TOM JAMBRICH
Federal Agent 4255
Australian Federal Police
THE FORENSIC ACCOUNTANT AND UNEXPLAINED WEALTH

INTRODUCTION

Criminals should not be permitted to enjoy the profits of their crimes. Beyond this basic moral conviction there is no consensus on how to tackle the financial consequences of crime, or indeed an understanding of the size of the problem. Until recently most criminal justice systems around the world allowed certain criminals, particularly those involved in organised crime, to enjoy the fruits of their labour even after conviction. It was not until the 1980s and 1990s that most European countries as well as Australia provided provision for the confiscation of criminal assets, upon conviction, into their legislative bases in order to provide a sense of fairness (Stessens 2000). As a consequence of this action, there is now a role for the forensic accountants and the skills and knowledge they bring to assist in the fight against organised crime.

As mentioned, the legislative changes were designed to bring a sense of fairness back into the criminal justice system. Whereas in the case of a murder or assault there is an opportunity for the victim or their family to sue the perpetrator, it is however often more difficult for the victims of organised crimes to sue the initial perpetrators (Stessens 2000). In the case of drug trafficking for instance, after an importation of heroin the drug itself may pass through several dealers before it reaches the addict. This would in theory make it difficult for the drug addict to claim compensation from the importer.

By examining court cases, the comments of judges and the experiences of forensic accountants, this paper will evaluate:

- the role of forensic accounting and forensic accountants in the fight against organised crime (Wall 2011) (Curtin 2011) (Ombudsmen 2003),
- the courts’ interpretation of and requirements for accepting forensic financial evidence
- some specific types of forensic accounting methodology,
- the new legislative weapon, unexplained wealth orders in the law enforcement arsenal within and outside Australia.
The paper will also discuss a new legislative weapon in the law enforcement arsenal of many countries, *unexplained wealth orders*. These are relatively new laws which require a person who lives beyond their means to justify their financial circumstances (Bartels 2010). Italy was one of the pioneers in the development of these laws. It introduced provisions where dangerous individuals (i.e. associates of Mafia type organisations and drug rings) can be deprived of their ill-gotten properties without conviction (World Bank 2001).\(^1\) It is enough for the prosecutor to prove that the property significantly exceeds the declared or known sources of income of the individual, who are in turn unable or unwilling to provide a satisfactory explanation as to their wealth (World Bank 2001).

In Australia these types of laws are currently in place in the Northern Territory\(^2\), Western Australia\(^3\) and were recently introduced in New South Wales\(^4\) and Commonwealth Parliament through changes to the *Proceeds of Crime Act 2002*(Cth) (Bartels 2010). Forensic accountants will and are playing a key function in the application of these laws (Wall 2011).

**ORGANISED CRIME – A DEFINITION**

Sociologists and criminologists have in the past had great difficulty in defining organised crime. The United Nations Convention against Transnational Crime signed in 2000 gives a very broad definition of organised crime as “structured groups of three or more people acting in concert to commit one or more serious crimes for material benefit” (Lunde 2004). The challenge with this type of definition is that it is so very broad and could therefore be applied to a number of criminal activities including street gangs. In this author’s opinion the key characteristic of organised crime that differentiates it from other crime is that it is an economic activity where the participants accumulate capital and then reinvest it back into the “business”.

There is another key feature of Organised Crime that makes it difficult to combat from a law and order perspective, and that is its propensity for violence (Lunde 2004). This means that witnesses are often reluctant to testify, making a conviction much more difficult. Law

\(^1\) Art. 2 ter of the Law 31 May 1965/ No. 575
\(^2\) Criminal Property Forfeiture Act 2002 (NT)
\(^3\) Criminal Property Confiscation Act 2000 (WA)
\(^4\) Criminal Assets Recovery Act 1990 (NSW)
enforcement has therefore had to adopt new and innovative approaches to combat this problem. The most recent and innovative response involves tackling the financial base of this type of crime. It is based on the principle that all organised criminals at some point want to spend the money they make from crime, so law enforcement needs to follow the trail of cash.

**THE ROLE OF FORENSIC ACCOUNTANTS IN THE FIGHT AGAINST ORGANISED CRIME**

The increased focus on the financial elements of organised crime has meant that forensic accountants now have a key role in assisting law enforcement agencies. They are often tasked to analyse the cash flow of criminals, provide advice to investigators and give evidence in court as to the financial status of criminals (Curtin 2011) (Wall 2011). Within Australia various police services are relying on forensic accountants to assist investigators. Some examples are as follows:

- **Victoria Police**

  Victoria Police employs some 14 forensic accountants with the last growth in numbers occurring in 2006-07. In terms of complex investigations involving organised crime, the Victoria Police adopt a multi-disciplined approach seconding accountants and solicitors to task force groups. An example of this was the Ceja taskforce, which investigated serious police corruption and links to organised crime (Ombudsmen 2003).

  Most routine matters however are Proceeds of Crime Investigations where forensic accountants try to establish how criminals spend their money and how they have funded the purchase of their assets. This allows the Victoria Police to seek restraining orders on criminal assets and seize them upon conviction. Tasking for such matters come through the central Victoria Police tasking coordination group through to the Manager of Forensic Accounting who then allocates work (Curtin 2011).

- **Northern Territory Police**

  The relatively small Northern Territory Police, with a total strength of only 1000 staff members (Wall 2011), employs a forensic accountant along with an assistant accountant in their Asset Forfeiture Unit. As will be shown in this paper this two-
person team has achieved some very impressive results with the Northern Territory’s Unexplained Wealth Provisions (Wall 2011).

• **Australian Federal Police (AFP)**

In August 2009 the Parliamentary Joint Committee on the Australian Crime Commission (ACC) made recommendations to the Australian Government that it should develop an integrated approach in the investigation and litigation of proceeds of crime (Australian Federal Police 2011). The government accepted this proposal and the first phase of the taskforce commenced in January 2011. The taskforce includes the AFP, Commonwealth DPP, ACC and the Australian Taxation Office (ATO). There is scope for other agencies to come on board if required. The taskforce’s charter is asset confiscation and financial investigations. Their main objective is as follows:

*Disrupting and deterring serious organised crime in Australia by removing the proceeds and instruments of Crime [i.e. the money]* (Australian Federal Police 2011).

The taskforce hopes to achieve this objective through the development of an asset confiscation strategy that is most suited to maximising disruption in each individual case whether via proceeds of crime action, tax remedies, civil debt recovery or recovery through international cooperation with foreign law enforcement agencies (Australian Federal Police 2011). The taskforce currently employs 14 forensic accountants nationwide.

**INTERPRETATION OF FINANCIAL EVIDENCE OF FORENSIC ACCOUNTANTS**

Before examining how forensic accountants can assist law enforcement in the case of organised crime, it is first important to discuss how the courts have previously and currently treat financial evidence.

In most cases such evidence is classified as opinion evidence. This creates a problem as under both common and statute law witnesses can only give evidence as to their observations. Witnesses’ opinions are therefore inadmissible as evidence in chief. It is up to the “trier of fact” (judge or jury) to form their own opinions based on the witnesses’ evidence. The trier of fact is assumed to have the requisite general knowledge to draw necessary inferences from the witness’ evidence. However, in cases where the trier’s knowledge on a particular subject
is limited, there is no choice but to seek assistance of knowledgeable experts. As noted in *Clark V Ryan* (1960) *108 CLR* experts are the only witnesses entitled to give opinion evidence. Evidence concerning the interpretation of financial information therefore falls into the category of opinion evidence. Justice Dixon further defined the admissibility test for such evidence as follows:

.. the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgement upon it without such assistance, in other words when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to obtain knowledge of it.

In terms of expert financial evidence, the two principal admissibility issues focussed upon by the courts have been the expertise and methodology of the forensic accountant (Freckelton and Selby 2009). Justice Robert Austin in *Australian Securities and Investment Commission V Rich* (2005) *190 FLR 242; [2005] NSWSC 149* at paragraph 256 further elaborated the principles below as key to the admissibility of forensic accounting evidence:

1. That the evidence if not admissible as evidence of fact must be evidence expressing the expert’s opinion;
2. The person put forward as an expert must possess specialised knowledge, training, study or experience;
3. That the expert’s opinion must be wholly or substantially based on his or her specialised knowledge;
4. That the expert’s report must distinguish between opinions and the facts on which they are based;
5. That the expert must set out his or her reasoning for each expressed opinion;
6. That where it is pertinent to do so the expert’s report must set out the reasoning by which certain information was considered and rejected or discounted for the purposes of the report;
7. That the expert’s opinion must be wholly or substantially based on the facts that can be proved by admissible evidence;
8. That the expert’s opinion and reasoning must be his or her own and not simply the adoption of work of someone else; and
9. That although the expert needs not be independent of the litigants he or she must be in a position to exclude from consideration everything except the matters identified as the facts upon which his or her opinions are based.

Indeed this particular case has been seminal in assessing how the courts deal with the evidence of forensic accountants.
In 2004, ASIC instituted proceedings against Mr. Rich and Mr. Silbermann, former directors of One.Tel Limited alleging that as directors they failed to act with a reasonable degree of care and diligence. ASIC sought orders prohibiting the defendants from managing corporations, and requested that they pay compensation of $92 000 000 (De Young 2005).

During the course of the trial, the defendants objected to ASIC tendering an expert forensic accounting report (Carter Report) prepared by Mr. Carter of PricewaterhouseCoopers. The Carter report dealt with the One.Tel Group's financial position, the reasons for the group's financial position, the nature of management reporting to the Board and the reduction in the net worth of the group (De Young 2005).

Justice Austin summarised the problems concerning the admissibility of Mr. Carter’s expert forensic accounting evidence at paragraph 33 of his final judgement⁵:

The principal difficulty was that he had been retained by ASIC shortly after its investigation began, essentially to assist it to sift through the evidence and to develop recommendations for the Commission as to the most appropriate proceedings. He prepared and presented a report for that purpose and was given unrestricted access to documents and persons, including former executive personnel at One.Tel. He was retained to prepare his forensic report for the court after he had submitted his previous report and ASIC had decided to embark on the present proceedings. It was not until his forensic report had reached the stage of a mature draft that someone at ASIC or in its legal team realised that it would not be possible for him to rely on all the sources of information that he had used for the earlier report: specifically, that he would not be able to rely on what he was told by former One.Tel personnel, because those individuals would not be called by ASIC to give evidence in the proceedings. The problem was not a problem about lack of independence, but rather about whether the court could be confident that Mr Carter’s expert opinions in his forensic report were free of influence from the matters he had been told to exclude.

The various roles of Forensic Accountants have been specifically spelled out in the *Accounting Professional and Ethical Standards Board* standard on forensic accounting services APES 215. This standard was released in December 2008 and replaced APS 11 *Statement of Forensic Accounting Standards* and GN 2 *Forensic Accounting* (Accounting Professional and Ethical Standards Board 2008b). In terms of defining what an expert witness

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⁵ Australian Securities and Investments Commission v RICH and Another [2009] NSWSC 1229
is, this standard follows the definition of Justice Austin\(^6\) as someone who expresses opinions to the court based on their specialised training, study or experience\(^7\). It stipulates that independence is a mandatory requirement for the role. The standard applies to accountants working in the corporate sector, in government, as well as those in accountancy firms, who are members of the three professional accounting bodies (Accounting Professional and Ethical Standards Board 2008b).\(^8\)

**SPECIFIC TYPES OF FORENSIC ACCOUNTING METHODOLOGY USED TO CALCULATE CRIMINAL INCOME**

Most of the methodologies used to calculate criminal income were originally developed by tax auditors to calculate recalcitrant taxpayer income (Curtin 2011) (Wall 2011). Generally national revenue administrators determine taxpayer compliance through direct and indirect methods of investigation using financial records. Direct methods rely on the verification of income or expenses by reference to their books and records used to prepare tax declarations by the taxpayer (Biber 2010). The indirect method involves determination of income through analysis of subject’s financial affairs, utilising information from a range of sources beyond the taxpayers control (Biber 2010). These assessments of income are based on circumstantial evidence, and in most instances would require a qualified expert to give *opinion based* evidence grounded on the assumptions in analysing the records. As most organised criminals either do not keep or go to extraordinary lengths to hide their business records, the indirect methods, centered on proving and assessing wealth, are probably most suited in the circumstances.

In terms of taxation legislation, the right to use indirect methods in most countries is derived from powers conferred on the tax authority, including the assessment and collection of taxes due and payable under those laws (Biber 2010). These indirect methods are not articulated in taxation legislation, as it would require a standardisation of definitions, descriptions and explanation of computations. This would lead to extremely large and complex legislation (Biber 2010). This lack of clarity has meant that it is currently up to the courts to determine if

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\(^7\) Paragraph 2 Definitions Section of APES 215

\(^8\) CPA Australia, the Institute of Chartered Accountants in Australia and the Institute of Public Accountants
the methodology used is reasonable. In Australia, the courts have held that an assessment will be valid if the (Taxation) Commissioner makes a genuine attempt to determine the taxpayers’ income. The estimation made may go close to being guesswork, and yet be lawful but a figure cannot simply be plucked out of the air (Biber 2010).

Forensic accountants who are involved in criminal investigations need to remember however that a key distinction between their role and that of the taxation auditor is that in Australia the ATO need only establish facts for a tribunal based on the balance of probabilities. Forensic accountants involved in a criminal investigation on the other hand, may need to establish facts beyond a reasonable doubt (Curtin 2011). This later assertion is a much higher standard, requiring in the case of opinion evidence, clearly set out assumptions. It also means that expert forensic accountants must be careful not to stray outside their area of expertise when giving evidence.

Although the terminology varies amongst various taxation auditors and forensic accountants, the three main indirect methods commonly used are:-

• asset betterment;
• the bank method; and
• cash flow analysis.

A respective analysis of these methodologies is outlined in the next section.

Asset Betterment

Asset betterment, also known as the net worth or asset accretion method, assumes that increases in net assets, after adjustments for income from non-criminal activities, represents a subject’s income from possible criminal sources. It is based on the theory that funds applied or expended cannot exceed funds available. The method relies on a detailed analysis of all assets, liabilities, expenditure and sources of funds to reconstruct the subjects’ financial affairs over a number of years. This method is favoured among revenue authorities, where the subject or taxpayer has accumulated considerable assets or had substantial changes in net worth over the same period of time (Biber 2010).
The formula tabled below illustrates the subject’s net worth (total assets less total liabilities) at the beginning and at the end of a financial year. The difference between these two amounts will be the increase or decrease in net worth of the individual. Adjustments could be made for income from non-criminal sources, however the forensic accountant would need to outline any assumptions made in his or her calculations (Biber 2010).

**Formula for computing income by Net Worth or Asset Betterment Method**

**Basic Assertion** - Assets less Liabilities = Net Worth

**Asset Betterment is:**
- Net worth at the End of Year
- Less
- Net worth at beginning of year
- Equals
- Increase or decrease in net worth
- Less
- Income from and expenditure for all non-criminal activities
  - i.e. including recurring and capital items as well as unusual items like gifts, inheritance, etc.
- Equals
- Unexplained Income (or Expenditure) if any.

Asset betterment has been accepted by courts around the world in most civil tax debt cases, however the US Supreme Court has cautioned that “it is so fraught with danger from the innocent, that the courts must scrutinize its use” (US Dept of Justice 2011a). In Australia the courts have allowed the Australian Taxation Office (ATO) to use asset betterment methodology, however they have stated that any tax assessment should be based on proper investigation and not raised on uniformed guesswork (Bentley 1994).

**Bank Deposit Method**

The bank deposit method is based on the premise that money received must either be deposited in a financial institution or spent (Biber 2010). This approach is particularly useful if a preliminary analysis of the subject’s bank accounts and expenditure indicates a likelihood of income from unknown sources (Biber 2010).
The bank deposit method involves a detailed analysis of all deposits into all business, personal and loan bank accounts that may be maintained or controlled by the subject. This provides the forensic accountant with a figure for the total deposits. Next the forensic accountant needs to deduct non-income receipts (i.e. gifts, gambling or inheritances) from this figure in order to establish gross receipts (Biber 2010). In coming up with a non-income figure, a forensic accountant may have to make judgements based on the established facts; for instance if the subject had a TAB gambling account which showed payments. It would thus be important for him or her to outline these assumptions.

Money not deposited into a bank needs to be accounted for separately (Biber 2010). The cash purchases of capital items and loan repayments for both personal and business use needs to be also determined. It may be open for any forensic accountant to give opinion evidence that personal or business expenses not paid out of bank accounts, were paid with cash. If this is the case then these assumptions need to be clearly articulated.

The result of this analysis will determine if there has been any increase in cash on hand. All of these factors can be determined through a detailed analysis of the subject’s financial affairs, which could include, but are not limited to, bank or credit card statements and an examination of public records concerning land title and motor vehicle registrations.

**Formula for using bank deposit and cash expenditure method**

*(Total deposits, including business and personal accounts).*

- Total Cash expenditure (cash payments for business, capital and private expenses)
- Add
- Increase in cash on hand
- Less
- Non Income receipts (e.g. loans or gifts)
- Equals
- Gross receipts as corrected
- Less
- Income from declared sources
- Equals
- Income from unknown sources.

The bank deposit method of proof has certain features in common with the asset betterment method of establishing income from unknown sources (US Dept of Justice 2011b). Both
methods are approximations, which seek to show by circumstantial means that a subject has an income from unknown sources. However unlike asset betterment, which considers year-end balances as well as asset acquisitions and liabilities, the focus in a bank deposit investigation is on the funds deposited during the period under review. Although the mechanics of arriving at a figure for an unknown or unsourced income are different, both methods involve similar underlying assumptions (US Dept of Justice 2011b). The bank deposit method is extensively used by the Internal Revenue Service in America, and has been approved by the courts in Gleckman v United States, 80 F.2d 394 (8th Cir 1936) (US Dept of Justice 2011b). The author has found no cases referenced in Australia where this methodology has been specifically challenged or discussed.

**Cash Flow Analysis**

A cash flow analysis, sometimes referred to as ‘Source and application of funds method’, ‘excess expenditure method’ or ‘T-account method’ is based on the theory that if expenditure exceeds declared income then undeclared income could be from criminal sources (Biber 2010). It is similar to the asset betterment analysis, however it is usually established over a much shorter period (Biber 2010).

From a basic income and expenditure principle one cannot spend more than one earns without going into debt. In the conventional accounting sense, a cash flow is used to describe the flow of funds through an organisation over a period of time. The available funds, which are calculated and identified, have enormous implications for any business, particularly as it determines the entities ability to pay debts and make necessary investments (Sutherland and Canwell 2004). This method requires a detailed analysis of all funds available to the subject, and increases and decreases are reflected in assets and liabilities. In terms of any cash flow analysis, all cash deposits and cash payments need to be considered as unsourced. This could result in an overstatement of inflows and outflows as an unsourced cash deposit into an account or an unsourced cash payment could be directly related to a prior untraced cash withdrawal from another account of the subject. In line with the primary role of the expert in being an impartial adviser to the court, any forensic accountant needs to develop a methodology that sets out assumptions to match these transactions. The important question is, how many days does one allow between a withdrawal from one account to a payment or deposit to another account to say it is the same set of funds (Wall 2011)?
In terms of the cash flow analysis methodology, the source of funds represents declared income, which the subject can substantiate. The application of funds includes increases in assets, purchases, expenses, personal living expenses and decreases in liabilities (Biber 2010).

**Formula for computing income by cash flow analysis or source and application of funds**

<table>
<thead>
<tr>
<th>Basic Assertion</th>
<th>Application of Funds</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Less Funds Available</td>
</tr>
<tr>
<td></td>
<td>Equals Unexplained Fund/Income</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Application of Funds</th>
<th>Source of Funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase in Asset</td>
<td>Decrease in Assets</td>
</tr>
<tr>
<td>Add</td>
<td>Add</td>
</tr>
<tr>
<td>Decrease in Liabilities</td>
<td>Increase in Liabilities</td>
</tr>
<tr>
<td>Add</td>
<td>Add</td>
</tr>
<tr>
<td>General Expenditure</td>
<td>Income from all declared sources</td>
</tr>
<tr>
<td>Equals</td>
<td>Equals</td>
</tr>
</tbody>
</table>

| Total Fund Applied/Used | Total Known Income |

The cash flow method is best suited to evaluate a shorter period of time than the asset betterment method. Provided all assumptions are clearly stated, the Victorian Supreme Court has accepted this methodology\(^9\) as a way of calculating income from criminal sources. The principles established in this case would also be highly persuasive in other Australian jurisdictions in cases where criminal income was an issue. A detailed cash flow analysis also has the added advantage of being able to offer corroborative evidence to the court by linking the receipt of funds by the accused to certain criminal actions (i.e. the receipt of funds to the sale of drugs).

**CASH FLOW ANALYSIS AND THE COURTS**

The *Queen V Ferguson, Sadler & Cox [2009] VSCA 198* is a *Victorian Supreme Court – Court of Appeal* case, which is, in the author’s opinion, pivotal in setting precedent on how forensic accounting methodology could be used to tackle organised crime. In the author’s

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\(^9\) Queen V Cox, Sadler & Ferguson [2009] VSCA 198
opinion this case re-affirms the consideration of Justice Austin in ASIC v RICH\textsuperscript{10} concerning the admissibility or discretionary exclusion of expert evidence, pertinent to forensic accounting. Specifically it exemplifies that forensic accountants need to outline all of their assumptions and not stray from their area of expertise. In writing this paper the author has also had the privilege of interviewing the principal forensic accountant in the aforementioned case, Mr. Gerard Curtin (Curtin), gaining an invaluable insight into some of the challenges after having his first expert forensic report excluded. In this case, Mr. Curtin had to rewrite his report mid-trial and clearly articulate all of his assumptions. Before I go into analysing his forensic accounting methodology, it is important to outline the basic premise of the case.

**Background of the case**

The three defendants (Ian Ferguson, Glenn Sadler & Stephen Cox) were Victoria Police drug squad detectives. The crown case was that the three men recruited drug traffickers by offering them heroin to on-sell for their mutual benefit. The crown alleged that the three men conducted their criminal activity under the guise of legitimate Victoria Police drug investigations. From August 1999 until early 2002, they sold allegedly 10 kilograms of high quality heroin estimated to be worth an estimated $1.5m. Joanne Ferguson, the wife of one of the detectives, was drawn into the conspiracy and actively participated in the alleged laundering and spending of substantial amounts of money (Ombudsmen 2003). In the author’s opinion, this case clearly typifies an organised criminal structure. It involves substantial criminal activity, a hierarchy of conspirators who also reinvested the proceeds to finance further drug purchases.

On 4 January 2006, a Supreme Court jury in Victoria found Ian Ferguson guilty of one count of conspiracy to traffic a commercial quantity of heroin, and one count of money laundering. He was sentenced to 12 years imprisonment. Stephen Cox and Glenn Sadler were separately charged in relation to the same conspiracy. They were tried together but separately from Ferguson. Sadler and Cox were sentenced to ten years and seven years respectively (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198).

In terms of the actual drug trafficking, the crown case relied on the evidence of Kenneth Lai. He testified that Cox and Sadler recruited and invited him to sell drugs on their behalf. He

\textsuperscript{10} Australian Securities and Investment Commission V Rich (2005) 190 FLR 242; [2005] NSWSC 149 at paragraph 256
alleged that they told him that they were able to supply him heroin at a lower price if he was willing to traffic on their behalf. The agreed deal was that he would give them about 30% to 40% of his profit. They also told him that if he helped them arrest drug dealers, they would give him a portion of the drugs seized (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198).

Lai assisted in providing evidence that enabled Ferguson, Sadler and Cox to arrest Duy Le. Le also agreed to sell heroin on behalf of Ferguson, Sadler & Cox. Lai subsequently absconded on bail. He continued to associate with Ferguson, Sadler & Cox in heroin transactions who in turn provided him with information on police attempts to arrest him.  

After an extensive police investigation, police arrested Le in New South Wales. He subsequently agreed to assist police in their investigation of Ferguson, Sadler & Cox. All three men were then arrested by the Ceja taskforce, a specialised investigative police unit established to tackle corruption in the Victoria Police (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198).

**Evidence from financial accountant: Gerard Curtin**

At the trials of the disgraced police officers, the Crown relied on the evidence of a forensic accountant, Gerard Curtin, to show that not only did Ferguson, Sadler & Cox benefit from drug trafficking, but that deposits into their bank accounts coincided with drug sales to their informers, Lai and Le (Curtin 2011).

Curtin undertook an extensive cash flow analysis, of the consolidated accounts of the family units of each of the three accused (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198). In terms of a criminal investigation, a cash flow analysis could be important in identifying unsourced income or linking the receipt of cash to criminal events.

In respect of his cash flow analysis, Curtin treated each family unit as a “business entity” where he had to identify, record, classify and summarise each transaction. His methodology can be outlined from his testimony which is as follows:

> Following the consolidation of all accounts an examination of all transactions records was conducted on a line-by-line basis to identify transactions between accounts that

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11 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 8
were specifically related, e.g. a mortgage payment by direct transfer from a savings account to a mortgage account. These transactions can be eliminated as they provide no additional cash flow...

Due to the nature of cash transactions and the limitations previously expressed, all cash deposits and cash payments are unsourced. All cash withdrawals are untraced. This could result in an overstatement of inflows and outflows as an unsourced cash deposit into an account or an unsourced cash payment could be directly related to a prior untraced cash withdrawal from another account...

A realistic approach to the cash flows estimates should recognise that an unsourced cash deposit into an account or an unsourced cash payment could be directly related to a prior untraced cash withdrawal from an account.

In order to minimise the limitations I adopted a method that would assist in eliminating transactions that could be “related” where specific information was not available. The method adopted is applied consistently throughout the analysis to ensure a uniform result.12

Curtin then adopted a number of assumptions and criteria, which he had to specify in his reports. The first stage of the process was to examine each untraced cash deposit or payment and compare it to untraced withdrawals taking into account the following criteria

1. Whether unsourced cash deposits were less than or equal to the untraced withdrawal
2. The amount of the unsourced cash deposit or payment;
3. The proximity of the unsourced cash deposit/payment to the prior untraced cash withdrawal (the period was generally three to four days, however this was flexible);
4. The proximity of the unsourced cash deposits/payment with other unsourced cash deposits/payments;
5. The constituency of the prior unsourced cash withdrawal and other untraced cash withdrawals;
6. The source of the unsourced cash withdrawal and the unsourced cash deposit/payment; and
7. The denominations of untraced cash withdrawals and unsourced cash deposits.13

Using this methodology, Curtin was able to offset unsourced cash deposits to cash withdrawals. Having undertaken this first preliminary stage, Curtin then undertook the second stage of the process, which was to determine whether there was any further information, which permitted a reduction of the unsourced cash deposit payments. These were as follows:

12 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 30
13 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 32
The amount of the unsourced deposit/payment;
• The consistency and proximity of the unsourced cash deposit/payment with other unsourced deposit/payment;
• Other untraced cash withdrawals within a three to four day period; and
• Other transactions detected/not detected around this time considering the consistency and the overall context of the transaction.\(^\text{14}\)

Curtin undertook a final process to obtain further information to see if he could offset further transactions. After this he was then left with a number of unsourced cash deposits, which he consolidated in chronological order on a monthly basis. As stated previously the prosecution ultimately made significant use of these unsourced cash deposits in putting its case to the jury. The examination showed that the defendants had unsourced income outside their police salaries.

The trial judge ruled that the first draft of Curtin’s report was inadmissable on the following two grounds.

1. Curtin had not made explicit the assumptions and criteria on the basis of which he made judgements and expressed opinions, about which cash payments and deposits were, and which were not unsourced; and

2. Even if these assumptions were explicitly outlined - was Curtin entitled to give expert evidence based on his background, studies and experience? The cross examination revealed that in part Curtin’s assumptions were made on the spending patterns of normal people. The judge concluded that this first report was not based on any recognised learning (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198). Curtin told the author that the judge’s conclusion came about when, during cross examination, he stated that he could always see certain transactional patterns in people’s spending, for instance when shopping was done on a Thursday at Coles.

Curtin also told the author that he never thought he would have to provide an outline of the methodology for eliminating transactions. He simply thought the court would only be interested in his list of final unsourced cash transactions, and not in how he was able to filter down other expenditure to be left with these transactions. Indeed when considering expert evidence, this author was of the view that it related only to complex financial or scientific matters in respect of which the court would give a decision. Most accountants do not think of

\[^\text{14}\] The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 33
simple cash flow analysis as something that requires the setting out of assumptions and opinions (Curtin 2011).

Curtin revised his report following the judge’s ruling, and made clear the assumptions and criteria that he employed to reach his conclusions. Curtin told the author that in redrafting his statement, prosecutors were also keen for him to make reference to an accounting standard dealing with cash flow analysis. This left him with a problem, as there was no specific standard dealing with cash flow analysis. Curtin had to rely on the newly issued “Statement of forensic accounting standard APS 11” in applying a standard of reasonableness to his cash flow assumptions. Clause 23 of that standard states as follows:

During the course of providing forensic accounting services, members may be instructed, or may seek, to utilise estimates or make assumptions concerning past or future events, facts or amounts, in circumstances where more data is not available. In such circumstances, members should ensure that the use of such estimates or assumptions is:

(a) reasonable in the circumstances; and
(b) suitably qualified and disclosed.

Curtin went on to state in his evidence that the concept of reasonableness was no more than a codification of what had been practiced in accounting for a long time (2006). Applying that standard, and using his experience in preparing cash flow analyses, he had developed a set of criteria and assumptions. Curtin did not develop these criteria and assumptions himself, but rather based it on the accounting concept of reasonableness. This was something Curtin had undertaken on a number of occasions, and was something common to all accountants (2006). The concept of reasonableness would appear to have provided the judge with sufficient security that Curtin, as an expert, was applying a recognised field of study rather than creating his own standards of assumptions and criteria (Wall 2011).

It is interesting to note that the new forensic accounting standard APES 215 does not outline anything in terms of the concept of ‘reasonableness’ in making assumptions (Accounting Professional and Ethical Standards Board 2008a). Paragraph 5.6 (i) does however state the following:

the significant assumptions upon which the opinions are based and the following matters in respect of each significant assumption:

(i) whether the Member was instructed to make the assumption or whether the Member chose to make the assumption; and

15 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 41
(ii) if the Member chose to make the assumption, then the reason why the Member made that choice

In the author’s opinion, the new forensic accounting standard APES 215 does not provide forensic accountants and the courts the same leeway in relying on the concept of reasonableness in making assumptions. It will be interesting to see how the courts interpret APES 215 in any future rulings.

After Curtin revised his report, the trial judge ruled that this second report was admissible. He noted that only a minority of the transactions were subject to a judgement call. He concluded that it was a matter of fairness to the accused that offset transactions be identified for the jury. The most important part of the first ruling is as follows:

Counsel for the accused have contended that the criteria and assumptions developed by Mr. Curtin are no more than principles relating to the normal spending habits of family units. However, on analysis, it is clear that the exercise conducted by Mr. Curtin was based essentially on an accountant’s methodology, and not based on any assumptions by him as to spending habits. For example, he was cross-examined as to why he would not off-set a smaller prior cash withdrawal against a larger subsequent cash deposit or cash payment in the same account. His response made it clear that as an accountant he would not offset the two amounts without being provided with further information. Similarly, Mr. Curtin stated that, in applying his criteria, he would not offset a cash deposit against a cash withdrawal where both transactions occurred from the same bank account. As an accountant he considered he would not be at liberty to offset the two transactions because they did not evidence a transfer of funds from one account to another. Each of those two responses, in my view, make it clear that, whatever similarity Mr. Curtin’s exercise bears to an assessment of the ordinary spending habits of a family unit, nonetheless the exercise performed by Mr. Curtin was based on an accountant’s methodology.16

It is interesting to note that throughout the judgment, the judges in the Supreme and the Court of Appeal refer to Curtin’s evidence in terms of a betterment analysis (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198). This description was based on the Crown inviting respective juries to infer ‘that there was an increase of $697 000 in the assets of Ferguson (R v Ferguson [2006] VSC 153) and of the other detectives17. In discussions with the author, Curtin disagreed with the judge’s assessment of his work as a betterment analysis. He described his analysis as a cash flow analysis where he was able to demonstrate cash

16 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 48
17 The Queen V Ferguson, Sadler & Cox [2009] VSCA 198 at paragraph 25
flowing into the defendants’ accounts after certain drug transactions. There was no analysis of detectives financial position at set points in time. This mis-match in description demonstrates the importance of a well-written report that clearly defines the accounting methodology used in the analysis.

As mentioned, ultimately the former detectives were found guilty at their Supreme Court trial, and they promptly appealed against conviction. Some of the grounds of appeal specifically related to the evidence of Curtin. The defendants’ legal representatives contended that his evidence should not have been admitted because it was not opinion evidence and because its prejudicial effects outweighed its probative value. In respect of the question of the admissibility, the Supreme Court Appeal judges ultimately agreed with the trial judge and concluded that his evidence was valid opinion evidence for the following reasons:

1. The subject matter of the opinion evidence was such that the tribunal of fact would not be able to form a correct judgment without the assistance of a suitably qualified expert.
2. The assistance that Curtin provided through his expert opinion is a fact or product of knowledge the court did not have.
3. Curtin was appropriately qualified to give the expert evidence in the form of the particular opinion sought to be adduced (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198) [paragraph 49].

In terms of the question of whether the probative value of Curtin’s evidence outweighed its prejudicial effects the Supreme Court Appeal judges again agreed in the affirmative. In a clear tribute to Curtin and his methodology they stated the following at paragraph 61 of the judgement:

We respectfully agree with his Honour’s analysis. The evidence had real and obvious probative value. Its value was enhanced, in our opinion, by the meticulous way in which Curtin had undertaken his task and by the clear and detailed form in which his assumptions, his methodology and his conclusions were set out in his reports.

The Supreme Court Appeal judges also noted the impartial way Curtin gave his evidence. When it was put to Curtin that one of the former police detectives ran a private investigations service, and that some of the unsourced deposits may have been cash payments, Curtin responded that he had assumed that the books of accounts (and tax returns) disclosed all amounts of income received and that the former detective had been totally honest in relation
to the list of expenditures for the business. The judges stated that these assumptions were “unimpeachable” (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198).

The importance of this case in terms of the forensic accountant

As stated previously, the analysis of Curtin’s work in this case by the Victorian Court of Appeal is seminal in developing a legally accepted methodology for the acceptance of forensic accounting analysis. It outlines for forensic accountants, particularly for those engaged in the fight against organised crime, that the probative value of forensic accounting evidence depends entirely on the logical force of the process of the reasoning based on the disclosed facts (The Queen V Ferguson, Sadler & Cox [2009] VSCA 198).

The aforementioned case also demonstrates that forensic accounting is not limited to complicated financial evidence, but can apply to a simple cash flow analysis. Even with simple accounting exercises, it is important to clearly articulate all of the underlying assumptions. Curtin was surprised that the court and the defence wanted to know his methodology in ruling out what he thought were clearly irrelevant or routine transactions. He thought they would only be interested in the transactions that were linked to drug monies, and he was incorrect. In line with the decision in *Australian Securities and Investment Commission V Rich* (2005) 190 FLR 242; [2005] NSWSC 149 forensic accountants not only need to set out their reasoning why certain information is included, but also why other information is excluded from any final analysis.

Finally, I think this case also demonstrates the importance for forensic accountants to stick to their own area of expertise. Attempting to speak about routine or normal spending patterns is fraught with difficulties and may complicate the final message.

NEW UNEXPLAINED WEALTH LAWS & THE FORENSIC ACCOUNTANT

Unexplained wealth laws are a recent development in the confiscation laws, which require a person who lives beyond their means to justify their financial circumstances (Bartels 2010). In such situations the onus of proof is on the individual whose wealth is in dispute to prove that it has not been derived from criminal means. If they cannot do this then the courts have the power to seize assets to the value of the unexplained income despite the fact that the person has not been charged with any criminal offence. Unexplained wealth laws are
currently in place in the Northern Territory\textsuperscript{18} and Western Australia\textsuperscript{19}. New South Wales and the Commonwealth have also just brought in similar legislation.

**The Purpose behind Unexplained Wealth Laws**

Laws of this nature are thought to deter would-be criminals by reducing the profitability of illegal activities and diminishing an offender’s ability to finance organised crime (Bartels 2010). Critics of these types of laws argue that they infringe on a person’s right to silence, and undermines the presumption of innocence (Clarke 2004). In jurisdictions with unexplained wealth laws, it is unnecessary to demonstrate that wealth has been obtained by criminal activity, but instead the state places the onus on the individual to prove that their wealth was acquired by legal means. These laws are quite contentious among various community groups and forensic accountants should understand that expert reports in these matters may be highly scrutinised. Therefore it is this author’s view that in order to better prepare themselves forensic accountants should understand the arguments for and against these laws.

**Arguments against Unexplained Wealth Laws**

There are many opponents to the confiscation of property through unexplained wealth provisions. Ben Clarke a Senior Lecturer in Law, University of Notre Dame, Western Australia, writing an article in the Criminal Law Review 2004 volume 28 “A man’s home is his castle — or is it? How to take people’s homes without convicting them of anything: The Criminal Property Confiscation Act 2000 (WA)” states the following about his concerns about unexplained wealth laws in Western Australia

> In a democratic society that observes the rule of law, depriving citizens of privately owned assets is a highly intrusive act of state. Such conduct is prima facie in conflict with norms such as the sanctity of property ownership, freedom of citizens from unnecessary interference by the state, and the right to privacy. The seizure of assets by organs of the state is a coercive exercise of power which should not be undertaken lightly.

Unlike previous proceeds of crime legislation where police have only been able to restrain criminal assets upon conviction by a court, there is great concern about the possibility of

\textsuperscript{18} Criminal Property Forfeiture Act 2002 (NT)

\textsuperscript{19} Criminal Property Confiscation Act 2000 (WA)
injustice regarding this law. Mr. Clarke gives a number of examples in his review article where the Western Australian legislation has caused hardship to possibly innocent people. In one case an elderly couple risked losing their house because their son hid 20 Kg of cannabis in their roof despite them claiming to know nothing about it (Clarke 2004). Forensic accountants could be used in these situations to investigate how this couple financed their house.

Other possible arguments against unexplained wealth provisions is that it discourages the guilty from pleading guilty in the face of overwhelming evidence thus adding expense to the community. It is also possible that it adds additional expense to the state in that a trustee may be required to be appointed to manage seized assets whilst matters are sorted out in court (Clarke 2004).

There are many within the judiciary and legal fraternity who have great problems with these types of laws. Bruce Wall, forensic accountant with the Northern Territory police has told the author that many judges, to whom he delivers his unexplained wealth affidavits, describe the Northern Territory’s version of this law as “odious”. There are obviously still many in the judiciary and legal fraternity that have problems with these laws (Clarke 2004).

**Arguments for Unexplained Wealth Laws**

However, to counter negative arguments the experience of many law enforcement agencies overseas in using unexplained wealth provisions remains quite positive. Under Section 75 of the United Kingdom Proceeds of Crime Act, the court can make a declaration against a person who is defined as having a criminal lifestyle, requiring that person to disprove that the assets acquired by them did not come from criminal conduct (Victoria Police 2010). Officers within the English *Serious Organised Crime Agency* have advised that they believe the ‘criminal lifestyle’ provision has been an effective tool in recovering criminal assets, however the matter may take up to three years before they go to trial (Victoria Police 2010).

As stated previously, Italy has also been at the forefront in developing this type of legislation. Police and Public Prosecutors can undertake investigation into suspected illegally obtained assets without having prima facie evidence of a crime (Victoria Police 2010). At the conclusion of such an investigation, the matter can be referred to a judge for further investigation. During any subsequent trial the burden of proof falls on the defendant to
explain the source of their assets (Victoria Police 2010). The Italian Central Director for Antidrug Services believes this process has been very effective in tackling organised drug crime.

In a submission to the Senate Committee considering the implementation of unexplained wealth provisions in the Commonwealth legislation [Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth)], Professor Rod Broadhurst from the Australian National University Regulation Institutions Network observed:

*tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in [organised crime] is usually indirect in terms of actual commission. Indeed, unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery that often facilitate serious crime* (Senate Legal and Constitutional Affairs Legislation Committee 2009).

In this author’s opinion, probably the best reason for the implementation of these types of laws can be found in the Explanatory Memorandum to the Serious and Organised Crime Bill 2009 which notes that:

*the existing confiscation mechanisms under Proceeds of Crime Act 2002 are not always effective in relation to those who remain at arm’s length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organized crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences...*

As previously mentioned, a number of states within Australia have already introduced unexplained wealth orders. The first of these was Western Australia in 2000\(^2\) (Bartels 2010). The Parliamentary speeches, when the act was introduced, stated it was targeted at “those people who apparently live beyond their means of legitimate support” (Bartels 2010). In Western Australia’s version of that legislation, the courts can make an order when a person’s wealth is greater than their acquired wealth. Courts have minimal discretion in this respect. Since its inception there have been a total of 24 Unexplained Wealth declarations (Bartels 2010).

\(^2\) Criminal Property Confiscation Act 2000 (WA)
The Northern Territory introduced unexplained wealth orders in 2003 (Criminal Property Forfeiture Act). At the time it was suggested that their legislation be built upon and improved on the Western Australian model (Bartels 2010). The Northern Territory has been “remarkably successful in utilising their wealth laws to seize assets from suspected organized criminals” (Parliamentary Joint Committee on the Australian Crime Commission 2009).

The author was able to interview the Northern Territory Police’s sole forensic accountant, Bruce Wall, regarding how this legislation works. Prior to joining the Territory Police as an unsworn member, he worked 20 years with the Serious Non-Compliance area of the Australian Taxation Office. It was his view that this background provided him with the skills to conduct unexplained wealth investigations (Wall 2011). According to Mr. Wall the Northern Territory has restrained \(^{21}\) $9 million dollars since 2004, with $3.74 million being forfeited to the crown.

Most of the Northern Territory unexplained wealth work comes from the Territory’s Police drug squad (Wall 2011) The orders however have a reverse onus of proof, in other words the subject must prove that their unexplained wealth did not come from criminal means. Mr. Wall outlined that none of his cases have so far been challenged, and all have been settled with some form of payment at mediation conferences. It will be interesting to see the situation in the Northern Territory if and when the unexplained wealth laws are challenged.

The Northern Territory legislation requires that police calculate a person’s total wealth, and their lawfully acquired wealth (Wall 2011). In all of his cases, Mr. Wall has used the Assets Betterment methodology in calculating unexplained wealth. He generally tries to assess wealth over a five-year period. Once his reports are written, the case is handed over to prosecutors in the Territory’s Department of Justice, who usually call on the services of “commercial savvy” barristers to represent the police in mediation conferences. Most subjects of unexplained wealth orders attempt to explain the wealth with gambling however they all eventually agree to settle (Wall 2011).

Bruce Wall has kindly given the author a sanitised version of one of his expert reports for an unexplained wealth hearing. The report is a well-crafted document in which Mr. Wall

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\(^{21}\) Restrain means that the owner cannot dispose of the property whilst the matter is settled at court
explains in great detail what an Asset Betterment Analysis is and how it works. He also states in a very general sense that his expert witness services are in accordance with the APES 215. In this author’s opinion, forensic accountants should go further and specifically outline in detail how their expert services are in accordance with APES 215 and the assumptions they make. Reference to a forensic accounting standard is important considering how the judge in the Queen V Ferguson, Sadler & Cox [2009] VSCA 198 took comfort in that the forensic accounting was a recognized body of learning (Curtin 2011). The expert report also has a number of spreadsheets, which demonstrate that, the subjects are in receipt of unexplained wealth.

CONCLUSION

In an ongoing column in the Melbourne Age Newspaper on the 29th of October 2011, the well-known Victorian Crime reporter John Silvester wrote “serious crooks it seems are more frightened of pen wielding accountants in mohair cardigans than gun-toting special operations police in Kevlar vests.” These somewhat stereotypical and slightly comical comments were made in the context of the changes to unexplained wealth laws, and how law enforcement is now focusing on chasing the money of criminals. It is however also an expression of the current emphasis in law enforcement policy which, as has been clearly articulated in this paper, is set to continue in earnest. There is also however much work to be done.

With the increased use of these types of laws in busting increasingly sophisticated organised crime syndicates, forensic accountants will have to refine their methodologies for determining unexplained income, and in so doing establish robust explanations of how they come to those conclusions. It is this author’s view that more and more of these cases will eventually go to court. The challenge will be for forensic accountants to continually learn from the cases discussed in this paper so that criminals would not be able to enjoy the profits of their crimes.
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