscation of unexplained wealth and criminal benefits. The Amendment Act received Royal Assent on 13 July 2018 and came into effect on 1 September 2018. WA Police Force and the DPP retain their functions under the CPC Act.

⁵ Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences* (2020) (Australian Institute of Criminology Research Grant): https://www.aic.gov.au/sites/default/files/2020-07/CRG-27-1617-FinalReport_0.pdf.

⁶ Western Australia, Parliamentary Debates, Legislative Assembly, 2017, 2894, (John Quigley, Attorney General) (*Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Bill 2017* Second Reading Speech).

- 3.13. In May 2019 the Hon Wayne Martin AC QC undertook a review of the CPC Act.⁷ Mr Martin accepted that the administrative arrangements relating to the investigation of unexplained wealth needed to be revised if the legislation dealing with the subject is to be efficacious and said that it was perhaps too soon after the passing of the Amendment Act for him to venture a firm view as to the most appropriate administrative arrangements, but a task force comprising prosecutors, police and CCC officials may have much to commend it (page 35). Mr Martin recommended that the Western Australian Government give consideration to the creation of a standing task force, resourced with specially trained personnel seconded from WA Police Force, the Office of the DPP, the CCC and the Public Trustee, to take responsibility for the co-ordination of work undertaken by agencies under the CPC Act (page 56).

The aim of the referral of powers under the CPC Act to the CCC

- 3.14. The CCC was given functions under the CPC Act by the Amendment Act. The long title of that Act is:

An Act to —

- **amend the *Corruption, Crime and Misconduct Act 2003* in relation to unexplained wealth and other matters; and**
- **amend the *Criminal Property Confiscation Act 2000* in relation to the role of the Corruption and Crime Commission.**

- 3.15. The aim of amending the CCM Act and the CPC Act to give the CCC functions under the CPC Act can be found in the materials to which I have referred in the background section of this review.
- 3.16. In summary, the CPC Act is an important tool in the fight against crime because confiscating the proceeds of crime can deter and prevent crime, provide resources to be used in policing and crime prevention and provide compensation to the victims of crime. The objective of unexplained wealth provisions in the CPC Act is to deter crime, particularly organised crime, by removing the primary financial motivation for it. By targeting unexplained wealth, the CPC Act targets figures in criminal organisations who play a key role in directing and financing criminal operations but arrange their affairs so that they can enjoy the proceeds of their crimes without personally taking part in them.
- 3.17. The provisions in the CPC Act which provided for the confiscation of unexplained wealth powers had been seldom used by 2017. Research had indicated that a number of Australian law enforcement agencies considered

⁷ Martin AC QC, *The Hon Wayne Review of the Criminal Property Confiscation Act 2000 (WA)* (2019).

the crime commission model as the most desirable and effective of Australia's approaches to unexplained wealth. The crime commission model is said to address procedural difficulties in highly complex financial investigations of individuals, many of whom can afford to seek professional advice on how to circumvent traditional investigations, by integrating all functions into a single agency, dealing with evidentiary barriers by using coercive powers to obtain evidence and moving quickly to restrain unexplained wealth.⁸ Research had also concluded that while unexplained wealth confiscations have the potential to target sophisticated organised crime syndicates, to be successful they require significant resourcing and skills, specifically in forensic accounting.⁹

- 3.18. The aim of the referral of powers under the CPC Act to the CCC was to ensure that those powers were used more effectively to deter crime.

The CCC's criminal property confiscation powers

- 3.19. Under the CPC Act, the CCC can make applications to court for:

- (a) an unexplained wealth declaration (s 11);
- (b) a criminal benefits declaration (s 15);
- (c) a confiscable property declaration (s 27);
- (d) a declaration that property has been confiscated (s 30);
- (e) a freezing order (s 41);
- (f) a production order for a property-tracking document (s 62);
- (g) a monitoring order (s 67);
- (h) a suspension order (s 67); and
- (i) an order declaring a sham transaction void or varying the operation of a sham transaction (s 135)

and the CCC may make an order that a person submit to an examination about property (s 58).

- 3.20. Under the CPC Act the CCC also has powers to request a financial institution to provide information (s 54), to apply to a Justice of the Peace for a search warrant and to search property pursuant to a search warrant granted by a Justice of the Peace (s 74).
- 3.21. The CCC may also exercise its powers under the CCM Act to assist in the performance of its unexplained wealth functions under the CPC Act – s 21AD CCM Act, so that when conducting investigations into

⁸ Marcus Smith and Russell G Smith, *op cit*.

⁹ Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, *op cit*.

unexplained wealth and criminal benefits the CCC has powers under both the CPC Act and the CCM Act.

The CCC's criminal property confiscation resources

- 3.22. The investigation of unexplained wealth and the recovery of property in the exercise of the unexplained wealth function are complex and resource intensive activities. That is because they require fast action and specialist financial skills and knowledge.
- 3.23. Since being granted unexplained wealth functions under the CPC Act the CCC has exercised those functions within its existing resources, by diverting resources from across the CCC, primarily from the Operations and Legal Services Directorates.
- 3.24. The Operations Directorate has invested significant resources in the unexplained wealth function. This has resulted in the Financial Investigation Team increasing in size since the function was conferred on the CCC. As at 1 August 2021 it had seven full time equivalents which included two Graduate Officers seconded from the Office of the Auditor General for 12 months, at the CCC's cost, and an investigator from the WA Police Force, the cost of which was shared between the CCC and the WA Police Force.
- 3.25. The exercise of the function conferred by the CPC Act has required the use of significant resources from the CCC's Legal Services Directorate to assist in establishing the function. The use of the two Acts by the CCC has required the provision of considerable legal advice, the development of policies and procedures and of templates for applications to courts. This work has assisted in the CCC now having a fully operating and capable unexplained wealth function which will mean that future matters will be progressed much more efficiently. Currently half of the CCC's legal staff are occupied with unexplained wealth and criminal benefits matters. These matters are far more legal resource intensive than the CCC's serious misconduct matters.
- 3.26. The CCC's technical and physical surveillance capabilities have been utilised in a number of investigations, particularly in the early stages, to gather intelligence about a target which assists investigators and lawyers plan investigative strategies.
- 3.27. Apart from the management of a deceased estate, no legal work has been briefed to external counsel, which has saved CCC financial resources, led to the development of in-house expertise in unexplained wealth and

criminal benefits law and allowed for a close working relationship between the CCC's investigating officers and its legal officers.

It is my view that the approach that the CCC has taken to the allocation of its resources in the exercise of its criminal property confiscation powers has been appropriate. It has endeavoured to ensure both that the powers are used effectively and that skills are developed within the CCC to maintain and improve its capacity to pursue criminal property.

The CCC's development of strategies to enhance its effectiveness and efficiency

- 3.28. The CCC's objective in the exercise of its unexplained wealth functions is to disrupt crime, corruption and associated illicit activity by removing the financial motivation for those activities, thereby reducing harm to the Western Australian community. In the three years since it has been provided with its unexplained wealth function the CCC has developed strategies to maximise its efficiency and effectiveness. In the early period after it was provided with the function the CCC focused its efforts on matters that were less likely to result in protracted investigation and litigation. This ensured that the CCC's limited resources were applied to cases which had the best chance of success and tested the CCC's systems and processes to ensure they were effective, before actively pursuing more complex and challenging matters. The CCC has built on that experience and moved on to more sophisticated matters involving organised crime targets and their assistants involved in cross-border transactions.
- 3.29. The CCC has restrained property as soon as practicable in an investigation. Unexplained wealth matters need to be undertaken as efficiently as possible so assets can be identified and restrained before they are moved beyond the reach of law enforcement.¹⁰ The early actions of the CCC to restrain property have ensured that the risk of property being so moved have been minimised and enhanced the effectiveness of the CCC's investigations.
- 3.30. In addition, the CCC has deployed its specialist resources, for example physical and technical surveillance, digital forensics and human source management, to assist in gathering evidence which has reduced reliance on

¹⁰ Marcus Smith and Russell G Smith, *op cit*.

traditional, resource intensive and time-consuming methods of investigation.

- 3.31. In deciding whether to commence or continue civil proceedings under the CPC Act, the matters to which the CCC has regard include:
- (a) the need to freeze property to prevent asset dissipation whilst it undertakes an investigation;
 - (b) the strength of the evidence and the extent of any further investigation that may be required;
 - (c) the likelihood of successful claims by an interested party in relation to property that the CCC seeks to freeze or confiscate;
 - (d) the ability for a respondent to satisfy a liability arising from an anticipated unexplained wealth or criminal benefits declaration; and
 - (e) the likely realisable value of property that may be available to confiscate.
- 3.32. In addition, the following questions are relevant to the CCC in determining whether to commence or continue civil proceedings under the CPC Act:
- (a) are the proceedings likely to disrupt crime, corruption, and associated illicit activity?
 - (b) are there reasonable prospects that civil proceedings under the CPC Act will result in the recovery of ill-gotten gains or the confiscation of property?
 - (c) are the costs of pursuing substantive confiscation orders likely to exceed the return?
 - (d) has the person been charged with or convicted of a confiscation offence?
 - (e) are there other mechanisms available to recover the suspected unexplained wealth or criminal benefits (i.e. civil claims, reparation orders under the *Sentencing Act 1995 (WA)*)?
- 3.33. Where commencing or continuing civil proceedings under the CPC Act will deprive a victim of a confiscation offence of restitution or compensation, it is the CCC's view and practice that it will not ordinarily be in the public interest for the CCC to proceed with those proceedings.
- 3.34. If a public authority has the capacity to act to enforce their legal or equitable claim over property, the CCC will generally not take action to commence or continue investigation or proceedings, unless:
- (a) the CCC is in a superior position to the government department or public authority to achieve a successful outcome;

- (b) the CCC has consulted with the public authority; and
- (c) it is in the public interest to do so.

3.35. Where the CCC has sufficient evidence to be satisfied that a third party (other than a public authority) has an interest in property, the CCC may determine not to investigate or take proceedings if it would deprive the third party of their enforceable rights or interest at law or equity in that property.¹¹

It is my view that the CCC has appropriate policies in place for the exercise of its functions under the CPC Act.

The CCC's operations in the exercise of its functions under the CPC Act

3.36. During 2018-2019 the CCC received 41 referrals of potential unexplained wealth matters. Nine of those were from the general public, 20 were from Western Australian public authorities and 12 were from other agencies. In that year the CCC generated a further six potential unexplained wealth targets, so there were a total of 47 potential unexplained wealth matters.¹²

3.37. During 2019-2020 the CCC received 28 referrals of potential unexplained wealth matters. Sixteen of those were from the general public, 11 were from Western Australian public authorities and one was from a federal agency. In that year the CCC generated a further nine unexplained wealth matters, so there were a total of 37 potential unexplained wealth matters. As at 30 June 2020, the CCC had instituted Supreme Court proceedings in four matters, leading to freezing orders over in excess of \$10 million in assets.¹³

3.38. The CCC's Financial Investigation Team has established effective working relationships with a number of agencies, including the WA Police Force, the Australian Taxation Office and other law enforcement agencies and confiscation authorities to achieve its objectives. The CCC's unexplained wealth functions complement actions taken by other law enforcement agencies and confiscation authorities to disrupt and deter serious organised crime. There have been a significant number of referrals of unexplained wealth matters, initial investigations and full investigations. The CCC's investigations, including matters referred from the WA Police Force, have resulted in confiscation of millions of dollars' worth of assets.

¹¹ The CCC's Guidelines for the public [16]-[21].

¹² The CCC's Annual Report for 2018-2019, page 53.

¹³ The CCC's Annual Report for 2019-2020, page 66.

- 3.39. The Australian Federal Police (AFP) and the CCC have shared experiences and best practices in targeting unexplained wealth. In cases progressed by the AFP under the *Proceeds of Crime Act 2002* (Cth) the CCC has, on a number of occasions, provided assistance which the AFP has welcomed. The AFP has found the CCC to be an effective, efficient and valued partner.
- 3.40. In October 2020 the CCC resolved its first unexplained wealth matter with the Supreme Court making an unexplained wealth declaration for almost \$630,000 and ordering the confiscation of cash and assets.
- 3.41. Later, on 21 October 2020, the Supreme Court also made a criminal benefits declaration against former Government executive, Mr Paul Whyte, arising from 530 corruption charges and a property laundering charge he was facing.
- 3.42. Following the charges for corruption crimes and illegally gaining a benefit to himself and others estimated at more than \$22 million, assets had been immediately restrained by a freezing order.
- 3.43. The criminal benefit acquired by Mr Whyte, to the exclusion of others who benefitted from the commission of his confiscation offences, was assessed as and declared to be just over \$11 million.
- 3.44. The CCC was successful in obtaining a criminal benefits declaration and confiscation orders prior to Mr Whyte being convicted and sentenced.
- 3.45. The assets confiscated include two properties with a combined estimated value of \$4.4 million, Mr Whyte's interest in a government superannuation fund of \$1.4 million (with taxes and fees to be deducted from that amount), his interest in his father's deceased estate which included a Scarborough property, and other monies arising from his interest in horses.
- 3.46. The first unexplained wealth matter resolved by the CCC was referred to it in 2019 by the WA Police Force after an investigation by the Organised Crime Squad into the activities of three persons, which did not lead to criminal charges.
- 3.47. The CCC used its powers under the CPC Act and the CCM Act to conduct inquiries, resulting in the resolution of the case.
- 3.48. The confiscated assets included cash, a Ferrari motor vehicle and Rolex watches which had been frozen since September 2019.

3.49. At 30 September 2020, the CCC had received 93 referrals from Commonwealth and State agencies, WA Police Force, the public and from the CCC's own activities.

3.50. In October 2020 there were \$13-15 million in assets which were subject to Supreme Court freezing orders obtained on the application of the CCC, relating to eight investigations underway.¹⁴

In my view the success of the CCC's operations in the exercise of its functions under the CPC Act in the three years since the Amendment Act was passed demonstrates that the CCC has been effective in using its powers in the exercise of those functions.

Negotiated settlements

3.51 The CCC has negotiated the settlement of unexplained wealth matters. This is consistent with the practice in other Australian jurisdictions – in most Australian jurisdictions the vast majority of unexplained wealth matters are finalised through negotiated settlement.¹⁵

3.52. In deciding whether to resolve civil proceedings under the CPC Act, the CCC will have regard to:

- (a) the stage of the investigation and the litigation;
- (b) the likelihood of the CCC obtaining an unexplained wealth or criminal benefits declaration;
- (c) the likely amount of the unexplained wealth or criminal benefits declaration if the CCC were successful in litigation;
- (d) the likely return if the CCC obtains an unexplained wealth or criminal benefits declaration;
- (e) the likelihood of an interested party successfully claiming an interest in property that may otherwise satisfy the liability arising from an unexplained wealth or criminal benefits declaration;
- (f) the particulars of any previous CPC Act proceedings taken by the CCC, DPP, or WA Police Force;
- (g) the cost of continuing to litigate the matter under the CPC Act rather than resolution through negotiation; and
- (h) any other relevant public interest factors.

¹⁴ CCC Media Release 22 October 2020.

¹⁵ Marcus Smith and Russell G Smith, *op cit*, page 53.

- 3.53. Unless the parties agree otherwise, all information disclosed during the negotiations is disclosed in confidence and is not to be disclosed to any third party.¹⁶
- 3.54. I have received positive feedback about the CCC's approach to settlement negotiations, which has been described to me by a person external to the CCC as principled yet commercial.
- 3.55. There has been some information in the public domain about the use of the CCC's unexplained wealth powers, such as the CCC's media release of 22 October 2020. The information available to the public has provided a clear message that not only will the CCC expose corrupt conduct, it will also recover the proceeds of that conduct.
- 3.56. Where information about the CCC's success in the exercise of its unexplained wealth has not been available publicly the effect of the CCC's actions has been successfully to disrupt criminal activity and it is likely that information about that success will have come to the attention of persons associated with those whose criminal activity has been disrupted.

It is my view that the CCC's policy for negotiating the settlement of its civil proceedings and its practices in negotiating those settlements are appropriate. It has recognised the benefits for all parties and the courts and the public interest in the timely resolution of proceedings by negotiation and has negotiated settlements in a manner that is consistent with its aim of disrupting corruption and crime.

The adequacy of the CCC's resources to carry out its functions under the CPC Act

- 3.57. As I have said earlier in this review the CCC has diverted resources from across other areas to exercise its unexplained wealth function under the CPC Act and has developed effective working relationships with a number of agencies, including the WA Police Force. The information that the CCC has obtained from these working relationships indicates that there is a significant number of unexplained wealth investigations which the CCC could pursue if it had the resources to do so.
- 3.58. Due to the complexity of unexplained wealth investigations, to carry out those investigations effectively, the following resources are required:

¹⁶ The CCC's Guidelines for the public [35]-[36].

- accountants and financial analysts;
- investigators, including experienced financial investigators;
- experienced lawyers;
- surveillance officers;
- digital forensic officers; and
- support staff.

3.59. The CCC's functions under the CPC Act have led not only to it handling difficult, complex matters, but also to it carrying out investigations concerning criminals and criminal organisations who have a history of the use of violence, at times extreme violence. The CCC is not able to operate on the basis that the security arrangements that it had in place prior to it exercising its functions under the CPC Act are adequate for the safety of its staff and the integrity of its investigations. The carrying out of security reviews and the implementation of security arrangements identified in those reviews require the allocation of resources.

3.60. To date the CCC has managed the additional functions conferred on it under the CPC Act within its existing resources. As I have pointed to earlier in this review, research has demonstrated that the effective use of unexplained wealth powers requires significant resources and skills.

In my view it cannot be assumed that the CCC will continue to be able to exercise its functions under the CPC Act effectively in the future without additional resources. The safe and effective exercise of the CCC's unexplained wealth and criminal benefits functions would benefit from additional funding to resource:

- **accountants and financial analysts;**
- **investigators, including experienced financial investigators;**
- **experienced lawyers;**
- **surveillance officers;**
- **digital forensic officers;**
- **support staff;**
- **further developments to record management processes;**
- **acquisition of additional software capabilities and licences used to undertake analysis of large and complex data sets;**
- **acquisition of additional equipment including laptop computers, mobile telephones and surveillance equipment;**
- **acquisition of digital forensic analysis tools; and**
- **enhancements to security arrangements.**

Included in the need for adequate resources to enable the CCC effectively to carry out its unexplained wealth function is a need for there to be both the Commissioner and an Acting Commissioner of the CCC at all times. As I have mentioned, the CCC has power under s 58 of the CPC Act to make an examination order for a person to be examined about confiscable property.

It is highly desirable that the Commissioner who is considering an application for an examination order has not been involved in any earlier decisions about the use of the CCC's investigative powers in the same matter. That is to ensure that any decision about whether or not to make an examination order is made impartially and has not, even inadvertently, been influenced by earlier involvement in the investigation.

To ensure that decisions made in the exercise of unexplained wealth functions are made impartially it is necessary for there to be at least two independent people who have the powers of a Commissioner of the CCC. Under the provisions of the CCM Act this means that there needs to be both a Commissioner and an Acting Commissioner available to exercise the powers of a Commissioner.

Secrecy provisions in the CPC Act and the CCM Act

3.61. Both the CPC Act and the CCM Act contain secrecy provisions.

3.62. Secrecy provisions are contained in Pt 9 of the CCM Act. Section 152 prohibits the disclosure of official information acquired in the course of the performance of a person's functions under the CCM Act but excludes from this prohibition disclosure of information by an officer of the CCC or a CCC lawyer under or for the purposes of the CCM Act or otherwise in connection with the performance of the person's functions under the CCM Act.

3.63. In the CPC Act secrecy provisions are contained in Pt 5, Div 5. Section 70 of the CPC Act provides that a person must not, except as permitted under s 71, make a disclosure to anyone that a financial institution intends to or has given information under s 53, or the nature of that information, that there has been a requirement for a financial institution to provide information under s 54, or the nature of the information that has been provided, or the fact that a person is or has been subject to a production order, an examination order, a monitoring order or a suspension order, or the contents of that order. Section 71 permits a corporation, an officer of a corporation or an individual to make a disclosure to the DPP, a police

officer and an officer of the CCC in limited circumstances and to a legal practitioner to obtain legal advice or representation.

- 3.64. The purpose of these provisions was explained by the Full Court of the Supreme Court of Western Australia in *Bennett & Co v Director of Public Prosecutions (WA)* [2005] WASCA 141; 31 WAR 212 at [35] where the Court said of Pt 5, Div 5 of the CPC Act:

It appears plain enough, however, that its purpose is to ensure that a person about whom information is being sought under the various provisions of Pt 5, and the associates of that person, are not "tipped off" about the interest of relevant authorities in his or her affairs. One purpose of that secrecy is to ensure that persons or property the subject of those investigative provisions are not removed from the jurisdiction before appropriate orders can be made.

- 3.65. There is no equivalent provision in the CPC Act to the provision in s 152 of the CCM Act to permit an officer of the DPP or the CCC or a police officer to disclose information for the purposes of or in connection with their duties. As a result, an officer performing duties under the CPC Act may be restricted in the carrying out of their functions, when the restriction does not in any way further the purpose of the secrecy provisions in the Act.
- 3.66. For example, communications between an officer of the CCC and a married couple the subject of enquiries in the presence of both members of the couple may be prohibited, as may be communications between members of a law enforcement agency and officers of the CCC where one agency is not then engaged in an investigation in which the other agency is engaged.

It would be desirable for consideration to be given to amending the secrecy provisions of the CPC Act to permit an officer of the DPP or the CCC or a police officer to disclose information for the purposes of or in connection with their duties.

The legal expenses of a person whose property is frozen

- 3.67. The CPC Act makes no provision for the payment of legal expenses of a person whose property has been frozen. However, the High Court has held that when making or varying a freezing order under the CPC Act a court may exempt some of the property from the freezing order on condition that it be spent for legal expenses. The exercise of this power calls for great

care by the parties and the Court in the framing of the exemption condition to ensure, to the maximum practical extent, that exempted funds are not misused, whether by overservicing and overcharging or by other abuse.¹⁷

- 3.68. The process of exempting frozen property on condition that the exempted funds be used for legal expenses involves difficulties for all parties. It takes considerable time for the CCC, the person whose property is frozen and the court and also requires parties to disclose, at least to some extent, the legal steps they propose to take which information may, until the disclosure, be the subject of legal professional privilege.
- 3.69. In determining its position on an application for a court order that exempts some frozen property for legal expenses the CCC has regard to the following matters:
- (a) whether the freezing order covers specified property only or all property that the individual owns, effectively controls, or has given away;
 - (b) whether the party has made a genuine application for Legal Aid assistance;
 - (c) whether the individual will be able to obtain or retain legal representation without recourse to frozen property;
 - (d) the extent of the frozen property available to satisfy a CPC Act declaration, and the risk of depletion of frozen property by future legal fees;
 - (e) the reasonableness of the legal expenses having regard to both the public interest and the individual's point of view in the context of the possibility of CPC Act declarations; and
 - (f) the competing factors between an accused's choice of counsel and what constitutes reasonable legal expenses.
- 3.70. The CCC has regard to *Legal Services Directions 2017* (Cth), the *Legal Aid Commission Act 1976* (WA) s 14 and *Legal Aid Commission (Costs) Rules 1990* (WA) and costs determinations made under the *Legal Profession Act 2008* (WA).¹⁸
- 3.71. In the comparative study by the Australian Institute of Criminology into the effectiveness of the confiscation of proceeds of crime legislation in Western Australia, Queensland and New South Wales conducted by University of Western Australia researchers to which I have referred

¹⁷ *Mansfield v Director of Public Prosecutions for Western Australia* [2006] HCA 38; (2006) 226 CLR 486 at [53]-[54].

¹⁸ The CCC's Guidelines for the public [43]-[46].

earlier¹⁹, the authors made the following recommendation with respect to legal expenses:

Provide means-tested legal aid funding through an administrative rather than a judicial process, assessed without regard to the value of the restrained assets (page 76).

- 3.72. In his review of the CPC Act Mr Martin made the following recommendations with regard to the funding of the legal representation for the defence of criminal prosecutions against a person whose assets have been frozen:

Recommendation #4: Any new Act, or amended Act, should provide that if a person is unable to fund legal representation for the defence of criminal charges pending against them because property which would otherwise have been available for that purpose has been frozen, the person is entitled to be granted legal aid for the purpose of defending the pending charges unless the legal aid authority satisfies the court that there are good reasons why legal aid should not be granted.

Recommendation #5: The legal aid authority should be given a first charge over the frozen property to secure the cost of the representation provided, with the charge to remain in force irrespective of the outcome of the confiscation proceedings (page 19).

- 3.73. The reasonable legal expenses of a person whose property has been frozen may not be limited to the expense of funding legal representation in defence of any criminal prosecution. For example, it may be that there is a legitimate basis to incur legal expenses in the proceedings in which the property has been frozen. Legal aid is not generally available to a person to contest those proceedings.

In my view the CCC's approach to applications to a court to release frozen funds for legal expenses is appropriate and in accordance with legal authority. In my view its present practice should be followed under the legislation in its present form.

However, it is also my view, having regard to the time needed to be spent by parties and courts on such applications, and the difficulties raised by the necessity to balance the consideration of the reasonableness of legal expenses and legal professional privilege, that it would be desirable for the CPC Act to be amended to provide that legal aid funding should be available to fund all the reasonable legal expenses, in both criminal and civil proceedings, of a person whose property has been frozen. Additionally, the Legal Aid

¹⁹ Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, *op cit*.

Commission should be given a charge over the frozen property for the legal expenses that it funded, whatever the outcome of the proceedings in which the property was frozen.

The National Cooperative Scheme on Unexplained Wealth

3.74. In the submission from Ms Samantha Nichol, Chief Counsel of the AFP, Ms Nichol suggested that I consider the benefits to Western Australia of taking up the Commonwealth's invitation to join the National Cooperative Scheme on Unexplained Wealth.

3.75. In the comparative study into the effectiveness of the confiscation of proceeds of crime legislation in Western Australia, Queensland and New South Wales by the Australian Institute of Criminology conducted by University of Western Australia researchers²⁰, the authors made the following recommendations:

Expand the National Cooperative Scheme on Unexplained Wealth to incorporate all Australian states and territories and to include:

- a dedicated, adequately resourced, multidisciplinary and independent expert body; and
- a fair and transparent mechanism for the allocation of confiscated wealth across jurisdictions.

Until then, in jurisdictions which are not currently part of the National Cooperative Scheme on Unexplained Wealth, appoint and adequately resource a dedicated, multidisciplinary and independent expert body to implement, investigate and enforce the existing schemes (page 71).

3.76. The authors noted that while the National Cooperative Scheme on Unexplained Wealth provided the architecture for a national unexplained wealth scheme, only New South Wales had referred the necessary powers to the Commonwealth. Interviews conducted by the authors revealed that a national scheme presented several difficulties, some of which related to information-gathering, investigations and allocation of confiscated wealth (page 70).

3.77. The authors also noted that the New South Wales Crime Commission's Annual Report 2016-2017 stated that at the date of reporting it had not received any payments flowing from successful shared confiscations and that this was despite the New South Wales Crime Commission working

²⁰ Natalie Skead, Hilde Tubex, Sarah Murray and Tamara Tulich, op cit.

with the Commonwealth to investigate confiscation matters since 2009 (page 71).

- 3.78. The New South Wales Crime Commission's Annual Reports for 2016-2017 (page 40), 2017-2018 (page 50), 2018-2019 (page 48) and 2019-2020 (page 37) all state that there has been no sharing of confiscated proceeds. Each of the 2018-2019 and the 2019-2020 Annual Reports contain the following two paragraphs:

During the reporting period, there have been meetings of the Co-operating Jurisdiction Committee, which is the committee of participating jurisdiction representatives with responsibility for considering and reporting on certain matters under the NCSUW, particularly the resolution of any 'deconfliction' issues and the sharing of confiscation proceeds.

In relation to the sharing of confiscation proceeds, a large number of matters were notified to the Co-operating Jurisdiction Committee during the reporting period. Several matters that were identified as involving cross-jurisdictional co-operation between the Commonwealth and NSW were considered by a sub-committee of those jurisdictions. An agreement was reached as to the recommended proportion in which the proceeds from those matters should be shared, but as at the end of the reporting period there had been no actual sharing by, or with, NSW under the NCSUW.

- 3.79. It would seem, from the New South Wales experience with the national scheme, that a fair, transparent and effective system for the allocation of confiscated wealth across jurisdictions is yet to be achieved.

There is merit in a national scheme, which could bring the benefits of shared national resources to a field which requires significant resources and skills in dealing with organised crime that is not limited by State and Territory borders. However, until there can be confidence that an appropriate system for the allocation of confiscated wealth will be implemented, it would not be appropriate for the State to join the national scheme, although it is appropriate to keep participation in the national scheme under review.

The freezing of property

- 3.80. As I have said, the conduct of unexplained wealth matters requires authorities, including the CCC, to act quickly to ensure that assets can be identified and restrained before they are moved beyond the reach of law enforcement. The CPC Act provides for the freezing of property by freezing orders, which are issued by a court, and freezing notices, which

are administrative in nature. The CCC can apply to a court for a freezing order. It is not given the power to obtain a freezing notice – which can be obtained by the DPP and WA Police Force – s 34 CPC Act.

- 3.81. The DPP has the ability to apply for both freezing orders and freezing notices. It uses freezing notices far more often than it applies for freezing orders, as can be seen from this table taken from its annual report for 2019–2020 at page 31:

Notices and orders obtained	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020
Freezing notices	186	170	183	198	203
Freezing orders	14	7	5	7	4
Total	200	177	188	205	207

- 3.82. Being administrative in nature, a freezing notice is much easier to obtain than a freezing order, and so it is not surprising that the DPP uses them in preference to freezing orders in the majority of cases.
- 3.83. In its submission to me the CCC did not submit that it should be given the power to obtain freezing notices. However, in my discussions with CCC officers I was informed that applications for freezing orders are far more resource intensive than freezing notices.
- 3.84. In his review of the CPC Act Mr Martin concluded that it was undesirable for there to be two different procedures for the freezing of property, with significantly different rights and protections for persons affected by the freezing, with the choice of process being, effectively, left to the WA Police Force and the DPP. Mr Martin also concluded that the undesirability of that feature of the CPC Act is exacerbated by the unsurprising reality that freezing notices, being the process which involves the lowest burden on the WA Police Force and the DPP is exercised at an overwhelmingly higher rate by them, being the process which confers the least rights upon affected persons.
- 3.85. Mr Martin recommended that any new or amended CPC Act should ensure that all freezing of property under the legislation is overseen by a court and should provide that the only circumstance in which a process should be available for the freezing of property without court supervision is in cases of urgency, where there is a significant risk property will be dissipated unless frozen and in those cases, the authority should be required to bring the case to court as soon as practicable after the notice has been issued.

- 3.86. In my view Mr Martin is correct in his analysis and conclusions that it is undesirable for there to be two different procedures for the freezing of property, with different rights and protections for persons affected by the freezing and that the undesirability of that feature of the CPC Act is exacerbated by the fact that freezing notices, being the process which confers least rights upon affected persons, are used far more frequently than freezing orders.

It is my view the fact that applications for freezing orders are very resource intensive needs to be borne in mind in any consideration of the resources required by the CCC in the exercise of its unexplained wealth function.

Ex parte applications to courts

- 3.87. The need to act quickly to ensure that assets can be identified and restrained before they are moved beyond the reach of law enforcement can require the CCC to make urgent ex parte applications to court.
- 3.88. When it is applying to a court for an order ex parte, the CCC is under a duty to make full disclosure to the court of all relevant information in its possession, whether or not it assists the application: *Thomas A Edison Ltd v Bullock* [1912] HCA 72; (1912) 15 CLR 679, 681 - 682; *Savcor Pty Ltd v Catholic Protection International APS* [2005] VSCA 213; (2005) 12 VR 639 [24] - [36]. This duty of full disclosure includes a duty to bring matters of law to the court's attention: *Memory Corporation Plc v Sidhu (No 2)* [2000] 1 WLR 1443 (1459 - 1460), *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* [2015] WASC 376 [30].
- 3.89. In his submission to me Mr E Greaves submitted that the CCC is falling short in its obligation to inform the court of relevant legal principles concerning undertakings to the court to pay any damages that the court may consider just to any party affected by the ex parte order applied for. In his experience the CCC's practice is to inform the court that it will, if required by the court, offer an undertaking to pay damages if an ex parte order is made. Mr Greaves has submitted that whenever it makes an ex parte application for a freezing order the CCC should inform the court of:
- (a) the decision in *Kalbasi v The State of Western Australia* [2015] WASC 317 [33] where Mitchell J said that an undertaking as to damages is generally appropriate where the State seeks a freezing order;

- (b) s 137 of the CPC Act which provides that the State is not liable for anything done or default made in good faith for the purpose of carrying the Act into effect; and
 - (c) that it might be said that the court should order that the CCC provide an undertaking as to damages.
- 3.90. In a responsive submission the CCC stated that its usual practice in its submissions to the court on applications for freezing orders has been to highlight the relevant authorities on an undertaking as to damages. This includes the authority of the High Court in *Mansfield* at [46] that the court has a discretion to refuse to make a freezing order if an applicant does not give an undertaking as to damages or offers an undertaking as to damages in unsatisfactory terms. Having regard to the authorities to which the court has been referred on applications for freezing orders the CCC has submitted to me that Mr Greaves' criticism of its failure to refer to *Kalbasi* does not give proper regard to the contents of the CCC's submissions to the court. However, the CCC sees no reason why it ought not to include reference to *Kalbasi* in future submissions and, in any event, the CCC's updated freezing order procedure expressly refers to including that decision.
- 3.91. Mr Greaves has also submitted that the CCC does not always ensure that the affidavits in support of applications to court contain only admissible evidence.
- 3.92. In its responsive submission the CCC submitted that the question of what evidence is required to persuade a court to grant a freezing order is given careful consideration within the CCC. The CCC is always looking to improve skills and training in the preparation of affidavits.
- 3.93. There can be no doubt that the CCC needs to ensure that it fully inform the court of all relevant matters of fact and law when it makes an ex parte application and that its affidavits contain only admissible evidence. The CCC's processes and procedures need to ensure that its officers and legal practitioners keep these obligations in mind at all times when preparing and applying for ex parte freezing orders. It seems to me that the CCC is doing so although, of course, no system is perfect and mistakes can occur. However, I can see no evidence of any systemic faults in the CCC's processes and procedures in applying for ex parte freezing orders.

Objections to confiscation of property

- 3.94. A person may, pursuant to s 79 of the CPC Act, file an objection to the confiscation of property. Section 78 of the CPC Act provides that a State is a party to proceedings on an objection. These provisions mean that when the CCC obtains a freezing order in a court and a person files an objection the State and the CCC are parties to action.
- 3.95. The usual practice is that the State Solicitor's Office acts for the State in those circumstances.
- 3.96. Mr Greaves has submitted that it would be preferable for the CCC to act for the State where the State is party to proceedings in which the CCC is a party because it applied for and obtained a freezing order. Mr Greaves has said that the DPP enters an appearance for the State in proceedings in which the DPP has obtained a freezing order.
- 3.97. In its responsive submission the CCC has said that to date it has only applied for freezing orders under ss 43(1) and 43(3) of the CPC Act. Further, on the basis of the decision in *Centurion Trust Company Ltd v Director of Public Prosecutions (WA)* (2010) 201 A Crim R 324, the CPC Act does not operate to invoke automatic confiscation of property where freezing orders are made under the provisions of ss 43(1) and 43(3) and so it has been pointless to file objections under s 79 where the CCC has obtained freezing orders.
- 3.98. It is the CCC's view that while there is some ambiguity about whether the CCC is the State for the purposes of the CPC Act it takes the view that the CCC is not the State for those purposes. Further, that if the CCC were to accept that it is the State then any settlement made by the CCC may bind the State in all its forms.
- 3.99. While it may be appropriate for the authority which has obtained a freezing order to also act for the State when there has been an objection to the confiscation of property it is my view that it is not desirable for the CCC to inevitably represent the State in those circumstances. That is because there may be circumstances in which the State may have an interest or a perspective that is not equivalent to those of the CCC.

Part IV: CONCLUSIONS FROM MY REVIEW

In undertaking this review I have reached the following conclusions:

- **the approach that the CCC has taken to the allocation of its resources in the exercise of its criminal property confiscation powers has been appropriate. It has endeavoured to ensure both that the powers are used effectively and that skills are developed within the CCC to maintain and improve its capacity to pursue criminal property.**
- **the CCC has appropriate policies in place for the exercise of its functions under the CPC Act.**
- **the success of the CCC's operations in the exercise of its functions under the CPC Act in the three years since the Amendment Act was passed demonstrates that the CCC has been effective in using its powers in the exercise of those functions.**
- **the CCC's policy for negotiating the settlement of its civil proceedings and its practices in negotiating those settlements are appropriate. It has recognised the benefits for all parties and the courts and the public interest in the timely resolution of proceedings by negotiation and has negotiated settlements in a manner that is consistent with its aim of disrupting corruption and crime.**
- **it cannot be assumed that the CCC will continue to be able to exercise its functions under the CPC Act effectively in the future without additional resources. The safe and effective exercise of the CCC's unexplained wealth and criminal benefits functions would benefit from additional funding to resource:**
 - **accountants and financial analysts;**
 - **investigators, including experienced financial investigators;**
 - **experienced lawyers;**
 - **surveillance officers;**
 - **digital forensic officers;**
 - **support staff;**
 - **further developments to record management processes;**
 - **acquisition of additional software capabilities and licences used to undertake analysis of large and complex data sets;**
 - **acquisition of additional equipment including laptop computers, mobile telephones and surveillance equipment;**
 - **acquisition of digital forensic analysis tools; and**
 - **enhancements to security arrangements.**

- the fact that applications for freezing orders are very resource intensive needs to be borne in mind in any consideration of the resources required by the CCC in the exercise of its unexplained wealth function.
- to ensure that decisions made in the exercise of unexplained wealth functions are made impartially it is necessary for there to be at least two independent people who have the powers of a Commissioner of the CCC. Under the provisions of the CCM Act this means that there needs to be both a Commissioner and an Acting Commissioner available to exercise the powers of a Commissioner.
- it would be desirable for consideration to be given to amending the secrecy provisions of the CPC Act to permit an officer of the DPP or the CCC or a police officer to disclose information for the purposes of or in connection with their duties.
- the CCC's approach to applications to a court to release frozen funds for legal expenses is appropriate and in accordance with legal authority. In my view its present practice should be followed under the legislation in its present form.
- having regard to the time needed to be spent by parties and courts on applications to release frozen funds for legal expenses, and the difficulties raised by the necessity to balance the consideration of the reasonableness of legal expenses and legal professional privilege, it would be desirable for the CPC Act to be amended to provide that legal aid funding should be available to fund all the reasonable legal expenses, in both criminal and civil proceedings, of a person whose property has been frozen and that the Legal Aid Commission should be given a charge over the frozen property for the legal expenses that it funded, whatever the outcome of the proceedings in which the property was frozen.
- there is merit in a national confiscation of unexplained wealth scheme, which could bring the benefits of shared national resources to a field which requires significant resources and skills in dealing with organised crime that is not limited by State and Territory borders. However, until there can be confidence that an appropriate system for the allocation of confiscated wealth will be implemented, it would not be appropriate for the State to join the national scheme, although it is appropriate to keep participation in the national scheme under review.

Annexures

Annexure 1 - Letter to stakeholders

[Stakeholder]

Review of the Corruption and Crime Commission's Unexplained Wealth Function

I have been engaged by the Corruption and Crime Commission (the CCC) to consider and report on:

1. The effectiveness of the Commission's processes in contributing to the aims of the referral of powers under the Criminal Property Confiscation Act 2000 (CPCA); and
2. What, if any changes are required to policy, procedure or legislation to improve the effectiveness and efficiency of the Commission's work under the CPCA.

I invite you to make submissions to me on the matters I am considering if you wish to do so. I have enclosed with this letter a list of issues that may arise for consideration. If you do choose to make a submission you may like to address some of those issues, or any other issues that you consider relevant.

It may be that you have had little, if any, contact with the CCC's exercise of powers under the CPCA, but that you have information or views on matters that are relevant to the review that you wish to provide to me.

If you do make a submission, please inform me when you do so if you wish your submission, or any part of it, to be kept confidential.

I request that any submission you may wish to make be received by me by 9 July 2021.

Yours faithfully

The Hon. Peter Martino

4 June 2021

Issues on which stakeholders may wish to make submissions

Background:

- The *Criminal Property Confiscation Act 2000* (CPC Act) provides for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.
- The *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Act 2018* (2018 Amendment Act) gives the Corruption and Crime Commission (the CCC) the power to investigate and civilly litigate unexplained wealth and criminal benefits matters under the CPC Act. The powers of the Director of Public Prosecutions (DPP) and of officers of the Police Force of Western Australia (WAPOL) under the CPC Act have been retained.
- The CCC exercises its functions under the CPC Act within its current resourcing levels. No additional resources have been provided to the CCC to exercise those functions.

Issues:

- Have the CPC Act matters undertaken by the CCC been conducted efficiently and effectively?
- Unexplained wealth confiscation matters require significant resources and investigative and forensic accounting skills. Are the resources of the CCC in these areas being used effectively?
- Are the CCC's resources adequate to enable it to carry out its functions under the CPC Act effectively?
- To the extent that there has been interaction between the CCC, the DPP and WAPOL in CPC Act matters:
 - has that interaction been effective?
 - have resources been used efficiently?
- Has any interaction between the CCC and other State or Federal government bodies been effective and efficient?

Annexure 2 - List of stakeholders contacted

1	Mr Steven Heath, Chief Magistrate of the Magistrates' Court
2	Her Honour Chief Judge Julie Wager, Chief Judge of the District Court
3	The Hon Peter Quinlan, Chief Justice of Western Australia
4	Dr Graham Hill, Director of Legal Aid WA
5	Mr Nicholas Egan, State Solicitor
6	Mr Brian Roche, The Public Trustee
7	Mr Bruce Roberts, Registrar of Titles at Landgate
8	Mr Chris Dawson, Commissioner of Police at Western Australian Police Force
9	Mr Edward Greaves, Francis Burt Chambers
10	The Hon Wayne Martin AC QC, Francis Burt Chambers
11	Mr John McKechnie Corruption and Crime Commission
12	Mr Scott Ellis, Acting Commissioner at WA Corruption and Crime Commission
13	Mr Ray Warnes, Chief Executive Officer of WA Corruption and Crime Commission
14	Mr Matthew Zilko SC, Parliamentary Inspector
15	Prof Natalie Skead, Dean of UWA Law School
16	Ms Amanda Forrester, Director of Public Prosecutions
17	Mr Martin Cuerden SC, President of Western Australian Bar Association
18	Ms Jocelyne Boujos, President of Law Society of Western Australia
19	The President, The Criminal Lawyers Association of Western Australia

20	Mr Allan MacSporran QC, Chairperson of Queensland Crime and Corruption Commission
21	Mr Michael Barnes, Commissioner of New South Wales Crime Commission
22	Mr Reece Kershaw, Commissioner of Police at Australian Federal Police
23	International Crime Cooperation Central Authority



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