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## Accounting as a Medium of Juridification: The Pragmatic Context of Forfeiture Law and Its Application

Ian Kenneth Fargher

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**Accounting as a Medium of Juridification:  
The Pragmatic Context of Forfeiture Law and Its  
Application**

Ian Kenneth Fargher

*This thesis is presented as part of the requirements for the conferral of the degree:*

*Doctor of Philosophy*

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School of Accounting,  
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November 2017

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## Abstract

Authorities throughout the world have increased the presence of forfeiture legislation aimed at targeting the growing wealth of organised criminals. The concept of removing the use and enjoyment of tainted assets, the proceeds of crime, has become the governing mantra espoused as the driving force behind the juridification of confiscation statutes. The focus on criminal proceeds inevitably invites accounting, as a profession, to join the legal fraternity as a medium in the prosecution of forfeiture matters.

Accounting is invited to contribute to the forfeiture adjudication in regard to its economic expertise, that advises with regard to monetary considerations, such as, the valuation of assets, the movement of funds and in establishing unexplained wealth. This specialist area is referred to as forensic accounting, with its validating influence being felt as judicial advice within the courtroom and in the ratification of judicial remedies to the community. The research uses Habermasian (1929 to present) rationality to examine the enhanced active communication arising from the facticity of accounting within the context of the legal system.

Resisting the totality of reliance upon the philosophical thought of one proponent, this dissertation applies the research of critical accounting researchers to the role accounting plays in the provision of validating expert evidence. Professional accounting attributes, simultaneously position accounting technologies inside and outside the courtroom. The treatise recognises the appropriate use of professionally endorsed patterned accounting principles that provide reliable substantiation and assist the communication of judicial decision-making.

Pragmatically, the research questions then consider the endorsement of appropriately deployed patterned accounting principles for use in forfeiture matters. Through the broad application of uniform evidence rules, it is argued that the presentation of expert forensic

accounting methodologies in legislative genres that engage similar issues to those of forfeiture, present valid utility when applied to the determination of unexplained wealth. Further the treatise reviews 48 cases reported under the unexplained wealth provisions of forfeiture legislation between 2011 and 2016.

The thesis concludes with the recognition of the role accounting plays in the juridification of forfeiture law, based on the proposition that the deployment of forensic accounting technologies, using professionally supported patterned principles, is a valid strategic approach to the denial of the enjoyment of the proceeds of crime. However, contrary to the rhetoric attendant with the introduction of juridified statutory clauses, the research fails to show the broad implementation of forensic accounting in support of unexplained wealth strategies. As a policy recommendation, this thesis suggests that a number of policy aims would be better realised if forensic accounting technology were to be more fully recognised and deployed in the service of the aims of the forfeiture statutes.

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## Chapter 1: Introduction

For three decades courts in the developed world have expanded modern forfeiture law as a means to recover private wealth that is – demonstratively or presumably – the product of the proceeds of criminal activity. Much of this process is expected to depend upon the deployment of accounting technology; more particularly, those forms associated with the area of *forensic accounting*. This deployment requires the valid communication of accepted accountancy skills that are recognised by the accounting profession. This communication must come through the legal profession, the members of which are not necessarily knowledgeable about accounting principles. The purpose of this thesis is to examine the nature of such deployment, both in the positioning of accounting within the legal context and operationally in the recent history of case law.

This thesis aims not to extend forensic accounting technologies, but to study the legitimisation process of how the accounting profession brings forth knowledge in the context of court-recognised expertise. Building on generally accepted accounting practices, the thesis's enquiry is into the integration of accounting knowledge, as applied to the facts before the court, in a manner that is legitimised by the legal profession and the community ultimately accepts. In fact, accountancy competencies that are broadly practiced by CPAs or Chartered Accountants<sup>1</sup> as basic skills may not be able to provide the communication and legitimacy the forensic accountant requires to serve as an expert influence. The research aim is to illuminate the legitimisation and communicative action strategies deployed between the expert accountants and the legal profession, with particular emphasis on the new legislative genre of providing remedies for unexplained wealth.

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<sup>1</sup> The reference to CPAs and Chartered Accountants is a broad description of accounting accreditation; that is, fulfilment of the requirements for membership of CPA Australia and/or the Australian and New Zealand Institute of Chartered Accountants.

To that end, this thesis will consider the contribution of legal and accounting theorists (such as Habermas 1987, 1996; Weber, 1905; Nozick, 1974; Robson, 1992; and Latour 1987,1988a) to understanding role of accounting as a medium (or vehicle) that influences democratic support for the legislative expansion inherent in juridification, specifically as applied to asset forfeiture. At the practical level, the research will examine 48 case judgements taken from the Australian Commonwealth, State and Territory legislatures, the rules of opinion evidence, several judicial and parliamentary reports into confiscation legislation and the history of forfeiture statutes in order to provide the first comprehensive conceptual and historical framework to understand how accounting evidence has functioned, specifically in relation to forfeiture law. Whilst the thesis's primary focus will be the Australian jurisdictions, countries such as the United Kingdom, the United States and Ireland occupy influential positions that affect the proliferation of forfeiture legislation both in the requirement for such statutes, the manner in which the law is crafted and the degree of administrative influence<sup>2</sup> (Young, 2009). Accounting itself is recognised as having an important role in distributive justice, and its integration with the legal process of confiscation gives expert accounting evidence the potential to contribute to judicial decision-making and perceptions of truth and fairness<sup>3</sup>. Therefore, the application of this study's findings should be widely applicable to jurisdictions beyond the countries it examines. The importance of this research lies in its systematic articulation of professionally accepted forensic accounting processes as it rationalises accounting's role in law, and in the reflective and critical questions that emerge from this process about the appropriateness of accounting as a medium that participates in the determination and distribution of both justice and liberty. Specifically,

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<sup>2</sup> Note the inclusion of Ireland due to its early adoption of a holistic approach to the administration of forfeiture laws (multi-agency taskforce) and Ireland's consequent influence on the European Union. Irish legislators were called upon to pursue innovative responses to the management of organised crime following the high-profile murder of journalist Veronica Guerin in June 1996. The Irish response was an early integration of accounting and legal expertise into the one taskforce approach.

<sup>3</sup> This statement will be discussed at length later in this thesis with reference to the accounting literature and its context of providing a true and accurate account of money-related issues and compliance strategies.

these questions concern the idea of just deserts (see Rawls, 1971; Nozick, 1974) and questions of liberty that focus on the right to the enjoyment of one's private property without coercive State practices (see Mill, 1864; Nozick, 1974). This thesis provides an original contribution to the knowledge of accounting as expert evidence, specifically as entered into the court for matters pertaining to criminal forfeiture. Moreover, because judicial remedy is most often dispensed in monetary terms, this thesis informs the application of accounting as a medium that has a growing influence in distributive justice, which is a strong element in the judiciary's struggle to adjudicate the 'right'<sup>4</sup> decision and the community's acceptance of the 'correct' remedy.

The modernist position of accounting holds that the numbers that constitute the tools of accounting reflect reality (Gaffikin, 2008, p40), giving rise to accounting's perceived reliability. However, accounting theorists recognise both quantitative and qualitative aspects of accounting (Arrington and Puxty, 1991; Chua, 1995) as accountants make professional decisions based on how specific modes of accounting technology are deployed, and in what context. In this regard, accounting has attributes of both art and science: the art of interpretation and the rigour of scientific repetition. This leads to questions of what accounting technologies are used, and how they are appropriately applied, to deliver valid meaning and reliable authority to the legal adjudication process. The legal system is obviously governed by the legal profession; however, when economic impact must be articulated, forensic accountants have an instrumental role in contributing to the trier of fact's resolution. The question then arises, particularly for lawyers without accounting skills, as to exactly how individual accounting technologies are recognised as providing valid advice to the judicial process.

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<sup>4</sup> The right or correct judgement is a complex notion subject to various lenses, contexts and due processes. The attributes of a 'right' or 'correct' decision will be revisited later in this dissertation and will inform the method used in this research.

This research broadly considers this dilemma. Initially it draws on the academic considerations of the highly influential German social and political philosopher Jurgen Habermas (1929 to present). As he is a member of the second generation of the Frankfurt Institute<sup>5</sup>, Habermas' his thinking informs a range of professional domains, including law and accounting,<sup>6</sup> establishing the foundations of a normative version of critical social theory based on a general theory of human interests, knowledge and inquiry. He describes the law as a colonising influence on society, or, as he terms it, the 'lifeworld'. He proposes a test for whether substantive claims will be approved by the law and the system whilst being accepted by the lifeworld. 'This test consists of universal rules of discourse – reciprocal accountability, inclusiveness, freedom to question claims and to presuppose counter-claims, and non-coercion'<sup>7</sup> (Lehman, 2006, p8). In this manner, Habermas offers accountants a way to determine whether accounting maxims are valid or invalid at the quantitative and qualitative levels, and their subsequent contribution to the broader discourse on legitimacy. Habermas postulates his ideal speech framework as 'an intuitive reflection of the conditions people would use to justify validity claims' (Lehman, 2006, p26). More directly, his research connects the transportability attributes of accounting, as described by Latour (1987, 1988a) and Robson (1992), to place the accounting discourse simultaneously inside the courtroom and outside in the community. In this way, he articulates the same reasoning, distilled from the dominant logic of economics, to enable accounting to function in both an internal and external medium.

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<sup>5</sup> The Frankfurt Institute, otherwise known as the Frankfurt School, refers to a group of post-World War II researchers who initially applied Marxism to the development of a radical interdisciplinary social theory ([www.britannica.com/biography/Jurgen-Habermas](http://www.britannica.com/biography/Jurgen-Habermas) accessed August, 2015).

<sup>6</sup> Although Habermas does not directly write about accounting, his thinking has been broadly applied to accounting as a profession; for example, see Power and Laughlin (1996).

<sup>7</sup> Habermas (1993, pp56–57) states that 'we presuppose a dialogical situation that satisfies ideal conditions in a number of respects, including...freedom of access, equal rights to participate, truthfulness on the part of participants, absence of coercion in taking positions, and so forth' (p56).

As this accounting research is positioned within a legal framework, it examines the significance of the court and court rules in promoting impartiality and rational discourse and testing of the validity of expert (accounting) statements. The research discussion recognises the court's obligatory passage points and entry barriers (Clegg, 1989) for reasonable adjudication, avoiding relativism<sup>8</sup>. It contemplates the nature of expertise, identifying those of its attributes that challenge and enhance communication. The research proposes that expertise is democratised through the emergency of patterned principles that interpret accounting maxims and statements as properly validated within the court; yet, at the same time, they create links with society's structure and its common norms and values.

The research argument examines the pragmatic context and application of forfeiture law; therefore, it considers the history and modern gestation of forfeiture statutes as the context for the legislation itself and for the judicial decision-making. Whilst forfeiture statutes have long-standing roots, the modern use of confiscation remedies to address serious and organised crime is punctuated with reports and official statements that position accounting technologies alongside the law to address 'follow the money' deprivation strategies. Further, the research will consider the evidential environment, particularly from the formal legal perspective (Uniform Evidence Act 2008), to appropriately equalise the accounting expert evidence in matters that have been brought to the court under different statutes<sup>9</sup>. The research will also review bureaucratic reporting with respect to the achievements in responding to organised crime that have emerged from the implementation of state-sponsored forfeiture. For this review,

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<sup>8</sup> In other words, this research presupposes that truth, knowledge and morality exist not just in relation to culture, society and historical context, but in accordance with a system of rules and norms reflected in duly processed (juridified) statutes, administered by a legal process.

<sup>9</sup> The rules of evidence pertaining to opinions expressed based on specialist knowledge are now based upon the same interpretation of expert-evidence rules as applied across common law (Feckleton and Selby, 2002). This facilitates consideration of expertise from one legal genre into another, removing the necessity to re-establish basic admissibility.

jurisdictional authorities' annual reports have been assessed individually and collated for comparison with the stated objectives of the statutes.

The final part of this dissertation is based on the reported judgements of cases, from matters brought under several non-forfeiture legislative genres (such as taxation and equity) and the 48 reported forfeiture cases between 2011 and 2016. The inquiry specifically targets the accounting technology that supported forensic accounting arguments relevant to the State's confiscation of assets. To this end, the research aims to identify the patterned principles associated with the use of specific forensic accounting technologies and then the reasoning that would allow transference from the non-confiscation legislative genre to matters that arise under forfeiture legislation or, pre-emptively, in developing 'follow the money' strategies.

## Research Questions

The thesis follows a mainly interpretive path. The main research question is:

1. Descriptively, how has the application of accounting technologies in forfeiture law cases evolved?

To provide a scholarly contribution to the future of accounting evidence, as well as to forensic accounting and its interface with the law and judiciary, the first research question leads to the second:

2. What are the attributes of the 'appropriate'<sup>10</sup> accounting technologies described in question (1)?

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<sup>10</sup> The attributes of 'appropriateness' will be discussed further in the theoretical and methodology sections of this proposal; see Chapters 3 and 7.

## Structure of this Research

This thesis is structured in 10 chapters:

1. Introduction
2. Definitions and Concepts
3. Literature Review
4. The Research Argument
5. Formal Acceptance of Expert Evidence
6. Forfeiture Legislation
7. Expert Opinion Evidence
8. Accounting Evidence
9. Forensic Accounting Expertise in Forfeiture Legislation
10. Conclusions and Further Research

### Chapter 1: Introduction

This chapter introduces the scope of the research and the research questions. It provides an end-to-end view of the issues discussed in the dissertation, and how that discussion relates to answering the research questions within the academic scope of the dissertation.

### Chapter 2: Definitions and Concepts

Chapter 2 considers a number of underlying concepts that pertain to the consideration of legal and accounting principles and philosophy. It is important to consider these concepts separately before they are brought together, informed by the literature review, as a contribution to the research argument in Chapters 3 and 4. The dissertation's foundation within Habermasian logical rhetoric frames the role of expertise, specifically forensic accounting expertise, with influence in a communicative structure involving rational

validation and simultaneous alignment to the lifeworld and the system. Contextual topics, by their nature and complexity, may justify dissertations of their own; however, this chapter serves to position such topics within the scope of this thesis.

### **Chapter 3: Literature Review**

Rather than relying entirely on the philosophical thought of one proponent, this dissertation draws from a range of thought that combines legal and accounting considerations with relevant sociological contributions. It presents the theoretical diagram (Chapter 3, p49) that illustrates the core position of accounting in this thesis: it absorbs intellectual and practical influence and radiates the translation of a range of philosophical and procedural considerations within a rational legal system and lifeworld structure. Consequently, the literature review is presented by topic before the individual concepts are integrated into the research's logical argument (Chapter 4).

Consideration of Habermas's description of the role of expertise in communicative action dominates the initial literature review; however, as Habermas did not directly address the role of accounting, let alone that of forensic accounting, many other considerations can inform the research narrative. Habermas positions expertise as an influencing agent or a medium; however, he argues that expertise needs to be understood in order to sway communication. Other theoretical considerations assist this understanding, chiefly theories of redistribution, the collaborative functions of the legal and accounting professions, the nature of the accounting metaphor and the influence of its inscriptions on revealing the 'truth'. These concepts, illuminated through the literature review, contextualise the connections that flow between the steps in the research argument in Chapter 4.



## **Chapter 4: The Research Argument**

The fourth chapter uses the concepts discussed in the literature review to form a stepped argument that articulates the role of forensic accounting in juridification, adjudication and communication of the judicial decision. The chapter argues that the legal profession requires accounting expertise to contribute to the discourse that underpins their decision-making process and validates its economic remedies, particularly when these are articulated and settled in monetary terms. Accounting expertise legitimises the legal argument by applying the accounting metaphor to numerically quantify, validate and translate the court's judgement for internal and external audiences.

Through evaluation of a credentialed patterned principle of implementation and justice, crafted from peer-accepted forensic accounting knowledge and methodologies, this chapter considers how the 'correctness' of the judicial decision is communicated. Validation of the ontological attributes of these methodologies is also considered at a more pragmatic level, with specific application to forfeiture legislation; it is applied in later chapters to answering the research questions.

## **Chapter 5: Formal Acceptance of Expert Evidence**

This chapter provides an important context for the role of expertise within the court, from a pragmatic viewpoint based on statutes, precedents and professional guidance. Accounting expertise must be seen as a recognised area of professional expertise that the legal profession formally invites into proceedings, in the category of expert opinion evidence (Unified Evidence Acts, 2008). The law controls the obligatory passage points and tests that must be passed before access to the trier of fact is granted. This chapter commences with the important recognition that evidence presented in court usually arises from a direct witness,

but that an exception has been made to allow the presentation of expert opinion in the form of expert witness testimony. The purpose of such testimony, also known as opinion evidence, is to add to the discourse that assists the trier of fact to adjudicate the matter, and aims to extend judicial knowledge through expert analysis, interpretation and explanation. To be heard by the court, it must be relevant to a fact in the matter and not unduly prejudicial. This chapter reviews the judicial determinations and deliberations with regard to the acceptance of evidence, and examines the changing statutory obligations and specific attributes built up from common law and from higher court and eminent judicial precedents. The chapter concedes that expert access to the court is at legal discretion and, as discussed by Harbermas, is not always transparent and clear. Once entered, expert evidence is subject to a range of practical legitimacy tests, from logical analysis and proper explanation to cross-examination. It is admitted that access to the court is paramount, as without presentation to the trier of fact, the expert's opinion cannot contribute to the debate.

The chapter moves on to review the attributes that the accounting profession itself has issued in the form of binding instructions to qualified forensic accountants. The elements of relevant Accounting Professional and Ethical Standards are considered together with their alignment with legal standards and evidence statutes. This chapter contributes to the response to the research questions by illuminating the legal acceptance and validation of expert accounting evidence.

## **Chapter 6: Forfeiture Legislation**

This chapter considers forfeiture legislation as a genre, including both Proceeds of Crime Acts ('*POCA*', '*POC*') and Unexplained Wealth ('*UW*') variants. It is important to understand the gestation and changing purpose of the legislation, as well as its history: from its earliest manifestations of attainder, deodand, and smuggling, through to the resurrection of asset confiscation as a method to curtail the profits of the drug trade. The 'modern'

interpretation of forfeiture legislation as a national and international response to target the assets of criminals involved in money laundering and organised crime is considered from the viewpoint of treaty-led juridification. The chapter's legislative focus remains on the Australian debate that has led to the harmonisation of Commonwealth, State and Territory statutes. The chapter reviews the conclusions, recommendations and agreements of several national and international conference outputs and reports, and examines the input of key contributors from entities such as the United Nations, crime commissions and the police. Incremental juridification is identified as statutes progressively incorporate new and further powers, such as the reverse onus of proof, combinations of civil and criminal remedies and unexplained-wealth provisions. The changes in administrative and evidential requirements that increase the need for accounting expertise are highlighted, along with specific provisions that require accounting attention, such as the provision of accounting evidence to support or oppose a POCA/UW application.

This chapter reviews the generic attributes of forfeiture legislation, then considers specific provisions relevant to expert evidence testimony within the forfeiture genre. This shows that statutory requirements can inform the pragmatic responses to the research questions, as is examined in later chapters.

## **Chapter 7: Effectiveness of Forfeiture Legislation**

This chapter considers the effectiveness of forfeiture legislation by comparing its espoused aims at its introduction with the published outcomes of its enforcement by the accountable bureaucracy. The reasons cited for the introduction and juridification of POCA and UW statutes rely primarily on depriving criminals of their use and enjoyment of ill-gotten gains. It is important to evaluate this objective because its achievement or otherwise distinguishes the claims made in support of specific juridification, such as in the parliamentary debate about the introduction of changes to legislation. The chapter relies on the information provided

annually across each Australian jurisdiction about the progressive application of forfeiture remedies. This information is mostly provided in a minimalistic quantitative manner as a small part of holistic agency reporting. The information pertaining to confiscation matters is initially reported in this thesis across individual jurisdictions before being aggregated and compared to the aggregated information with regard to organised crime, the primary target area of forfeiture. None of the various jurisdictions presents combined information, despite the recognition that organised crime knows no administrative borders.

This chapter compares the value of confiscated or retained property with estimations of the economic proceeds and effects of organised crime. Given the massive imbalance between the confiscated sums and the estimations, it is uncertain whether the deployment of accounting technology is an effective response to the espoused forfeiture objectives and an appropriate basis for juridification in the forfeiture legislative genre. Progressive trends and the effect of increased injection of accounting expertise into the compliance and investigative domain through more recent task-force responses give rise to questions for further research. Australian outcomes and approaches are contrasted with international experience, specifically noting the issue of attrition and the accounting expertise either brought into or inherent in the judicial and administrative structures that address forfeiture. This dissertation's conclusions and assessments regarding the effectiveness of forfeiture legislation contextualise the contribution made by the proper deployment of accounting technologies at the case (matter) level. The chapter thus broadly informs the response to the research questions as well as directions for future research.

## **Chapter 8: Accounting Evidence**

Chapter 8 examines the evidence given in court by forensic accountants in matters that bear similarities to forfeiture cases. For example, cases that include judicial interpretation and comment on accounting issues that concern valuation, cost of living and undeclared cash

transactions direct the precedent for forfeiture matters, even though the case at hand may be from another statutory genre. In this regard, forensic accounting evidence in matters brought under the taxation acts, equity claims and family law gives an indication as to the courts' legal acceptance of accounting technology and particular forensic accounting methodologies and methods. This review is important, as it provides a judicially "consecrated" addition to the accounting evidence narrative, which can be transposed to areas of forfeiture jurisprudence on a case-by-case basis.

The chapter reviews the relationship of forfeiture jurisprudence at the issue level with the legal and accounting concepts relevant to asset confiscation. Whilst the chapter maintains its central focus on Australian jurisdictions, it refers to judicial comment from key international legislatures where appropriate. The purpose of considering forensic accounting evidence from genres other than forfeiture litigation, and from other jurisdictions, is to understand the actual legal interpretation of forensic accounting evidence by judges. This interpretation includes the balance of different experts' opinions and the judge's integration of the accounting facts with other legal objectives. For example, judges in family law have, over time and through precedent, referred to the concept of "value to the owner" (Scott and Scott, 2006 at 45)<sup>11</sup> that does not fully align with an accounting valuation, yet has become the dominant valuation concept to be deployed by forensic accountants in family law matters. As the court favours this dominant concept, forensic accountants must now address their accounting technology to report on and evaluate the "value to the owner". Pragmatically, adherence to an accepted judicial view of accounting evidence provides significant input into this dissertation's response to the research question, as one of the main objectives of expert opinion evidence is to influence the adjudicative discourse. If an accounting technology has been accepted in some judicial form, it therefore influences the court unless explicitly set

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<sup>11</sup> "The concept of 'value to owner' considers and takes into account the benefits to a particular owner even though this may not be based on a hypothetical third party purchaser" Scott & Scott (2006) FamCA 1379 at 45.

apart. If an accounting technology has not been hitherto accepted by a court, it may have to be presented with extensive reasoning to justify its selection and validity. Because accepted accounting methodologies transfer to patterned principles that underpin the clarification of accounting concepts across legal genres, the specific accounting practices discussed here are detailed in the appendices. The accounting ontology, methodology and methods referred to in this dissertation professionally peer supported, demonstrating attributes aligned to accounting knowledge and skills that could also be applied to POCA and UW matters. The outcomes of this chapter's research inform facets of the response to the second research question, sponsored by their prior application within various legal genres, yet validated with respect to the essential attributes of confiscation. These research outcomes inform the future development of forfeiture strategies that rely heavily on accounting to articulate income and measure gaps that indicate the use and enjoyment of tainted funds.

## **Chapter 9: Forensic Accounting Evidence for Forfeiture Matters**

This chapter provides the pragmatic basis for answering the research questions, through the review of the judgements in 48 forfeiture cases. Based on the theoretical positioning of expert evidence considered in earlier chapters, the case-level review maps the development of forensic accounting evidence specifically in confiscation matters. Judicial comment on the acceptance or denial of the accounting technologies and methods presented to the court is compared with the credence expected to be shown to the accounting evidence where it concurs with the content and approach discussed in earlier chapters (particularly Chapters 7 and 8). The ontological alignment of accounting gap analysis methodologies as applied to the

structure of forfeiture legislation is broadly discussed, and the specific sections of the Australian statutes that the judiciary have considered in obiter dicta<sup>12</sup> are considered.

The first research question is specifically answered from an internal court perspective based on the contextual material in earlier chapters, considered in conjunction with judicial feedback contained in official judgement summaries at the case level. The second research question is answered from an external perspective through the articulation of the proper accounting solution to address the particular issues that arise between the legal discourse, judicial decisions and community norms. For example, the deployment of accounting gap analysis methodologies, coupled with valid precedent responses that constitute a strategic approach to specifying the sources of tainted funds and unexplained wealth. It is noted that this chapter reflects on the potential for the use of pre-emptive accounting strategies to support UW litigation; however, analysis of case judgements fails to reflect such strategic approaches being put before the court.

## **Chapter 10: Conclusions and Further Research**

The final chapter revisits the topic of this dissertation and reflects on the particularisation of the two tranches: a theoretical and a practical response to the role of accounting as a medium of juridification. The chapter notes the incongruence between accounting's articulated facilitation role enunciated during and after the juridification process and the lack of focus on the deployment of accounting-led strategies to address the repatriation of tainted funds from criminals. The chapter reflects on the role of accounting in the matters put to the court and as an influencing medium of juridification, finding that the judgements indicate an absence of strategic use of accounting technologies as a direct, pre-emptive assault on organised crime,

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<sup>12</sup> 'Obiter dicta' refers to the judge's expression of opinion or consideration of an issue in court or in a written judgement.

contrary to the espoused aims of the statutes when presented to parliaments in the act of juridification.

The chapter also revisits the research questions in light of the investigation and context of the previous chapters:

- a. Descriptively, how has the application of accounting technologies in forfeiture law evolved? and
- b. What are the attributes of ‘appropriate’ accounting technologies described in question (a)?

The responses to these questions are related to the value of this dissertation in terms of additional knowledge available to forensic accountants and expert accounting witnesses. Future research is suggested that could be undertaken into the patterned principles that would legitimise the role of accounting as a fulcrum to advance strategies aimed at the identification and quantification of tainted funds arising from and use for, but not necessarily directly linked to, organised crime.



## Chapter 2: Definitions and Concepts

This chapter introduces the discussion of definitions and concepts, including the varying use of terminology associated with the accounting processes that bear on this dissertation. For clarification, Table 2.1 provides a brief reference to the separation of definitions and concepts that evolve from the dissertation's title.

<b>Table 2.1: Definition and Concepts Summary</b>	
Forensic Accounting Technology	Refers broadly to the deployment of a range of accounting techniques in a manner that facilitates discussion in debates or forums.
Accounting as a Medium of Juridification	Generally, refers to an increase in formal statutes or law
The Pragmatic Context of Forfeiture Law and Its Application	Refers to the setting within which to explore how accounting influences the objectives of redistributive justice.

A significant motivation for undertaking this thesis topic is that, in the writer's experience<sup>1314</sup>, members of the legal profession make little or no distinction between basic numbers and accounting, viewing accounting simply as the rote production of a report or 'set of figures'. Yet professional accountants (particularly scholars of critical accounting)

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<sup>13</sup> The author's experience includes the provision of over 100 accounting expert court reports as well as 10 years as a senior public servant with the Australian Taxation Office, where duties included regular meetings with the Commonwealth Director of Public Prosecutions to monitor and pursue prosecutions linked with taxation.

<sup>14</sup> The author's experience has not led to this research being reflexive, as it has not influenced the approach to the research or the method of analysis. In this regard the author's experience has merely given rise to the important recognition of the issue of strategic active communication between expert accountants, the legal profession and the lifeworld.

recognise that accounting has both quantitative and qualitative attributes (Chua, 1986; Arens and Chapman, 2006; Gaffikin, 2008). Particular terms, including the word *accounting* itself, represent slightly different, yet aligned, concepts. The word *accounting* refers to the body of accounting knowledge that distinguishes it as a profession that includes the certified associations and membership of accounting bodies. Membership is granted following the passing of specified barriers to entry, such as academic and practical competence in a core set of accounting skills and knowledge. This is an important distinction because professional accreditation recognises the acquisition of an exclusive body of knowledge – that is, expertise – as hegemonically recognised both within and outside the profession. The term *accounting technology* represents the technical consolidation of accounting methodologies<sup>15</sup>; that is, the reasoned thought behind *accounting methods* that ontologically validates those methods when properly performed. *Accounting methods* are the processes that lead to the production of accounting outputs such as financial reports, quantification techniques and analysis. *Accounting action* refers to the actions that arise from accounting methods and, in a Habermasian<sup>16</sup> sense, contribute to communicative action. The term accountingization will be discussed in detail in Chapter 3, represents the use of accounting as a behavioural direction mechanism; for example, using accounting measures to reward particular behaviours, outcomes and ‘efficiencies’<sup>17</sup>.

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<sup>15</sup> In the absence of a theory of accounting, the accounting genealogy has been constructed through the peer acceptance of various methodologies providing conceptual rigour. The profession and accounting bodies (sometimes government-supported) define methodological acceptability, which they enforce through membership and disciplinary constraints. Consistent with a modernist vision, the accepted accounting methodologies were initially seen to lie within the philosophy of science; however, in the late 20<sup>th</sup> century they have been augmented by theories of economics, finance and psychology (see Gaffikin, 2008).

<sup>16</sup> The philosophy of Habermas will be extensively considered in this dissertation. The reference here is that accounting action contributes to Habermas’s process of communicative action (Habermas, 1984)

<sup>17</sup> There is debate in areas such as health and welfare about the actual achievement or desirable effect of accounting-directed efficiencies and cultural change. Nevertheless, accounting-directed efficiencies are claimed and, in some cases, legislated, as with the UK’s New Public Management philosophy (see Power and Laughlin, 1992; Nyland et al. 2006).

To effectively contribute to communicative action that arises from the court, accounting needs to be positively aligned with the legal process, as demonstrated in the acceptance of forensic accounting expert evidence to assist the court. The important question about this alignment is whether it is “grounded in criticisable reasons and is, thereby, made rational” (Arrington and Puxty, 1991, p32). Accounting’s basis in numbers deployed remotely<sup>18</sup> (Robson, 1992) holds its rationality across jurisdictions and culture, informing public argument and providing grounds for democratic communication of legal adjudication and decisions. Accounting brings the perceived rationality of science<sup>19</sup> to the linguistic legal process (Watts and Zimmerman, 1986). In this way accounting adds facticity and strength to the legal narrative through the validity of numbers, particularly evident where words (the decision) need to be translated into money (the remedy).

## Forensic Accounting Technology

Forensic accounting refers broadly to the deployment of a range of accounting techniques in a manner that facilitates discussion in debates or forums. It may include accounting technologies associated with the tracing or flow of funds, valuations, accounting performance or net worth. Specifically, in this research, such discussion is within the legal context. Forensic accounting technology is deployed as expertise when rectification of injustice with regard to the possession of property is required. For example, the court may call on forensic accounting techniques to articulate the transactions leading to the acquisition of property using the proceeds of a criminal act (Queen v. Ferguson, Saddler and Cox, 2009). In this instance, a forensic accountant may be able to trace the utilisation of funds directly to or from a specific crime, to fulfil the predicate crime requirements of ‘Proceeds of Crime’ legislation.

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<sup>18</sup> In this case ‘remotely’ means ‘deployed from outside the legal system’; that is, from the accounting body of knowledge into the legal system, and then, after endorsement, outside into the lifeworld.

<sup>19</sup> This is not a claim that accounting **is** a science; however, its positivist attributes and alignment with scientific method create the perception of accounting as a science, and it is that perception that is the concern of this dissertation (see Gaffikin, 2008).

More broadly, expert accounting technology may be utilised to articulate, value and quantify illegitimate sources of wealth for the purposes of actions taken under ‘Unexplained Wealth’ legislation<sup>20</sup> utilising gap analysis type techniques (Crumbley et al., 2005; Botha, 2009; Nigrini, 2011; Shalak et al., 2012; Albretch et al., 2014; Kranacher et al., 2013).

Such technologies define the point of commencement as the economic position of a subject before the suspected or known perpetration of criminal acts, which leads to methods like the compilation of an opening balance sheet position. Accounting analysis continues with respect to income and expenses (in line with profit and loss methods) over the duration of a period of asset accumulation controlled by the subject, before an ending position, similar to a closing balance sheet, is calculated for comparison to the beginning financial position<sup>21</sup>. The term ‘unexplained’ implies that the legitimate net income accumulation during the period of analysis is insufficient to explain either the coverage of lifestyle expenses or the improved net asset position quantified by deducting the ending balance sheet from the beginning balance sheet. That is, the gap between the explained and the unexplained financial positions bears examination (Crumbley et al. 2005; Nigrini, 2011; Shalak et al., 2012; Albretch et al., 2014).

In this manner, the accounting method computes the inexplicable incremental financial position, as distinct from the anticipated yields of each financial investment. Expertise in the form of accounting methods such as transactional analysis, cash flows, capitalisation, standard living costs, net worth analysis and asset betterment can be employed to assist the court with its adjudication (for example, see Chapter 8). Forensic accounting expertise removes the ‘messiness’ of transactional data, instead organising it into rational understanding (commencing with debits and credits) that facilitates digestion by the court

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<sup>20</sup> ‘Unexplained Wealth legislation’, in general, refers to forfeiture legislation or statutory provisions that instruct and justify asset confiscation on the basis of an unexplained gap in one’s wealth. That is, the wealth has been established to be in excess of that acquired by legitimate, explainable means.

<sup>21</sup> In this regard the opening and closing balance sheets articulate the financial position at specific points in time, whereas the profit and loss statement reports the aggregate position resulting from all transactions between two points in time (that is, the time of the opening and closing balance sheets).

(Albretch et al., 2014). The court then has a basis on which to make a just decision (Shalak et al., 2012). In this way, accounting flows from outside the court to become a medium supporting juridification that fortifies the court's objective to deliver justice, often settled by financial penalty (or forfeiture) that is either grounded in the expert's calculation or prescribed by statute and punitively administered.

Given the escalating use of accounting technology in the judicial process (see Moore, 1991; Carter, 2006; Clarke, 2002; Kirby, 2011) it is important to understand how courts use accounting evidence, its impact on judicial decisions, the favoured substance and form of accounting technologies and the attributes of influential or non-influential accounting evidence (Selby and Freckleton, 1999). The public rationale for the use of forensic accounting is to serve the values of the lifeworld<sup>22</sup>; that is, to use the accounting inscriptions<sup>23</sup> (Latour, 1987, 1988a) and the dominant metaphor of number (Morgan 1988; Robson, 1992) to support the precision, rigour and accuracy of a judicial decision. "Accounting, both in research and practice, has given the central place to the use of quantities as the dominant mode of information" (Robson, 1992 p686). Classically, Plato asserts that "the properties of number appear to have the power of leading us to reality" (Plato, translation [1941] p236). Specifically, in the international expansion of the forfeiture legislative genre, the presentation of accounting evidence, the choice of accounting technology and the conduct of the forensic accounting process, as presented to the court, may influence the outcome of matters that form a crucial part of a country's control of organised and large-scale crime<sup>24</sup>.

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<sup>22</sup> 'Lifeworld' is a sociological concept that refers to the world as it is experienced or lived (Edmund Husserl, 1936). Habermas sees the lifeworld as representing the qualitative, symbolic values and influence of society, whereas the 'system' is more quantitative, built around the mediums of money and power (Habermas, 1984).

<sup>23</sup> The term 'accounting inscription' refers to "the material and graphical representations that constitute the accounting report: writing, numbers, lists, tables" (Robson, 1992) This includes the dominant metaphor of 'number'.

<sup>24</sup> The link between forfeiture legislation, confiscation action and remedies to combat organised crime will be discussed throughout the first five chapters of this dissertation.

Legal adjudication requires rational explanation both internally (between legal participants) and externally (to the community). The legal story needs to be adjudicated by the court, then related to the community for their approval. Telling the tale requires translation from legal linguistics, making the facts digestible to an audience who do not have the expertise, access or time to consider the primary legal framework and legal discourse. The translation must connect with community estimations of legitimacy, particularly when the judicial decision is exercised in monetary terms (such as compensation, forfeiture, penalty or redistribution). The rationality of accounting technology serves in matters of economic disputation as an ideal translator between linguistic legal argument, statutory imperatives, adjudicated judgement and community legitimacy. . Legislative juridification is grounded in effective translation; that is, the necessity to explain proceedings to the community so that their democratic support for the judicial system is gained and maintained. The community must accept the rightfulness of legal processes and the validity of decisions for the proper functioning of laws and the enacting of statutes to continue.

This dissertation takes its initial argument from the influential theorist Jurgen Habermas, considering accounting as expertise within Habermas's description of communication and legal processes. Whilst Habermas does not directly refer to accountants, others have used Habermasian philosophy in describing accounting's expert role within bureaucracies and communities (Arrington and Puxty, 1991; Laughlin, 1987; Power, 2013, 1968; Roberts, 1988; Puxty and Chua, 1989). Habermas has theorised and debated extensively in his major works *Between Facts and Norms* (1996 [1992]) and *Theory of Communicative Action Vol 1* (1984 [1981]) and *Vol 2* (1987 [1981]); only a fraction of his broad program has been extracted to inform this thesis, with particular focus on how accounting expertise influences the bureaucracy (the system, which includes the legal system) and the community (the

lifeworld), and how this is facilitated by the steering mechanisms of money and power. Habermas refers to this process as 'colonisation'.

The research argument then reflects on two theories of distributive justice (Rawls, 1971; Nozick, 1974) that are based on the perceived need for redistribution under circumstances of inequitable attainment, such as through enforcement of proceeds of crime statutes, when tainted assets are acquired through criminal acts or from the proceeds of crime. The process of redistribution is considered on the basis of rational principles, termed 'patterned principles of justice', that the community recognises as consistent and fair (Arrington and Puxty, 1991; Cooper, 1977; Vallentyne, 2007; Wellman, 2002). Patterned principles are similar to a formula for redistribution. A patterned principle of justice holds that a distribution of goods is just only if it meets a particular pattern. For example, Rawls (1999) relies on principles of fairness to determine just redistribution, whereas Nozick (1974) relies on historical entitlements to recognise just acquisition and the requirement for redistribution where just acquisition has not occurred.

Patterned principles provide the conceptual validity to which accounting technologies connect to inherit their validity. The process by which a patterned principle is accepted by the community is one where the community's values and norms are accommodated by, or reflected in, the pattern that gives the principle validity. The pattern is recognised, accepted and understood by both the sender and the receiver, with common regard for the issue of the communication. It therefore leads to communicative action being 'wired' from one group to another (Habermas, 1981). Accounting technologies are instructed by patterned principles, such that their ontology is also validated by their alignment with community norms. Accounting, therefore, supports the calculation of an equitable redistribution, essentially through the legal process of injecting accounting knowledge into court adjudication and judicial decision-making. Whilst the legal system is administered and controlled by the legal

profession, accounting expertise is permitted to inform the legal process, through special leave as expert opinion evidence (Uniform Evidence Act (Cth), 1995 and aligned legislation), if appropriate conditions are met (Doyle, 1987). Accounting, in the form of forensic accounting, must be presented through the legal process (Clegg 1984; Practice Note CM7, Federal Court of Australia, 2013) to legitimise its communication. This dissertation argues that accounting inscriptions provide unique, rational attributes (Latour, 1987, 1988a; Robson, 1992; Chua, 1989) that enhance the communication from within the legal system to convince the community that the associated legal process and outcomes are broadly valid. Consistent with Robson's argument (1992), accounting techniques and calculations can be "translated into broader social, economic and political discourses not normally associated with the apparently neutral, technical discourse and practices of accounting" (p566).

The dissertation then moves on to analyse the practical use of accounting to communicate and translate monetary messages from within the legal system, and to analyse the example of forfeiture legislation. This discussion initially reflects on forfeiture legislation, the nature of confiscation statutes (civil or criminal) and the evolution of forfeiture as a judicial remedy from the historical concepts of deodand and attainder to a responsive compliance measure to prevent criminals' use and enjoyment of tainted assets. The specific role of expert opinion evidence and inclusions for forensic accounting evidence (as expert opinion evidence) to be admitted, presented and considered by the court are contemplated (Talve, 2013, Bronstein, 1999; Dwyer, 2008; Frye v. United States, 1923; Daubert v. Merrell Dow Pharmaceuticals, 1993; Makita v. Red Bull, 2006). Further, the purpose and subsequent effectiveness of forfeiture legislation in achieving its aim to reduce and prevent organised crime is examined through comparing the purposeful statements made by those who proposed confiscation legislation with the statistical outputs to date, qualitative feedback from the relevant enforcement agencies and case outcomes.



Finally, after case-based research, the thesis evaluates and proposes rational attributes of forensic accounting evidence suitable to provide valid expert opinion in forfeiture litigation matters. This deliberation is informed by the examination of accepted professional perspectives. As forensic accounting occupies a position using both accounting and legal knowledge<sup>25</sup>, this research is informed by legal and accounting thinking. Recognition of the legal role of judicial gatekeeper<sup>26</sup>, theoretical literature on legal concepts of entitlement, legal decision-making, adjudication and evidence informs this research from foundational as well as purposeful perspectives. The mixing of the two professions itself acknowledges the coupling of professional standpoints whilst individual professional status as either accountants or lawyers is maintained and enforced<sup>27</sup>. Forensic accounting is only one area where the accounting and legal professions mix; others include the application of statutory performance, governance and regulation. However the professional mix in forensic accounting places greater focus on the blend of professional content rather than professional hegemony<sup>28</sup>.

Of importance in this work is consideration of how legal decisions are affected by the addition of external expertise, specifically accounting expertise. Literature on accountingization (Power and Laughlin, 1992) and expertise deployed in the form of accounting messages at a distance (Robson 1992) is considered with respect to accounting's

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<sup>25</sup> Forensic accounting primarily relies on the accounting body of knowledge knowingly exercised within the legal context, but is also informed by behavioural aspects of psychology and criminology (see Albrecht et al., 2009).

<sup>26</sup> The court is the judicial forum where forensic accounting evidence is heard. The courts are the domain of the law, and therefore legal training is required to admit and assess accounting evidence (both in presentation and judgement). Hence those with legal accreditation define and interpret evidence, admitting it into the court through their role as legal gatekeepers.

<sup>27</sup> Whilst forensic accountants must be cognisant of legal processes and concepts, such as those pertaining to evidence, they remain qualified accountants, not qualified lawyers. Similarly, those legally qualified may develop the skills required to interpret (and cross-examine) accounting evidence; however, they are not therefore qualified in accounting. Such professional distinctions are enforced by the formal rules of professional membership as either an accountant or lawyer. Maintaining a professional designation is a matter of professional compliance and membership. Compliance is enforced by conformity to membership norms such as appropriate continuing education and subscription payments.

<sup>28</sup> This is despite the fact that forensic accounting also fuses concepts from other professions such as psychology and criminology (see Crumbley, 2007)

legitimising 'scientific' influence and communicative inscriptions (Morgan, 1988; Latour, 1987; Moonitz, 1961; Mattessich, 1962; Duncan, 1982; Chua, 1986; Watts and Zimmerman, 1986). In the Australian context, the work of Selby and Freckleton (1999) and Freckleton, Reddy and Selby (2001) add practical research that reflects on how the legal fraternity (judges and magistrates) read and digest accounting messages.

As previously noted, the theoretical work of Habermas in particular provides a framework to understand forensic accounting's role as expertise in judicial communication and the construction and maintenance of legitimacy. Power and Laughlin (1996) refer to the 'Habermas effect' within such fields as law and accounting:

There is now considerable familiarity with the contours of Habermas' thinking and increasing interest in its implications for the practice of social research (p 441)

This research uses Habermasian critical theoretical analysis, applying it to the pragmatic context of the clarification of accounting expertise, as a medium in the discourse of adjudication that leads to legal decisions in forfeiture law. Habermas's theory of communicative action is applied to understand the integration of the court's deliberative decision and its action analysed with respect to the social control of regulated activities (ranging from evidence to legal enforcement), expressed in discourse that includes symbols (such as accounting calculation) (Habermas, 1987, pp43-60). Of importance is Habermas's description of the role of expertise in the capture, rationalisation and translation of the legal process of adjudication, for both the court participants and the wider audience. In aligning the sent message with the received and thus forming the basis of communicative action. Communicative action then underpins the democratic support necessary for the juridification process. With respect to the forfeiture genre, the legal argument is constructed from the need articulated by Nozick (1974) to rectify injustices in property acquisition and transfer (see

Nozick's third rule of justice), and is thereafter informed by Habermasian theory of law, communicative action and the facilitation role of expertise (in this case accounting). The convergence of these perspectives is encapsulated in a theoretical framework diagram (Chapter 3, p44).

The role of expertise from outside the law is considered, specifically with respect to accounting. In this regard forensic accounting is centrally positioned to use its *a priori*<sup>29</sup> knowledge and the factitious attributes of calculation and number to translate and resonate legitimation messages. The role of expertise in legal adjudication is considered theoretically, as well as with respect to its form (for example, a formal written report or oral evidence) and process (for example, the objectives of the presentation of opinion evidence). Hence, the literature on opinion evidence is contemplated as theoretical, statutory and authoritative guidance (see Chapter 5).

### **Accounting as a Medium of Juridification**

The title of this study locates accounting as a medium of juridification. That concept is complex but, in general, refers to “the tendency towards an increase in formal (or positive, written) law” (Habermas, 1987, p 359). Juridification is a metonym for a broader late-modern social process in which public life is increasingly formalised, quantified and approached in an ‘objective’ way (see, for example, Laughlin, 1987; Arrington and Puxty, 1991; Broadbent and Laughlin, 1994). This is not merely an expansion of the volume of regulation but the inclusion of new tenets in existing statutes; for example, the inclusion of

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1. <sup>29</sup> *A priori*: relating to or denoting reasoning or knowledge which proceeds from theoretical deduction rather than from observation or experience (Oxford Dictionary, accessed 2017).

the reverse onus of the onus of proof<sup>30</sup> within legislation regarding the proceeds of crime. Juridification also includes the convergence of different areas of expertise under the legislative process; for example the inclusion of accounting measurements or quantification in sections of statutes not otherwise concerned with accounting. As Habermas notes, juridification fits this broader context of the formal rationalisation of the public sphere:

From this standpoint we can distinguish processes of juridification according to whether they are linked to antecedent institutions of the lifeworld and juridicially superimposed on socially integrated areas of action or whether they merely increase the density of legal relationships that are constitutive of systematically integrated areas of action (1987a, p 366).

Habermas contextualises the concept of juridification within welfare state expertise as being intended to support social integration but often achieving the opposite (Power and Laughlin, 1996): the front line and social workers are linked and driven by values and work practices undisturbed until colonised by legal formality and (as an extension) the financial logic of accounting. The tenets, norms, methods and standards of pre-existing expertise are annexed and overrun by the rational (scientific) logic of a legal/accounting structural coupling.<sup>31</sup> In the context of this research, structural coupling refers to the values of accounting and law becoming intertwined with social values that support both professional and social legitimacy. Reference to the coupled process conceals the prior self-referential regulatory procedure (in this case within the legal profession). The expertise of accounting is 'attached' to the legal framework that dictates the formal and informal need for the calculation of outputs, efficiencies or remediation that accompany the legal instructions.

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<sup>30</sup> In this regard, the accused or respondent to a forfeiture application bears the onus of proof that the property was not the proceeds of crime or is not tainted property; see, for example, *Criminal Proceeds Confiscation Act 2002(Qld)* and the *Proceeds of Crime Act 2002 (Cth)*.

<sup>31</sup> *Structural coupling* is a complex notion worthy of sociological study beyond this treatise; however, *structural coupling* will be briefly revisited in Chapter 2. For the current discussion, structural coupling of the legal/accounting professions refers to the combining of individual professional attributes to produce synergistic leverage, in this case through money (accounting) and power (law).

In this way structural coupling, through forensic accounting, supports juridification, despite the tension that arises from the stress between the social power that endorses sanctioned law (such as, subjective rights) and sacred law that is sanctioned by social power (popular support towards the realisation of collective goals for the greater good). For example, civil libertarians' concerns with regard to unfair property seizure without conviction are overridden by the political imperative for the prevention of criminal enjoyment that arises from the use of their ill-gotten gains (see, for example, the submissions of the Queensland Council for Civil Liberties, the Law Society of South Australia, Liberty Victoria and the Law Council of Australia to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill*, 2012).

Habermas has philosophised across a range of issues. This research is mostly concerned with how Habermas positions the authority of law and the legitimising role of experts in the support of the law. Habermas describes the public rationale for the use of expertise (in this case forensic accounting) to serve the values of the lifeworld; however, he also warns that the exclusive nature of expertise can inhibit discourse, such that it is only transparent to those who possess the expertise (Habermas, 1996). This expertise facilitates and legitimises communicative action (Habermas 1984) through its accounting inscriptions (Latour, 1987) and the metaphor of number (Morgan, 1988), as these enable the dissemination of information that permits judicial action to be interpreted and its power to be exercised at a distance (Robson 1992)<sup>32</sup>. Forensic accounting's links to the antecedent accounting institutions provide legitimacy through independently acknowledged expertise. This expertise reifies legal claims through leverage upon regulatory procedures outside the self-legitimation of the legislative regime. Accounting expertise provides "material from which

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<sup>32</sup> The concepts of communicative action, inscriptions, the metaphor of number and action at a distance will be discussed and developed progressively throughout this dissertation.

a durable individual and collective self-understanding can be made, turning them into influential sources of political judgement and deliberation” (White, 1995, p76).

The idea of accounting for decision-making purposes seems an obvious role; however, scrutiny of accounting as a facilitation technology brings up questions about its role as a steering medium<sup>33</sup> within the legal setting. In this context, Power and Laughlin (1992, p133) refer to the “increasing *accountingization* of things,” a process through which many aspects of both public, and indeed private, life are constructed through various modes of accounting and financialisation.

‘Accountingization’ is perhaps an ugly word, but it expresses the sense in which accounting as a method may eclipse broader questions of accountability (Power and Laughlin, 1992, p 133).

Accountingization is defined as “the displacement of core values within [this sector] of the economy by the invasive influence of financial measures and imperatives” (Lapsley, 1998, p.117). According to Langfield-Smith (1992), shared beliefs and values are seen as a prerequisite to collective functioning. Accountingization invades existing shared beliefs, adding to them a new benchmarking, technocratic system governed by the perceived legitimacy of accounting and economic reason. This may be evident in circumstances such as when an accounting system is introduced into an area that has previously been driven by goodwill or moral imperatives. The accounting system usurps the existing governance with its accounting measurement and priorities that may or may not be compatible with the former (now less powerful) beliefs and motivations.

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<sup>33</sup> Habermas discusses the concept of a steering mechanism, which acquires its meaning from systems theory, as providing communicative mechanisms to facilitate adaptability. Accounting can be seen to steer economic activity, particularly as the language of business. The role of accounting as a steering mechanism will be revisited later in this dissertation (Habermas, 1996, 1984).

## The Pragmatic Context of Forfeiture Law and Its Application

The second part of this research's title, *The Pragmatic Context of Forfeiture Law and Its Application*, provides the setting within which to explore the accountingization of redistributive justice. Specifically, this refers to the accounting attributes and technologies presented in the form of expert evidence in *Proceeds of Crime* (POC) and *Unexplained Wealth* (UW) legislation. POC and UW legislation is intended to address the failure of the just acquisition and transfer of property (Nozick, 1974) that occurs when criminal proceeds are the source of property acquisition; that is, when tainted funds lead to tainted assets (see, for example, Remeikis, 2013; Tiozek 2013).

Forensic accounting is employed to assist the trier of fact (mainly the judiciary) to make the 'right' decision with respect to the redistribution of tainted assets. However, historically it is difficult to rectify the injustices of the past with respect to property acquisition, so the court is challenged to establish what belongs to whom and where the starting point is for a just beginning. Issues such as where assets are acquired through the co-mingling of funds (where tainted funds are mixed with untainted funds), the leveraging of tainted funds (where tainted funds are leveraged against legitimate borrowing facilities), mixed ownership (criminals and non-criminals holding equity positions) or beneficial owners hiding behind a veil of entities (corporate or trust structures) continue to arise. The 'truth' of beneficial ownership is frequently an accounting question pertaining to the control and distribution of funds.

Expert evidence advising the court on these issues must be admitted to legal adjudication. Hence it must be of acceptable form and provenance to negotiate the obligatory passage point<sup>34</sup> (Clegg, 1984) of opinion evidence as defined by statute and common law (see the

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<sup>34</sup> In this case the obligatory passage point is the pre-court processes of challenging evidence, which must be passed for the evidence to be heard in court. Clegg (1984) describes the importance of adherence to the rules of passage through these points, which cannot be avoided; the points are controlled by professions (in this case the

Australian *Uniform Evidence Acts*). The expert accounting evidence must also be understood by the decision-maker, a problematic factor given the “unfamiliarity of judges and barristers with commercial principles” (Craig and Reddy, 2004, p73). Expert opinion is only influential if it is allowed to be heard; that is, given entrance to the court as expert evidence. The entry of expert evidence is at the discretion of the presiding judge (a member of the legal profession), who controls the gateway with both statutory rules (see the Australian *Unified Evidence Acts*, 2008) and interpretation (that is, reference to precedent decisions; see, for example, Chapter 4). Expert evidence is a special category of evidence given dispensation to be heard, as it assists the court in its adjudication. Like all evidence, it must first be relevant to the matter at hand. Unlike evidence in the form of direct facts from witnesses, expert evidence must comply with a number of attributes; whether it does may prevent it being heard, or may reduce its validity or veracity once heard.

There is a rich history of accounting expertise presented in evidence across a range of legal genres such as family law and equity law. Both civil and criminal jurisdictions have been assisted by accounting expert evidence. Arising from these matters is a history of precedents and senior judicial commentary with regard to the appropriate context for expert opinion evidence. This has served to increase the proliferation of opinion evidence, specifically forensic accounting (Kirby, 2011). To maintain relevance, the specific content of accounting evidence must necessarily address the facts of the matter; in doing so the accounting expert’s ‘story’ needs to draw from the recognised accounting body of knowledge, then, be applied to the adjudication at hand. Standardised responses are insufficient, as they lack the complete explanation to justify the expert’s opinion and the full consideration of the aspects of professional guidance found in the relevant Accounting Standards (see for example Accounting Professional and Ethical Standards – APES 215 *Forensic Accounting Services*;

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legal profession) at risk of penalty (in this case not allowing access and potentially non acceptance of expert status in future matters).



APES 110 *Code of Ethics for Professional Accountants*). Whilst the provision of forensic accounting evidence may be bounded and guided by legal and accounting professional statutes, standards and precedent, the ultimate purpose of expert evidence is its contribution to the court's adjudication. The court is searching for the 'truth'<sup>35</sup>. The expert's opinion only gains traction in the debate if it is deemed as 'truthful' by the trier of fact (the judge). The expert must influence the judge beyond his/her knowledge, to enhance the perception of truth through expression, clarity, logical thought, adequate investigation, independence, identification and exploration of specific issues (Michels, 2004). Accounting experts are obliged to explain and justify their methodology, including which methods they have discarded and adopted.

Selby and Freckleton (1999, 2001) have highlighted the high degree of difficulty involved in translating accounting expert evidence to the trier of fact (judiciary and magistrates). This raises the question of professional integration of accounting knowledge within the legal profession's domain. By necessity, the legal and accounting professions couple to produce a justifiable economic remedy; however, the extent of basic accounting knowledge within the judiciary and its advisors remains undefined. Accounting is not a prerequisite subject or skill set for legal designations. In Ireland, political pressure following the murder of prominent journalist Veronica Geurin (1996) by organised crime members prompted the establishment of specific knowledge within those courts responsible for forfeiture remedies. The Criminal Assets Bureau Act, 1996 was the first multi-agency bureaucracy to focus on organised criminals' illegally acquired assets. It included law enforcement, tax officers and social welfare officials who were specifically equipped with forensic accounting and financial analyst skills. This multi-professional task force has recently been adopted in the Australian commonwealth jurisdiction (Commonwealth Serious Financial Crime Taskforce).

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<sup>35</sup> The concept of legal 'truth' will be further reviewed in Chapter 4.

The political message espoused to support the introduction of forfeiture legislation inevitably portrays the need for confiscation as a measure to deny organised crime the use and enjoyment of their ill-gotten gains (see, for example, Clarke (Victorian Attorney-General), 2014; Bleije (Queensland Attorney-General), 2013). Whilst the behavioural results of organised crime may include some high-profile confrontational attributes (such as violence, murder, the use of weapons and stand-over tactics), its egregiousness is measured in economic terms. So it is appropriate to reflect on the economic progression of forfeiture cases as a preventive measure compared with economic assessments of organised crime. In the Australian context, various accountabilities have existed at State, Territory and Federal levels that include the more recent formation of a bureaucratic task force to integrate expertise from several perspectives, including accounting. Australian authorities have learnt from the Irish experience, which has also been adopted to some degree in the United Kingdom's bureaucratic structure. This thesis reviews the effectiveness of POC and UW legislation with respect to the stated aims of the legislators and the published achievements of task forces assigned to enforce it.

## Chapter 3 Literature Review

### Chapter Introduction

As previously noted this dissertation does not rely upon the philosophy of a single proponent, rather its theoretical stance has been developed by the incorporation of eminent thought across a range of issues that pertain to both the theoretical and pragmatic interpretation of the research topic. This is important because the aim of the thesis is less about the accounting technologies and more about the legitimising strategies used in the deployment of such technologies. In order to co-ordinate, these issues and position the intersection of the literature, a theoretical diagram has been developed that centrally positions the core matter of Expert Opinion Evidence (Forensic Accounting). The areas of literature that contribute to the debate radiate in and out of this central position to present a flow towards communicative action and lifeworld influence.

The purpose of the Theoretical Diagram (p44) is to provide a pictorial road map for the integration of theoretical constructs that inform this research. It positions literary topics for review as distinct topics, whilst they remain connected to the overall purpose and flow of the research. This approach provides a theoretical framework for the stepped research argument and technical review discussed in chapters three, four and five. These chapters construct the context to ask and answer the research questions pertaining to forensic accounting's contribution to, and acceptance by, the court. Further, the context is viewed from both within and outside of the legal system with specific attention given to accounting evidence that contributes to the genre of forfeiture law.

In advancement of the account, this chapter cuts across debates postulated by Habermas (with respect to the law, expertise and communication), Nozick (concepts of justified entitlement

and redistributive justice), Rawls (patterned fairness of redistribution), Robson (accounting at a distance), Laughlin (accountingization) and Clegg (power and professional process domination). These authors refer to some underpinning concepts which, for clarity, are noted below, prior to further discussion of the literature.

## Key Concepts

In order to assist the reader to follow the discussion in this chapter it is timely to reflect on some of the concepts that support the discussion. This introduction serves to reinforce key concepts employed in the theoretical interpretation that follows. As noted this dissertation draws on conceptions explored by Habermas (1929 - current) as applied to accounting within the context of the law. Habermas proposes his theory of communicative rationality (1981) arguing that “reason is tied to social interactions and dialogue” (Finlayson, 2005), with that reason having arisen from transparent deliberation. Habermas rationalises that the social theatre that consists of one’s everyday ‘*lifeworld*’ interacts with the ‘*system*’ that contains the strategic activity of economic and administrative institutions and organisations. Money (monetarisation) and power (bureaucratisation) are manipulated such that the latter grows at the expense of the former, a process Habermas refers to as ‘*colonisation*’ (Chambers, 1996; Habermas 1985).

### The Lifeworld

The initial reference to ‘lifeworld’ comes from the biological consideration of the structures and elements that surround and contribute to the experience, nourishment and life of an organism. Edmund Husserl (1936) applied the term as the self-evident universe, a world in which subjects experience “living together in wakeful world-consciousness” (Husserl 1936/1970 p108-09). For Habermas the lifeworld is the contextual environment of competencies, practices and attitudes represented in terms of one’s cognitive horizon

(Habermas, 1985). The lifeworld is the everyday environment we share with others. It is both personal and intersubjective. In terms of this dissertation, the lifeworld is important, because it forms the populous that underpins the democratic processes, and therefore, by way of their vote, they elect the law makers, who in turn facilitate the juridification process by passing new and additional statutes.

### **The System**

The system refers to the common patterns of strategic action that serve the interests of institutions and organisations (Habermas, 1984). That is, the professional and administrative context enhanced by technical rationality. In regard to this dissertation, the system is essentially the professional environment of the legal system including the legal profession, statutes, the courts and the bureaucratic administration of the law.

### **The Lifeworld and the System**

Habermas proposes that the system is implanted in the lifeworld, colonising it, fostering a self-interested rationalisation, that facilitates the manipulation and influence of consensus decisions. Over time the importance of the lifeworld's local values, inherently understood between people, are subsumed and replaced by the system's moral order. The new moral order fosters a new set of community norms, compatible with the expectations of the system. Juridification is both a symptom and a tool of this process as it replaces the lifeworld's primary, morally based interconnections and decisions, with instructional statutes and legally interpreted remedies, which in turn, reinforce the new norms. Consensual understanding no longer co-ordinates interaction. Rather, interaction is directed by the consequences of self-interested action (Baxter, 2011).

## Intersubjectivity and accounting

Accounting as a language assists in making the intersubjective meaning accessible to the lifeworld through translation of the actions of the system, primarily through the parlance of money. Accounting provides a new set of system accredited norms, which facilitate the system's colonisation of the lifeworld. The intent is to influence and co-opt the lifeworld members to support the democratic legitimacy of the system's juridification agenda.

## Communicative action

Communicative action is a sociological term developed by Habermas in his book *The Theory of Communicative Action* (1984). It refers to co-operative action undertaken based on mutual deliberation and rational argumentation. The process of argumentation is the "type of speech in which participants thematize contested validity claims and attempt to vindicate or criticize them" (p18). Communicative action is enhanced by accounting as an influencing and clarifying medium, recognised by the lifeworld as expertise that is informative and understood if it meets certain conditions such as the delivery of proper patterned principles that are validated by the lifeworld's norms.

## Patterned Principles

The basis of patterned principles thought evolves from mathematical formalism where the world is described and understood in terms of patterns, articulated in precise language. That is, without detailed calculative knowledge, one can rely upon the outcome based upon adherence to a pattern of principles (for instance, a formula). The concept of relying on patterned principles for decisions has been applied beyond mathematics, such as in patterned principles of justice that determine just deserts on the basis of unhistorical determinants. A principle is patterned if "it specifies that a distribution is to vary along with some natural

dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions” (Nozick, 1974, p156). Distributive justice is defined and interpreted according to some matching dimension, for example, the principles that inform a calculation as it is deployed by accounting technology. This is at variance with end-result and historical distributive theories which respectively consider the outcome and the prior processes in relative isolation. Patterned principles have scientific credibility, through repeatability, (Ball, 2009) however they evolve through continuous intervention in people’s lives as the pattern for decision making is recurrently described to highlight the influential variables. Experts, including accountants, provide and update this description. Habermas is interested in the influence of these patterns in terms of a mechanism that co-ordinates communicative and strategic interaction (Habermas, 1985; Baxter 2011).

### **Autopoiesis**

Autopoiesis (originally a biological term) refers to a system that can reproduce and maintain itself through self-organisation. It is autonomous and operationally closed, operating within self-referential feedback systems. The Law has been described as an autopoietic system, when it self-references between members of the profession even if they may have different titles and roles, for example an advocate, judge, lawyer, barrister, solicitor (Teubner, 1993). Similarly, accounting has been called autopoietic when it self-references, for example, when establishing peer accepted accounting principles (Robb, 1989; Mingus, 2007; Egbu, Botterill and Bates, 2001). Autopoietic expertise does not contribute to communicative action, because it is not understood by the lifeworld. Such expertise needs to be translated by a facilitating medium before it can exert any influence that arises directly from expert testimony.

## Accountingization

Strict interpretation of accountingization is the use of accounting technology to efficiently refine organisational processes such as for the purpose of profit maximisation. The calculative effect of accounting is brought to bear on the organisational goals becoming a (perhaps the) measure of achievement, often in preference to other moral organisational goals (Power and Laughlin, 1992). Of particular importance to this dissertation is the accountingization narrative that converts ‘bookkeeping fictions’ to ‘scientific facts’ (Littleton, 1933). For example, an amount coded to a general ledger account then becomes a factual component of that account that include both the quantitative and qualitative expression of that account, as if the coding to the account was a scientific certainty, rather than a result of professional determination and allocation (which may have been used to allocate coding to another account based equally on a professional determination of the attributes of the transaction). Accountingization fosters the acceptance of new accounting based norms for societal measurement, which are not necessarily limited to purely accounting reports. For example, an accounting measurement, such as profitability or a particular valuation, may produce a colloquial interpretation of ‘good’, ‘bad’ or ‘satisfactory’. Accountingization may propel accounting inscriptions to the forefront of the validation process, thereby legitimising a societal norm through a positive accounting description or correspondingly delegitimising through a negative accounting description.

## Obligatory Passage Points

Clegg (1989) in describing his circuits of power as specific interpersonal flows, bases his work on Foucault’s theories of power, knowledge and resistance (Foucault, 1975, 1980, 1986 and 1988). Clegg’s circuits are three interacting “discursive fields of force”, socially constructed by organised human agency (the Episodic, Dispositional and Facilitative



Circuits) (p17). Obligatory passage points are controls for conduits to empower or disempower where the three circuits meet. For example, Court rules form an obligatory passage point that can legally empower an accountant through the determination of probity and access to the court as an expert witness, or alternatively in the negative, disempower an expert through denying access to be formally presented and heard. Such a passage point is obligatory in that it cannot be otherwise by-passed or circumvented. The legal profession, in managing the passage point (such as through sections of the *Uniform Evidence Act, 2008* ), thereby controls the only access to the court available to forensic accountants.

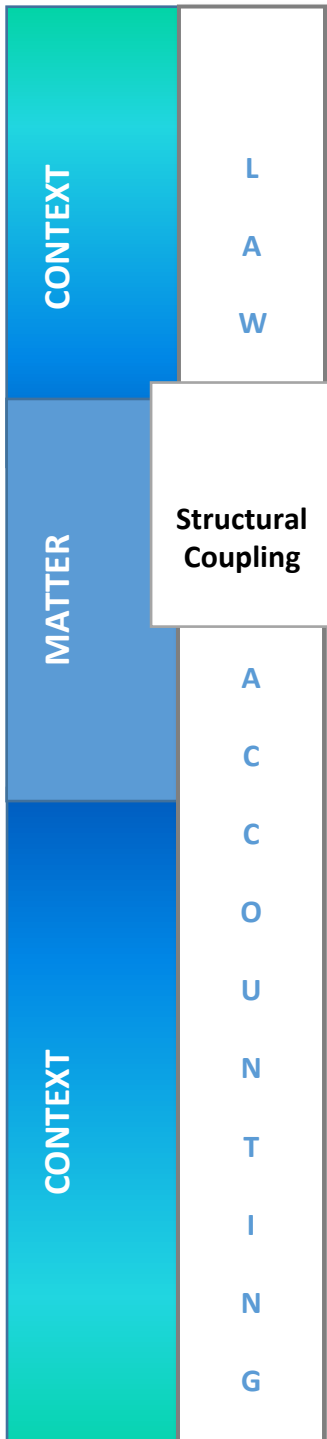
### **The Importance of this Chapter**

Cognisance of the influence of expertise dispensed through the legal system, in this case forensic accounting, this chapter is important because it reflects on both the legal and accounting professions as separate professions with inter-dependant and potentially synergistic responsibilities to the court, and to the populace, who rely upon correct dispensation of justice in circumstances that broadly prohibits the lifeworld's direct assessment of individual matters. The importance of this chapter with respect providing the answers to the research questions is that the literature provides an ontological perspective and context within which to drill down to more pragmatic issues.

This chapter is structured such that initial consideration is given to the research framework as presented in the Theoretical Diagram. This diagram puts expert opinion evidence (the prime research concern) in the centre of the discussion, informed by consideration of several genres of thought that arises from the professions (law and accounting), that pertains to nature of expertise and its influence, the validation of expertise and acceptable expert reporting, as well as the circular nature of the democratic influence and underpinning of the juridification process . The chapter explains the diagram before considering the literature in three parts;

Part 1 – Expertise and the Law; Part 2 – The Accounting and Legal Professions; and Part 3 –  
Justified Re-distribution.

**Theoretical Diagram**



J  
U  
D  
G  
E  
M  
E  
N  
T  
A  
L

*Entitlement Theory*

- Subjective Rights
- Just Acquisition
- Just Transfer

C  
A  
L  
C  
U  
L  
A  
T  
I  
V  
E

**Juridification**  
[Expansion of the Legal System based on Popular Sovereignty – Objective Law]

Legal Linguistic Legitimation  
[legislation; judiciary; evidence]

Rectification of Injustices

**VALIDATION THROUGH RATIONAL DISCOURSE**  
**Expert Opinion Evidence**  
[Translation through **Forensic Accounting**]

Inscription  
Legitimation of number  
Quantification, 'Scientific'

**Accountingization**  
Accounting's Calculative Strategies for Legitimacy  
Power of Number  
[Monetary rules and practices]

Reasoned, open, deliberative debate.

Communicative Action

Valid action at a distance

Patterned Principles giving the 'right' decision

Expertise

Monetary

Colonisation

Political

**Lifeworld**

Issue / objective:  
Crime prevention and equitable rebalancing of the proceeds of crime.

Colonisation

## Theoretical Diagram

The diagram centrally positions the process of validation of expert opinion evidence (in this case accounting expertise) through rational discourse. Forensic accounting provides a significant contribution to the rationalisation of the discourse through translating the legal linguistics into factitious quantification. The vehicle for this account is in the form of special entry to the court through Expert Opinion Evidence. The core consideration of this research pertains to the validation role forensic accounting plays, in terms of legitimacy, accounting technology, tools and techniques, professional presence and credible messages. Validation is facilitated by patterned principles of implementation and justice as constructed from the recognised accounting body of knowledge (expertise), integrated with the law (statute and common), to facilitate understanding and legitimacy in support of both system and lifeworld objectives (in the case of forfeiture, the prevention of the use and enjoyment of criminally tainted funds). The main focus of this study contextually straddles the professional boundaries of accounting and law, dealing with the facts of the matter at hand whilst cognisant of both the foundational accounting body of knowledge, the deployment of peer accepted, patterned accounting technologies within the legal environment. The professional knowledge, values and attributes of the individual legal and accounting professions come together to be structurally coupled around the facts of the matter to address redistributive justice. That is, both professions utilise overlapping professional structures and thought directed at explaining the matter, deducing and communicating an appropriate remedy inside and outside the courtroom.

The judgemental arbitration of the law and the calculative facticity of accounting are both applied to the matter at hand in an effort to communicate the appropriate rectification of injustices from the breakdown of entitlement theory (see Nozick's just acquisition/just

transfer, 1994) to the lifeworld. The lifeworld has an issue to resolve, in this case, that of crime prevention and the equitable rebalance of the proceeds of crime. Accounting has a teleological ontology in this respect as well as a history in the resolution of economic moral quandaries (Arrington, 2007). The system has a vested interest to champion this resolution as a valued contribution to the lifeworld, interpreted through the reliability of accounting numbers. The lifeworld looks to both the juridification (supported by argumentation) and the accountingization (supported by calculation) processes to help resolve the legal issues. In Habermasian terms, the lifeworld is colonised by the system through the use of the legal and accounting profession's knowledge and their values that override, and replace, traditional collective norms (Habermas, 1996, 1984). Together they provide a contestable rational explanation of both process and outcome. The professions participate in exchange for the democratic connection with their political and monetary power to the lifeworld (the development of a professional hegemonic position and benefits). The lifeworld looks for comfort in the 'right' judicial decision, which it interprets with descriptive words and facts (inscriptions such as measurement or quantification) presented to them without the necessity of lifeworld members having to avail themselves of the proximity of the full knowledge of the facts of the matter at hand<sup>36</sup>. The community is concerned, but overall they cannot have access to the full proceedings. They rely on communication that provides a valid account to them. In this manner professional expertise contributes to both the internal system and the external lifeworld through the provision of properly deployed patterned principles which serve as a surrogate to the alternative of full knowledge.

Internally, the adjudicative purpose of the accounting validation process is to assist the judiciary in making the 'right' decision through legitimisation by the numbers, the factualisation of the 'truth' and communication of an action consistent with the value

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<sup>36</sup> That is, avail themselves of the court transcripts or by personal court attendance during the hearing.

requirements of the lifeworld in an ‘ideal speech act’<sup>37</sup>. The audience relies upon accounting to inform the validation process, establishing accounting legitimacy as a patterned principle of justice, that is, an adjudicated outcome cradled by repeatable, sound and stable reasoning, akin to (the reliability of) a scientific process. For example, the accounting claims that can withstand validity testing discourse, particularly in the form of cross-examination. Further the claims can be recalculated to produce the same answer given the same assumptions, or an associated answer under the articulation of changed assumptions. This platform is familiar to the legal profession in their reference form of a precedent, that is, reliance upon prior, influential reasoning and judgements (obiter dicta of the trier of fact). However, precedent familiarity has little resonance externally, in the lifeworld, because it requires a priori legal knowledge, that is not generally available outside the boundaries of professional expertise.

Externally, accountingization assists through interpretation of the facts of the matter through the lens of professional accounting methodologies, already accepted as contributing to distributive justice. The lifeworld recognises the legitimisation effect of accounting as it impacts in a range of regular management, reporting and monitoring activities. Accountingization reduces the legal ambiguities through the translation of qualities into quantities, linguistics into facticity and the perception of repositioning the argument into the trusted domain of science rather than art. Robson (1992) reflects that “the relationship between the signifier in language and the signified is arbitrary” whereas numbers have the “essence of their objects contained within them” (p690). In the absence of regular and specific evaluation of individual matters, the lifeworld rests upon an accounting function to facilitate Habermas’ communicative action, that leads to trust in the deliberative outcomes of the court. The legal system packages the numerical essence in recognisable patterned accounting technologies, taking them from within the centre of deliberation (the courtroom)

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<sup>37</sup> The concept of a ‘valid speech act’ will be discussed in chapter 3.

to broad availability, with little alteration. When applied to POC – UW legislation it is the accounting quantification that validates the ‘reasonableness’ of the forfeiture action, in that it aligns the confiscation value with the scope of the profit and assets earned from criminal activity or as unable to be explained as being earned from legitimate activity. Accounting highlights the gap in numbers with greater specificity than can be linguistically achieved. This is not necessarily readily apparent as the prima facie numbers may not reflect a range of monetary and equity issues, such as, economic structures, co-ownership, costs, time value of money and mixing legitimate with illegitimate monetary sources. Accounting interprets according to its professional logic, rules and process, explainable to the judicial process to aid and enlighten the ‘right’<sup>38</sup> decision (Kirby, 2011). Accounting aligns to patterned principles with the lifeworld’s moral measure on one axis and various credible quantification methods on the other. This correlation advises the conversion of numbers (amounts) to proportional remedy. For example, where a high assessment of conspicuous wealth intersects with the absence of a proper explanation of legitimate accumulation, then the remedy expectation should be a considerable redistribution of wealth rather than a mere token adjustment, such as, forfeiture limited to a single seizure<sup>39</sup>.

The accounting translators, forensic accountants, are admitted to their interpretive positions by formal legal acceptance based upon recognised expertise passed through the legally administered gateway of expert opinion evidence (see for example the Uniform Evidence Acts<sup>40</sup>). Ironically, it is largely accountingization that also interprets the validity of the UW-POC genre (at the institutional level) by accounting for the collated results of UW-POC action compared with the espoused economic aims of the legislation. Accounting therefore

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<sup>38</sup> The concepts of ‘right’, ‘correct’ and ‘true’ judicial decisions will be discussed in chapter 3.

<sup>39</sup> For example, only confiscating cash money found on hand at the boarder rather than full inspection of the source and context that created this and other tainted funds.

<sup>40</sup> The Uniform Evidence Acts refer to the harmonised Commonwealth, New South Wales, Tasmanian, Norfolk Island, Victorian, Western Australian and Northern Territory Evidence Acts.

translates to the lifeworld the forfeiture remedy as well as its broader legislative effectiveness (see Chapter 4).

If the lifeworld comprehends and accepts the accounting translation it integrates both the outcome and the method of its attainment into its tenets (becoming colonised in Habermas' terminology). The lifeworld rewards the legal profession with the political power of acceptance (and potential further juridification) and the accounting profession with the steering control of money. The three value systems (Legal, Accounting and Lifeworld) become entwined through structural coupling<sup>41</sup> and mutual recognition. Accounting becomes an integral part of the law's juridification process. It intervenes with the strength of numerical inscriptions, tautens the linguistic 'letter of the law' and acts as an interpretive, and potentially a control, tool of the system. It is consumed by the lifeworld, which in turn rewards hegemonic status to the expert professions.

## Literature Review

The predominant argument of this research is that the role of expertise in general, and accounting expertise in particular, supports juridification of the legal system through the enhancement of the communicative action that, in turn, supports the judicial process. Accounting adds to the discourse and provides augmentation of the legal account. It is against this purpose that a range of literature has been reviewed in chapters 1 and 2, that informs the legal context of the source of expertise in general and specifically accounting, the role of the expert and the specific contribution of expert knowledge. Further categories of literature are reviewed pertaining to the formal, judicial, acceptance of expert opinion evidence, the pragmatics of POCA-UW legislation and the effectiveness of the implementation of modern forfeiture statutes in chapters 3, 4 and 5. The first part of this literature review proceeds to

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<sup>41</sup> In this regard, structural coupling refers to mutual dependencies, mutual reinforcement and mutual benefits.



explore the diagram (p42) in greater detail by means of theoretical examination of the role of expertise, particularly within the legal system. This review draws heavily from the work of Habermas (1984, 1987, 1988, 1990, 1996). Literature in this regard includes Habermas' writing as well as critical commentary from a range of authors. The second part of the literature review considers relevant issues pertaining to the accounting and legal professions, specifically concerning their coupling in the adjudication and juridification processes. The attributes of accounting and law are explored not merely in regard to the merge of common territorial borders, but with respect to the two professions' mutual overlapping coexistence that allows the provision of evidence to enhance the qualitative and quantitative expression of judicial consideration. The attributes of accounting that position it as legitimate expertise are contemplated, with the further consideration of the literature pertaining to the formal provision of expert opinion evidence at the court interface ('courtroom door') deferred for specific attention in chapter 5.

The third focus of the literature review is with regard to the correction of ownership through justified redistribution, particularly that which arises from the deliberations of Nozick (1974) and Rawls (1999). Such consideration ventures further into the area of patterned prescriptions for redistributive justice both in terms of legitimacy and validity, before revisiting Habermas in the context of ideal speech acts that provide the 'truth' and validity to effect communicative action. The purpose of these three sections of the literature review is to build a relevant cognisance that supports the research argument articulated in chapter 2. That argument is also augmented with reference to the literature at a more pragmatic level, to provide a direct focus oriented toward the research questions.

## Part 1                      Expertise and the Law

The helicopter context of the diagram is the law, therefore the first consideration is the realm of legal theory drawn upon from the philosophy of Jurgen Habermas (1929 – current), a leading German sociologist and philosopher in the convention of critical theory and pragmatism. Linked to the Frankfurt School<sup>42</sup> of philosophers, he has written broadly addressing the conditions that allow for social change and the formation of rational institutions (Held, 1980). Most relevant to this thesis are Habermas’ thoughts on the law and active communication espoused primarily in his books *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) [1998] and *Theory of Communicative Action* (1984) [1989]. Habermas builds upon Kant’s (1724-1804) regulatory ideas of rational consensus, to explore the tension between facticity and validity within the law (1996). That is, between “factual generation, administration, and enforcement in social institutions on the one hand and its claims to deserve general recognition on the other” (Rehg, 1998 pxi). Habermas’ analysis is an extension of his rational theory of communicative action (1984) without the moralistic oversimplifications of Kant. Habermas references this as a ‘post-metaphysical’ approach with his philosophical reliance on “notions of validity, such as truth, normative rightness, sincerity and authenticity”. The law then is both a system of “coercible rules and impersonal procedures that also involves an appeal to reasons that all citizens should, at least ideally, find acceptable” (Rehg, 1998 pxi, pxiii; Habermas, 1992).

### Two views of the law: Internal and External

According to Habermas the law is a “distinctive system, ... fundamentally about arguments .... providing the material correlate of the theory of communication” (Power and Laughlin, 1996, p456). He references two views of law; that of deriving legitimacy from democratically

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<sup>42</sup> A school of social theory and philosophy associated in part with the Institute for Social Research at the Goethe University Frankfurt (Held, 1980)

established statutes, in order to convert moral norms to legal norms (Habermas 1996, p147 to 153) and; that at a contextual level dealing with rational adjudication (Habermas 1996, p230-237). In the first sense he describes:

mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law, illocutionary obligations of this sort build up into a potential that holders of administrative power should not ignore (p147).

In the second sense he describes a process of discursive lawmaking which relies on the rational assent of participants for its binding nature.

..... the understanding of law .... can guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by all citizens and expresses a self-understanding of the legal community as a whole. This holds *mutatis mutandis* for a procedural understanding of the law, which reckons from the start with a discursive competition between different paradigms.

.... A single judge must conceive her constructive interpretation fundamentally as a common undertaking supported by the public communication of citizens.

.... Professionally proven standards are meant to guarantee the objectivity of the judgement and its openness to intersubjective review (pp223-224).

Law making is therefore seen as entwined with communicative power for the purpose of the common good, “an account of communicative action in terms of validity claims that must be vindicated in discourses of varying types” (Rehg, 1998, pxix). In this fashion the “discourse principle”, as Habermas describes it, “acquires the shape of a democratic principle” (Habermas 1996, p458). That is, discourse validates laws such that “only those norms are valid to which all affected persons could agree as participants in rational discourses” (p107). The discourse principle impartially justifies and legitimises legal norms without direct recourse to moral questions for justification (pp118-131). The Habermasian view of law is internally related to democracy that reflects rule *by* the people and the rule *of* law rather than rule *over* the people and the rule of men (Habermas 1995). In essence this refers to a system of self-legislation (Rose 1984) which is externally constituted through institutionalised rules

that ensure the required communicative conditions are met (Shelly, 2007) and internally constituted by the consequent rational discourse. “The judge represents integrity – self-government – to the community, not of it” (Habermas 1996 p223).

Legal discourse is predominantly of a linguistic nature, at times erring towards autopoietic construction bounded by institutionalised language of a specialised (expert) character, that resonates with the legal audience. Its recognised audience is the legal profession, the litigants and the public, perhaps in descending order of importance (Goodrich, 1987, p117). The dual tasks of legal rhetoric are to provide an account (in the context of the applicable law) and a commentary of the “argumentative techniques and value logic that will best serve the credibility or acceptability of the exercise of judicial will” (Goodrich, 1989, p117). The account has significant importance for legal argumentation “because it strengthens the disposition toward action by increasing adherence to the values it lauds” (Perelman and Olbrechts, 1969, p50). The account is one side, which operationalizes the discourse principle to function as a rule of argumentation or a reflective form of communicative action that requires the interests of each person be given equal consideration. The law “stabilizes behavioural expectations”, “justifying basic rights of due process”, and ensures the discourse principle such that the “legitimacy of legal norms can be tested” (pp219-224). The discourse principle becomes the standard for the legitimacy of law to which this dissertation will return later.

## **Juridification**

Blichner and Molander (2005) refer to juridification as both a descriptively and normatively ambiguous concept when they distinguish five dimensions of juridification. Descriptively, definitions range from mere proliferation of the volume of law through to the effect of legal monopolisation, the expansion of judicial power, through to guidance with regard to the

expectation of lawful conduct. Normatively, juridification is seen as the “hallmark of constitutional democracy, the triumph of rule over despotism”, that is the provision of legally assured rights through the rule of law (Blichner and Molander, 2005). Habermas (1984, 1987, 1996) takes the complexities of both descriptive and normative juridification to his colonisation process, that is, (in this case) the systemised process of legal norms legislatively supplant individual moral co-operation (such as, habits, loyalties and trust). The lifeworld is invaded by the system (in the form of legal process). Generally this refers to the ‘social community’ of the lifeworld which is connected by inherent value systems and jointly held perspectives, then has those value systems redefined and changed by the invasion of another value system, in this case the legal system. Juridification compliments democratisation legislatively to preserve the rights of citizenship and rights of social participation (1996, p152) but at the expense of separate individual rights. The colonisation process preserves the discourse principle in the form of communicative freedom of all citizens and as the primary determinant of legitimate juridification not restricted by natural or moral rights (p127).

Normative juridification is limited to the service of communicative justice that reflects a shared sense of what is right given the lifeworld values and beliefs. This principle of democratic legitimacy results from ‘interpenetration’ of the specific form of law:

Only those statutes may claim legitimacy that can meet with the assent (Zustimmung) of all citizens in a discursive process of legislation that in turn has been legally constituted (Habermas, 1996, p110).

Looking at juridification from the top down through the prioritised colonisation of law, Habermas (1996) applies a different perspective from those who apply critical accounting. Critical accounting supporters apply a bottom up lens on how accounting becomes a crucial medium of juridification where “areas of life subject to legal intervention have also been opened up to the possibility of calculative strategies” (Power and Laughlin, 1996, p457). The

law then comes to depend on expertise “not only concerning the technical features of production but also concerning the psychological features of the producing subjects” (Miller and Rose, 1990, p2). From above, legitimate juridification guarantees the principle of having discourse, whereas, accounting contributes to the content of that discourse from below, that is, from the facts of the matter rather than from the legal principle. Whilst Habermas does not specifically reference accounting, the research espouses that accounting is a medium of this juridification. It is a facilitating medium in the sense that accounting contributes content to, and translation of, the discourse. “If one views it empirically, law often only provides the form that political power (in this case accounting and the translation of money) must make use of” (Habermas 1996, p137). Accounting deploys patterned principles of operation to explain its interpretation of facts adding to the discourse, in a credible manner.

Accounting provides the facticity through a power external to the law. Accounting brings authoritative inscription<sup>43</sup> techniques supporting patterned, repeatable responses to the argument (as will be discussed in due course). Accounting assists the juridification process “by adding a system of coercible rules and impersonal procedures that citizens find acceptable” (Rehg, 1996 p xi). Accounting comes from the legal process (such as from expert evidence) but binds the moral view through reasoned calculation. Sponsored by the system, juridification expands in search of mutual recognition by the lifeworld, manages the risk of dissent through the employment of expertise (for example, calculation by forensic accountants).

Accounting enters into the application discourse (application of the law to the matter under consideration), with the intent to clarify relevant characteristics of the matter, to facilitate a determination that is appropriate in accordance with the applicable norms, and suitable for

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<sup>43</sup> Authoritative inscriptions are messages recognised as having support and credence. In this case numbers in a format that has the support and credibility of accounting both as a knowledge and as a profession.

translation into broader discourse to provide validation. Accounting is not inherently concerned with juridification (see, for example, the gestation of CLERP 9 harmonisation with The Corporations Act 2001 in the Australian Context<sup>44</sup>) (Brown and da Silva Rosa, 1998), however in combination with the legal profession it is recognised both within and outside the court. Accounting's legitimising message assists to justify juridification messages. For example, accounting quantification of the effects of organised crime and the value of unexplained assets, controlled by high profile suspected or proven criminals, is coupled with the legal discourse that further legislation is required to ensure a 'fair' distribution of assets and to prevent use and enjoyment of tainted gains (see Australian Crime Commission, 2015; Organised Crime Strategic Framework, 2015; Criminal Assets Confiscation Taskforce, 2011). This enhanced discourse then supports new laws such as those that reverse the onus of proof as to whether assets are untainted.

### **Legitimacy of the Law**

The concept of legitimacy is at the heart of Habermas' description of the law, derived from Immanuel Kant's concept of the universal principle of rights (Kant, 1785 [1959]; Korsgaard, 1985), albeit that Kant embedded that legitimacy in the morally oriented freedoms of free choice. Kant's view of the law is therefore subordinated to morality. Instead, Habermas fixes the law's legitimacy in free discourse, where rational consensus underpins regulatory ideal and the tension within the internal-external legal dichotomy. For Habermas, legitimisation involves an unconditional claim which remains true beyond the current context, that is, it is commonly understood as to its normative value in an everyday realm. It is this legitimate claim that is the subject of discourse that provides the momentum for communicative action,

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<sup>44</sup> The Corporate Law Economic Reform Program (CLERP 9) modified the Corporations Act 2001 in order to strengthen the financial reporting framework and improve investor confidence. The modifications placed legal obligations for the use of Accounting Standards by accountants. Legislative inclusion was driven by the legislature rather than the accounting profession who preferred a self-governing model.

to which we will return to in regard to the role of expertise in chapter 4. The theory of communicative action espoused by Habermas in his earlier tome (1984), holds that social coordination is brought about through language. Language seeks to communicate in a more meaningful way than mere semantics and grammar, to provide a message about the objective world that rational people should accept from a just viewpoint and in respect for other people. Language is presented in arguments that provide reasons “proffered in discourse that redeem a validity claim raised with constative or regulative speech acts: thus they rationally motivate those taking part in argumentation to accept the corresponding descriptive or normative statement as valid” (Habermas 1996, p226). This is a strength of the law and its linguistic approach. Language through discourse therefore legitimises and makes normative a statement based upon argumentation for internal consumption, however for the external audience the premise of the argumentation does not rest upon the statement alone, but requires the support of the structure of the argumentation process:

such a theory relies on a strong concept of procedural rationality that locates the properties constitutive of a decision’s validity not only in the logicosemantic dimension of constructing arguments and connecting statements but also in the pragmatic dimension of the justification process itself (Habermas 1996, p226).

Habermas postulates that “the legitimacy of legal norms is gauged by the rationality of the democratic procedure of political legislation” (Habermas 1996, p232). This rationality is supported not only “by the rightness of moral judgements” but by “the availability, cogency, relevance and selection of information”, and “the authenticity of strong evaluations” (p233). Accounting assists the discourse principle, to provide authenticity for evaluation, to combine with the law (structurally coupling), to increase rigour (the facticity of number), to formularise understanding (the deployment of patterned principles) and to connect with wider, familiar forms of evaluation (such as, accountingization and accounting as a recognised metaphor).



At the contextual level the legal system provides an administrative framework for procedurally regulated bargaining, that tests resolutions for consistency from a judicial perspective. In this form, the law takes its legitimacy merely from its legality, to provide the basis of judicial decision-making. That is, the law's power arises because it exists as a statute that merely requires judicial interpretation, as applied to the facts of the matter. The judge's decision forms a paradigm "usually equated to the judge's implicit image of society" (Habermas, 1996, p392). That paradigm is a "social construction of reality"<sup>45</sup> which, in pragmatic form, carries directional value either as statutory interpretation or precedential instruction, or both. The judges' paradigms rarely include perspectives supported by personal accounting skills at a professional level and often do not include accounting interpretation ability (Selby and Freckleton, 1999, 2001).

Habermas initially argues that expert cultures inhibit discourse due to the use of exclusive concepts and language (Habermas, 1984). However when expertise is applied within the court's internal context, governed by the legal system's discourse rules, the judicial view of reality is aided in its description. Expert evidence goes beyond the observation of facts with an informed contextual interpretation. Expertise brings with it a "rhetoric of technical validity" vital to its own legitimacy, yet "conditionally assignable, bestowed on the interpretation of the matter" (Power and Laughlin, 1996 p457). Expert rhetoric facilitates the discovery of possible means of persuasion which is reliant on the presentation and reception of its message, such as, using peer accepted standard practices within accounting technology (Generally Accepted Accounting Principles, GAAP) to explain, interpret or contextualise the facts of a matter. At the same time, Habermas puts that the law is only legitimate to "the

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<sup>45</sup>An extended discussion of the social construction of reality is beyond the scope of this research however it can be noted that the theory is that persons and groups interacting in a social system create, over time, concepts of each other's actions, which become habituated into reciprocal roles. Hence in this context the judge's social context shapes his/her view on what he/she (and therefore the court) accepts as real. See, for example, Berger and Luckmann, 1966.

extent that it emerges from a broadly inclusive process of participative democracy” (Baxter, 2002 p205), that is, a return to the discursive rule of law. The legal discourse is rationalised against the administrative power inherent in the statute, and is limited by its influence on the communicative power that arises from the citizens’ public discussion. This limits the courts to the “discourse of application” where they adjudicate according to legitimately accepted norms applied to the facts of a matter rather than engaging in a “discourse of justification” with regard to the creation and acceptance of the norms themselves (Baxter, 2002; Habermas, 1996). Accounting evidence is also limited by rationalisation against the terms of the statute and is an influencing factor on public discussion, however, it is limited to the “discourse of application”, with little contribution to the “discourse of justification”.

### Expert Cultures

If the discourse of legal application is to be assisted by expertise to inform both the internal and external audience, the court must remove the problems Habermas raises with expert cultures, such that, the expert’s contribution is tailored to assist not to inhibit discourse. Two problems arise, firstly, that the character of expert knowledge is specialised and therefore inaccessible to a broad audience, and secondly, that the expert culture sees the audience as a pitiful and ineffective victim. Politically expert cultures are seen as a hegemonic threat to democracy and equality. The imbalance of knowledge violates notions of equality (Turner, 2001), however under the steerage of the legal system, expertise is required to openly contribute to the discourse principle. The law brings to bear public scrutiny through formal review, formal questions and cross-examination. The law imposes an implied warranty on experts, that they must stand ready to justify their claims. In this manner the expert’s discourse and credibility becomes tied to the account of public reason (Habermas, 1996).

First and foremost accounting is an independently recognised area of expertise, professionally distinct, that commands its own set of knowledge, technology and principles<sup>46</sup>. Accounting exists separately from the law and although accounting has statutory links (for example audit and accounting standards, taxation legislation) they give rise to independent professional practices, processes and standards of quantification, qualification and explanation (Chua, 1986; Fargher and Cooper, 2009; Carr-Saunders and Wilson, 1933). The accounting message is legitimised through its many roles (management accounting, taxation accounting, environmental accounting, financial accounting and forensic accounting) and the wide group of stakeholders that rely on accounting reports (lenders, shareholders, superannuants, valuers and community stakeholders). Accounting then stands accused, *prima facie*, of the first problem, that of being aloof with respect to knowledge, and potentially also of the second, albeit that accounting can claim to have a long fulfilled the stakeholders' expectation of providing regular standardised economic explanations such as annual financial statements and audit assurance<sup>47</sup>. Of further concern is the supposed neutrality of experts which Habermas implicitly questions in his reference to 'expert cultures'. Expert knowledge can be taken to be a specially informed ideology, that masquerades as and is accepted by ordinary people as 'fact'. The deeper claims of the expert remain hidden therefore what is agreed to be fact through discourse is potentially not the product of open debate but of the pronouncement of authoritative experts, a peer group. Thus in order to preserve the discourse principle the ideological character of, and accessibility to, expert knowledge needs to be resolved. However Habermas decries that resolution is inhibited by steering mechanisms such as the law, power and money which are deployed by experts who are culturally distant from the

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<sup>46</sup> Note the professional accreditation processes of CPA Australia, the Australian and New Zealand Institute of Chartered Accountants and their international counterparts, which are based upon distinct academic credentials and acquisition of specific knowledge.

<sup>47</sup> Here it is recognised that there is a broad debate that pertains to the inclusiveness, clarity and worth of financial reporting. To explore this debate further in this thesis would deviate from the core purpose of the dissertation (see for example Chea, 2011).

constitution of the life-world (Habermas, 1996). In this way the discourse principle can be seen to be inhibited by unresolved circular references between groups of mutually supportive experts.

### Cognitive Authority

Merton (1976) refers to a similar notion as “cognitive authority” (p26) in that experts attain authority through cognisance of distinctive knowledge and ideology. Cognitive authority theory developed from social epistemology in reference to the type of expertise influence that would be rationally recognised as being appropriate (Wilson, 1983). Cognitive authorities exert influence related to their areas of expertise, epistemic authority, rather than authority arising from their position or status. Cognitive authority is open to resistance and submission (Turner, 2001) which is fundamentally understood by the manner in which people construct knowledge based on first-hand experience or learning second-hand from others. In the case of experts they contribute to the creation of second-hand knowledge, in this case, disseminated through the legally controlled discourse principle (Chea, 2011). The dissemination of second hand knowledge is not limited to the expert content but is dependent on the attributes of distribution such as judgement of information quality<sup>48</sup> and the relative positioning of the cognitive authority<sup>49</sup> (Rieh, 2002). The weight of the cognitive authority depends on both recognised expertise and reputation. The legal system qualifies the expertise and reputation by means of assessing and granting court access (see chapter 6). The legal system therefore provides its own regulated process for the anointment of the expert and expertise.

From the lens of cognitive authority, Habermas’ expert culture can be challenged. Indeed the legal rules that oversee the court formally facilitate this challenge as a process rather than as a

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<sup>48</sup> A full discussion of the attributes used to quality assess information is beyond the scope of this research. For a summary of approaches to individual quality assessment see Savolainen, R. 2007,

<sup>49</sup> That is, the status of the holder of the cognitive authority, for example some professions may be held in higher regard by the lifeworld because their expertise may be seen to be better aligned to lifeworld values or norms.

discrete event. Compliance with the rules of opinion evidence, fulfilment of the explanatory criteria of professional and ethical accounting standards, as well as cross-examination, allow informed, rational and democratic questions to be asked with regard to the witness' authoritative status, thereby returning ultimate authority to the people (through legal representation), who reject or accept the expert's claims based on the expert's responses (Turner, 2001, p123).

## Part 2                    The Accounting and Legal Professions

### The Accounting and Legal Professions

*“Law is vulnerable to the justice of humour” (Goodrich, 2005, p294),*

perhaps law is also vulnerable to the justice of calculation?

“We are all commanded to know the law – and yet legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than a highly trained elite of specialists in various domains of legal study” (Goodrich 1987, p7). Whilst the accounting and legal professions share remote origins<sup>50</sup> their independent gestation has not been smooth. Both accounting and law are recognised as distinct professions with their own membership criteria, body of knowledge and hegemonic positions. In this regard, the law has maintained the ultimate power of legitimisation through control of the legislative process, that adjudicate issues where generally accepted accounting principles and processes have been tested and challenged. Napier and Noke (1992) note a mutually beneficial cross fertilization between the law and accounting although the legal relationship

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<sup>50</sup> In the mid nineteenth century Scottish accountants petitioned to have their own charter as a distinct profession. Prior to that, modern accounting was delivered simultaneously with legal advice, often in a similar form to today's forensic accountants where *“accountants then incorporated the duties of expert financial witnesses into their general services rendered. An 1824 circular announcing the accounting practice of one James McClelland of Glasgow promises he will make “statements for laying before arbiters, courts or council.”* (Nurse D. 2002 "Silent Sleuths". AICPA). The original distinction between the accounting and legal professions developed with respect to audit type specialties (Fargher and Cooper, 2009).

has been somewhat dominant. Further “the respective claims of accountants and lawyers to professional expertise have been expanding, bringing the professions into commercial rivalry” (Napier and Noke, 1992 p 31). Bromwich and Hopwood (1992) point out that the law regulates accounting, a position that is sustained in the Australian context, such as, through the regulation of accounting and audit standards under the Corporations Act (2000).

There is limited research regarding the interface between accounting and law with more consideration given to the boundaries rather than the interface itself (Carter, 2006, p2). This research, and the nature of forensic accounting, considers the interface itself, the crossover of professional knowledge and contributions between the two professions, that is, forensic accounting. Accounting plays an increasing social role (see, for example, accountingization below) “defining expectations, interactions and power relations, through the provision of information” (Carter, 2006 p3). In Habermas’ view the law plays a steering role between the external system and the internal lifeworld. Accounting supports this role through the addition of more expertise and legitimisation. The law capitalises on the leverage of power assisted by accounting’s leverage of money, particularly evident where the law imposes financial penalties or a fiscal settlement.

Both professions cement their status, through utilisation of rules of practice to maintain hegemonic control of obligatory passage points<sup>51</sup> within the system. In this regard the discourse available through the court system is the domain of the law, whereas, financial reports, valuations and transactional detail are the domain of accounting. Accounting controls the construction and auditing of financial accounts whilst law controls access to the judicial system (see Clegg, 1989). In order to seek legal discourse on a financial issue the matter must

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<sup>51</sup> Clegg (1989) describes how professions establish and maintain control of nodal points including, administering obligatory passage points through rules that fix relations and membership, and owning innovation and techniques. These gateways form the borders of the profession, for the hegemonic benefit of members and to the exclusion of non-members (pp187 – 239)

proceed through the appropriate path of accounting verification and legal entry as administered through each of the appropriate professions' passage points. (see chapter 6). The interdisciplinary contribution of accounting and law contributes to the social discourse to enhance the understanding of legal consequences and outcomes through the more common parlance of money. Accounting's contribution is most important when the outcome of the legal process is expressed in the metaphor of money, such as, an amount assessed to be paid for financial punishment, compensation or forfeiture.

The law delivers its message linguistically, attempting to argue with logic, transcending from norms to reasons, whereas accounting relies on facticity to extend its computable meaning. Accounting can be interpreted as portraying the world as "written in numbers" (Keat and Urry, 1975, p244). Accounting presents as a delinguistifying medium (Power and Laughlin, 1996). The daily practice of law appears to treat accounting as 'fact', or science. These labels hold considerable power and perceived legitimacy in order to validate the matter at hand. To label as 'fact' denotes certain notions of truth, objectivity, general acceptance and correctness supporting a realist ontology (Hussey, 1988; Waldron, 1994; Wittgenstein, 1974). The reliability of numbers is an essential characteristic that contributes to the usefulness of accounting information (Maines and Wahlen, 2003). Researchers in accounting have accepted that quantification is the hallmark of 'science' (Chambers, 1966, 1980; Mattessich, 1962; Sterling, 1970; cf. Chua, 1986; Hines, 1988; Lyas, 1984). The normative view of expert accounting evidence is that accounting standards, generally accepted accounting principles (GAAP) and the facticity<sup>52</sup> of accounting should lead to consistent, clear, rules-based opinions, that converge and concur given the consistency of available facts (FASB 1980). The apparent objectivity of accounting standards and the accurate calculability of

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<sup>52</sup> The facticity of accounting evolves from the numerical base of calculation and money in contrast to the linguistics of law evolving from conceptual (and potentially codified) argument. This differentiation will be revisited later in this chapter with respect to accounting's patronage towards legal arguments reflected in monetary transfer remedies.

accounting variables presents an expectation of professional ‘tightness’ and lack of variability. That is, repeatability as ‘truth’ in numbers (Watts & Zimmerman, 1986).

The combination of text and number sign systems blend together to establish a better account (the story). That is, a sense of “communion centred around particular values recognised by the audience” (Habermas, 1996, p51) that serves to enhance both the account and the judicial decision. Habermas refers to this strengthening of the account as ‘formal pragmatics’ (Habermas, 1985; Baxter, 2011), “rationally reconstructing the necessary presuppositions of communicative action” (Baxter, 2011 p12). His theory focuses on the use of ‘speech acts’ as validating communicative action, which is an area that this research returns to in greater detail in chapter 2. The core concern of this research’s questions are the attributes and content of speech acts of forensic accountants that strengthen the account in forfeiture matters.

### **Professional coupling**

Professional coupling has been discussed in the literature under headings such as ‘structural coupling’ (Laughlin and Broadbent, 1993; Teubner, 1987) or ‘loose coupling’ (Lingard et al, 2014; Manning, 1984, Koff and DeFreise, 1994). Weick ( 1976) defines loose coupling as “a situation in which elements of an organisation are responsive but retain evidence of separateness and identity” (in Lingard et al, 2014, p4). Structural coupling recognises similar parameters under a tighter domain in which “all that takes place is determined by the system’s structure at that instant” (Romesin, 2002, p15). Structural coupling to a system defines the point where juridification becomes a positive or negative steering force (Teubner, 1987). This can happen through reliance on self-referential professional structural coupling “when relevance criteria are not met or when the conditions of self-reproductive organizations are endangered” (Teubner in Laughlin and Broadbent, 1993, p 340). From a Habermasian perspective adverse professional coupling occurs when the professions are



bound to the system and do not perform their role as a medium in response to the lifeworld's needs. The perspective of structural coupling informs this research by bringing forth cognisance of the management of the tension between professional autonomy and interdependence, which shapes the collaborative professional practices, as well as recognition of the potential for juridification to breach the legitimacy link, through the over prioritisation of the system connection (for example, producing laws supported by the legal system and not by the populous).

Loose coupling operates at the boundary of professions with the literature mainly citing research that reviews professional teams in the medical field (Lingard et al 2014), policing (Manning, 1984) and education (Koff and DeFriese, 1994). The professional participants "use autonomy and interdependence as resources to achieve complex goals in collaborative settings" (Lingard et al. 2014 p1). Loose coupling is a more cohesive notion transcending disciplinary hierarchies, even if only at the professional extremities. This approach aligns to the potential for law and accounting to draw on independently recognised bodies of knowledge and practices to progress the discourse principle. Accounting knowledge brings a translational role to the facts of the matter, augmenting the legal argument, as required, in a calculative manner.

Habermas (1996) describes separate but interlocutory roles of the law and expertise (in this case, accounting). In this sense he makes a distinction between law as an institution and law as a medium with its steering qualities (1984). Law and expertise inform and steer the justification discourse in their own separate manner. Law from its statutory reframing of norms and values, and expertise from its hegemonic knowledgeable authority (in accounting's case) of money. Professional coupling (between law and accounting), has the potential to capitalise on the broader base of extended professional knowledge, but only to the extent that it is not welded to an authoritative system that makes use of the law to fulfil its

own functions, inconsistent with lifeworld legitimacy. Legitimate juridification supported by professional coupling is therefore interventionist to the extent that it is reflexive to the values and nature of the lifeworld (Teubner, 1986, 1987).

### **Accounting Inscriptions – The Accounting Metaphor**

The arbitration process requires expertise to assist in its deliberation (Power & Laughlin, 1996). Expertise marshals the facts of the matter into a credible, informed story. In this case forensic accounting provides that expertise, to augment the account, specifically in the dominant metaphor of the *number* (Morgan, 1988; Hooper & Low, 2000; Waters-York, 1996). People are accustomed to using metaphors in ordinary daily life to simplify the communication of ideas (Lakoff and Johnson, 1980; Carter, 1990). This is particularly true in the business context where complex issues are clarified through metaphoric analogy (Bolman and Deal, 2003; Robbins and Coulter, 2010). “Metaphors focus more on addressing the cognitive or conceptual similarities between the metaphor and the reality of the situation which the metaphor is describing” (Vevaeke and Kennedy, 2004). A metaphor enables an idea to be communicated, which is difficult to represent in literal language (Carter, 1990). In the professional context metaphors facilitate the social construction of perceptions (Young 2001) which Habermas would argue in terms of facilitating communicative action.

The accounting metaphor of number portrays a linguistic precision that reduces ambiguity (Walters-Yorks, 1996, Arrington and Francis, 1989). Robson (1992) refers to the “quantitative orientation of accounting enabling *action at a distance*” (Robson, 1992, p686). Accounting provides a numerical code to the philological interpretation of legal texts through a manner of quantification that is stable, transportable and combinable. That is, the accounting numbers retain their stable, reliable character inside and outside the court room and can be added and subtracted given the combination of other accounting or valuation

evidence (Robson, 1992). Accounting aids the logic and unity of legal postulation to present a formal construction “claimed to privilege both [the legal] system and objectivity as a function of [that] system” and “with it the legitimation of the binding validity of legal norms” (Goodrich, 1987, p39).

### **Accounting at a Distance – The Accounting Message Inside and Outside the Court**

As most of our knowledge cannot be received directly<sup>53</sup>, messages are derived through inscriptions representing worldly knowledge. Accounting inscriptions include “various techniques to mark, write, record, and tabulate” (Latour, 1987; Robson, 1992 p689). Accounting inscriptions facilitate ‘action at a distance’ because their factitious nature provides a reliable translation of remote events and decisions which they signify (Law, 1986, Robson, 1992). Inscriptions disseminate their message through mobility (“the ability to move back and forth between settings”), stability (“of relation between the inscription and its context”) and combinability (allowing the receiver to “aggregate and tabulate creating norms through which to make comparisons”) (Robson, 1992 pp689 – 697).

The action at a distance concept is important because it explains how the legitimacy of accounting’s numerical metaphor is transmitted to and recognised by the populous where they assess and most likely accept the message as confirming the ‘right’ adjudication. The distance is from within the court where the audience can be fully informed through the experience of the proceedings, to the community outside the courtroom and remotely located, unable to rely upon personal experience of the judicial events. Nevertheless, the internal machinations of the courtroom are of concern to the outside audience who require a reliable interpretation, albeit through secondary information.

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<sup>53</sup> The lifeworld is so vast that only a small proportion of knowledge can be based on personal experience or even second hand testimony hence one relies upon a systemised approach to assimilate messages. (Habermas 1984, 1996)

## Patterned Principles in Accounting and ‘Accounting at a Distance’

Accounting’s reputation is legitimated by claims to represent the accuracy of numbers in a replication of scientific theory (Mattessich, 1962; Chambers, 1966; Chua, 1986). Its metaphor (Morgan, 1988) is viewed as hard knowledge with precision, rigor and objectivity (Duncan, 1982). Yet accounting can have a qualitative dimension (Briers and Chua, 2001) allowing application of accounting technologies to a broader interface with the lifeworld. Unlike mathematics, accounting numbers are presented with both an internal and external context that gives the data a patterned meaning. The argument is that “the quantity that is expressed by a number is a quantity of “something and that something has a quality” which is “disclosed or rather constructed through the operation of the concepts of prior knowledge” (Frege, 1991). Therefore, if the populous has prior knowledge they can relate to the accounting of those things (for example, money, as it represents economic value or purchasing power).

Accounting is based on inscriptions (Latour, 1988a) with unbounded mobile qualities of stability and combinability. That is, accounting is recognisable and understandable across boundaries making it a useful tool of the system in colonisation of the lifeworld (Habermas 1996). Accounting inscriptions form a regular and intelligible arrangement, discernible by the populous, familiar with the measurement of things in accounting terms (such as financial reports, economic data and valuations). Accounting inscriptions inherently include formularisation in their construction based on regulated professional rules. The combination of these inscriptions in a credible and perhaps familiar pattern validates an economic outcome that is reusable, transportable and translatable. The external legal discourse is made richer through the legitimate structure of its calculation, not just its outcome. The discourse benefits not only from legitimisation of the outcome but in the argumentative discourse that gives rise

to its construction, for example, the deployment of peer accepted accounting techniques to the calculation of a penalty or confiscation remedy.

The appropriateness of such techniques addresses the research questions which, when deployed in combination and with a targeted outcome, can be referred to as patterned principles on which to base judicial decisions. Patterned principles for distributive justice shall be considered in greater depth later in this chapter, as the code that influences the lifeworld's acceptance of judicial remedies particularly when deployed towards the forfeiture genre.

### **Accountingization**

Accounting has become broadly recognised as a legitimate quantification tool due to the rise in the 'accountingization' of things. Accountingization is a term coined by Power and Laughlin (1992 p133) and is primarily a reference to "explicit standards of performance" and "greater emphasis on output controls" that have permeated public and private business activity over the past two to three decades. Accountingization has been recognised as a medium of juridification through its nexus between legislation and outcome performance, such as, in the U.K. New Public Management (NPM) doctrine (Sevic, 2002; Power and Laughlin 1992; Hood, 1995).

Accountingization has been described in change studies (Weick and Quinn, 1999), theorising that the information from the organisation's environment impacts on the behaviours and behavioural interpretations of that organisation (or in Habermasian terms, the system's information leveraged for colonisation). The studies highlight the need for the organisation to "make it [the information] meaningful for the members of the organisation and its goals" (West and Turner, 2004, p299). Accounting technology is utilised for interpretation, with reliance upon its wide financial authority. Hood (1995, p93) claims this can be seen as part of

“a broader shift in received doctrines of public accountability and public administration” (p93). He notes that “accounting was to be a key element in this new conception of accountability, since it reflected high trust in the market and private business methods” (p94). The medium of accounting language has been used to translated economic rationalism (for example, of the NPM), to describe more cost centre units, break down the identification of costs, to improve the description of cost structures and to align financial reporting to private-sector norms (p96).

The connection of accountingization to this research is not as a direct addition to specific legislation or measures of output in and of themselves, but from the overarching perspective that the legitimising force of accounting translates public legislation into accounting facts and measures (predominantly money). “The steering media of money and administrative power are anchored in the lifeworld through the legal institutionalization of markets and bureaucratic organisations” (Habermas, 1996, p75). The medium of market legitimised money is embedded through accountingization into the legislative process. Power and Laughlin (1996, p462) comment that Habermas sees “the solution to the colonising effects of money and markets in terms of the legitimizing role of public law”, that is, the validation provided by legally facilitated discourse.

Habermas notes the tension that exists between legal norms (that are promulgated by statute) and the facts of implementation (such as, a threat of legal sanction) (Habermas 1996, p30). Forensic accounting often facilitates the threat of legal sanction in the form of redistribution of money such as financial penalties or forfeiture. Money converts information to communication, “substituting for special functions of language” (Habermas 1987a p70). Money steers economic sub-systems and administration, such as, the administration of UW-POC remedies, with normative support from statutes and the state (for example Proceeds of Crime legislation). Simultaneously money is not dependent on the state alone for

legitimation because, as Dodd (1994) points out, “money possesses contradictory qualities as both a medium which requires normative support throughout society in order to exist and an economic instrument which symbolises and generates major asymmetries of wealth and power” (Habermas 1987a p75). Money and accounting as a support to monetary calculation are “chronically embroiled” in the explanation of the system and the lifeworld (pp76-77). Accounting is simultaneously the technology of calculating transactions whilst being reflectively constructive (Hines, 1988), having persuasive and enabling characteristics which “create particular financial forms of visibility for abstract and organisational phenomena” (Potter, 2005, p265). Accountingization assumes validity at the technological level without cognisance of the ambiguity and problematic nature of accounting over functionalizing the system (Power and Laughlin, 1996). The force of the apparently factual, derived from logical and mathematical treatments, acquires an objective authority “behind the backs” of participants, operating inside of the law (Habermas, 1996, pp39-40).

### **Part 3                      Justified Re-Distribution**

#### **Distributive Justice**

In order to progress to advising the ‘right’<sup>54</sup> decision regarding the ownership of property (or its removal), a brief consideration<sup>55</sup> of property ownership is necessary. ‘Property’ in general is a term “for rules that govern people’s access to and control of things like land, natural resources, means of production, manufactured goods, money and other tangible and intangible assets” (Stanford Encyclopaedia of Philosophy, 2004). The pragmatic component of this research centres on the justification of private property rights (as opposed to common or collective property). Private property rights refer to a “kind of system that allocates

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<sup>54</sup> The concepts of ‘right’, ‘correct’ and ‘true’ decisions will be discussed in greater detail in chapter 3.

<sup>55</sup> The philosophical consideration of property and property rights is a broad topic, a subject considered over many years by philosophers, academics and practitioners. A full consideration of property rights is therefore beyond the scope of this dissertation.

particular objects, like pieces of land, to particular individuals to use and manage as they please, to the exclusion of others, and to the exclusion also of any detailed control by society” (Stanford Encyclopaedia of Philosophy, 2004). Private property arises through a system of social rules, so private property is continually in need of public justification because it requires public force and expense to uphold these social rules (Ackerman, 1977).

Kant (1797) refers to the universal principle of justice when he considers an act to be right as long as “its guiding maxim permits one person’s freedom of choice to be conjoined with everyone’s freedom”.<sup>56</sup> He inferred property rights from nature to agency “it is a duty of right to act towards others so that what is external (usable) could also become someone’s” (Kant 1797 [1991] p74) Kant therefore describes individuals as inviolable self-owners with basic rights to the fruits of their labour. The right to private property in John Locke’s political theory assumes that a man is subject to the laws of nature and self-preservation. It follows that any product of man’s physical labour belongs to him/her and one is able to appropriate anything un-owned through his/her labour, provided he/she leaves “enough and as good” for others (see Locke, Chapter V, Second Treatise of Government, 2005 [1690]). Such unilateral subjective property rights cannot acquire legitimacy without being ratified by an arrangement that respects everyone’s interests, such as, property rights in a civil constitution to settle who is the owner and on what basis (Hutcheson 2002, Kant [1797]).

Rawls’ (1971) and Nozick’s (1974) acquisitional justice theories both specify the initial situation and, after deliberation, accept the outcome. Rawls’ is an end-result theory of fairness with the representative worst-off person being no worse off than he would have been in any other possible situation (the difference principle) (Kilcullen, 1996). His viewpoint is of society as a co-operative pursuit of individual interests, hence the rectification of injustice is

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<sup>56</sup> A detailed discussion of the doctrine of natural rights and analysis of rights such as duties, permissions and power is beyond the scope of this research.



one that prioritises liberty and rights arising out of the principles of justice harmonised with rational goodness. Rawls refers to the ‘social surplus’ obtained by co-operating with society, that is, by obeying the law and participating in society one is owed distributive justice. However, Rawls has been criticised for his reliance on his patterned principle of people “maximising the minimum”, that is, the unbiased rational pursuit of the greatest benefit of the least disadvantaged as the basis for wealth distribution.

Nozick’s is a process theory that is historical and unpatterned where people have rights to the things they produce, which can be laid out in a historical story. Entitlement Theory has three principles including the need for rectification. “To Nozick, the unconscionable thing is that anyone should feel justified in appropriating property that is rightly entitled to someone else” (Fraser, 2011, p1). It is a theory of justice that claims we can tell whether a distribution (or redistribution) of goods is just or not by looking at its history. Nozick recognises the need for re-distribution, however, he does not provide a theoretical prescription for that redistribution. When applied to POC-UW legislation the need for redistribution would be recognised through reviewing the historical lack of genuine attainment, or the direct funding of an acquisition from the proceeds of crime. This dissertation recognises the predominance of the historical reasoning for the need to enact redistribution in the POC-UW context, however, the need requires a process of redistribution that is validated by the application of a patterned process. A patterned process that accounting can provide.

### **Entitlement Theory**

UW-POC matters are influenced by the manner in which assets were acquired (historical), however this is an unpatterned narrative. Nozick’s Entitlement Theory is unpatterned in that “the distribution resulting from acquisition is not correlated with anything else such as moral merit, need, usefulness to society; people may be entitled to things got by chance or gift”

(Kilcullen, 1996, p1). Entitlement Theory is instructional with respect to its three core principles however being unpatterned the methods of rectification (third principle) are inconclusive.

The three main principles of Nozick's Entitlement Theory are:

- *A principle of justice in acquisition* dealing with the initial acquisition of property and the terms under which it is being held;
- *A principle of justice in transfer* explaining how property can be exchanged and transferred from one to another; and
- *A principle of rectification of injustice* describing how to deal with property that is unjustly acquired or transferred, including victim compensation and long past transgression (Nozick, 1974).

Nozick believes that if the world were wholly just, only the first two principles would be needed, that is, everyone would be entitled to what they have and hence society is just<sup>57</sup> (Duignan, 2014). Nozick's theory shows the connection of justice with entitlement and the overriding importance of the concept, however, it does not include elements of fairness or just deserts or reciprocity that should be embedded within any concept of justice suitable for validation by the lifeworld. Nozick does not propose the rules of rectification other than noting that it is an important task for each society to work out operable policy details for rectification.

UW-POC matters are a statutory process of rectification, however, such rectification needs to include the elements of fairness in order to sustain legitimate system and lifeworld support for the remedy. Habermas notes the importance to rely on fairness in reference to Weber's fifth principle of the "methodical conduct of life" (Habermas, 1984, p164-5) The status Nozick places on historic considerations is limited in this respect, however it informs the

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<sup>57</sup> For Nozick distributive justice, no matter how unequal, is only dependent on the nature of the transaction that facilitated the distribution of 'holdings', as he refers to property.

legal debate with a sense of comfort embedded in the review of historic actions, a stance familiar to the court. Review of these actions is by particular attention to the historical facts of the matter and not formularised as to the outcome (as opposed to Rawls' maximising the minimum). Historical discourse by itself that contributes to the Court's argumentation is equally particularised in that it requires detailed knowledge of the past actions that surround the facts of the matter. Such knowledge is complex and lengthy, unsuitable for assessment and validation by a broad and remote audience unfamiliar with the evaluation of that level of detail. For example, a chronological description of criminally acquired assets might require individual scrutiny over an unbounded period that contains many intricate and unwieldy transactions, which are too complex for broad translation without expert interpretation. Rawls' and Nozick's notions inform the concept of rectification that support the foundations of fairness and historical occurrence, however they require the assistance of expertise to broadly translate rectification beyond the limited onlookers in possession of the full detail. Broad translation requires a patterned response recognisable through structure and discipline by the system and lifeworld. Here the patterned response is one of process (or formula) rather than one of ideological fulfilment. With respect to UW-POC matters forensic accounting provides the patterned process, in peer accepted methods, that reconstruct, interpret and simplify the data using accounting technology.

Forensic accounting presents a basis for fair distributive justice when the community (through legal adjudication) assesses that the first two entitlement principles have been violated. Specifically, that the principles of justice in acquisition, or in transfer, have been violated by either proven use of the proceeds of crime or implied, unexplained, illegal means of possession. UW-POC legislation is required to invoke rectification through asset forfeiture. The UW-POC statutory provisions (the law) commence the rectification process, however accounting ultimately resolves the forfeiture redistribution through quantification of

the acquisition argument and the monetary transfer remedy. Accounting technology legitimises the adjudication and validates the judicial message by economically balancing questions of rightful or tainted entitlement.

### The right decision

Albeit that Weber (1864-1920) anchored his thesis in protestant ethics, rather than the Habermasian discourse principle, his methodical conduct of life influenced the development of the theory of communicative action (Habermas, 1984, p143-366). Of Weber's five principles, number 5 states:

The methodical rigor of a principled, self-controlled, autonomous conduct of life, which penetrates every domain of life because it stands under the idea of assuring oneself of salvation (Weber in Habermas, 1984, p165).

Habermas interprets Weber's analysis effecting the judicial system and its organisations as formal consideration of their vocational ethic in terms consistent with the moral-practical consciousness of the system and lifeworld. That is, the legal system's deliberation and decisions need to be seen via the discourse principle to be 'right' and consistent with the system and lifeworld's values in order to spread purposive-rational action<sup>58</sup> (1984, p166-168). If this is not the case the message to the populous becomes fragmented, with the creation of disunity of reason. If accounting evidence is to be presented to assist the judicial decision making process it must be trustworthy, a reflection of an accepted pattern recognised as telling the 'truth'. That is, the expertise must be marshalled in a manner deemed as correct, be embedded in the values of the court and the lifeworld, be able to be translated and legitimised into the internal and external discourse. Attributes include the expert evidence that meets the test of cognitive authority, delivered as a valid speech act, based upon articulated, peer accepted methodology and sufficiency of investigation and reporting (see chapter 3).

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<sup>58</sup> Habermas describes purposive-rational action in terms of directed human behaviour with rationally aligned intention.

## Patterned Principles of Justice

Particularly, in the absence of primary information, the lifeworld relies on a patterned inscription to provide secondary knowledge. The lifeworld can test the patterned inscription for consistency against the lifeworld's values and norms. That is, expertise expressed in accordance with its moral and functional merit, that may vary in its calculation details, but is marshalled along the dimension of a code reinforced by accepted norms. This is similar to a mathematician who relies on the application of a recognised formula (or pattern) for consistency rather than undertaking a range of individual calculations to compare the final single unit calculation. In same way, in the legal genre of Family Law, a patterned principle has evolved through the court preference of expert accounting evidence consistent with the concept of 'value to the owner'. Sprouting from the valuation of impaired minority shareholdings, the legally determined principle has grown to direct accounting methodology in a manner specifically to suit the 'reality' of the Family Court<sup>59</sup> (see Warnick J in Ramsay and Ramsay, 1997). A patterned principle of justice is supported by both, an ontological reasoning and a properly executed methodology. In mathematical terms the proper formula is ontologically sound, having been structured according to the rules of mathematics and therefore belonging by first principles to equations known as formulae. The formula is then applied to various values in a peer accepted methodological application that produces a reliable, meaningful result. Similarly accounting ontologically validates its 'formulae' according to the generally accepted accounting principles and then deploys accounting technology according to those principles to produce a reliable, meaningful contribution to communicative action (Gaffikin, 2009).

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<sup>59</sup> Contrast the equity court's valuation (willing buyer/willing seller) case of Spencer (1907) with the valuations accepted in Family Law cases such as Marriage of Reynolds (1984) 10 Fam LR 388, Hull and Hull (1983) FLC 91-360, Sapir and Sapir (No 2) (1989) FLC 92-047, Turnbull v Turnbull (1991) FLC 92 258, Ramsay and Ramsay (1997) FLC 92-742, Best and Best (1993) FLC 92 418, B&B (No 2) (2000) 26 FLR 437 and Wall and Wall (EA83 of 1999).

When applied to the UW-POC context it becomes clear that, as wealth may have historically been illegally attained or transferred, rectification is required. Such rectification, that requires asset redistribution, is generally contrary to the lifeworld's endorsement of libertarian principles, necessitating a morally supported pattern being applied to suitably account for the injustice in acquisition. The research argument in chapter 4 picks up this discussion within the steps that directly reference the patterned principle of redistribution that anchor confiscation remedies to lifeworld values.

### **Communicative Action**

Patterned principles underpin purposive-rational discourse leading to communicative action which in turn supports or denies juridification. They utilise natural language, which rationally binds individuals based on deliberation and argumentation. Communicative action provides legitimacy when it resonates with those involved in the discourse, which collectively strengthens the democratic process that bolsters legislative legitimacy. This involves accepting truth claims (about the objective world) and moral claims (about rationally acceptable norms). In this way, Habermas sees communicative action as the basis of morality, democracy and the legitimacy of law (see Habermas, 1984).

This principle has to begin with, the cognitive sense of filtering reasons and information, topics and contributions in such a way that the outcome of a discourse enjoys a presumption of rational acceptability; democratic procedure should ground the legitimacy of law (Habermas, 1996, p151).

The power of this discourse is also reflected in a motivational response where collective objectives are integrated with the “normative regulation of behavioural expectations” (p151). Action is then directed towards integration and solidarity. That is “action which explicitly raises claims to truth, rightness and sincerity within institutional contexts in which such claims can be consensually resolved” (Power and Laughlin, 1996, p444).

The dual structures of the internal 'system' and the external 'lifeworld' utilise communicative action for resolving pragmatic enquiry, mediating between these two fundamental arrangements. Here law (and accounting) have a special place providing a legitimised steering role beyond the other steering systems of money and power. Law has a priority role to provide communicative action with argumentation that is reflective of the lifeworld norms, to test "real abstractions" in the "core zones of the lifeworld" (Habermas, 1987 p374). Accounting provides a compact of support through the accounting metaphor and the deployment of accounting technology in the manner considered in Chapter 4, *The Research Argument*.

## Chapter 4: The Research Argument

### Introduction to the Research Argument

This chapter deals with the role of accounting expertise in the validation of evidence and judicial remedy within the pragmatic context of forfeiture legislation. Part 1 of this chapter follows the logical argument summarised in Table 1. The argument provides a stepped framework that initially considers the context of juridification, supported by the law, coupled with accounting. Part 2 then considers the nature, role and purpose of accounting in that amalgamation, as well as the pragmatic application of forensic accounting in order to provide acceptable evidence, specifically focused on asset deprivation. The purpose of this chapter is to build on the literature review of chapter 3, such that the theory can inform the more pragmatic application to POC-UW legislation. The importance of this chapter is that it connects the theoretical arguments that pertain to the topics raised in the first three chapters, into a logical format, which can be applied to lead to a reasoned reply to the research questions. Academic and judicial literature contribute to aspects of the research argument, which is reviewed in both a theoretical and pragmatic sense. This is important because the research questions, in and of themselves, may appear fickle, perhaps easily answered without due attention to the applicable definition of the word ‘appropriate’. To reiterate, the two research questions are:

1. Descriptively, how has the application of accounting technologies in forfeiture law cases evolved?
2. What are the attributes of *appropriate* accounting technologies described in question (1)? (highlight added)



The word ‘appropriate’, interpreted as suitable, apt or proper in the circumstances, implies a measure that fits with some criteria or standard. In this case, the research argument turns on the word ‘appropriate’ for the formation of the research criteria that are to be applied to the inspection of forensic accounting evidence at the case level (see chapters 8 and 9) and for future research into accounting led UW remediation strategies. Such criteria or standards are circularly referenced, back to the purpose of the argument, that is, to understand how expert forensic accounting evidence supports the discourse that, in turn, underpins the legitimacy of juridification. Expert evidence that fits the ‘appropriate’ criteria can be translated to be validated with respect to the system and lifeworld norms that legitimise [or de-legitimise on the contrary] when attached to legal proceedings. This chapter considers the notion of ‘appropriate’ criteria from various viewpoints to culminate in a framework from which to evaluate instances and patterns of forensic accounting evidence in the forfeiture genre.

In this chapter, Habermas’ view of expert culture, as an aloof disconnection, is challenged by the idea of the experts’ cognitive authority that is contested through systemic processes such as cross-examination. That is, the legal system procedurally creates transparency and the translation facility that dilutes Habermas’ attributes of exclusivity and barriers to cognisance, such that, the evidence is understood inside and outside the courtroom. The legally enforced discourse of the courtroom breaks down the barriers to cognisance of expertise, and the law, such that, the narrative of the litigation is available to the community. This contest is viewed from a theoretical viewpoint (that of an ideal speech act), from a pragmatic viewpoint (that of the sufficiency, truth and validity of the report), from an assurance standpoint (that of formally meeting professional accounting standards and advice) and peer accepted consistency (such as, reliance upon Generally Accepted Accounting Principles and appropriately conducted forensic accounting methods). Expert evidence in compliance with the statutory specifications and common law articulation (the judicial interpretation) is the

subject of chapter 5, which is, in turn, connected to the research argument in the compilation of the proper investigative methodology for chapters 8 and 9. Consideration of the need for rationality and reason in the truthful vision (that arises from the expert's narrative) is discussed through the application of Weber's empirical mode of cultural rationalisation (1864–1920)<sup>60</sup>. Habermas extends Weber's need for rationalisation as a central element of legitimacy reflected in ideal speech acts. The concept of an ideal speech act directly relates to how expert opinion influences communicative action, in order to influence the behavioural dispositions and the conduct of life and ultimately in democratic juridification. The ideal speech act effects the legitimacy of the expert's evidence, which is necessary for the acceptance of the expert's opinion within and outside the court.

As chapter 5 will consider the legal formality of expert evidence's access to the court's processes (the legal admission and acceptance of opinion evidence), a brief reflection of how this structural rationality reflects in Weber's purposive-rational approach<sup>61</sup> is due. Empirical and analytical knowledge (such as accounting) contribute to purposive-rational action through the application of their strategies and techniques. In the accounting example, the strategies are based upon the achievement of rational objectives and that the accounting techniques, are rational, peer accepted methodologies which have been deployed with the support of incrementally logical, stepped processes. For example, accounting may be used to establish a rational objective, such as, an acceptable return on investment, then accounting is

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<sup>60</sup> Max Weber was a significant contributor to modern social science (modernity). His two most celebrated contributions were the 'Rationalization Thesis' and the 'Protestant Ethic Thesis'. This dissertation calls upon some points Weber raises in his rationalization thesis as they pertain to the need for the legal system and particularly the courts to champion rational decision making over concepts of ritual, superstition and deity. Weber's theses were far-reaching spanning several disciplinary, methodological, ideological and philosophical reflections that extend beyond the bounds of this dissertation. Habermas, 1984, devotes significant space to discussion of Weber's philosophy and extractions that assist the development of Habermas' opinions.

<sup>61</sup> Max Weber viewed sociology as a science of social action rather than the social-structural view of his contemporaries (Durkheim, Spencer). He focussed on the subjective meanings attached to one's actions. Purposeful-rational action is chosen through rational consideration of both the goal of, and means for, an action. Value-rational action is an action that is rationally pursued, however, the goal may not be rationally defined (for example, the pursuit of salvation).

also deployed to rationally monitor economic performance to comment on the achievement or otherwise of that objective (such as progressive rates of return). In terms of forfeiture matters, accounting may be deployed to articulate the details of a fraud, then also deployed to follow through the use of the proceeds of that crime and their mixture with untainted funds. Simultaneously, competences and motives promote value-rational action that combine to give the rational action legitimacy (Habermas, 1984, p174). Again, the example of accounting, supports the community's values and norms with the rational quantification processes aimed at the fulfillment of norms, consistent with the community's value system. For example, accounting methods can be used to establish and follow genuine sales transactions, then deduct associated costs, to logically arrive at a profit, irrespective of the argument of whether it is morally right to take a profit from that sort of transaction or not (for example, from a charity).

Pragmatically, this chapter then reviews the competencies and motives of accounting experts (specifically forensic accounting) at a 'truthful' level, that is, the framework required to compile evidence that fulfils the elements of an inquiry that can rationally be presented and accepted as true. This framework presents a normative rationality expressed in adherence to patterned principles, which are then applied to peer accepted forensic accounting techniques and strategies. The literature on 'legal truth' is reviewed both with respect to the legal creation of 'truth' and the legal acceptance of 'truth'. The conclusion from this investigation is that validity is a better proxy for truth<sup>62</sup> in the context of expert opinion evidence and therefore validity defines 'acceptability' as pivotal to the second research question. Validity is supported by proper deployment of accounting techniques in accordance with accounting

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<sup>62</sup> Concepts of truth extend well beyond the scope of this thesis, even when limited to within the legal framework. The argument in this chapter presents the case for validity as a workable proxy for truth rather than the penultimate view of what is truth for, and from, the legal perspective. Validity is then carried forward to the research methodology, to answer the research question of 'appropriate' (or valid) expert evidence for forfeiture litigation.

professional guidance, proscription and assurance (for example, as contained in APES 215 - Forensic Accounting Services, or in the detail prescribed in a range of accounting standards). Also peer acceptance of accounting and audit practices (at the methodological level) are validly deployed in a suitable manner to be relied upon for forensic accounting evidence to establish undisclosed and other forms of tainted income. The thesis will return to peer acceptability and assurance of accounting practices supported by the judiciary in chapter 8.

### **Judicial Rationalism**

The research argument is based on the rationalist approach, which logically relates the legal system to a process of rational discourse to justify the validity of claims, in this case made by expert accounting witnesses. Habermas cites Weber as using the term ‘rationalisation’ to “designate the growing autonomy of the law and morality, that is, the detachment of moral-practical insights, of ethical and legal doctrines, of basic principles, of maxims and decision rules, from the world-views in which they were first embedded” (Habermas, 1984, p162). Weber was concerned that modern society had become increasingly interested in efficiency, predictability, calculability and dehumanization (Weber, 1904–1905/1958). Rationalisation is influenced by scientific study and technological advances, particularly in Western society over the late 19<sup>th</sup> and 20<sup>th</sup> centuries. Rationalisation was typified by modern society’s movement from reliance on customs and traditions to the development of practices supported by rational thought for the common good. This has been evident in the growth of bureaucracies and systems such as the law and responsible ethics<sup>63</sup> (even though religion may retain an interpretive influence). Weber describes four types of rationality as the practical rationality of selecting the best fit day-to-day activities; theoretical rationality, cognitively

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<sup>63</sup> In this regard ‘responsible ethics’ refers to logical consistency between ethical decisions and the behaviour that follows from those decisions, also referred to as acting virtuously. Ethics provide a rational basis for the moral behaviour that logically defines what a virtuous person would do in the situation to enhance the common good (see Rousseau, 1712-1778).

considering the world through abstract concepts; substantive rationality, when making the best choice in order to achieve an end where values and actions are most congruent, and formal rationality in the selection of choices with respect to the larger social structure after the calculation of and quantification of the most efficient methodology (Brubaker, 1984; Habermas, 1984; Kalberg, 2014; Levine, 1981).

“All human beings engage in practical rationality in attempting to solve the routine and daily problems of life” (Levine, 1981, p12). In Weber’s terms people seek the “methodical attainment of a definitely given and practical end by means of an increasingly precise calculation of adequate means” (p293). Theoretical rationality involves “an increasingly theoretical mastery of reality by means of increasingly precise and abstract concepts” (Weber, 1958, p293). When related to evidence, this entails the attribution of causality, logical deduction and the composition of meaning. “It is derived from the inherent need of actors to give some logical meaning to a world that appears haphazard” (Ritzer, 2007 p43). Substantive rationality, considers groups of socially acceptable values. Specifically, Weber (1921/1968) linked this to “economic oriented social action” directed by some higher value principles that direct the means to an end. The rational calculation of the means to an end is reflected in formal rationality, under which, the method of calculation is corralled based on accepted rules, regulations and laws (Kalberg, 1980). The legal system and bureaucracy institutionalise or formalise rationality, to determine the means to an end in accordance with their rules and laws (Ritzer, 2007). Through this rationalisation process the charismatic appeal of emotions, magic, sacred traditions and revelation are replaced by formal ethics based on general principles and legal norms, which count as conventions (or precedents). They can be considered and applied to the methodical conduct of justice through rational adjudication and “profane decision” (Habermas, 1989, p163). In this manner, justice is rationalised, not according to those occupying positions of authority as personal rulers, but

more perennially, as “the legally constituted authority relating to citizens called on to obey the law by the official that enforces it” (p163).

### **Purposive - rational**

Justice is rationalised and is purposefully pursued and calculated in Weber’s terms because, the “methodical rigor of a principled, self-contained autonomous conduct of life, ... penetrates every domain of life because it stands under the idea of assuring oneself of salvation” (Habermas, 1989, p165). In other words, the desire to obtain salvation through pursuing a logically argued “life of good intent” is culturally important. Relating this to the modern legal system, the rational communication of judicial administration, process and decision is important in the diffusion of purposive-rational action, that democratically legitimises punitive remedies and the systemised statutes, because, put simply, it contributes to a “life of good intent”. Purposive-rational behaviour is achieved through the employment of rational technique, that is “consciously and systematically oriented to experience and reflection” (MacIntyre, 1971 p251-2 in Habermas 1989, p169). Accounting represents one such group of techniques. Habermas assumed Weber’s rationality argument in his concept of ideal justifiability or the consensus theory of truth where “the truth condition of propositions is the potential assent of all others”; thus “the universal-pragmatic meaning of truth ..... is determined by the demand of reaching a rational consensus” (Habermas 1971/2001, p89). This interpretation of truth is understood with respect to the ideal speech situation.

### **Part 1 The Research Argument**

The research argument (‘the argument’) presented for this dissertation is consistent with a purposive-rational approach to the interpretation, adjudication and active communication of justice. Table 1 presents the argument that underpins this research, as a stepped purposive-rational approach that commences from the broadest perspective at the top stage and that

progressively moves to more specific issues at the bottom, where the research questions are connected. The argument's rationale is built around the rational progression of accounting's quantitative augmentation of the legal account to bring influence to the adjudication within the court and to enhance the message for communicative action outside the court. The argument reflects on this purpose in terms of accounting's support for the system's influence on the lifeworld acceptance of legal norms and, in circular reference, the consequent influence on the lifeworld's democratic support for legal juridification. That is, the argument, although presented linearly in table 1, is in fact, circular because better understanding of legal decisions and the higher lifeworld confidence is with respect to the right decision that has been made, in turn reinforces greater democratic support for new and changed laws. The research argument is expressed by step (11 steps) in order to assist its cognitive explanation, whereas the application of the argument is, in practice, fluid, interlocked and progressive.

**Table 4.1: Point Summary of the Research Argument<sup>64</sup>**

1. Juridification is occurring whereby law is increasing its presence both at the legislative and administrative level;
2. To support this process the law needs legitimacy and power to define statute (democracy) as well as legitimacy and means to effect decisions based on those statutes (communicative action);
3. Juridification increases the law's ability to steer the resolution of economic disputes, specifically unjust ownership of property;
4. Accounting (forensic accounting) is structurally coupled with the law in this juridification, particularly at the adjudication level because resolution of economic disputes is defined, expressed and understood in monetary terms;
5. It is important that the law provides and communicates the 'right' outcome of adjudication so that it maintains legitimacy (authority and power) in both the internal system and external lifeworld;
6. The 'right' outcome needs a medium of expression recognised by the system and lifeworld for its validity and fecundity;
7. Accounting provides the metaphor of 'number', already recognised for its role in distributive justice and holding professional 'expert' status;
8. In providing the 'right' outcome the law strengthens its account utilising accounting technology to provide a factitious 'scientific' decision synergistically aiding both professions' legitimacy;
9. The lifeworld does not have the time, inclination nor capacity to adjudicate each matter but it wants to be satisfied that the matters are correctly adjudicated;
10. Forensic accounting provides the lifeworld with a legitimate patterned justification (translation) the lifeworld can rely upon to be 'right';
11. So, pragmatically, how has accounting evidence in the forfeiture genre evolved and what is the legitimate patterned accounting justification for evidence pertaining to forfeiture matters?

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<sup>64</sup> This argument has been applied to juridification in favour of the influence of forensic accounting. The argument has been developed by the author for the purpose of this thesis. The argument is not proposed to be exclusive to the field of forensic accounting and may be appropriated for other disciplines that influence the juridification process.



## Stepped Explanation of the Research Argument

Step 1: Juridification is occurring in Western societies as people look towards statutory remedies to societal issues (Blichner and Molander, 2005). The political process effects parliamentary representation, which, once a mandate is obtained, sponsors legislative resolutions for a range of issues that arise locally, nationally and internationally. As recognised by the Westminster system, the separation of powers<sup>65</sup> then fosters separate administrative and judicial responses to juridification. Administration is increased, with bureaucratic skills and capacities harnessed in support of new and changed legislation. The judiciary is asked to adjudicate on an increasing amount of new matters that include those that do not have readily available precedents. The proliferation of confiscation and forfeiture statutes are a good illustration of both new legislation and of tenets within that legislation that push the boundaries of the purpose and infiltration of the law. For example, the recent addition to forfeiture statutes of the reverse onus of proof, where unexplained wealth is deemed to have been unlawfully acquired. In such cases, those charged are required to prove that their wealth was lawfully obtained, rather than the onus being on the prosecution/plaintiff to prove that assets arose from tainted proceeds. In this manner the boundaries of traditional legal concepts such as “innocent before being proven guilty” are pushed out, replaced by the new legal purpose and thereby reach into the community (ALRC Interim Report 127, Encroachments by Commonwealth Laws, s 11 Burden of Proof). Other pertinent examples are the increased unified legislative intervention in industrial relations (Clark, 1985), national security (Knott, 2014), corporate regulation (see the CLERP process leading to the Corporations Act 2001 and harmonisation<sup>66</sup>), evidence (ALRC report 102 to Uniform

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<sup>65</sup> The principle of the separation of powers is that, in order to prevent oppressive government, the three powers of government should be held by separate bodies—the Legislature, Executive and Judiciary—which can act as checks and balances on each other. [www.aph.gov.au](http://www.aph.gov.au) > ... > Powers, practice and procedure > Infosheets.

<sup>66</sup> The Corporate Law Economic Reform Program (CLERP 9) modified the Corporations Act 2001 in order to strengthen the financial reporting framework and improve investor confidence.

Evidence Law<sup>67</sup>) and Unexplained Wealth provisions (Law Council of Australia 2014). Teubner (1997) comments that “the phenomenon of juridification is a partial aspect of societal evolution and cannot be effectively reversed by delegalisation strategies” (p19). Teubner notes that juridification is not merely the proliferation of laws, but the propagation of statutes in new areas, as well as new types of laws, such as, the movement from proceeds of crime legislation to new laws based on unexplained wealth.

Step 2: The broad perspective of juridification relies upon democratic support for its proposal, drafting, acceptance and importantly, legitimacy, without which the law cannot, in the long term, be effective. Laws require democratic support to be brought into statute and they require democratic support to be effectively administered (see chapter 2). Democratic backing is gained and maintained through the support of communicative action materially influenced by constituent opinion (Habermas 1984, 1996).

By mobilising citizen’s communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law, illocutionary obligations of this sort build up into potential that holders of administrative power should not ignore (Habermas, 1996, p147).

Step 3: Having secured increased legislative capacity, the law’s steering power over the resolution of legislative disputes is increased as application of the legislation brings matters within the arbitration of the courts (Habermas 1996). Juridification, in this sense, increases judicial power complete with the law’s indeterminacy<sup>68</sup> and potential lack of transparency both in the form of lack of openness and intelligibility (Blichner and Molander, 2005). Specifically, in this research, new laws bring the unexplained and assumed illegal acquisition and ownership of economic assets under the law with its attendant discourse, conditions, rules and regulations.

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<sup>67</sup> The Australian Law Reform Commission report 102 considered and extended the existing provisions of the Uniform Evidence Acts in areas such as opinion evidence (amongst others).

<sup>68</sup> In this sense indeterminacy refers to the lack of clarity about how statutes (particularly new ones) are to be interpreted in the formation of rules and precedents.

Step 4: Accounting provides institutional support (structurally coupled with the law) synergistically assisting the internal processes of the new legislation by converting the facts and behaviours in question into economic quantification and accounting inscriptions. Accounting is already qualified as a moral discourse “as the saying (writing) of something about economic activity to someone else, with economic activity understood as originating from human purpose to transform the conditions of lived experience” (Arrington, 2007). The law is then provided with a recognisable monetary expression to adhere to its linguistic description that gives a more powerful expression of its context and condition.

Step 5: In order to maintain continued democratic support, the law needs to give the community (lifeworld) confidence that the court’s decisions are ‘right’ and ‘correct’. The community needs to believe in the continuance of proper structure and delivery of the law. Alternatively, as indeterminacy and lack of transparency increase, the democratic legitimacy of statutes erodes as the populous ceases to understand the legal machinations. Greater importance and dependence is placed on expert interpretation for a suitable explanation both within and outside the jurisprudential community. Whilst the nature of a ‘right’ or ‘correct’ decision will be considered separately in due course, nevertheless it can be accepted that a proper outcome is expected to arise from the adjudication discourse, which is expressed in testimony, cross-examination and judicial comment. The material content and outcomes of this discourse are required to be effectively communicated to the community in order to garner their acceptance.

Step 6: Step 6 can be summarised as gaining validity from the community. The community needs to receive the communication in the form of an understandable discourse that empowers them to be able to agree that the judgement is ‘right’. The discourse must be translated and clarified from within the court, to the outside, based on credible inscriptions and language countenanced by the legal system and received by the community with equal

authority. Validity reflects judicial rationalism, rationalised against recognised authoritative patterned principles.

Step 7: Accounting responds to the community's and system's rationalistic needs by adding 'facticity' in content and context of the legal communication. In its content, accounting uses the metaphor of 'number' to quantify and in that quantification an attendant qualification<sup>69</sup> (the aspects of what is being counted) and further associated quantification (proportionate quantification of further aspects of what is being counted). In this context accounting brings its own description, professional credibility and history of accepted expertise, as the basis of reporting and decision making.

Step 8: Accounting strengthens the proper legal account both internally and externally by combining numerical facticity with the legal narrative to address the tension between the facts and norms. Accounting facts are re-contextualised in legal linguistics without the loss of the power of accounting's scientific rhetoric or the transportability of the monetary metaphor. Accounting professionally couples with the Law to provide 'harder' social-scientific inscriptions, (Latour, 1987, 1988a) synergistically enhancing the communicative power of the 'softer' qualitative discipline of law. That is, the values of economic reason, expressed through accepted accounting practice, technologies and expertise, are integrated with, and augment, legal values and norms, acknowledged in the primary setting of the court. This mixture of accounting and legal professional content gives rise to a reliable code or credible pattern to be applied to, and relied upon for, specific contexts. Pragmatically, accounting expertise is acknowledged by the legal domain of the courts through adherence to the concept

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<sup>69</sup> The quantification of something implies the quantification of the quality aspects of what is being quantified. For example, the quantification of 6 motor bikes means that 6, two wheeled conveyance vehicles (or what one agrees as being a motor bike), are the subject of the quantification. That thing, that is a motor bike, has qualities (a seat, wheels, handlebars, brakes, engine) and further quantities that are proportionate to the original quantification (6 motor bikes = 12 wheels).

of opinion evidence, its rules, guidance and judicial prerogatives (Arenson and Bagaric, 2007, p508-526).

Step 9: Accessibility to the courts and legal functions is limited by space, time and knowledge. The community as a whole finds the court system inaccessible, however they recognise the importance and potential invasiveness<sup>70</sup> of the legal system. Therefore, the community require confidence that proper decisions are being reached. They do not have the access, time nor capacity to evaluate judicial outcomes or the effect of legislation that pertains to specific circumstances, however they recognise a vested community interest in the comfort of the court's 'valid' operation.

Step 10: An influential method to communicate the court's proper operation is to authenticate adjudicative outcomes based on an accepted formularised discourse. That is, accepted in terms consistent with lifeworld norms, grounded in lifeworld values and preferences for the good life. Forensic accounting provides such formularization in the production of accounting technologies consistent with peer accepted calculation methods, that have credibility from professional acceptance and a moral purposeful outcome. Such methods are available for questioning by fellow experts as well as cross-examination by qualified legal counsel. They provide an avenue for assumptions to be drawn out and tested in order to establish a legitimised pattern, before becoming the basis of calculation. The methods which fit the pattern can be applied consistently to calculations or varied in such a manner that they enlighten the differences between calculations. If the pattern has validity and is properly applied, the legitimacy is bestowed on the calculation, giving the lifeworld assurance that the number is correct and properly construed.

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<sup>70</sup> In this regard the recognition of the potential that a legal decision may cascade to effect (and bind) the community by redefining lifeworld norms with potentially intended and unintended consequences.

Step 11: The final step of the research argument is the application of the communicative action that arises from the 10 earlier steps, in this case, to the forfeiture legislative genre. This research aims to understanding prior forensic accounting evidence in the forfeiture and similar genres to understand what patterns and methods have been accepted by the courts or should legitimately be accepted by the courts. As explained in the following chapters, the Australian judiciary have not considered many forfeiture cases and even less of these have addressed forensic accounting evidence that has extended beyond a mere counting exercise. Therefore, in answering the second research question, cases in other jurisdictions (such as, the U.K., Ireland and the U.S.) and similar genres (such as, taxation cases that estimate undeclared cash earnings and valuations) will add to the analysis. Further, consideration is made of legitimate forensic accounting technology professionally utilised to estimate unexplained wealth, and the application of generally accepted accounting practices to these forensic accounting calculations, which may provide new knowledge for those in the legal fraternity tasked with joining or adjudicating the legal discourse of justified re-distribution.

## **Part 2 ‘Appropriate’ Criteria for Forensic Accounting Expert Evidence**

### **General**

In assessing the concept of the ‘appropriate’ criteria for forensic accounting expert evidence one needs to review what are proper standards, principles and measures that the accounting expert needs to communicate to give their evidence. In order to analyse these elements in a logical manner this dissertation has segmented the discussion into five areas. They are; theoretical; functional; assurance; peer acceptance; and system requirements. Of these, the first four will be discussed in this chapter, whilst the system requirements, which comply with the formal legal system’s gateway rules of access (the obligatory passage point rules),

will be discussed in chapter 5. All areas will be discussed with reference to contemporary literature, statutory rules and professional guidance within the constraints of this thesis.

The theoretical discussion considers evidence as the ontological presentation of the truth, legitimacy and as a valid speech act, all aimed at influencing active communication internally and externally to the courtroom. The functional discussion considers more pragmatic elements of evidence that also contribute to the rational discourse in defence of the truth claim and that contribute to the legitimacy of such a proposition. The assurance discussion considers the relevant professional advice that the presentation of forensic accounting evidence needs to consider and abide by, whilst the elements of peer acceptance include the proper deployment, construction and conclusions drawn from accounting technologies. All five areas provide the basis of rational discourse questioning and are the basis for the defence of the legitimacy of claims presented as opinion evidence.

### **From Expert Cultures to Expert Cognisance**

Habermas presents expert cultures as steering mechanisms being converted over to the media of power and money, becoming elitist, “splitting off from contexts of communicative action in daily life .... leading to a one-sided rationalization or reification of everyday communicative practice” (1984, p330). Expert cultures develop autopoietically (a system capable of reproducing and maintaining itself), “developing according to their own logics and cut off from any influx from everyday consciousness” (p355). Experts acquire normative status, that suspend challenges to validity claims through their reified status and hegemonic professionalism<sup>71</sup>.

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<sup>71</sup> Habermas see this as a “signature of modernity” where a sophisticated culture inserts itself over a ‘tribalist’ culture producing on-sided imperatives with no need for “justification in terms of transcendental grounding” (Habermas 1984, p397).

Linguistically expressed from a statutory viewpoint, autopoietic court decisions under colonisation risk the loss of their ties to the lifeworld notions of fairness and ‘rightness’. Justice by itself becomes systemised by the coloniser and loses its connected legitimacy. Habermas’ legitimacy arises from procedure rather than through attainment of independently specified normative objectives or “substantive moral choices” (Flores and Himma, 2013, p123). The two types of procedural requirements are that “of legal constitution of decision processes and that of moral - political assent of all citizens secured through reasoned deliberation” (Zurn, 2007)

The law provides the venue for reasoned deliberation to reinstate validity challenges, to strip away the expert’s ideological veils, with the objective to mediate everyday practice. Formal pragmatics are used to reconstruct the (expert) knowledge that has previously been fragmented out. This discourse tests the validity aspects of truth, normative tightness and authenticity, for rational<sup>72</sup> reasoning. The expert makes their claim under an implied warranty that they stand ready to justify their utterance, albeit that it is based upon specialised knowledge. The law, through cross-examination and peer expert review, provides the empirical framework to test the plausibility of claims, breaking down the “normative context of bourgeois culture”. The rational communication “ingrained in the use of language” is deployed to reach a non-reified understanding communicable to everyday practice (Habermas, 1984, p397-398).

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<sup>72</sup> In this regard the term rational is understood as having to do with the provision of reasons for beliefs or actions. For an illustration of this definition see Richard Norman’s saucer of mud example. “To want simply a saucer of mud is irrational, because some further reason is needed for wanting it. To want a saucer of mud because one wants to enjoy its rich river-smell is rational. No further reason is needed for wanting to enjoy the rich-river smell, for to characterize what is wanted as ‘to enjoy the rich river smell’ is itself to give an acceptable reason for wanting it, and therefore this want is rational” (1971, pp63-64; cited in Habermas, 1984, p16).



## Theoretical

### Truth

‘Truth’ is an important concept with respect to the law, a concept broader than can be fully considered for this dissertation<sup>73</sup>. The law defines truth through the use of conventions which, once “sufficiently specified and determined in virtue of the social practices that constitute the law” (Balkin, 2003, p102), become autopoietic in terms of defining things that are true as legal claims, in the eyes of the law (Haack, 2002). In this regard the law ‘creates’ truth giving rise to considerable real world consequences (Balkin, 2003, p102). For example, the court’s judgement that a defendant has received unexplained wealth is a matter that becomes ‘true’ when the court, after adjudication decides this is so, therefore denoting the receipt of unexplained wealth as now being the truth. In the manner of creating this ‘truth’ the law has exercised power in its determination of the issue as being true or false and the consequences that flow from that decision. The propagation of legal truths shape active communication however, the law’s power to enforce legal truths may or may not be a reality as it may clash with other knowledge, norms and other forms of the truth shaped by alternative institutional purposes. For example, a civil matter may attest that something is true “on the balance of probabilities” whereas a criminal may not find the same thing true “beyond reasonable doubt”. In creating truth the law has the capacity to ensnare and colonise community norms and to enforce or argue dichotomically as either ‘right or ‘wrong’. It is this dichotomy that the adversarial judicial system is most concerned with, as distinct from the truth of substantive fact.

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<sup>73</sup> For a broad consideration of the law and truth see the conference papers from the Federalist Society Conference on Law and Truth, *Yale Law School* March 2002, Also Moore M.2002. Regarding procedural truth, see G L Certoma, 1982, *The Accusatory System v the Inquisitorial System: Procedural Truth v Fact?*, 56 *Australian Law Journal* 288; Regarding legal truth, see Robert S Summers, 1999, “Formal Legal Truth and Substantive Truth in Judicial Fact-Finding”, 18 *Law and Philosophy* 497; Joseph M Fernandez, 2009, *An Exploration of the Meaning of Truth in Philosophy and Law*, 11 *University of Notre Dame Australia Law Review* 53 at 79-80.

Therefore this research refrains from such consideration of truth (which is best left to the trier of fact) in preference for the exploration of validity, in particular, the validity of expert evidence. In essence this is the legitimacy found in the internal and external presentation of expert evidence and in the legitimacy arising from investigative questioning by qualified inquisitors. As Viscount Simon LC commented “A court of law ..... is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it” (Hickman v Peacey, 1945, at 318.). Habermas cites Peirce’s explanation of truth as “ideal assertability” being the “vindication of a criticisable claim under communication conditions”, justified in front of “an audience of competent interpreters that extends ideally across social space and historical time.” (Pierce, 1931 in Habermas, 1996, p15). Initially developed with respect to scientific claims, Habermas notes similar “structures and pre-suppositions” (p15) in everyday validation of communication aimed at discursively reaching a common understanding of the world. Thus Habermas extends Pierce’s “community of investigators” (p15) to active communication with the broader community of interpreters.

In a Habermasian sense, empirical truth is found in the assertion (the truth-bearer) that has been subjected to discourse directed towards rational consensus, which brings out the truth (Habermas, 1971 [2001] p86). More recently he articulates a “pragmatic epistemological realism” (2003a, p7) where “the objective world, rather than ideal consensus, is the truth-maker” (Bohman and Rehg, 2014). In this regard truth testing at the logical level relies on more scientific, empirical critique. At the dialectic level discourse resolves reasoned challenges and support from alternative theories and reflections. At the rhetorical level discourse seeks a truth agreement from a universal audience relating to the objective world. Habermas weights truth as a subset of validity, with validity construed through “idealizations that are connected with the medium of language” (Habermas 1996, p17). Agreeing with

Frege (1848-1925) and Peirce, Habermas writes “ideas are then considered to be directly embodied in language, so that the facticity of linguistic signs and expressions as events in the world is internally linked with the ideal moments of meaning and validity” ..... “the difference between the truth of a proposition and its being taken to be true is accounted for by explicating truth as a rational assertability under ideal conditions and hence only in reference to the discursive redemption of validity claims” (1996, p34-35). In this regard the external communication of what is proper is validated by the discourse of justification, to prove the worth of the statement against current and future objections, such as, those in our expert evidence example, that arise from qualified cross-examination or rational questions from peer experts. Discursive review and questioning exchanges reasons, to build a rationally motivational force, to accept or reject validity based on the strength of the reasons presented, and the risk that better reasons or a change of context may arise.

### Ideal Speech Acts

Truth, validity claims and reasons are presented through speech acts (the elementary units of communication). The propositional content of speech acts “establishes a relationship between an utterance and the outside world” (Schoop, 2001). This dissertation takes a rather narrow perspective of speech acts in terms of the expert’s articulation of ideal speech acts. Again, the scope of speech act theory, is broader than this thesis allows, so the focus for this dissertation will be on speech acts in their support of validity claims (and hence influence on active communication) or valid speech acts. Habermas pragmatically approaches the speech act with the postulation that “we understand a speech act when we know the kinds of reasons that a speaker could provide in order to convince a hearer that he is entitled, in the given circumstances, to claim validity for his utterance – in short we know what is acceptable” (1998b, p232). That is, the inherent claims of a speaker (such as the expert giving evidence), contain some form of claim that the speaker is bound to justify in order to gain validity and

acceptance if the hearer responds with an affirmative position (1984 pp95-97; p282; p297). The speech act pre-empts discourse which includes the processes of argumentation and dialogue. With regard to argumentation, the term refers to “that type of speech in which participants thematize contested validity claims and attempt to vindicate or criticize them through argumentation” (p18). The outcome of such discourse that uses language for mutual understanding, is rational support for communicative action. Support for communicative action can be tested through questions during rational discourse, which, in the legal example, is supported by cross-examination, judicial inquiry and the opposition’s peer evidence.

The attributes of the speech act itself, as well as its reasons and context, provides the basis for testing questions, the answers to which affirm or deny validity. Habermas sees speech act theory<sup>74</sup> as the basis of communicative competence, that emanates through language as reconstructive science under the conditions of rationality (Rehg, 2011). Communicative rationality is said to concern all three worlds being the objective, subjective and social (inter-subjective). This Habermas derives from “the basic attitudes toward the objective world of what is the case and a basic attitude toward the social world of what can legitimately be expected, what is commanded or ought to be.” (Habermas, 1984, p49).

The objective world is defined as “the totality of all entries about which true statements are possible” (Habermas, 1984, p100) therefore, a true or false estimation is allowed of the set of circumstances propositioned as expressed beliefs or intentions. The subjective world is the “totality of the experiences of the speaker to which he has privileged access and which he can

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<sup>74</sup> Consideration of speech act theory in this thesis is limited to the way in which words can be used not only to present information but also to carry out actions as immediately relevant to evidential discourse, specifically as defined by Habermas. Academic consideration of Speech Act Theory is broad, incorporating a number of perspectives and contexts worthy of individual consideration in depth beyond the scope of this research. It traces its genealogy from consideration of locutionary, illocutionary and perlocutionary acts including such acts as promising, ordering, greeting, warning, inviting and congratulating. Green, Mitchell, 2015, Speech Acts, *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2015/entries/speech-acts/>>.

express before a public” (p100). It exists in alliance with the objective and social worlds, this private world of desires and feelings, once expressed, is judged on the sincerity and truthfulness of the utterance. The speaker employs a self-expressive mode very relevant to the communication of expert opinion evidence where an expert’s view is asserted for contest or acceptance. (Dwivedi et al, 2012). The subjective world has two contributing components being the “spontaneous expressions of subjective experiences” and “the institutionally bound speech acts” (Habermas, 1984, p100). The latter is particularly relevant to forensic accountants who give evidence within well prescribed professional norms and standards. In such cases the action that relates to the norms, and the underlying norms themselves, are both criticisable.

The intersubjective or social world is defined as “the totality of all legitimately regulated interpersonal relations” (Habermas, 1984, p100). Norms are the essence of the social world that connect its members and provide the social force recognised for uniting and binding membership. “Actions of an actor are judged based on their normative context, i.e., whether their actions are in accord or deviate from the existing norms. Second, norms are justified according to whether they embody the values and interests that are recognised as legitimate by those affected. Hence relations between actor and the social world are judged according to their legitimacy and justification” Dwived et al, 2012, p16). In developing the intersubjective world Habermas offers an ethical-political model referred to as the “ideal speech community” which orients public argument toward the formation of a rational consensus (Arrington and Puxty, 1991). Communicative action “relies on a cooperative process of interpretation in which participants relate simultaneously to something in the objective, the social, and the subjective worlds, even when they thematically stress only one of the three components in their utterances” (Habermas, 1984, p61). A common three world reference system is used to speak and to listen. Hearers can contest an “utterance in three respects:

depending on whether it is expanded to a statement of fact, an expression of feeling, or a command, they can call into question its truth, its sincerity, or its legitimacy” (p27). If the speaker and the hearer form agreement then the utterance is legitimised even if the utterance fits within one world (p120). Pragmatically, the relationship between the three worlds must retain internal alignment in order to maintain legitimacy. Communicative action requires consistency between the thematic evaluations of the worlds.

One cannot accept the truth of an assertion but at the same time doubt the sincerity of the speaker or the normative appropriateness of his utterance; the same holds for the case in which a speaker accepts the *normative validity* of a command but suspects the seriousness of the intent thereby expressed or has his doubts about the existential presuppositions of the action commanded (and thus about the possibility of carrying it out) (p121).

### Questioning Cognitive Authority

Chapter 2 discussed the concept of cognitive authority as essentially the denotation of the power and influence an expert acquires by the fact that they possess and exercise expertise, based upon a select knowledge or skill set not generally available in the community. The discussion so far in this dissertation has leaned towards Habermas’ communicative rationality that presupposes the equal social capital of those who participate in the discourse. That is the ideal of power-free communication (McNeely, 2003).

However, such an ideal is illusory where the speaker has unequal cognitive authority. Habermas himself subscribes to the view that expertise prevents communicative action, when the knowledge and skills that inform the discourse are not equally understood by the hearer. He theorises that expert subsystems “build up irresistible internal dynamics and systematically undermine the domains of action” which are dependent on informed social integration (Habermas, 1984, p327). Therefore, expertise suffers from being aloof from its audience as well as treating its audience as pitiful and ineffective victims. Further, specific to

accounting, it has been shown not to be a disinterested technology<sup>75</sup> “due to the presence of a multiplicity of interests that can be brought to bear on it” (Arrington and Puxty, 1991 p33). Accounting presented in evidence therefore requires a critical eye as to inherent interests that may influence expert testimony (for example, the selection of different valuation methodologies). Accounting has claimed an external legitimisation, outside its own discourse that is “revealed through systems of rules that are privileged over other ways of understanding and other approaches to the production of knowledge”, that is, court recognised, professional expert knowledge (see chapter 5). However, critical accounting scholars believe that such knowledge claims can be indeterminate (Arrington and Francis, 1989, p1).

Expert opinion witnesses have an inherent cognitive authority because the exclusive nature of their testimony is that their knowledge and/or skills must be distinguished from those generally acquired. Chapter 5 explores the meaning of this distinction in detail, taking particular note of statutory requirements, judicial feedback and instructive precedents. The law is therefore presented with a challenge, that is, to preserve the distinction that creates cognitive authority, whilst simultaneously facilitating the broad transfer of evidential information to a general audience. The law requires expert evidence to be knowledgeable and authoritative in terms of peer acceptance and distinct from the everyday person, yet democratised without undermining, such that, the testimony’s status (legitimacy) and content is understood both internally and externally on an equal forum.

The law is tasked with providing the structural framework for the rational questioning of the expert’s cognitive authority, which it does, firstly, through the application of the criteria that

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<sup>75</sup> Whilst accounting for many years had been seen as a disinterested technology, more recently critical accounting theorists have shown that accounting can mask a “conservative ideology bias” (Tinker et al, 1982 p167) and “take on meaning through an accounting text’s placement within the web of the whole range of texts presented to us as part of the written present of our social structure” (Cooper and Puxty, 1994, p127). Arrington and Francis (1989) note that “an emerging body of critical accounting literature subverts the mainstream view that knowledge of accounting is grounded in objectivist and foundationalist principles” (p1)

allows access to the court (that is, being granted expert opinion witness status), then through the formality that allows the expert witness to present their evidence (in chief), through alternative expert opinion, through cross-examination or through judicial enquiry of the expert. Under the common law justice system<sup>76</sup> the judge is neutral (attempting to determine the truth of the case), whereas, the advocates that represent the parties are adversarially opposed (Hale, 2004). The U.S. and U.K. based legal systems subscribe to the “philosophy of the adversarial system in that the truth will more likely be reached if both sides of the issue are fully presented and that this is more likely to occur if the sides are presented by partisan advocates” (Scontas v Citizens Ins. Co., 1969).

In their representative capacity, legal advocates may bring forth expert witness testimony either in favour of their client (or prosecution or defence) or as a single expert on behalf of both parties<sup>77</sup>. However the expert testimony is brought, it is, by the act of admission to the court, formally subject to investigative discourse with regard to the validity of the testimony. The specific qualifications of judicial officers (lawyers-barristers) include investigative discourse in the form of strategic question and answer techniques aimed at querying the truth and validity of an expert’s claim. Such skills are transferable across types of expertise, however, they may also engage the services of an alternative expert either directly (by entering alternative expertise into court) or indirectly (as an advisor to assist in the crafting of suitably detailed and researched questions, often known as a ‘ghost expert’).

### [Justifying a validity claim](#)

This research is therefore concerned with the justification of validity claims within the arena of expert opinion evidence. Pragmatically, the objective component of the claim is exposed to

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<sup>76</sup> The common law justice system gives precedential weight to the body of past court decisions by judges, particularly of a higher court, in making consistent future decisions. (Washington Probate, "Estate Planning & Probate Glossary", Washington (State) Probate, s.v. "common law", 2008)

<sup>77</sup> This distinction is discussed in chapter 5.



questions about the rightness and truthfulness of the claim; subjectively, the claim is laid open to tests of sincerity and professionalism of the expert; and inter-subjectively the claim is subject to relationship testing such as independence, potential conflicts or peer acceptance of methodologies. The test is made more difficult due to the lack of a scientific absolute and often varies in accordance with evidential contexts which are socially constructed (Gibson, 2009). “Scientific method (in the court) is geared to reduction of sources of error and bias to the smallest possible degree, often using statistics to quantify ‘certainty’ and the magnitude of possible error. This engenders confidence in results but is always only the best estimate obtainable. Which is why distinction is drawn in the philosophy of science between certainty of knowledge and certainty itself as an absolute that exists independently of our ability to know it” (Habermas 1996, p3).

Habermas would have it that communicative action is the original mode of language used in the speech act, which would be the focus of judicial testing discourse, however he also recognises other modes of language including “the figurative, the symbolic and indirect mode of language use” (Cooke, 1994, p22) as well as the strategic, perlocutious<sup>78</sup> use of language (Habermas, 1984, p120-21). The testing discourse therefore needs to penetrate the illocutionary effect of expert testimony such that the “manifestly strategic linguistic activity” (Cooke, 1994, p24) is exposed, to shine light on the inherent philological context of the testimony’s validity claim. Use of the accounting metaphor in testimony, albeit factitious and stable, does not exempt testimony from etymological meaning. On the contrary gestation of the numerical semantics may require more specific testing discourse to confirm validity in regard to the proper numerical extraction and application. Here, the validity of the patterned

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<sup>78</sup> Habermas does not separately define “perlocutious” [recall he wrote primarily in German therefore his work is subject to translation] however it is aligned with his concept of communicative action as the precursor act of speaking (or writing), that persuades or convinces the action. That is, the speech act has the aim of action but in of itself does not constitute action.

principle behind the calculation may provide more morphological reliability than the resultant number itself.

The vehicles for the testing discourse arise through expert evidence-in-chief (evidence given by the expert to the court), cross-examination of the expert, evidence provided by an alternative expert and inquiring questions from the trier of fact (magistrate or judge). Cross-examination is the interrogation of a witness by one's opponent that occurs after the direct presentation of evidence (in-chief). Direct presentation of evidence is led by the appropriate legal representative who brought such evidence to the court. It is a core element of a trial which can be extremely influential (Lubet, 2004). Cross-examination has two main objectives, consistent with the role of investigatory discourse: that of "eliciting evidence to assist your case, and eliciting evidence to damage your opponent's case" (Thompson, 2009). Cross-examination is typically limited to questions that pertain to the evidence offered during the direct examination and may be followed by a re-examination. The chief 'rule' of cross-examination, known as the 'Browne v Dunn rule' (1893) is one of fairness, demanding that a cross-examiner cannot contradict the testimony of the witness without first putting the alternative evidence to the witness in order to allow them to attempt to justify the contradiction (MWJ v The Queen, 2005; R v MAP, 2006). In the case of expert opinion evidence this may mean the introduction of evidence by an alternative expert. (Thompson, 2009; Beckett, 2012).

### **Functional**

From a functional perspective the validity of an expert witness testimony commences on shaky ground as, despite formal adherence to codes of conduct prescribed by the courts to the contrary (see chapter 5), expectations are that an expert witness will testify corresponding to

the interest of the party who calls them. Judge G.J. Samuels<sup>79</sup> disparagingly referred to the expert witness as tending “to present the same image in legal literature as the lawyer does in Shakespeare; venal, grasping and fit to be hanged”. This is however, a product of an adversarial legal system. The courts mainly rely on cross-examination as the primary source of validity testing discourse. Pragmatically the cross-examination of expert witnesses is set out in two parts: that of admissibility (chapter 5) and that of weight (Perry and Hampel, 2005; Maiden, P. SC, 2010). Querying an expert witness typically attracts leading questions regarding issues such as:

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<sup>79</sup> Gordon Jacob Samuels was a British-Australian lawyer and NSW Supreme Court Judge (1972-1992) who was appointed as the 36<sup>th</sup> Governor of NSW (1996-2001). The statement was reportedly made regularly in Expert Witness Cross Examination seminars (Maiden SC, Bar Practice Course, 2010).

Objective:

- Correctness of the facts upon which the opinion is based;
- Validity of choice of methodology and methods given the circumstances;
- Accuracy of the methodology and methods used including calculations; and
- Gaps in tests and investigations.

Subjective:

- Expert qualifications and experience;
- Independence; and
- Bias.

Inter-subjective:

- Articulation and explanation of assumptions;
- Validity of assumptions;
- Reasoned and logical process leading to the expert opinion; and
- Comparison between opinion and that of other expert opinions

(NSW Bar Association, 2010).

Expert opinion evidence is usually presented in the form of a written report which is then entered into the court through affidavit. Having been allowed as testimony the expert warrants the defence of their report through validating discourse, in the form of cross-examination. The expert report takes the form of an investigative report that addresses the issues of the matter at hand, fulfils the expert's professional guidelines and in completion of the expert's obligations under the relevant statute that facilitates expert opinion evidence. Specifically, for the forensic accounting expert witness such guidance is found in the Accounting Professional and Ethical Standards (such as APES 215) and the professional association's codes of ethical and professional guidance. In this regard the profession comes

to the court with its own (accounting) peer supported legitimising rules (as discussed in the assurance section, below).

Pragmatically, the expert accounting evidence, presented in the form of a report addressed to the court, arises from an investigation of the facts of the matter at hand. The manner of investigation materially affects the validity of the evidence and it is the rationality of the investigation and conclusions that arise that are the focus of the court's discourse. The investigation is the deployment of accounting technology in an inquiry aimed at advising the court with respect to facts and expert interpretation. The inquiry does not provide the answer to the main question of the matter in front of the court, as that is the prerogative of the trier of fact, usually the judge (see chapter 5).

#### [A valid investigation](#)

Much of the legal discourse with respect to the investigation has focused on the independence of the investigator and the investigation (see chapters 2 & 5), however, the attributes of an investigation that contribute to its validity and the validity of the investigative conclusions cover broader parameters. Michels (2010) presents a practical taxonomy of an investigative report for a reliance and duty investigation, which parallels the purpose of an evidential expert report. He dissects the investigation as the satisfaction of his 'truth standard', which, as previously discussed, contributes to the validity of the expert evidence. He holds that the "degree of certainty implied by the investigative effort" as a core element in the maintenance of expert authority throughout the court's validation discourse. This commences with an accurate account of the facts, not mere "conjecture, personal opinion nor a simple transmission of client information or advocacy" (p102). An accurate account is objective, tempered with professional judgement within the boundary of the expert's field of expertise

(see chapter 5). Philosophically,<sup>80</sup> this is referred to as “metaphysical objectivity” where the “existence and character of the entity in question is independent of the human mind, including perceptions, beliefs, judgements of the investigator” (Michel 2010, p104). Expert testimony is objective in the strongest sense when independent of the expert’s state of mind or community norms or when influenced by the circumstances within which it is established. An expert opinion is “no longer objective when it strays beyond the boundaries of acceptable professional interpretation of the materials” (p109).

Objectivity is also tempered with procedure that rationally leads to a valid account, that is, ‘epistemological’ objectivity. Epistemological objective validity arises from the rational deployment of cognitive and procedural features of an investigation that enhance the prospects of arriving at the right answer. “Epistemological objectivity obtains when either of the following is true: (1) the cognitive processes at issue reliably produce accurate representations, or (2) the cognitive processes are free of factors that are known to produce inaccurate representations” (p110). In this regard, the expert’s evidence derives its validity from the inquisitorial nature of the investigation where, contrary to the adversarial approach, the evidence must later withstand questioning in order to defend its validity. Epistemological validity therefore stands on procedural legs that must withstand the testing discourse of the court, such as, questions about the deployment of accounting technologies, inspection with respect to what transpired, what standards govern the process, what results the standards mandate and the reliability of the process as deployed.

Again, Michels (2010) postulates some tools of epistemological objectivity noted as independence, sufficient inquiry, evidentiary reliability and professional judgement. That valid expert testimony must be independent, has been a significant focus of precedent case

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<sup>80</sup> This thesis recognises objectivity as a determinant of an expert’s validity open for examination, however, it does not investigate further concepts of legal objectivity. (See Leiter, 2002).

law (as discussed in chapter 5), however, at this juncture two types of factors that influence independence need to be considered: advocacy conflicts and biasing influences. Advocacy conflicts materialise as both overt and inadvertent efforts to protect or advance the interests of the client. In this respect, the role of the expert witness is very different to the role of the lawyer who represents their client, a fact that sometimes lawyers need to be reminded of, when they present expert testimony in litigious and adversarial situations (Beran, 2009).

Biasing interests that can affect the validity of an expert account range from close personal or professional associations, to previous associations with other expert reports related to the matter (see, for example, *Rich v ASIC*, 2004), to a commitment to a particular genre of expertise or previously expressed opinions that may limit the scope of accepted ontologies. For example, an expert forensic accounting witness may have a particular view on the application, of say, valuation, that limits the analysis that the expert is prepared to undertake in a particular matter, despite peer approved alternative methodologies. Biasing interests may be overt or subtle and may not result in an invalid account. The bias may therefore be subjected to limited judicial acceptance and discretion (see chapter 5), that is, impairment to the evidence's validity but not deemed totally invalid. For example, the bias may lie somewhere between knowing, intentional, reckless, negligent or inadvertent, that leaves plenty of room for professional interpretation within the validation discourse that adjudicates between these boundaries.

The validity of a report is grounded in the scale of enquiry, such that it is sufficient to uncover the facts that concern the matter at hand (p 116). "The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based" (Model Rules of Professional Conduct R 2.3, 2007). In practice, the amount of enquiry is limited, particularly with respect to the deployment of accounting technology. It is normal practice for accounting to define a commencement and conclusion period (for example, Profit and Loss

Reports) or comparisons of particular snapshots in time (for example, the Balance Sheet Report), or to specify a particular transaction (for example with date, time and transaction details). With respect to the validity of evidence, the question of sufficiency of investigation turns on insufficiency, that is, answering the question that, if further inspection was conducted, would it materially elucidate the findings? This is a higher standard than whether the consequence of further inquiry would make a finding more or less probable than without further inquiry (*Basic Inc v Levinson* , 1988, 231-32).

Sufficiency of inquiry is dependent on the latitude and resources made available to the expert and the consequent scope and depth employed by the expert given such latitude and resources. Specifically, the expert needs to be afforded the necessary latitude (such as access to documents, contracts and ledgers) and adequate means (such as allocated funds and skilled staff) to enable coverage of the appropriate investigative territory to sustain valid responses to the court's testing discourse. Pragmatically, a forensic accountant not able to engage sufficient resources or investigative latitude should decline the position of expertise, at risk of being found wanting during cross-examination. The available resources and latitude shapes the scope and depth of an investigation, that is, the range of factual events and issues an expert can explore and the level of penetration of inquiry into those events and issues. A valid account requires sufficient scope and depth of investigation to reflect sufficient factual inquiry. For example, a forensic accountant would need to account for an issue to determine whether it was a one-time event or an occurrence on multiple occasions, or similarly, whether one issue of impropriety was an indicator of a number of associated issues or a trend. Scope and depth can be graphically pictured (see Diagram 2-1) as the horizontal axis representing the range of issues the forensic accountant will explore, whereas the vertical axis represents the depth or extent of inquiry taken into each issue. This gives a continuum of evidence that may illuminate a large array of issues without much depth, to a single issue which is

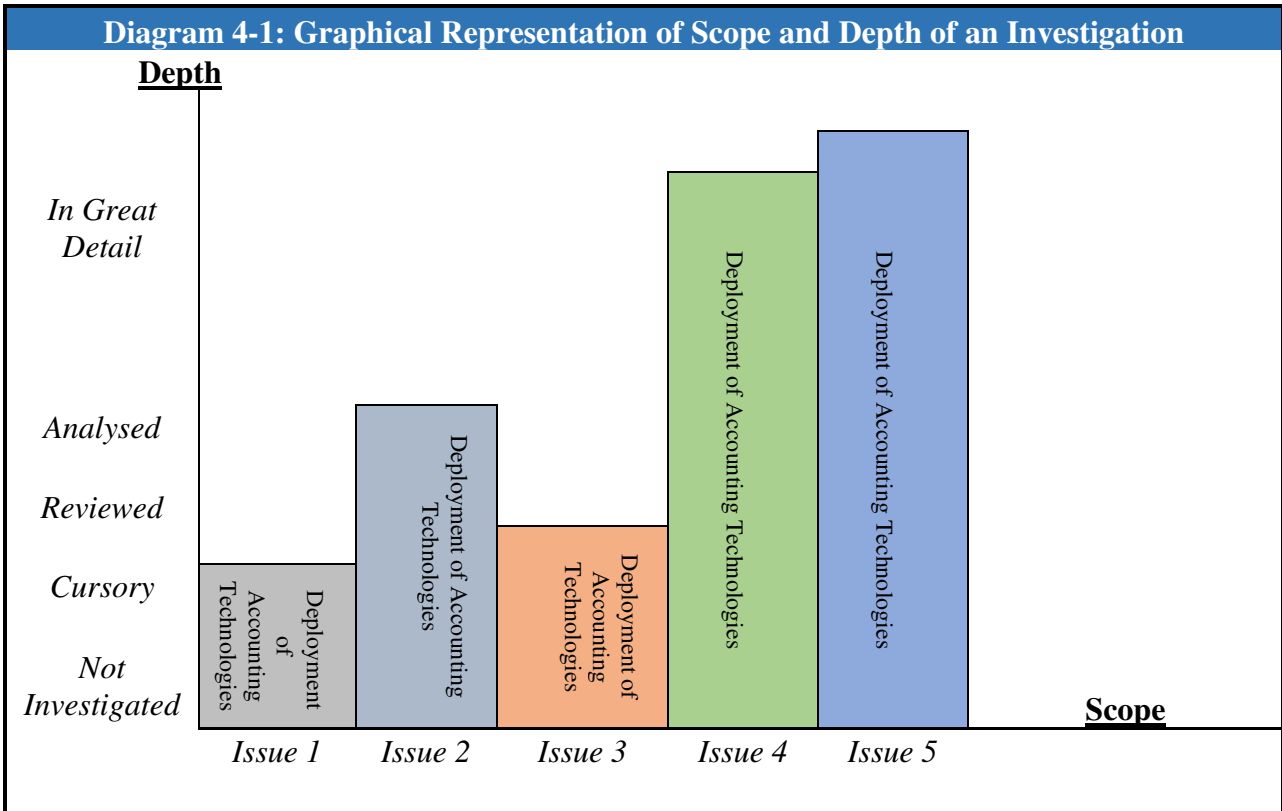


extremely deep and pervasive. For example, unexplained wealth may arise from the commission of a single lucrative criminal activity or it may be the result of an accumulation of activities either from various criminal pursuits that occurred at one time, or from a number of tainted activities that have occurred over a period.

The nature of evidence also has a material effect on the validity of an inquiry, in that the primary facts as gathered, have an inherent reliability which has a material effect on an investigator's inquiry. Special concerns about evidence reliability need to be considered, addressed and articulated transparently to the court's rational discourse. This covers the identification and finding of facts as well as "the care and deliberation in evaluating the evidence collected" (Michels, 2010, p118). The expert witness relies upon claims, defensible not only on the facts and the deployment of accounting technologies, but in respect of the surrounding and support processes, for example, proper document handling, chain of custody of evidence<sup>81</sup>, secure storage and organised recall. Further, the expert must consider the elements that contribute to their claim, such that, the structure of the claim is itself contestable through testing discourse on both content and process. In this regard, the expert is expected to exercise professional judgement based upon their expertise. Therefore, the layers that underpin and contribute to the construction of an expert opinion are also contestable through the court's rational discourse. The expert's selection and emphasis "can profoundly shape the factual narrative" (p119), thereby providing an account sensitive to distortion other than the biased perspective previously noted.

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<sup>81</sup> In this context the chain of custody refers to the chronological and logical procedure that allows the documents that are relied upon by the expert witness to be reliably logged to prove their integrity from seizure through to production in court (Lexisnexis.com).



[Professional Analysis and Interpretation](#)

The forensic accounting expert’s accounting analysis and conclusions are constrained by professional standards of analysis and interpretation, a “community bound enterprise” (Wendel, 2005) where “the criteria for reasonable exercise of judgement are elaborated intersubjectively among an interpretive community that is constituted by fidelity” to accounting (p1,167). Formally this constraint is proclaimed in guidance that either directly addresses forensic accountants or broader guidance to those who claim professional inclusion under membership of professionally recognised accounting bodies. Specifically, the Accounting Professional and Ethical Standards Board issued (APES) 215 is applicable to the provision of Forensic Accounting Services, which describes the fundamental responsibilities of members who supply such services. APES 215 purposely includes expert witness testimony. APES215 has mandatory and advisory requirements including explanations and discussion. The standard does not stand alone but is read in conjunction with other

professional standards and legal obligations pertaining to members classified as professional accountants. First and foremost members are instructed that their conduct must comply with the APES110 *Code of Ethics for Professional Accountants*, specifically, in order to meet the member's public interest obligations, that include being, "and be seen to be free of any interest which may be regarded as being incompatible with the fundamental principles of Section 110 *Integrity* and Section 120 *Objectivity* of the Code" (sec 3.3). Further, a professional accountant is instructed to ensure their independence, exercise professional competence and due care, maintain confidentiality and adhere to a process of professional engagement (APES 305).

Distinction is clearly made with regard to the provision by professional accountants of expert witness services (sec 5) and the report communicated to the court as the basis for informing the adjudication. The standard APES215, section 5 (see Appendix A), highlights the need to review and separate the objectives for providing a forensic accounting expert opinion, with other objectives for services provided that may be seen by an informed third party to present a potential conflict or impediment to independence. The standard couples with the legal requirements (statutory and common law) in mandating the member's compliance with their paramount duty to the court, duty to assist the court objectively and in an unbiased manner, and to remain within the area of the member's expertise. Of paramount importance, in the practical provision of expert witness services, are the mandatory instructions for the completion of the formal report upon which such services depend. There are 15 legal requirements or restrictions in paragraph 5.6, which essentially parallel legal requirements extracted from statutes (for example, the Unified Evidence Acts) and case precedents that are commonly cited. This easily facilitates legal-accounting professional coupling, that commences from the common use of legal instructions and investigative scope. Paragraph 5.6 mandatorily states:

(S)subject to any legal requirements or restrictions, a Member providing an Expert Witness Service shall clearly communicate in any Report:

- (a) the instructions received, whether oral or written;
- (b) any limitations on the scope of work performed;
- (c) details of the Member's training, study and experience that are relevant to the matters on which the Member is providing expert evidence;
- (d) the relationships, if any, the Member or the Member's Firm or the Member's Employer has with any of the parties to the Proceedings (including any of the matters referred to in paragraphs 3.8, 5.1, or 5.2) that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code or the Member's paramount duty to the Court, and any appropriate safeguards implemented;
- (e) the extent, if any, of reliance by the Member on the work of others;
- (f) the opinions formed by the Member;
- (g) whether an opinion is provisional rather than concluded, and, if so, the reasons why a concluded opinion has not been formed;
- (h) the significant facts upon which the opinions are based;
- (i) 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
  - (ii) if the Member chose to make the assumption, then the reason why the Member made that choice;

- (j) if the Member considers that an opinion of the Member may be misleading because a significant assumption is likely to mislead, then a statement to that effect and an explanation of why the assumption is likely to mislead;
- (k) where applicable, that the Member's opinion is subject to the veracity of another person's Report upon which the Member's Report is based;
- (l) the reasoning by which the Member formed the opinions, including an explanation of any method employed and the reasons why that method was chosen;
- (m) a list of all documents and sources of information relied upon in the preparation of the Report;
- (n) any restrictions on the use of the Report; and
- (o) a statement that the Expert Witness Service was conducted in accordance with this Standard.

(APES 215 - paragraph 5.6)

It should be noted that many of the requirements of paragraph 5.6 are designed to enhance open and rational discourse by mandating the reporting of contextual material as well as material (significant) assumptions that effect an expert's process or opinion. This is further supported by the retention of working papers, methods and calculations that underpin the forensic accounting service as provided (paragraph 7.3).

Professional accounting and audit standards vary in their relevance to expert accounting witnesses, with particular connection to the facts of the matter and the context of the case<sup>82</sup>.

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<sup>82</sup> As the accounting (APES) and audit (AUASB) standards are a significant proportion of the accounting body of knowledge they will be relevant to almost all expert accounting opinion assignments. Therefore, discussion of exactly how the content and analysis of these standards are directly relevant to accounting expert opinion is not

The legislative influence of these standards is found in their independent legal authority under the Corporations Act (Cwth) 2001 (sec 296, 334). They serve to support the accountingization of things and to validate the accounting body of knowledge from authority outside the court, but importantly, with the power of the law. In such a manner, the law uses the power of its ‘left hand’ to support the legitimacy of its ‘right hand’ and to narrow the distance between the two professions by embedding both professional bodies of knowledge in the same broad statutory system. The community recognises the cognitive authority of both professions, structurally coupled, through common statutory legitimisation, but distinctly different, in their professional and potentially emancipatory<sup>83</sup> messages, validated in either linguistics (the law) or facticity (accounting) (see the discussion of Jeremy Bentham in Gallhofer and Haslam, 2005, p64-65).

### Peer Acceptance

The concept of peer supported accounting practices that validate a forensic accountant’s expert evidence has been established at the theoretical level (intersubjective legitimacy), the assurance level (APES 215 and similar guidance) and at the judicial level (see chapter 5). Specifically, peer supported forensic accounting practices rely upon several methodologies that devolve to specific methods, which are peer supported when logically conducted and rationally argued. Deployed correctly, these methodologies and methods can be rationally defended and explained in the court’s testing discourse. Distinctively, accounting methodology refers to “the framework of the means for gaining knowledge ..... and thus sets the limits of knowledge” (Gaffikin, 2009, p7), whereas, methods refer to the specific accounting techniques deployed to gather data, analyse and produce information. Peer

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pursued in this dissertation, except as directly relevant to aspects that define the patterned principles of accounting technologies discussed in chapters 8 and 9 with respect to UW-POCA accounting evidence.

<sup>83</sup> In this regard the reference to emancipatory messages is the attempt by both professions to communicate externally from the court. As discussed earlier accounting publicity to some extent breaks down the expert’s cognitive authority in favour of active communication however hegemonic forces remain problematic to a genuinely open process.

accepted methodologies relevant to POC-UW matters can be sorted into several categories such as:

- Basic Accounting Principles; mainly the economic entity assumption, the time period assumption, the cost principle, the matching principle, the materiality principle and conservatism,
- Direct Income Reconstruction; mainly transaction tracking and documentation, and
- Indirect Income Reconstruction; mainly the deployment of methods used “to develop indicators of concealed income and hidden assets” (Kranacher et al, 2011), and
- Generally Accepted Accounting Principles and Accounting Standards; mainly focused on financial accounting, however, they may be relevant to the interpretation of a particular accounting procedure in a matter.

Each of these methodologies instructs a range of methods which are carried out in a series of purposive-rational steps designed to achieve the methodological objective. The most appropriate method depends on the facts of the matter and the information available to the forensic accountant, the scope of the investigation and the certainty of conclusion required for the accountant to form and sustain their expert opinion. A description of methods that belong to the methodologies above are included in the appendices of this dissertation, as they are referenced to, and form an explanatory note to their reference in the cases referred to in chapters 8 and 9. Due to the relatively few publicly available documented forensic accounting reports that have been presented in evidence, this dissertation explores peer accepted forensic accounting methodologies and methods accepted in cases that align with forfeiture purposes (see chapter 8). For example, matters that concern undisclosed income under taxation legislation and under family law or matters that concern redistribution under equity tort law.

The normative view of expert accounting evidence is that accounting standards, generally accepted accounting principles (GAAP) and the facticity<sup>84</sup> of accounting should lead to consistent, clear, rules-based opinions that converge and concur given the consistency of available facts. The apparent objectivity of accounting standards and the accurate calculability of accounting variables presents an expectation of professional ‘tightness’ and lack of variability. However, the nature of accounting expertise is that it relies upon professional judgement with regard to the deployment of accounting technology under the principles based instruction of accounting standards. Brown (1993) notes three kinds of professional judgement: semantic, pragmatic and institutional. The incompleteness of accounting standards such that they require the expert to utilise professional judgement contributes to the uncertainty of the professional discourse and hence is an important variance for cross-examination that requires defence of validity based upon the valid speech act, rather than merely, the shield of professional rules.

## Conclusion

Articulating a stepped approach to the role of accounting expertise facilitates the progressive consideration of the important components in an expert witness’ account that influence the internal and external contexts of the courtroom. The expert witness must develop their credibility through making a valid contribution to the court’s discourse and to the extension of that discourse outside the walls of the court. The validity of the expert evidence is carefully constructed through a grounded ontological and epistemological objectivity. It is tested through objective, subjective and intersubjective queries. The legal system provides both formal and informal methodology to support validity testing. The most formal

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<sup>84</sup> The facticity of accounting evolves from the numerical base of calculation and money in contrast to the linguistics of law evolving from conceptual (and potentially codified) argument. This differentiation will be revisited, with respect to accounting’s patronage towards legal arguments reflected in monetary transfer remedies.



methodology is that deployed by the court's legal gatekeepers, who exercise the provisions of the Uniform Evidence Acts and apply the espoused learnings that have arisen from precedential judgements and formal authoritative reviews. In chapter 3, the research reviews the formal process of the expert evidence as it finds its way into the courtroom, past the obligatory passage points administered by the legal system. In this regard, the case level considerations have been complemented by a number of prominent reviews, as well as legislative advice and statutory changes.

## Chapter 5: Formal Acceptance of Expert Evidence

### Chapter Introduction

At the core of this thesis is the effect of expert accounting evidence<sup>85</sup> within the legal adjudication process. However, such expertise is not readily invited into the legal debate held within the hierarchical, authoritative structures, known as the legal system. The court, as the legal system's central forum, has its peculiarities, rules and conditions. Normal witness testimony is limited to those who have experience of the events pertaining to the matter at hand. Expert opinion testimony does not fall within those parameters.

The purpose of this chapter is to review and analyse the specific exclusion<sup>86</sup> that allows opinion evidence to contribute to legal adjudication. The legal fraternity controls the only access point for opinion evidence to be heard, through interpretation of access requirements. Therefore, the gestation and alignment of evidence statutes (for example the Evidence Act (Cwth), 1995) and the development of key judicial (common law) precedents are materially important in order to understand the influence of expert opinion evidence in modern judicial processes (Kirby, 2011). In this regard, the statutes of the individual jurisdiction need to be recognised. As previously noted the Australian federation has provided an unusual legal context in which the Australian Commonwealth Government (also known as the Federal Government) has limited constitutional powers granted to it either constitutionally or by agreement from the states. This has led to the construction of legislation at the Commonwealth level with the intention of it being mimicked at the state level<sup>87</sup>. The

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<sup>85</sup> Where reference is made to 'expert witness', 'opinion witness' and 'expert opinion witness' they refer to the same role regarding the provision of specialised testimony based upon expertise.

<sup>86</sup> In this regard 'exclusion' serves to include such evidence, not exclude it. The exclusion is from non-admittance. It is not unusual for the law to express itself in such apparently reverse terms that can contribute to misunderstandings to readers without a legal background.

<sup>87</sup> As interstate business and individual movement have increased in Australia, the need was felt for greater uniformity of law, between jurisdictions, on particular subjects, in order to gain efficiencies and clarity. The

mimicking process requires the formal adoption of the same (or very similar) legislation through each state and territorial parliament.

The current status of the Uniform Evidence Acts is that they have been adopted in the following form in the jurisdictions of the Commonwealth of Australia, New South Wales, Tasmania, Victoria, the Australian Capital Territory and the Northern Territory.

- *The Evidence Act 1995* (Cth), enacted in February 1995 (also by agreement to be used in the ACT)
- *The Evidence Act 2011* No. 12 (ACT) received assent on 13 April 2011
- *The Evidence Act 1995* (NSW), enacted in June 1995
- *The Evidence Act 2001* (Tas).
- *The Evidence Act 2008* (Vic).
- *Evidence (National Uniform Legislation) Act 2011* taking force on 1 January 2013 in the Northern Territory.

Whilst the *Uniform Evidence Acts* constitute an evidentiary code, “to a certain extent it is a break from the common law past” (Stuesser, 2010, p73). Queensland and Western Australia remain hybrid jurisdictions, in that the common law prevails, but there is significant ad hoc legislative reform. The *Evidence Act 1929* (SA) has not adopted the Uniform Evidence Act provisions. Despite the lack of harmonisation of evidence law in these jurisdictions, in practice, the issues that pertain to expert opinion evidence are similar throughout Australia (and for that matter the United States and United Kingdom) albeit that the legal interpretive authority may rely more on common (case) law than on statute. As is consistent with the

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process of unification can be any of three methods: a) National Applied laws (or template legislation); b) National Model Legislation, enacted as mirror acts; and c) Legislation of the States referring legislative power to the Commonwealth. The Uniform Evidence Acts represent a mirror act process. See as examples *the Corporations Act 2000*, *Australian Crime Commission Act 2002* (Cth), *Business Names Registration Act 2011* (Cth), *Competition and Consumer Act 2010* (Cth), *Work Health and Safety Act 2011* (Cth).

scope of this dissertation, specific emphasis is placed on accounting evidence, however, it must be recognised that the issues of expert evidence are broadly applicable across many areas of recognised expertise. Non-legal (but professional) theoretical insight, into the hierarchical legal power structures, is drawn from Clegg's *Circuits of Power* (1999), which describes the empowerment of expertise as its message is legitimised and expert membership is accommodated within a structured domain such as the courtroom.

The statutory borders placed on court access and the framework of testimony are evaluated by the 'trier of fact', that is, within the prerogative of the judge. This chapter will analyse key cases from the Australian, the United States and the United Kingdom's jurisdictions where the explanation of the court's judgement has given rise to informed thought, or a precedent, or where such an earlier precedent has directly been challenged. Such decisions reflect influential judges' rationale with regard to the requirements for expert evidence to be allowed into the court as well as the attributes and limitations of the evidence itself. In this regard the hierarchy of judicial opinion is important, taking into account decisions made by leading individual judges, courts of appeal and more senior courts.

Reflective of the need for expert witness' claims to be validated within the courts' testing discourse, this chapter, comments on recent changes to the courts' processes to test validity and to open up the expert's cognitive authority to challenge. Such processes flow from the expert's original evidentiary report. In this respect the court's power is exercised through direction to the (opposing) expert witnesses to produce joint reports in suitable form, and/or to participate in joint, simultaneous, cross examination (referred to as "hot-tubbing"). Concurrent with the judicial lens, this chapter considers the prescriptions of legal codes or court rules, as a separate but influential determinant of the expert witness framework. Similarly aligned, the codes and prescriptions of the accounting profession are appraised, in the later part of this chapter, from two perspectives. Most directly, the Accounting

Professional and Ethical Standards (such as APES 215 – Forensic Accounting Services) which advocate a minimum level of attributes and inclusions that should be included in an accounting professional’s expert report and testimony. Further, recognition of opinion evidence is underpinned by the accepted accounting body of knowledge, hence the content of an accounting expert’s report is expected to be consistent with accepted peer methodology and practices. Such peer practices are further considered in chapter 8.

The importance of this chapter for this research, is that, consideration of expert opinion evidence requirements, from the courtroom perspective, inform the subsequent case studies, as well as, commentary with respect to the structural expectations of the legal system in receipt of expert testimony. The legal system has structural nodal points where the flow of evidence is allowed, blocked or mitigated (Clegg, 1999). These nodal points<sup>88</sup> cannot be bypassed. They have their own rules, processes and assembly which need to be understood and obeyed at risk of penalty or exclusion. The rules, processes and assembly are expressed in statutes and common law. That is, an expert who delivers testimony must adhere to the principles espoused in statutory instructions and judges’ interpretations. The consequences of non-adherence may be episodic punishment (such as exclusion from presentation or down grading of influence through judicial mitigation) or durational (such as damage to reputation or professional retribution from the accounting or legal professions), (Clegg 1999). The chapter is segmented into four parts. Part 1 considers the predominance of the legal domain with respect to the acceptance of expert opinion, Part 2 reviews the rules of providing expert opinion evidence, Part 3 extends this discussion to the formality of court rules and codes of conduct for expert witnesses. Part 4 refocusses the expert witness instructions to those specifically addressing the accountant’s professional obligations. This chapter is important

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<sup>88</sup> Clegg refers to “nodal points” as key positions or places where people do what is expected of them. The nodal points are “links in the chain that follow and redistribute rules and orders they have received ..... thereby reconfirming and validating the system” (Poluha, 2004, p199)

because it reviews the structural boundaries imposed on expert accounting witnesses. Without cognisance of, and adherence to these boundaries experts run the risk of not being heard or having their message downgraded and potentially incurring episodic or more permanent sanction.

## **Part 1: The Legal Professional Domain**

The court system is by nature the domain of the legal profession, yet it is the obligatory passage point through which the non-legal expert must pass in order to exercise empowerment of their message to the social system. Clegg describes three circuits of power, the episodic circuit, the dispositional circuit and the facilitative circuit. Obligatory passage points “are positioned at the junctures where the three levels (or circuits) of power interact” providing the channels for empowerment and disempowerment (Boje and Rosile, 2001, p90). The court provides the fulcrum where the three circuits are leveraged between themselves, providing a forum for expert witness legitimisation and validation. For example, the episodic circuit provides the court’s daily work routine and ordered legal process (e.g. schedule, appearance, order, legal formality); the dispositional circuit constructs meanings and memberships (e.g. position, rules of address, stabilisation of legal rank); and the facilitative circuit provides the disciplinary system of rewards and punishment (Clegg, 1999, p208). Access to the court itself provides meaning and membership, a prima face legitimisation for the expert who, by their message, in turn legitimises the court. The expert may attempt to tell their story either by means of a formal report or by their presence in the court, or by both. The presentation of a written court report, usually tabled in the court by affidavit, makes the expert available to the court for examination on the contents of their report (to validate the expert’s claim through testing discourse, usually cross-examination).

Expert evidence has been presented to courts over a long period. Saunders J, 1554, in *Buckley v Rice* stated:

...if matters arise in our laws which concern other sciences and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing for thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them at 191.

In contemporary times the use of expert opinion witnesses has “increased dramatically .... both in its frequency and complexity” (Davies, 1997, p188). This increased presence of experts in court has led to a body of judicial comments with regard to the treatment of such evidence and expertise. Judicial commentary covers the admission, content, expression and qualification of expert testimony. Court entry is contingent upon judicial discretion, albeit instructed and advised by legislation and precedent. Such instructions “can never be free of surplus or ambiguous meaning: they are always indexical to the context of interpreters and interpreting” (Clegg, 1999, p201). In this regard, the lawyers, barristers and judges partake in the interpretive gatekeeper role through the avocation, contestation and adjudication of the privileged access necessary to present expert knowledge to the court. The interpretation is often adversarial, with lawyers aligned to their client’s interests. This is in direct contrast to the expert’s overriding duty to dispassionately advise the court, rather than the client, who may have engaged them (and who may pay their account). The expert gains empowerment through the agency specifically delivered by statute, mainly (in Australia) the Evidence Act, 2008<sup>89</sup>, which delegates authority at the discretion of the legal profession on the tacit basis of “organisationally negotiated order” (Strauss, 1978). That is, the primacy of instruction arising from legitimate legislation duly passed into law. Other jurisdictions such as the United

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<sup>89</sup> Reference to the Evidence Act, 2008, refers to the harmonised approach to evidence acts in Australian and may be seen as representative of any of the specific Evidence Acts of the Commonwealth or the States and Territories.

Kingdom and the United States have similar legislative frameworks that apply to the admission and acceptance of expert opinion evidence.

Interpretive authority extends the statutory mandate through the articulation of reasoned judgements in landmark cases that carry precedential messages. A precedent is defined as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases" (Black's Law Dictionary, 1979, p1059). A precedent on an issue is therefore, a collective body of judicially described principles that guide a court on issues to consider when interpreting the law. It is a central principle in common law jurisdictions, such as in Australia, the United Kingdom and the USA. In this manner a decision in a current case may influence decisions in similar future cases. Precedents can be binding (must be followed) or persuasive (advisory when applied with relevance). Precedents that arise from case or common law are as equally influential as statutory law. Precedents are relied upon across jurisdictions, carried through the recognition of logical argument across unrelated legal systems (for example, from the US legal system to the Australian system<sup>90</sup>), or the direct lineage of hierarchy (for example, from the British based legal systems to Australia, or from within the domestic Australian legal system from higher courts to lower courts). This concept was initially of 'precedent' guidance but 'principle' controlled. That is, the judicial thinking around a legal principle that has been informed by its application to a scenario (within a matter or case). However, in the early 20<sup>th</sup> century, precedents evolved as a resistance to outside influence, not merely for guidance, but to encourage an ordered legal process directed at "wisdom in result" (Llewellyn, 1949, p396). Informative precedent cases from the US include tests of admission such as the *Frye* (1923) rule, which was later replaced by the four *Daubert* (1994) tests for the rejection of unreliable scientific evidence. *General*

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<sup>90</sup> The use of international legal materials is a contentious issue in Australia, particularly in the context of using such materials in constitutional interpretation and in relation to basic human rights. The decision of the High Court of Australia in *Al-Kateb v Godwin*, 2004, provides a clear example of the different opinions on this issue. Kirby, 2006.



*Electric Co v Joiner* (1997) and *Kumho Tire Co v Carmichael* (1999) followed, that ruled on the sufficiency of expert testimony with regard to relevance, clarity rather than jury confusion, and the use of unusual knowledge criteria. In the British/Australian context, the seminal cases are *Makita (Australia) Pty Ltd v Sprowles* (2001) and *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*, which pertain to the obligation of an expert report to comply with the expert's prime duty to the trier of fact; *ASIC v Rich* (2005) and *Evans Deakin Pty Ltd v Sebel Furniture Ltd* (2003) which concern the potential conflict arising from roles and obligations; *The Ikarian Reefer (National Justice Compania Naviera SA) v Prudential Assurance Co Ltd* (1993) which outlines the duties of expert witnesses and *Clark v Ryan* (1960) which discusses the requirement of an expert to provide evidence beyond matters that the trier of fact could determine by themselves.

When the judiciary exercise their access authority they must be disciplined, regulated and abide by constituted rules inscribed within the legislation, as well as, consideration of these precedent decisions empowered by the relative status of the deciding court or judge. Discretionary liberty is hierarchical with the appeals process open to episodic disciplinary comment should a lower jurisdiction stray. For example, the explanation of a full court or eminent judge's decision may (and has) re-fix(ed) the acceptable context of expert evidence. Repeated as a precedent, the decision is then recognised in future adjudication, becoming a disciplinary boundary, that future experts must be cognisant of, and abide by. If a lower court judge deviates from a precedent, without an appropriate alleviating change in context, then an appeals court may provide an overriding judgement accompanied by adverse episodic comment. Therefore lower court dissent from precedent is rare. A "case holds with authority the rule on which the court there chose to rest the judgement; more, that the rule covers, with full authority, cases which are plainly distinguishable on their facts and their issue, whenever the reason for the rule extends to cover them". However, it is also correct to say that "a case

holds with authority only so much of what the opinion says as is absolutely necessary to sustain the judgement. Anything else is “distinguishable” and non-controlling for the future” (Llewellyn, 1945, p395). Specifically, the presentation of expert accounts in court is governed by the concept and boundaries of “expert opinion witness testimony” (Evidence Act 1995, sect 79), which grants privileged access to a special witness whose role is to inform the courts with respect to matters within a knowledge set, rather than as a “real witness”, who is only a describer of observed facts.

Evidence is the means by which a fact is proven (Anderson, 2014). A “real witness” is a non-hearsay<sup>91</sup> witness who can testify to the facts of the issues to be decided by the court and be cross-examined. Generally a witness may only give evidence of the facts that the witness has actually observed (Wilson, 1999). Evidence is inferential, structured within the burden and standard of proof and other “forensic reasoning rules designed to prevent juries reading decisions on insufficient evidence or falling prey to reasoning fallacies” (Roberts and Aitken, 2010, p20; Roberts and Zuckerman, 2010, ch15; ) The admissibility of evidence is structured around the primary rule of evidence being “that if evidence is not relevant it is inadmissible; if evidence is relevant it is admissible unless a specific rule of exclusion operates to exclude it” (ALRC Report 38 at [119]). The credibility of a “real” witness and their testimony depends on the extent to which they are recognised as a source of reliable information about the matter they have been called upon to testify.

The rules of evidence regulate what witnesses can say and what physical evidence may be introduced, in line with two broad principles:

- to provide the court with the best evidence; and
- to establish rules of fairness (Anderson et al, 2014, p78).

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<sup>91</sup> Hearsay evidence can be a complex notion, however, it is best described as a “statement by a witness that a fact occurred, when the witness did not actually observe the occurrence” (Wilson, 1999)

## Best Evidence

Best evidence means that original evidence is preferable to secondary or copy evidence and often applies to documents, data and physical items that may be introduced through association with oral witness testimony. Similarly, it is assumed that “first-hand information is more reliable than second-hand gossip, and consequently direct oral testimony is preferred to hearsay” (R v Adams, 1996 at 481). This thread of evidential hierarchy is built upon inferential common sense, however strength in this hierarchy does not guarantee admission of evidence, nor weakness guarantee omission because admission judgements also reflect normative decisions on fairness, rights and in some cases cultural specifics (Roberts and Aitken, 2010)

## Fairness and Probative Value

Rules of fairness prevent the admission of evidence that is disproportionately prejudicial, compared to its value in proving a relevant fact. In other words, evidence could be excluded because “the probative value of the relevant inferences that could be drawn from the evidence is outweighed by the potentially prejudicial impact of other, illegitimate inferences that the evidence might support or suggest to the fact-finder” (Roberts and Aitken, 2010, p22). The probative value of evidence is the “ability of evidence to make a relevant disputed point more or less true” (Wex Legal Dictionary, 2015), that is, seeking the truth. The Uniform Evidence Acts Dictionary, describes probity as “the extent to which the evidence could rationally affect the assessment of the probity of the existence of a fact in issue” (Uniform Evidence Act (Tas) s3(1), 2001). The relevant section 135 of the Evidence Act, 1995 gives the trier of fact discretion to exclude evidence:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time (s 135).

The judicial test of the probative value of specific evidence is one of balance rather than that of a clear line. Multiple factors must be weighted by the judge in the arbitration on whether to allow the evidence into the courtroom. This has been the particular focus of review for evidence of credibility or character. The term “substantial probative value” was found to impose a higher standard of relevance than “significant” in *R v Lockyer (1996)* by Hunt CJ, requiring the evidence being admitted to be “important” or “of consequence”. Opinion evidence of a circumstantial nature has been successfully challenged (*R v Burton, 2013*). Probity has been left to be open to a great deal of judicial interpretation which the judges appear to have been reluctant to relinquish (McNicol, 1999). Therefore the interpretation of probative value of an expert witness testimony is largely a matter of individual judicial interpretation (Lord Denman in *Doe d Jenkins v Davies* at 323). Heyden J in *Dupas v The Queen, 2012*, noted that in the judges making their decision on probative value, it is never a question that the judge can decide conclusively<sup>92</sup>.

## Part 2: Rules of Evidence

The rules of evidence are the gatekeeper’s tools for use when assessing entry to the court through “admissibility”, that is, allowing evidence to be heard by the magistrate, judge or jury. Obviously, if an expert’s evidence is deemed not to be admissible it lacks any influence in the adjudication. Even if an expert’s evidence is admitted, its influence may be diminished through legal instruction (for example from the judge), in effect, questioning the extent of the probity of what has been presented. The rules of evidence come from the relevant evidence

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<sup>92</sup> see also *R v XY, 2013* where the issue of probity arose where differential conclusions could be drawn from the expert evidence, and in that manner not conclusive.

statutes which, in Australia, have been largely harmonised between the Commonwealth and each state through the Uniform Evidence Acts. These acts grew out of the Australian Law Reform Commission (ALRC) in 1987. The acts have codified the common law rules of evidence operating until that time as well as extending some provisions which will be discussed in the narrative below (McClellan CJ, 2009).

## Relevance

Generally, admissible evidence is any testimonial, documentary or tangible evidence that may be used to introduce or support a point presented by a party to the proceedings. However, the first principle of admissibility is relevance, tending to prove a fact or issue by a credible witness (Wilson, 1999). The applicable legislative instruction is found at s 55 (*Evidence Act*, 1995). It has the intention of “only a minimal logical connection between the evidence and the fact in issue is required, sufficient to make the fact in issue more probable or less probable than it would be without the evidence” (ALRC Report 26 Vol 1). As accepted in *R v Clark* (2001) at [111]–[112], s 57 allows for provisional admission of evidence, subject to relevance being established in the adjudication process, where its relevance is unclear at the outset.

The relevant sections of the Evidence Act (Cwth, 1995) are:

### **SECT 55**

#### **Relevant evidence**

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

## **SECT 56**

### **Relevant evidence to be admissible**

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) Evidence that is not relevant in the proceeding is not admissible.

## **SECT 57**

### **Provisional relevance**

- (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:
  - (a) if it is reasonably open to make that finding; or
  - (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.
- (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

## SECT 58

### Inferences as to relevance

(1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

The definition of relevance is made irrespective of its eventual acceptance, but proceeds on the assumption that, if accepted, the evidence could rationally affect the assessment of the existence of a fact in issue in the proceedings (*Adam v The Queen*, 2001 at [22], [60]). The emphasis is therefore on the capability of the evidence, rather than the weight, except where issues of credibility or reliability may be such, that in a particular case, the evidence may not be able to perform that task (*R v Shamouil*, 2006, at [62]-[63]). This means that the relevance of evidence is initially accepted with some latitude that it has relevance, but that the relevance may only become apparent as the matter continues and, if this does not eventuate, the judge mitigates the evidence by discounting the evidence's relevance (Street, CJ, 1992). The judge is "not required to or permitted to make any assessment" of whether a jury or the trier of fact would accept the evidence (Judicial Commission of New South Wales 1995, Pt 3.1).

Admissible evidence must be capable of assisting the inquiry in some probative<sup>93</sup> manner (as the whole of the evidence) and given it satisfies this general principle it is admitted unless excluded by a discretionary rejection (*BBH v The Queen*, 2012: Heydon J at [97]-[104]; Crennan and Kiefel JJ at [152], [158]-[160]; Bell J at [194]-[197]). Assessment of relevance is made by the legal profession (for example, a judge, potentially the trier of fact) based, not upon legal expertise per se, but on broad life experience and the context or circumstances of

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<sup>93</sup> The "probative value" of evidence and the "credibility" of a witness are defined in the Dictionary to the *Evidence Act 1995*.

the matter. Assessment of witness credibility becomes irrelevant if the evidence has been admitted by the court for its relevance to a fact, in which case, issues with regard to witness' credibility are best tested under the court's discourse, such as cross-examination.

### **Expert Opinion Evidence.**

Despite the term 'opinion' not being defined in the legislation, the opinion rule, is that, "evidence is generally not admitted for the purpose of proving the existence of a fact about the existence of which the opinion was expressed" (s76 *Evidence Act, 1995*). This is a tautological issue in that a related issue concerns the extent to which facts stated by an expert as forming the basis for the expert's opinion can be admitted as evidence of the facts already stated. However, opinion evidence for another purpose can be used for that purpose with specific exceptions including expert opinion at s79<sup>94</sup>. The relevant section in full reads:

#### **SECT 76**

##### **The opinion rule**

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the opinion rule are as follows:

- \* summaries of voluminous or complex documents (subsection 50(3));

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<sup>94</sup> In this regard, it is similar to the admission of hearsay, for a non-hearsay purpose, but later is also used for hearsay, as in the legislation at sec 60. For a full discussion see ALRC102, 2005, Chapter 7.



- \* evidence relevant otherwise than as opinion evidence (section 77);
- \* lay opinion (section 78);
- \* Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);
- \* expert opinion (section 79);
- \* admissions (section 81);
- \* exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- \* character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

## **SECT 77**

### **Exception: evidence relevant otherwise than as opinion evidence**

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

## **SECT 78**

### **Exception: lay opinions**

The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and

- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

## **SECT 79**

### **Exception: opinions based on specialised knowledge**

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
- (2) To avoid doubt, and without limiting subsection (1):
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and
  - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
    - (i) the development and behaviour of children generally;
    - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

## **SECT 80**

### **Ultimate issue and common knowledge rules abolished**

Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

These sections have statutorily articulated many of the common law developments regarding the rules of evidence with respect to expert opinion witnesses. Commencing with a description of the opinion rule, the legislation moves to the important s79, which converts the previous “exemption” based on specialised knowledge, from judicial enquiry to statutory provision. These sections are followed up by s135 to s137 which give general judicial discretion to exclude any otherwise admissible evidence. Whilst these later sections have wider application than merely opinion evidence, they nevertheless retain their potency when applied to expert testimony.

### Expert Opinion

Opinion, defined as “an inference from observed and communicated data”, was applied in *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)* (1996) at 629 and accepted by the Full Federal Court in *Bank of Valletta PLC v National Crime Authority* (1999) at [20] and *Lithgow City Council v Jackson* (2011) at [10].

Further the Corporations Act 2001 defines an expert by stating an “expert in relation to a matter, means a person whose profession or reputation gives authority to a statement made by him or her in relation to that matter” (*Corporations Act* (Cth), 2001, s9). The concept of expertise is recognised as a “high level of specialised skill or knowledge in an area” (Cambridge English Dictionary, accessed 2016), however, the legal challenge to expertise also considers the knowledgeable area, such that the area itself, is subject to validity testing and is peer accepted, rather than, as derogatorily expressed by Sidney Phipson (1992), “as being revolting to common-sense, and inconsistent with the commonest honesty” (p439; see also Blom Cooper, QC, 2006).

## Field of Expertise to Specialised Knowledge

S79 replaces the traditionally referred to, common law test of “field of expertise” with the concept of “specialised knowledge”. Freckleton and Selby (2009) refer to the field of expertise as a “formal sphere of knowledge” (p52). Common law in Australia is not settled with respect to the definition of the required body of knowledge for an expert opinion, however, the judicial debate has been conducted along the lines of the reliability of such a body. This debate has been influenced by significant Australian and United Kingdom judges, such as, Dixon CJ, Gaudron, J and King CJ as well as the logic that has evolved through United States cases such as *Frye v United States* (1923) and *Daubert v Merrell Dow Pharmaceuticals* (1993).

Dixon CJ cited, with authority, J.W. Smith in *Clark v Ryan* (1960):

On the one hand it appears to be admitted that the opinion of witnesses possessing a peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment 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 the attainment of a knowledge of it ... While on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. (Smith, 1876 in *Carter v Boehm*, p577 cited at 491)

Three key points are raised, firstly, that the purpose for the admission of expert evidence is to assist the judge, or the trier of fact, in their adjudication towards reaching a decision. Secondly, that the evidence is proffered on the basis of a knowledge set and experience attributed to the expert but not available to the judge, and thirdly, the evidence as presented must provide assistance for the court to inferentially advance their adjudication (Ligertwood, 2004 at 7.44). The judgement in the United Kingdom case, *Bonython v R* (1984), is

influential in Australia, as a reference test for the “field of expertise”. King CJ commented, for consideration that expert evidence was permissible:

- (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and
- (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court (at 46-7).

The purpose of the “field of expertise” test, as confirmed in *Clark* (1960) and *Bonython* (1984), is to safeguard the fidelity and reliability of the science or technology upon which the expert evidence relies, through probing the organisation and peer acceptance of the underpinning knowledge. Historically, this has arisen through a line of common law judgements. (McClelland CJ, 2009).<sup>95</sup> In *Frye v United States* (1923), a case concerning the admission of expert evidence arising from a polygraph test, the court instructed that expert testimony must be based on “scientific methods that are sufficiently established and accepted”:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognised, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained acceptance in the particular field in which it belongs. (at 1014)

*Frye’s* general acceptance test has gained positive traction in Australian legal argument however there is “no single approach to the question of whether there is a demonstrable field of expertise” (McClellan, 2009 p7). There are Australian cases that “adopt a test of general

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<sup>95</sup> See e.g. *McKay v Page and Sobloski*, 1972; *Eagles v Orth*, 1976 and *Lewis v R*, 1987.

acceptance within the scientific discipline<sup>96</sup>, other authorities that require the court to exclusively consider the reliability of the source of the evidence<sup>97</sup> and authorities that adopt both tests<sup>98</sup>” (p7). The particular concern regarding the application of *Frye* to Australian law is that the recognition of a field of expertise is placed with the profession rather than the trier of fact. Freckleton and Selby point out that the language of *Frye* might be used to determine the substance of the expertise however further enquiry of the profession may be used to determine the applied technique’s reliability (Freckleton and Selby, 2009).

The Australian Law Reform Commission, as designers of the uniform evidence legislation, recommended against articulating an exclusionary rule in s79, in favour of a broader approach, mitigated, where necessary, by the court’s discretion at ss135-137 (ALRC 26 at 743; also Einstein J in *Idoport* at 244-246). The commission cited difficulties in implementing exclusive tests with respect to what accepted theories and techniques may constitute a “field” for expertise. The general discretion with regard to the relative probative value of the evidence was preferred in order to avoid “misleading or confusing the tribunal of fact” (s137). Even so, the debate with respect to the reliability of an expert witness’ testimony continues to rage around the application of s79 or s135 and s137.

Again, in the United States *Daubert v Merrell Dow Pharmaceuticals* (1993) provided powerful judicial comment regarding the standard for admitting expert testimony, which indirectly overturned the *Frye* standard with reference to “specialised knowledge”. *Daubert* dealt with two children, born with serious birth defects which their parents claimed had been caused by the Merrell Dow Pharmaceuticals product, Bendectin. The plaintiffs successfully

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<sup>96</sup> See, for example, *Clark v Ryan*; *R v Gallagher*, 2001; *Idoport v National Australia Bank*, 1999, at 239; *R v Harris* (No 3), 1990, at 318; *Carroll v The Queen*, 1985, and *R v Runjanjic*, 1991.

<sup>97</sup> *Carroll v R*, 1985; *R v Runjanjic*, 1991; *R v Lucas*, 1992; *R v Jamieson*, 1992 and *R v C*, 1993.

<sup>98</sup> *Casley-Smith v Evans & Sons Pty Ltd* (No 1), 1988 at 320, 328; *Shoshana Pty Ltd v 10th Cantanae Pty Ltd*, 1987; *Ritz Hotel Ltd v Charles of the Ritz Ltd*, 1988.

<sup>98</sup> *R v Gilmore*, 1977 at 939, 941; *R v Lewis*, 1987; *R v Bonython*, 1984, applied by Gaudron and Gummow JJ in *Osland v The Queen*, 1998.

argued, under the U.S. Federal Rules of Evidence (1975), that the rules superseded the common law Frye decision, in that the rules do not require general acceptance of the specialised knowledge. In part, the United States, rule 702 (Federal Rules of Evidence, 1975), states:

If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise .... (rule 702).

Spigelman CJ held in *R v Tang* (2006) that the *Daubert* meaning of “knowledge” was the same as required for s79<sup>99</sup>. In response to the Crown’s efforts to introduce identification evidence from a “face and body” expert, he commented:

“[T]he word knowledge connotes more than subjective belief or unsupported speculation. The term applies to anybody of known facts or to any body of ideas inferred from such facts or accepted as truths on ”good grounds” .... Proposed testimony must be supported by appropriate validation” (at 590).

In this regard, Spigelman went on to conclude that the appropriate validation of the expert was not forthcoming, describing the evidence as merely subjective and “bare ipse dixit”<sup>100</sup> (at 154). The status of the “asserted body of fact or corpus of ideas” (Freckleton and Selby, 2009, p174) was not sufficiently deduced from recognised principles and hence not validated. The word “knowledge” must “exist at a higher level than that of a mere understanding or belief, which may not derive from known facts or accepted rules on good grounds” (McLellan, 2009, p13). On good grounds, in this context, is a reference to the ability to traceably adduce inferences from the facts of the matter, that is, in reference to the reliability of the science, discipline or system of logic, on which the opinion is validated. This is

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<sup>99</sup> Spigleman did not think that *Daubert* had further meaning for s 79 than the definition of “knowledge” (see McLellan, 2009)

<sup>100</sup> “bare ipse dixit” is an assertion without proof; or a dogmatic expression of opinion.

particularly evident when an expert's opinion is based on emerging or novel disciplines.

*Daubert* quoted Webster's Third New International Dictionary (1986) in the decision:

Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to anybody of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds ..... But, in order to qualify as "scientific knowledge", an inference or assertion must be derived by scientific method (p 9-12).<sup>101</sup>

*Daubert* continued to expand on the considerations, for the trial judge, with respect to the reliability of scientific method or theory as expert evidence, such as; " i) whether the theory is generally accepted in the scientific community; ii) whether the theory/method has been subjected to peer review and publication; iii) whether the theory/method has been tested or can be tested; and, iv) whether the potential or known rate of error is acceptable" (1993, also see McClellan 2009 p16). Einstein J, in the NSW context, affirmed the *Daubert* view in *Perpetual Trustee Co Ltd v George* (1997) and *Lakatoi Universal Pty Ltd v Walker* (1999). However Spigelman CJ differed in *Tang* (2006) finding that evidential reliability is not a consideration under s 79.10. More recently the decision by McMurdo J's decision in *Cairns Regional Council v Sharp* (2013 at 18) reinforced the decision in *R v Bonython* (1984 at 46-47) indicating that the common law jurisdictions may be "closer to accepting reliability as a relevant consideration in relation to admissibility of evidence" (Freckleton and Selby, 2013).

In the Australian Uniform Evidence Acts Rules, s79 codifies the words "has specialised knowledge" for those jurisdictions who have adopted the legislation. This poses three separate questions, which must be answered in the affirmative before expert evidence is admitted to the court. Firstly, does the witness have "*specialised knowledge*"? Secondly, is that knowledge "based on the person's training, study or experience" and finally, is the opinion of the witness "wholly or substantially based" on that knowledge (s79). Section 79

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<sup>101</sup> The *Daubert* matter focussed on purely scientific opinion evidence however similar principles have been applied to other specialised knowledge in *Kumho Tire Co Ltd v Carmichael* (1999)



“requires a nexus, first between the knowledge of the expert (“specialised knowledge”) and their training, study or experience and then, between the expert’s opinion and that knowledge (McLelland CJ, 2009 p 4). The burden of proving this nexus rests with the party seeking to adduce that evidence, to be proven “with precision” (Mason P. in *R v G*, 1997).

Gleeson CJ, considered the underpinning knowledge base of an expert (psychological) opinion in *HG v Queen* (1999). He commented:

An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question... [T]he provision of s79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question. (at 39).

Crucially, reference to the reliability of the expert’s knowledge base was noted by Gaudron J in *Velevski v The Queen* (2002):

the concept of “specialised knowledge” imports knowledge of matters which are outside the knowledge or experience of ordinary persons and which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.

A more liberal view was considered by Heerey J in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd*:

...the *Turner* (1975) rule, adopted in *Murphy* (1989), is a separate requirement. Even if a proffered opinion is that of a person suitably qualified within an organised area of knowledge, if that area is not outside the experience of ordinary persons, the opinion will not be admissible.

The concept of the expert witness’ testimony as requiring knowledge outside that of an ordinary person has sometimes been contentious for expert accounting witnesses. This is particularly evident when the accountant’s evidence is described as “merely the summation of numbers” (*R v Ferguson*; *R v Sadler*; *R v Cox*, 2009) which can be seen as within the mathematical skills of both the trier of fact and of the average person. It is noted, that the role

of a forensic accountant is varied with recognised specialised knowledge associated with the calculation of economic damages, breaches of contract, securities fraud, tax fraud, money laundering, business valuation, monetary transactional analysis and computer forensics (Crumbley et al , 2005). However, such knowledge may depend on the clarification and explanation of monetary transactions, similar to a person's personal purchasing and banking. It therefore falls to the expert accounting witness to distinguish their work from that of the ordinary person. Such distinction should account for "training, study [and] or experience" which the ALRC should include experience as:

An expert should be defined as a person who 'has special knowledge, skill, experience or training about a matter', and that he generally be able to give opinion evidence that utilises his specialised knowledge, skill, experience or training. Experience can be a sounder basis for opinion than study. Not to include special experience as a qualification would keep valuable evidence from the courts. (ALRC 26, vol 1, paragraph 742).

### Accounting as Expert Knowledge

An accounting expert testifying based on accounting knowledge fulfils the concept of a specialised knowledge expert provided their opinion remains both relevant and within the accounting's professional body of knowledge. This fulfilment may have to be established *voir dire*<sup>102</sup> on the balance of probabilities. In the case of the accounting profession, being based on a body of knowledge is well recognised the court may not take a liberal relevance approach, seeking a very specific skill set. For example, an accountant may be able to understand and articulate business operations but the court may require specific knowledge of

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<sup>102</sup> Voir dire refers to 'a trial within a trial', in this case a hearing to determine the admissibility of evidence. Where there is a jury voir dire refers to a hearing in the absence of the jury. The specific inference here about the admission of expert evidence is that such evidence may relate to a fact that is yet to be proven in the case. Therefore the fact may have to be recognised in the case before the relevance of the expert evidence is admitted as it is linked to that fact.

types of product losses within the operation (R v Kobina Amponsem, 2014). Mere prior recognition of accounting expertise into court is not sufficient to guarantee its entry as a specialisation under the context of a different matter. Accounting needs to go further to prove that the accounting inscriptions are more than the common knowledge of assembling a budget or the management of personal accounts (R v Ferguson; R v Sadler; R v Cox, 2009). Pickering refers to this as the “performative idiom” (Pickering, 1995, p414) where “accounting is understood as concerned with “doing things” in the world and involving an emergent interplay between human and material agency” (Dambrin and Robson, 2009). This same interplay can “commonise” accounting such that transactions may be understood without need for fiscal interpretation. As such, accounting evidence can fall foul of the common knowledge rule, particularly where the accounting expert opinion is mostly based on a list of transactions, such as, in-out transactions in a ledger or notebook.

To be soundly within the concept of “specialised knowledge”, the accounting metaphor needs to be presented from the position of a professional discipline, that allows the expert’s opinion to assist the court with financial clarity. The adjudication process is tasked with making decisions pertaining to the *actus reus* and the *mens rea*, otherwise known as the guilty act and the guilty mind. Except in cases of strict liability (where *mens rea* is not required) those elements of a case must be established beyond reasonable doubt (in criminal cases) or on the balance of probabilities (civil cases). The expert’s testimony goes to the illumination of these elements together with causation. The terms *actus reus* and *mens rea* “do not have any meaning in themselves” (Allen, 2016, p15) they require context and application which may be supplied by the expert witness. Accounting evidence has greater relevance to *actus reus* and causation.

*Actus reus* is made up of “the conduct of the accused and the state of affairs which is the proscribed effect of that particular crime” (Wilson, 1999). The conduct (including omission)

that is punishable by law. “The conduct may be at large” (such as any conduct causing financial loss) “or prescribed specifically (such as the making of a false pretence) or by reference to some test (such as in a charge of attempt where the *actus reus* is conduct which is sufficiently proximate to the completion of the crime)”. (Wilson, 1999). The conduct must have causation, that is, must substantially contribute to the state of affairs, that causes the result in fact, having more than minimal impact, as well as in law. Whilst the accounting body of knowledge is generally recognised by the court, this specific application of the rule will be discussed further in chapters 8 and 9 of this dissertation.

### **Exclusionary Discretion**

As discussed earlier, the Evidence Act, 2008, confers exclusionary discretion in ss135-137. This serves to reinforce the overall probative value of the evidence but also to exclude evidence that may be “misleading or confusing” (s135(1)(b)) or evidence that may “cause or result in undue waste of time” (s135(1)(c)). Whilst the earlier issues of admissibility and reliability of expert evidence may err towards being allowed to be heard it is with respect to their further review under ss135-7. Further comment by the trier of fact, under these sections may still lead to exclusion or it may lead to the evidence being put together with judicial mitigation of its probity (for example, a contextual comment from the bench regarding the relative weight provided to the evidence being presented).

### **“Wholly or substantially based” on Specialist Knowledge**

This condition limits the expert witness to providing evidence within their area of expertise (specialised knowledge) and not outside that area (s78). Further an expert must point to the assumed facts that are the basis of their opinion. Gleeson CJ observed that:

Experts who venture opinions (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a

spurious appearance of authority, and legitimate processes of fact-finding may be subverted. (*HG* at 44)

For example, in the case of *R v Bradbury* (2015) the NSW Police's forensic accountant for the prosecution reported that the defendant was under financial stress, which the prosecution took as his motive for the murder of his wife. The defence pointed out that, among other deficiencies in the accountant's report, the forensic accountant was pontificating on a psychological condition, outside the professional expertise of an accountant. The result was a declaration of no case and withdrawal of the prosecution by the Department of Public Prosecutions.

It is not for the expert witness to decide on the ultimate issue before the court, but to assist the court with advice pertaining to the issues of fact that the court needs to consider. In its consideration, the court needs to be able to understand the expert evidence in order to determine how much weight to place upon it. It is for this reason that an expert must describe the basis for the formation of their opinion including articulating the foundations of their logic. Heydon JA noted this could be achieved by the expert witness providing:

... the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.<sup>103</sup> (*Makita (Australia) Pty Ltd v Sprowles*, 2001, at 59).

Further:

[W]hat an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based ... One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved. (at 64).

The issue here for forensic accounting expert witnesses is a negative one of having their evidence excluded under s135, or having the probative value of their evidence reduced

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<sup>103</sup> Heydon JA, quoting from *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39-40 per Lord President Cooper.

through judicial mitigation. The use of s135 is the preferred resolution when an expert fails to describe how an opinion is formed from the basis of their specialised knowledge, applied to the facts of the matter (ALRC Report No 26, vol1, par 750). The view in *Makita* (2001) has been seen, in subsequent decisions, to represent a “counsel of perfection”, most notably in *Sydneywide Distributors v Red Bull Australia Pty Ltd* (2002), where “proper disclosure of the factual basis of the opinion” (Branson J at 10) could be tested under the court’s discourse if deemed admissible. Her honour said:

It is sufficient for admissibility, in my view, that the trial judge is satisfied on the balance of probabilities on the evidence and other material then before the judge that the expert has drawn his or her opinion from known or assumed facts by reference wholly or substantially to his or her specialised knowledge. (at 16).

Their Honours went on to say that fundamental propositions arising from a discipline do not have to be each referenced back to an appropriate authority, however they remain open to the testing discourse of cross examination to allow the expert to validate their views. Similarly, Heerey J reflected on the requirement for an expert witness to prove the facts on which their opinion is based in *Cadbury Schweppes Pty Ltd v Darrell Lea chocolate Shops Pty Ltd*. He concluded that there was a line of common law authority allowing expert testimony without full substantiation but diminished in its impact under the scrutiny of the legal discourse<sup>104</sup>.

### Following Instruction

One of the more recent issues arising from the increasing use of expert witnesses, particularly forensic accountants, is the production of an expert report consistent with, and limited to, the legal instructions of counsel. While the perennial issue of expert witness independence can be addressed under the probity v prejudice conundrum (ss135-137), recent case reviews have highlighted a limitation on expert witness reports through truncated or directed lawyer’s

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<sup>104</sup> See *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002); *Neowarra v Western Australia* (2003); *Jango v Northern Territory (No 4)* (2004); *Ramsey v Watson* (1961).

instructions regarding the preparation of the expert report (Freckelton and Selby 2014). “A fundamental obligation of those commissioning expert reports is to ask open-ended, non-leading questions, so as not to bias the answers elicited” (pviii). Garling J in *John v Henderson* (no 1), (2013) reiterated the principle that everything should be done by legal counsel to present the expert as neutral and non-partisan. The forensic accounting expert witness should be acutely aware of the instructions given to them by counsel, as they have an obligation to publish them as part of their report. This recognition should pre-empt and avoid any truncation or direction that may interfere with the expert’s overriding duty to advise the court dispassionately according to the expert’s knowledge and experience, taking into account previously discussed arguments supporting concepts of legal truth and validation (chapter 2). In this regard pre-trial alternatives may be useful to expert witnesses, such as an expert conclave, where opposing experts get together, without the restrictions of lawyers, to sort out the reasons and basis for their disagreements and the areas of agreements and to advise the court accordingly. It is noted that Australia leads the world in the use of innovative expert witness management techniques aimed at reducing the cost of litigation in the adversarial court system. Expert conclaves and expert ‘hot tubbing’ (where more than one expert is simultaneously placed in the witness box and asked questions from each litigant) are two such innovative techniques.

### **Privileged Communications**

One of the important differences between the Uniform Evidence Laws and those jurisdictions relying on common law, is the treatment of draft reports and communications between the expert and counsel. Under the Uniform Evidence Laws draft reports and such communications are unavailable for discovery. Under the common law approach, set out by Lingren J in *Australian Securities and Investments Commission v Southcorp*, 2003, and again by Dodds-Streeton J in *Shea v TruEnergy Services Pty Ltd (No 5)*, 2013, two principles arise.

Firstly, that the expert's working documents, including data sets, are not privileged communications, and secondly "disclosure of the report in order to rely upon it in litigation is an implied waiver of the privilege with respect to the original instructions to the expert from the lawyers" (Freckleton and Selby, 2014, pix). On the contrary the Uniform Evidence Law provides that where the "dominant purpose" of the expert's report or communication is to advise the client the privilege claims are allowed, preventing opposition access. These principles are important to forensic accountants who conduct investigations in preparation to providing an expert report to the court. Investigations require the preparation, analysis and variation of data based calculations given a variety of assumptions, that may be accepted or rejected in the final court report. Therefore jurisdictional variances may be meaningful in the rigour of contemporaneous explanations of how data is managed along with the reasons for acceptance or rejection, not only of the methodologies, but the actual calculations.

### **Hindsight Bias**

In a fast changing world, decisions arrived at in the compilation of an expert report that rely upon an investigation at a point of time, are valid decisions based on the facts and assumptions as stated. As the progression of a matter from investigation to report to court may take many months or longer issues relevant to the forensic report may have changed, assumptions may have been clarified, predictions become settled facts. The temptation arises to bring today's values and standards into yesterday's report in a manner referred to as "hindsight bias". As noted in *Archer Capital 4A Pty Ltd v Sage Group plc* (no 3) (2013) this is not appropriate conduct leading to the probity of the report to be diminished. There is nothing sinister in experts changing their minds, however, such a shift should be separately articulated with accompanying reasoning (Freckleton and Selby, 2014).



## Procedural Delivery

The increased admission of expert evidence has created a number of practical concerns for court. Traditionally each expert is tediously walked through their report, assumptions, processes, methodologies, methods and findings. The expert is then asked to compare their findings with those of other experts or other evidence. The court time is further extended for cross-examination, judicial questioning and re-examination. The testing discourse is often artificially constrained by the nature of the questions, often giving little respect to the expert and their level of knowledge. The thrust of adversarial conflict places the expert in a position that prioritises justification over the objective of helping the court. Freckleton et al (1999) studied Australian Judges, and subsequently magistrates, regarding their perception of expert testimony and found that “35% considered bias as the most serious problem with expert evidence and another 35% considered that the presentation or testing of the expert was the most serious problem. This was manifested in their differing concerns about poor examination in chief (14%), poor cross-examination (11%) and the experts’ difficult use of language (10%)” (Rares, 2013 at 3).

Procedurally, expert evidence is usually admitted as evidence-in-chief, that is, in the form of an affidavit or written statement which can then be reiterated in the witness box if necessary. This leads to the expert witness being questioned on their report’s contents by the party who leads the expert’s evidence, before potential cross-examination from the opposing side followed by re-examination if necessary. Specifically, when expert witnesses disagree with each other in regard to the content of their expert opinion, the courts have developed unique forms of testing discourse, such as, a compulsory combined report or an expert witness ‘hot-tub’. A compulsory combined report is constructed such that it is in a substantially reduced format (usually three pages). The report is a brief to the judge stating the points agreed upon

by the experts and the points disagreed by each experts (usually one page each). The report is often ordered to be completed in a very short time, at the expedience of the court.

“Australian courts and agencies have been acknowledged as having the most experience with the ‘hot tub’ method in which the experts give their evidence concurrently” (Rares, 2013). Yarnall, 2009, recognises that the ‘hot tub’ process is an Australian innovation (p312; Wood, 2007). The ‘hot tub’ approach refers to the concurrent presentation of expert evidence by two or more experts placed in the witness box together, at the same time. Questions are then asked of either or both (or all) of the experts who respond, as they are addressed or in turn.

The judge or listener can hear all the experts discussing the same issue at the same time to explain his or her point in a discussion with a professional colleague. The technique reduces the chances of the experts, lawyers and judge, jury or tribunal misunderstanding what the experts are saying. (Rares, 2013).

There is, however, no necessity that experts agree on their opinions (Thorn v Worthing Skating Rink, 1876).

### **Part 3: Court Rules and Codes of Conduct**

Similar to the differences between Australian jurisdictions in evidence acts, there are significant variances in the law and rules regarding the administrative requirements for expert witnesses presenting to national, state and territory courts. These administrative requirements are expressed in the statutes pertaining to each jurisdiction with a number having explicit codes of conduct. Strict adherence to the codes, as applied in each jurisdiction, is important, at risk of having the expert opinion report excluded on what may be seen as a technicality (Charrett, 2015). The relevant statutory clauses specify procedural requirements and content for expert reports, procedural rules for expert conclaves and the presentation of expert opinion evidence in court.

Table 5.1 aligns the jurisdictional requirements with the relevant legislation and statutory clauses. Overall the statutes cover the general and procedural issues in relation to the rules for giving expert evidence, overarching obligations for expert witnesses and their reports,

minimum mandatory content of reports, procedures for specified experts such as those appointed by the court or jointly appointed by all parties as a single expert.

**Table 5.1: Australian Federal, States and Territories: Jurisdiction- Legislation - Rules and Code alignment**

<u>Jurisdiction and evidence law</u>	<u>Evidence Act</u>	<u>Civil Procedure Rules relating to expert evidence</u>	<u>Expert Witness Code of Conduct</u>
Supreme Court of the Australian Capital Territory [ACTSC]	Uniform Evidence Act Evidence Act 2011 (ACT)	Court Procedures Rules 2006 (ACT) Part 2.12 Expert Evidence Rules 1200—1246	Schedule 1 Expert Witness Code of Conduct
Federal Court of Australia [FCA]	Uniform Evidence Act 1995 (Cth)	Federal Court Rules 2011 (Cth) Rule 5.04 and Part 23 Experts RR 23.01—23.15	Practice Note CM7 Expert Witnesses in proceedings in the Federal Court of Australia
Supreme Court of New South Wales [NSWSC]	Uniform Evidence Act 1995 (NSW)	Uniform Civil Procedure Rules 2005 (NSW) Rules 31.17—31.54	Schedule 7 Expert Witness Code of Conduct
Supreme Court of the Northern Territory [NTSC]	Uniform Evidence Act Evidence Act 2011 (NT)	Supreme Court Rules (NT) Order 44 Expert Evidence	
Supreme Court of Queensland [QSC]	Common law Evidence Act 1977 (Qld)	Uniform Civil Procedure Rules 1999 (Qld) Ch 11, Part 5, Division 2 Rules 423—429S	
Supreme Court of South Australia [SASC]	Common law Evidence Act 1929 (SA)	Supreme Court Civil Rules 2006 (SA) Rules 160, 161	Part I Practice Direction 5.4 Expert Witnesses (Rule 160)
Supreme Court of Tasmania [TSC]	Uniform Evidence Act Evidence (2001) Tas	Supreme Court Rules 2000 (Tas) Part 19 Division 5 Expert Opinion Evidence Rules 514—517	
Supreme Court of Victoria [VSC]	Uniform Evidence Act Evidence 2008 (Vic)	Supreme Court Rules 2005 (Vic) Order 44 Expert Evidence Rules 44.01—44.06	Form 44A Expert Witness Code of Conduct
Supreme Court of Western Australia [WASC]	Common law Evidence Act 1906 (WA)	Rules of the Supreme Court 1971 (WA) Order 36A Expert Evidence Rules 1—9	

Source: Legislation review: MTECC

Where a jurisdiction has an explicit Code of Conduct the expert witness is usually required to specifically acknowledge that they have read the Code and have understood it. The expert has to confirm that they have complied with the Code and agree to continue to comply with it. The codes articulate that the overarching duty of an expert witness is to assist the court and

not to be an advocate for a party. The expert witness must comply with court directions and co-operate with other expert witnesses as required by the court. For example, a court may direct a conference with another expert, with the objective to produce a court report that sets out the opinions where experts agree or disagree and stating the reasons why they disagree. An expert must endeavour to reach agreement and must not act on legal instructions to withhold or avoid agreement with other experts<sup>105</sup>.

### **Giving Evidence in Court**

The common initial method for delivering expert testimony is the provision, to the court, of a complying, written report led as evidence-in-chief. As noted, the expert report forms the basis of an expert's assertion which can then be complimented by oral testimony and subsequently validated through testing discourse such as cross examination. Procedural rules require a complying report before oral testimony is permitted, that is before an expert can give an exposition of their opinion or their opinion of another expert's opinion. The scope of evidence -in-chief is limited to matters aligned to the expert report. An expert, once their report has been admitted, must be made available for cross-examination and the cross-examination may be conducted separately or concurrent with other experts. Courts have some discretion such that expert evidence is given in the most appropriate manner for the circumstances, such as the order in which expert evidence is adduced.

### **Part 4: Accounting Standards**

As discussed an expert witness is deemed so because of their demonstrated competence in a body of recognised knowledge. As an example, an accounting expert witness can reference a body of knowledge that includes the professional and practice instructions issued by the

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<sup>105</sup> Western Australia is an exception in that it does not have procedural rules or Code of Conduct provisions in this regard.

Australian Accounting Standards Board (AASB). Such instructions are increasingly harmonised internationally and, in Australia, carry the legislative weight of the Corporations Act (Cth) 2000 and its state and territory aligned statutes. As an expert witness it is therefore important to be aware of and properly apply AASB standards as they are relevant to the methodologies and methods employed to produce an expert opinion or report. Proper application of accounting standards ensures that the expert accounting evidence has prima facie peer support, hence adding credibility to any testing discourse. Accounting standards and principles (along with peer accepted methods) form the basis for valid patterned principles to be deployed by expert accounting witnesses. Of particular note however, are the situations where the specialised knowledge of the forensic accountant has been deliberately mitigated by the court under the judicial prerogative that pertain to specific legal genres. Examples of this include valuation (which has a variety of judicial precedents relevant in various legal genres, such as, in establishing compensation for forced acquisition or family law value to the owner) and asset tracing under equity law. The judicial prerogatives that influence the application of accounting technologies are further considered in chapter 8 of this dissertation with respect to their relevance to the UW/POCA statutory application of the ‘control’ concept and the court’s adjudication.

The Accounting Professional and Ethical Standards Board (APES) issues professional and ethical guidance standards which contain both mandatory and advisory guidance for professional accountants who are members of the three professional accounting associations, that is, CPA Australia, The Institute of Chartered Accountants Australia and New Zealand and the Institute of Public Accountants. Formed in 2006 to develop and issue, in the public interest, high quality professional and ethical standards (APESB Statement of Purpose, 2016). The APES cover a wide range of professional engagements or assignments. They are grouped by series: APES 100 series cover the Code of Ethics for Professional Accountants; APES 200

series cover Professional Standards applicable to all members; with APES 300 and APES 400 series specifically addressed to members in public practice and business in that order.

The APES perform a guidance and governance role in the manner of Clegg's (1989) dispositional circuit, that provides rules of practice and social meaning. Failure to comply with the mandatory instructions of APES gives rise to episodic professional punishment, administered by the professional associations. More relevant is that non-compliance with APES may be brought up in court against the expert accounting witness reducing their credibility in the validating discourse by discounting the expert's reliance on properly deployed, peer accepted, patterned principles. Whilst aspects of several APES are relevant to the expert accounting witness (particularly the APES 100 series) it is APES 215 – *Forensic Accounting Services* that is most relevant to the preparation and delivery of an expert witness report.

APES 215 is well aligned with the legal framework discussed above as it has arisen as informed by both the Evidence Act and common law. Specifically, this standard covers the provision of ethical Forensic Accounting Services (mandatory sections in bold), which include as a primary purpose, accounting investigations and the provision of expert accounting evidence in proceedings. The standard emphasises independence both in actual fact and perception, appropriate expert competence and due care, confidentiality, proper professional engagement terms, prevention, mitigation and transparency with regard to potential and actual conflicts of interest. The standard expressly addresses the content of an expert accounting report which bear considerable similarity with the statutory provisions and precedent resolutions discussed earlier. Mandatory contents of an expert forensic accounting report are:

- a. the instructions received, whether oral or written;

- b. any limitations on the scope of work performed;
- c. details of the Member's training, study and experience that are relevant to the matters on which the Member is providing expert evidence;
- d. the relationships, if any, the Member or the Member's Firm or the Member's Employer has with any of the parties to the Proceedings that may create a threat or a perceived threat to the Member's obligation to comply with the fundamental principles of the Code or the Member's paramount duty to the Court, and any appropriate safeguards implemented;
- e. the extent, if any, of reliance by the Member on the work of others;
- f. the opinions formed by the Member;
- g. whether an opinion is provisional rather than concluded, and, if so, the reasons why a concluded opinion has not been formed; (h) the significant facts upon which the opinions are based;
- h. 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 (ii) if the Member chose to make the assumption, then the reason why the Member made that choice;
- j. if the Member considers that an opinion of the Member may be misleading because a significant assumption is likely to mislead, then a statement to that effect and an explanation of why the assumption is likely to mislead;
- k. where applicable, that the Member's opinion is subject to the veracity of another person's Report upon which the Member's Report is based;

- l. the reasoning by which the Member formed the opinions, including an explanation of any method employed and the reasons why that method was chosen;
- m. a list of all documents and sources of information relied upon in the preparation of the Report;
- n. any restrictions on the use of the Report; and
- o. a statement that the Expert Witness Service was conducted in accordance with this Standard.

Members are instructed of the need to promptly inform legal representatives of changes of opinion or any reliance on information subsequently found to be false or misleading. The member has an obligation to maintain a quality control system to support the forensic accounting assignment which includes the maintenance of appropriate working papers that capture the details of calculations, determinations and estimates. Due to the obvious impact contingency fees would have on the actual or perceived independence of the expert accounting witness such arrangements are prohibited in favour of proscribed fees and remuneration.

## **Conclusion**

The forum for the formal delivery of forensic accounting evidence will always be a venue controlled and managed by the legal profession. The prime setting is the courtroom, that adjudicates specific cases under the authority and condition of the evidence acts and other relevant statutes. The forensic accountant must pay due deference to this authority in order to make a claim and to substantiate its validity, without probative damage. The trier of fact (judge or magistrate) relies upon both statutes and common law precedent to inform their



assessment of the forensic accountant's evidence before informing the court to allow or deny evidential access and the appropriate weight such evidence should carry.

Whilst the court assesses and allows expert witness testimony, largely on the recognition of the origin of such evidence, from peer accepted knowledge (in the case of accounting, a professional body of knowledge), it is at the court's discretion to contextualise the knowledge for the court's purpose. Therefore, in the case of accounting, methodologies have arisen that the court has assessed as being more appropriate to the court's objectives in matters such as in equity cases, family law, compensation and common law. Recognition of these show how judicial prerogative has shaped the framework of the accounting expert's testimony, while respecting the statutory pillars of evidence. This informs the substantiation of accounting evidence suitable for UW/POCA matters. Similarly, understanding of this contextual hegemony provides the background for communicative action, in that the lifeworld assesses the accounting evidence with respect to the alignment of the court's (the system's) context with lifeworld expectations. For example, if the court remains inhibited by concepts of discrete accounting entity structures or if the court's thinking is expanded by prioritisation of overriding concepts such as an individual's centralised economic control of those entities. This dissertation considers this discussion further in chapter 8.

## Chapter 6: Forfeiture Legislation

### Introduction

The process of juridification is of important to this research. Specifically, juridification in forfeiture law, which can be seen in the evolution of statutes and the extension of statutory provisions, advised by experts, who deploy their expertise in support of the colonising ambitions of the legal system as described by Habermas (1984, 1987, 1996). The vehicles for driving and positioning juridification have been national and international conventions and periodic reviews, each advising incremental enhancements to forfeiture laws after input from experts. Modern forfeiture revitalises ancient notions of confiscation that have added new concepts which oblige the newly (suspected) affluent to establish legitimate entitlement to their wealth.

This chapter looks at legislation that belongs to the forfeiture genre, initially from a historical viewpoint, then from the context in which the juridification of forfeiture legislation have been justified and legitimised. The espoused forfeiture objectives, mainly to remove the use and enjoyment of the proceeds of crime and to prevent the funding of further crime, are, in of themselves, uncontroversial, however it is the “means adopted to achieve those objectives which generate controversy” (Maxwell, 2011, p1). Specifically, juridification as reflected in the statutory removal of judicial discretion, the lack of necessity for a predicate conviction and the reverse onus of proof, which have been contentious (Odgers, 2011; Gray, 2012; Bartels 2010; Cranny, 2011; Sentelle J, 1989; Fisse, 1992). The burden of proof has also been reduced from the criminal standard of “beyond reasonable doubt”, to the civil standard of on “the balance of probabilities” in many cases (Skead and Murray, 2015; Young, 2009; Friedlander et al 2010).

Initially, reflection on the extensive history of confiscation provides a deontological view of legally enforced forfeiture in the name of god or the king. This arose as an instrument of remediation, power or sacrifice depending on the circumstances. More recent appropriation consideration has been driven as a means to address organised criminal activity, particularly the increasing incidence of drug-related crime. Juridification has followed the recommendations of international and domestic conferences (United Nations 1987, 1988, 2003, 2004; FATF 1970, 1990, 2012, Costigan, 1983, PJCLE, 2010). The conference recommendations provide statutory legitimacy by fulfilling the discourse principle, underpinned by apparent democratic discussion, which is also aided by the representative considerations that accompany the introduction of laws and the bargaining process required to deliver parliamentary support for the adoption of statutes.

As previously discussed, expertise plays a pivotal role in the interpretation and support for juridification, both with respect to the legitimisation of forfeiture statutes and in the adjudication of just confiscation remedies. This chapter reviews the binding of expertise to specific statutes, their instruments and their jurisdictions. Of particular note are the similarities and differences that guide and bind the synergies between legislative design, purpose and expert involvement. For example, when the statute stipulates that when property is “proceeds of unlawful activity” or “an instrument of unlawful activity” it must be forfeited to the Commonwealth (Proceeds of Crime Act 2002 (Cth)). Property is proceeds of an offence pursuant to it being “wholly (or partly) derived or realised” (s 329(1)), however the terms ‘derived’ or ‘realised’ are not defined. Defining such terms interpreted to fit the specific circumstances opens the role for expert court advice (see *Jeffrey v DPP*, 1995; *Studman v Commonwealth DPP*, 2007).

Expertise can only perform its role when appropriately credentialed by the specific statute and matched with jurisdictional legitimacy (such as enforceability), therefore the nature and

limitations of specific legislation must be acknowledged. This chapter highlights legislation that applies to the Australian precincts covered by this research, as well as the discussion of practice regimes (for example, civil or criminal) and legislative instruments (for example, restraining orders, forfeiture orders and pecuniary orders). Comments from other influential domains such as the United Kingdom, United States and Ireland are noted as they inform the discussion that has accompanied the dissemination of Proceeds of Crime Acts (POCA) and Unexplained Wealth legislation (UW) within the federalised Australian system. Whilst this discussion is, by necessity, heavily reliant on legality (that is, the letter of the law) the research's ultimate perspective is one of how the statute mutually influences, yet requires, accounting expertise. Accounting, guided by the legislation, deploys its inscriptive metaphor as a claim to representational accuracy within the legal context of process and instrumentation. Representational accuracy is not simply the production of a result but of credible expert deployment of proper techniques that represent a reliable pattern of construction (patterned principles). The facts of the matter and the context are transformed through the financial language of proceeds assessment, quantification and equity (Robson, 1992). As has been admitted by law enforcement (FBI, 2012; NSW and SA Police submissions to the PJCLE, 2012) this is a new role for the expert and the law, particularly suited to the forensic accountant, who can advise the adjudication process, not with respect to guilt and incarceration, but in the discourse of money and finance.

The remote foundations of forfeiture legislation are found in the common law doctrines of attainder and deodand (U.K. 14<sup>th</sup> to 17<sup>th</sup> centuries), and their flow-on to British colonies, in statutory forfeitures from the mid 1800's and the annals of customs laws. The lack of expert quantitative support, as well as arbitrary and pecuniary execution of confiscation laws,<sup>106</sup> saw forfeiture statutes lose legitimacy and their use curtailed, until more recent times, when the

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<sup>106</sup> As will be discussed, the punitive use of forfeiture in loss of favour or alternative regime support became commonplace under a succession of British monarchy and was extended to colonies such as the Americas.

international community<sup>107</sup> resurrected their status in the fight against significant and organised crime. The contemporary use of forfeiture laws to redress significant and organised crime follows the consideration of national and international reports. Juridification through new legislation and its upgraded contents has been promulgated by the United Nations, influential nation states such as the United States and the United Kingdom, the Commonwealth of Australia and individual Australian States and Territories. Templated legislative prescriptions have been advocated (PJCLE 2012), however, various jurisdictions have implemented a mixture of statutory remedies, often the result of the bargaining process required to obtain the required minimum consensus to pass the appropriate bills through each parliament.

## The history of forfeiture laws

### Attainder

Attainder is a term derived from the Latin *attincta* meaning stained or blackened. It was a concept derived from the ancient Greek and Roman notion of infamy and the European feudal notion of outlawry. (Schall, 2006) Attainder has variously been used for a judicial process that declares guilt and punishment without the privilege of trial. Examples, particularly from England between 1300 and 1800, were for High Treason that resulted in horrific executions such as being ‘drawn and quartered’. Attainder followed the death penalty removing the property of the perpetrator and any ‘blood’ rights such as inheritance. Property (and peerage) was escheated to the Crown or Lord.

Even without execution:

Attainder involved the infliction of civil death on the offender. The offender’s property was forfeited to the Crown; he was prevented from entering contracts

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<sup>107</sup> See United Nations Conventions discussed below.

or receiving property by way of gift or inheritance; his marriage was dissolved, his wife was made a widow, his children were orphaned. He lost all forms of civil capacity, including the capacity to give evidence or to sue (Edgely, 2010 p403).

The penalty of attainder was commonly used in the Wars of the Roses when successive governments, “from motives of both security and revenge wished to destroy its opponents as speedily and with as much appearance of legality as possible” (Lander, 2010). The obvious political use and abuse of attainder<sup>108</sup> led to its eventual abolition by statute in England in 1870 (House of Commons Journal, Vol 125, 1870) although some features live on in statutory form.

In Australia, many of the features of attainder persisted until the demise of capital punishment (see, for example, *Dugan v Mirror Newspapers Ltd*, 1977), where the High Court held that attainder remained part of Australian law). The separation of duties principle established in the Australian Commonwealth Constitution (1900) serves to limit the application of attainder, however, the states remain free to permit such bills. In the United States attainder was outlawed under the Bill of Attainder Clause in the U.S. Constitution (Article I section 9), however, the punishment scope and effect of the clause is currently subject to some debate<sup>109</sup> (Dick, 2011). The U.S. Supreme Court has determined that the “legislation must not be intended to punish; legislation enacted for otherwise legitimate purposes could be saved so long as punishment is a side-effect rather than the main purpose of the law” (Stark, 2002, p30)

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<sup>108</sup> Such as, a convenient way for the King to convict subjects of crimes and confiscate their property.

<sup>109</sup> For example, discussion on legislative remedies for issues such as anti-Communism and labour management. See also the ExxonMobil challenge to the Oil Pollution Act 1990 (Wilson, 1966; Carrigan 2000)

## Deodand

Some interpretations of deodand relate back to the Old Testament.<sup>110</sup> Literally a “thing forfeited or given to God” this concept was legislatively applied from about the 11<sup>th</sup> century until 1846 in the U.K. on the causation of a person’s death. Deodand commenced with the object or instrument that caused the death and extending to ‘payment’ of some personal property to the crown (The Royal Almoner or the Sherriff) for application to a pious purpose. Coroner’s inquests were given the duty to determine the offending object causing death and determine its value. The operation of collecting and remitting a deodand was cumbersome and often opaque as sheriffs appear not to have had to detail remittances in their annual returns (Hale, 1778). With the arrival of the industrial revolution and potentially culpable factory machines (where any moving part contributing to death could be forfeited) the notion of deodand was found to be out dated and the practice was discontinued in 1846. Under the same parliamentary bill sponsored by Lord Campbell, dependents were given the right to pursue legal remedies (Smith 1967).

## In the United States

Use of “writs of assistance”<sup>111</sup> by King George III fuelled the excesses that contributed to the American Revolution. The government’s early use of seizure laws were a source of tension between colonists and the British Crown so civil forfeiture use was reduced<sup>112</sup> (Adams in Bradley, 1988). The United States Constitution protects property rights through both the Due Process Clause as well as “through a specific limitation on the scope of forfeiture in the

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<sup>110</sup> "If an ox gore a man that he shall die, the ox shall be stoned, and his flesh shall not be eaten." Exodus 21:28-30, cited in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) as an historical origin of the deodand and in rem forfeiture.

<sup>111</sup> A writ issued by a superior colonial court authorizing officers of the British crown to summon aid and enter and search any premises. Origin Expand. 1700-1710. dictionary.com, Random House. Officers of the Crown also collected commission on forfeited goods.

<sup>112</sup> John Adams saw the confiscation issue in *Wilkes v Wood* (1763) involving pamphlets critical of the government leading to 49 instances of document seizures as being the spark of the American Revolution.

treason context” (Article III) (Schwarcz and Rothman, 1993). The U.S. First Congress however did adopt some forfeiture law in the maritime context that allowed for forfeiture of ships and cargo for evasion of customs duties and the illegal slave trade, whilst outlawing forfeiture as a consequence of federal criminal conviction (The Palmyra, 1827). In the American Civil War, forfeiture was used to confiscate rebel’s property and also with respect to the confiscation of Southern supporter’s assets with the U.S. Supreme Court upholding forfeiture “under the broad construction of the government’s military power” (Schwarcz and Rothman, 1993; see *Miller v United States*, 1871 at 659). American courts did not rely on the concept of deodand but crafted their own confiscation regime.

### Customs Laws

The British Navigation Laws<sup>113</sup> of the mid 17<sup>th</sup> century, passed in the context of England’s expanding naval power, required imports and exports to be carried on British ships. Otherwise the ships or cargo could be seized and forfeited to the crown. Administrative forfeitures have a long history in customs laws, underpinning customs duties and generally permitting the seizing agency to proceed non-judicially against comparatively low value of property that has been illegally imported. A written notice of seizure is given to the person with an interest in the seized property, however, it is the property that is the defendant, known as *in rem* forfeiture.

An *in rem* action is limited to property of the defendant that is within the control of the court. An action *in rem* is a proceeding that takes no notice of the owner of the property but determines rights in the property that are conclusive against all the world. The object of the lawsuit is to determine the disposition of the property, regardless of who the owner is or who else might have an interest in it. Interested parties might appear and make out a case one way or another, but the action is *in rem*, against the things.

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<sup>113</sup> The British Navigation Acts were a series of laws enacted between 1651 and 1850 that restricted the trading rights of ships within the British Empire, preventing direct trade from the Netherlands, Spain, France and their colonies. (Clapham, 1910)



Customs forfeiture could therefore be enforced against the cargo or ship even if the owner was outside the jurisdiction. Customs legislation promulgated to jurisdictions such as the U.S and Australia supported the practical state necessities of enforcing admiralty, piracy and customs duties. For example, the Australian *Customs Act 1901(Cth)* allows for the forfeiture of instruments of smuggling such as ships or boats and carriages or animals used in smuggling (ss 228-229).

### Forfeiture Laws and Drugs

Most of the 20<sup>th</sup> century was a lull in respect of forfeiture legislation, with the exception of its extensive use with regard to Prohibition<sup>114</sup> in the U.S. when legislation facilitated the seizure of equipment, product, cash and vehicles used by ‘bootleggers’<sup>115</sup>. Modern juridification of confiscation laws began in 1970, with the U.S. Congress approving a new approach to white collar crime by passing the Racketeer Influence and Corrupt Organisation Act (‘RICO’). RICO included forfeiture provisions aimed at removing the economic benefit of crime as a distinct and different response from incarceration alone. Parallel provisions were included in the Comprehensive Drug Abuse Prevention and Control Act of 1970. RICO “stated that a convicted defendant forfeited to the government any interest acquired through the racketeering activity and any property right obtained through RICO’s prohibited activities” (Garretson, 2008, p46).

RICO took the next step in modern forfeiture juridification by “imposing forfeiture directly on the individual (*in personam*) as part of a criminal prosecution”<sup>116</sup> (Garretson, 2008, p46).

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<sup>114</sup> Prohibition (1920-1933) was a U.S. constitutional ban on the sale, production and transportation of alcoholic beverages (Blocker, J. 2003).

<sup>115</sup> Bootleggers are those people who are in the illegal business of transporting (smuggling) alcoholic beverages.

<sup>116</sup> As opposed to *in rem*, in the guilty property as previously discussed p7.

An *in personam* action can affect the defendant's personal rights and interests and substantially all of his or her property. It is based on the authority of the court, or jurisdiction, over the person as an individual rather than jurisdiction over specific property owned by the person. A court with *in personam* jurisdiction in a particular case has enough power over the defendant and his or her property to grant a judgment affecting the defendant in almost any way.

West's Encyclopedia of American Law, 2008

The growing egregiousness of drug distribution and the apparent wealth of its proponents provided the momentum for the United Nations Economic and Social Council to adopt the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in Vienna, 1988. Delegates from 106 states signed the Convention subject to state “ratification, approval or act of formal confirmation” (Para 21). Australia ratified the Convention in 1992. The Convention contains article 5 – *Confiscation*, that recommends each signatory state to adopt measures to facilitate the deprivation of proceeds from drug offences (detailed in Article 3). Forfeiture legislation is mandated (Art. 5 Para. 1), along with adequate capacity for investigation (Art. 5 Para. 2), access to fiscal information (Art. 5 Para. 3) and international co-operation (Art. 5 Para. 4). Notably, Art. 5 Para 7 introduces reversing the onus of proof in forfeiture legislation stating:

Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings (Art 5 Para 7).

The status of the United Nations Convention provided legitimacy driving local juridification through its perceived expert consideration, support and determination. For example, the preamble refers to the social effects of drugs (including on children), as well as the links between drug trafficking and organised crime and corruption from an authoritative stance. The preamble then delivers the expertise in support of the expressed ‘desire’ to implement

statutorily supported change in line with the stated convention's communique. Thus expertise is deployed directly as a medium of juridification as legislation is promulgated to local jurisdictions in support of treaty obligations.

### Type of Legislation

Forfeiture legislation has two classifications that are 'Civil' and 'Criminal'. The 'Civil' forfeiture legislative regime has two constituent groups: Proceeds of Crime (POCA) and Unexplained Wealth (UW). POCA legislation is "usually applied after a person has been convicted of an offence and applies to property acquired as a result of criminal activity proven beyond reasonable doubt" (Gray, 2012). POCA legislation can also include provision to confiscate assets used in the commission of a crime, similarly proven. As such, conviction usually results in automatic forfeiture. Civil action that does not require proof of a predicate crime requires the lower standard of proof being "on the balance of probabilities"<sup>117</sup>. UW legislation or provisions usually extend the law such that it does not require a link between an individual's significant wealth and a predicate crime and it reverses the onus of proof (Dixon, 2012). The onus of proof normally places the duty to prove or disprove a disputed fact, to the required standard, on the prosecution (criminal matters) or the plaintiff (civil cases). The juridification of UW legislation has given courts the authority to order that an individual "proves the legitimacy of an unexplained amount of wealth". In practice, this means that authorities have investigated and determined that an individual controls wealth beyond that reasonably expected, given the individual's legitimate capacities to create income and wealth. The onus to prove legitimate accumulation or source of wealth is then with the individual.

The 'Criminal' forfeiture legislative regime requires conviction for a predicate crime associated with the forfeited assets. The criminal forfeiture is seen as a punitive measure

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<sup>117</sup> For criminal matters proof beyond reasonable doubt (the highest standard) is required. For civil cases the standard of proof is either by preponderance of evidence or by clear and convincing evidence (a lower standard).

associated with the commission of the crime and therefore requires the criminal standard of proof beyond reasonable doubt. The distinction between criminal and civil prosecution is sometimes unclear. Whilst there is a clear distinction with respect to the level of proof required for a decision, there are differences such as “civil orders not imposing a criminal liability, do not result in criminal guilt and do not expose people to any criminal sanction” (Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014, Explanatory Memorandum, p9). Nevertheless, UW prosecutions are “brought about by a public authority and have punishment and deterrence of breaches of Commonwealth law as one of their stated objectives” (p9).

Further the relation between sentencing and confiscation is complex. The High Court of Australia has found that “punishment can only be inflicted after a finding of guilt at the criminal standard” however UW has been viewed as a ‘hybrid’ legislation (King, 2012, p337). Nolan (2013) summarises the argument (in the Irish context) as follows:

The civil process is utilised by many countries, including Ireland, to combat criminal objectives. The property which is confiscated is deemed to be - though not conclusively proven to be - the proceeds of crime. (Gray, 2012)

But is this process truly a civil one? Gray posits that “forfeiture proceedings are better viewed as criminal in nature.” In this jurisdiction the label of civility ensured the POCA (Proceeds of Crime Act) Legislation’s survival (Meade, 2000). Because of this civil guise the courts are of the standpoint that the process does not, as McGuinness J states, have “all the features of a criminal prosecution” as “the procedures set out under The Proceeds of Crime Act, 1996 are not criminal in nature .... Accordingly in this context the protections offered by Article 38.1 of the Constitution are not applicable.” (Gilligan v Criminal Assets Bureau and Others, 1998)

Therefore the sequasi-criminal proceedings are allowed to continue. On the other hand, Meade puts forward that the lack of a trial does not make the process any less criminal.

(Meade 2000). Conversely, a criminal sanction is being imposed and effectively punishing the individual for criminal activity without affording them the right to a fair trial. (Nolan, 2013, p64).

The Victorian and NSW jurisdictions also commented on the distinction between recouping profits as distinct from being a penalty and forfeiture as a penalty in *R v McLeod*<sup>118</sup> (2007) and *International Finance Trust Company Limited v NSW Crime Commission* (2009) where asset recovery was described as a necessary deterrent to the motivating greed of ill-gotten funds. In *R v McLeod* (2007) the court considered that both past, and the likelihood of future confiscation, could be taken into account when sentencing under the concept of ‘proportionality’. This is where the loss of tainted property goes further than mere restoration of the ‘status quo’, such that, the confiscation has the effect on the offender that is a relevant component of sentencing. This is a question that the court could be assisted by accounting expertise, as it puts a financial variable alongside other considerations such as fines and incarceration.

### **Forfeiture Laws and Money Laundering**

Another authoritative driver of domestic juridification in the forfeiture genre has been a flow on effect of the international Financial Action Task Force (FATF), who produced 40 recommendations that pertain to anti-money laundering<sup>119</sup>. Australia, the U.S. the U.K. and Ireland (via the E.U.) are amongst the 36 primary members. The FATF recommendations are

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<sup>119</sup> The FATF Recommendations incorporating amendments were last issued in 2012. They were progressively developed from the 1970s and formally issued in their current form in 1990. They can be found at <http://www.fatf-gafi.org/documents/documents/internationalstandardscombatingmoneylaundryingandthefinancingofterrorismproliferation-thefatfrecommendations.html>

the internationally endorsed<sup>120</sup> global standards against money laundering and terrorist financing (FATF 1990). Recommendation 3 – *Money laundering offence*, requires countries to adopt measures similar to those in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (referred to above) and the United Nations Convention against Transnational Organised Crime and its Protocols<sup>121</sup> with regard to the confiscation of the proceeds of a variety of specified predicate crimes, that may be utilised in money laundering. In particular Annex I, article 12 – *Confiscation and seizure*, states:

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
  - a. Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
  - b. Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

Recommendation 4 – *Confiscation and provisional measures*, and 38 – *Mutual legal assistance: freezing and confiscation*, are aimed at the prevention of criminal property being laundered or re-invested “either to facilitate other forms of crime or to conceal illicit proceeds” (FATF, Best Practices on Confiscation, p. 1). These recommendations place binding obligations on member countries including Australia, The U.S., The U.K. and Ireland. The FATF undertakes regular audits of member countries with respect to their anti-money laundering programs (including POCA and UW legislation). An adverse audit result

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<sup>120</sup> The FATF Recommendations set an international standard, which countries should implement through measures adapted to their particular circumstances. Member countries conduct bi-annual regional peer reviews (mutual evaluations) which are reported back to the task force which includes observer bodies such as the International Monetary Fund, the World Bank and the United Nations. Practical sanctions restricting international financial access can be the result of a poor mutual evaluation.

<sup>121</sup> Ratified by Australia in 2004

may embarrass a country internationally and preclude them from aspects of international co-operation, access to funding and limits on banking transactions.

i. United Nations Conventions and Confiscation

1. *United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2004* ('*Convention against Organised Crime*'),
2. *United Nations Convention against Corruption 2003* ('*Convention against Corruption*')
3. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* ('*Convention against Illicit Drugs*')

The forward to the Convention against Organised Crime engages “civil society” in their fight, imploring nations to enhance their domestic legal regimes to harmonise and co-operate internationally, in order to “have a real impact on the ability of international criminals to operate successfully and help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities” (piv). Confiscation of unexplained wealth was first postulated by the United Nations at the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988). Article 5, paragraph 7 of that convention recommended that “each party consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation” (para 7)

The above three conventions (*the conventions*) all reinforce the imposition of legislative obligations on ratifying countries with respect to confiscation and forfeiture. Consequently, they are a driver of the modern juridification of domestic and international forfeiture legislation both in terms of new legislation and in the inclusion of extended clauses (such as the reverse onus of proof). As the instruction with regard to forfeiture legislation is harmonised across the conventions, they are best considered in one line, albeit that specific

article and clause references will vary in accordance with each individual directive. Article 12 *Confiscation and seizure*, of the Convention against Organised Crime, opens with forfeiture for the proceeds of crime. This article is similarly expressed in the Convention against Corruption (2003) and the Convention against Illicit Drugs (1988). The conventions go further, not only with their obligations for member nations to enact complimentary and supporting legislation, but with respect to additional terms for asset forfeiture. Specifically, states are broadly instructed to “adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item ..... (referred as proceeds of crime) .... for the purpose of eventual confiscation” (Art 2 s 2). Further, matters where the proceeds of crime have been converted into other property or intermingled with legitimate sources remain liable for confiscation up to the assessed value<sup>122</sup> of the intermingled proceeds. State parties are instructed to empower their domestic courts “to order that bank, financial or commercial records be made available or be seized” (s 6), overwriting bank secrecy laws.

Reversing the onus of proof is advocated in s 7 such that:

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

Article 13 - *International cooperation for the purposes of confiscation* (Convention against Organised Crime) sponsors international facilitation through harmonious legislative provisions, such that, investigation and confiscation is not defeated by international boundaries. Article 13 is aided by Article 15 – *Jurisdiction*, Article 16 – *Extradition*, Article

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<sup>122</sup> Assessment by definition usually requires the evidence of an assessor, being the independent accounting expert.



17 – *Transfer of sentenced persons*, Article 18 - *Mutual legal assistance* , Article 19 – *Joint investigations*, Article 21 – *Transfer of criminal proceedings* and Article 30 – *Other measures: implementation of the Convention through economic development and technical assistance*. Table 3-1 highlights the content compatibility across the three U.N. conventions. Whilst the conventions include UW issues in the pursuit of criminal assets, there are no treaties or conventions that specifically address UW (AFP, Submission 9, 2012, p9).

**Table 6-1: Content Compatibility Across the Three United Nations Conventions**

<u>Section Content</u>	<u>United Nations Convention against Transnational Organised Crime and the Protocols There to</u>	<u>United Nations Convention against Corruption</u>	<u>United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</u>
Confiscation and Seizure	Article 12	Article 31	Article 5
Onus of Proof - Reversed	Article 12 para 7	Article 31 para 8	Article 5, para 7
Investigation, Identifying, Tracing and Seizure	Article 12 para 2	Article 31 para 2, 3	Article 5, para 2
Transferred and converted property	Article 12 para 3	Article 31 para 4	Article 5, para 6(a) & (c)
Intermingled Banks, Financial and Commercial Records	Article 12 para 4, 5	Article 31 para 5, 6	Article 5, para 6(b)
Third party rights	Article 12 para 6	Article 31 para 7	Article 5, para 3
International cooperation for the purposes of confiscation	Article 12 para 8	Article 31 para 9	Article 5, para 8
Disposal of confiscated proceeds of crime or property	Article 13	Article 37, 38, 39	Article 10
Jurisdiction	Article 14	Chapter IV	Article 10
Extradition	Article 15	Article 55	Article 5, para 5
Transfer of sentenced persons	Article 16	Article 42	Article 4
Mutual legal assistance	Article 17	Article 44	Article 6
Joint investigations	Article 18	Article 45	Article 7
Transfer of criminal proceedings	Article 19	Article 46	Article 8
Special investigative techniques	Article 21	Article 49	
Asset Recovery		Article 47	
		Article 50	
		Chapter V	

Source: Published Conventions: [www.undoc.org/pdf/](http://www.undoc.org/pdf/)

## In Australia – Federal, State and Territorial Laws

Before considering the passage of forfeiture legislation in Australia one must recognise the limitations of the Australian Federal system, specifically, those powers constitutionally passed onto the Commonwealth government, and those that remain under the control and administration of the states and self-governing territories. The Commonwealth of Australia was formed (1901) as a constitutional monarchy. The six (until then legally independent) states agreed to a constitution (the Australian Constitution, 1900) that defines the structure, powers and procedures, rights and obligations of the Commonwealth and of the states in relation to the Commonwealth. Only specific areas of statutory powers were given to the new Commonwealth and they did not include ‘law and order’. Such powers were limited to defence, foreign affairs, postal and communications and later taxation. Each of the six states independently retained control of their own police forces and associated laws. Two partially self-governing territories (Northern Territory (NT) and the Australian Capital Territory (ACT)) have capacity to make their own laws, with the NT having their own law and order jurisdiction. The ACT relies upon the Australian Federal Police (Commonwealth) law and order statutes in respect of the legal genres that concern this research.

This disparate ownership of the law and order legislative power has led to criminal jurisdiction shopping, where criminals relocate their activities or assets to a jurisdiction they perceive to be more favourable than another (AFP, 2012). Furthermore, where legislation is dependent on predicate crimes, there may be application difficulties if a predicate conviction was in another jurisdiction<sup>123</sup>. As AFP Commissioner Tony Negus, Chair of the Australian Crime Commission Board observed:

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<sup>123</sup> For example, if the assets for confiscation reside in one state and the conviction necessary for a proceeds of crime action was made in another state.

It is agreed across the board of the Australian Crime Commission that criminals will exploit any weaknesses that they can identify, and that includes weaknesses in legislation across jurisdictions or the weakest link, if you like, in the way that legislative processes have been constructed (PJCLE, 2012, Committee Hansard, p2)

According to evidence given to the Parliamentary Joint Committee on the Australian Crime Commission on the legislative arrangements to outlaw serious and organised crime (2009), the varying nature of these statutes has driven criminals to move their operations and/or assets out of some jurisdictions into another (Andrewartha et al 2013; PJC ACC, 2009). Focusing on the Commonwealth jurisdiction, a civil forfeiture provision was added to the Customs Act 1901 (Cth) in 1977 (s 229A), whilst the need for specific Proceeds of Crime (PoC) legislation in Australia was raised in the Royal Commissions of the 1980's (Williams, 1999)<sup>124</sup>. This culminated in a push for a nationally consistent approach resolved by the Premier's Conference of 1985 (Special Premiers' Conference on Drugs, 1985).

The Proceeds of Crime Act 1987 (Cth) (POCA 87) followed, that initiated conviction-based confiscation, however, this was eventually found to be ineffective due to the onerous level of proof required at the criminal conviction standard of beyond reasonable doubt. This point was highlighted in the Australian Law Reform Commission 1999 report *Confiscation that counts: A review of the Proceeds of Crime Act 1987* (ALRC Report No. 87). The report recommended that civil forfeiture be adopted (rec. 4) in uniform Commonwealth legislation (rec. 11). Further, the then Attorney General (2002), reflected in his second reading speech to the Proceeds of Crime Bill 2002 that the POCA 87 of the time “failed to impact upon those at the pinnacle of criminal organisations” (Hansard, 13 March 2002). The 2002 statute provided for conviction based orders, civil forfeiture for serious offences and civil forfeiture for indictable offences (Blakeney, 2012)

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<sup>124</sup> See, for example, the Royal Commission of Inquiry into Drug Trafficking, The Hon Mr Justice DG Stewart, Feb 1983

Over the past 15 years there has not been the anticipated uniform approach to unexplained wealth legislation amongst the Australian Commonwealth, States and Territories. Each jurisdiction has pursued their own legislative agenda, with some commonality, and other divergent aspects, including a staggered implementation. (Victorian Police, 2012). Western Australia was the first state to enact civil forfeiture laws that extended their application to an unexplained wealth declaration against a person where it is more likely than not that the total value of the respondent's wealth is greater than the value of the person's lawfully acquired wealth. The unexplained portion of the wealth is payable to the State of Western Australia (Criminal Property Confiscation Act 2000 (WA)). The Northern Territory followed with the Criminal Property Forfeiture Act 2002 (NT) having similar provisions (ss 67-72). Table 6-2 shows the progressive enactment of Commonwealth and State forfeiture legislation which now all provide for both civil and conviction-based forfeiture. The most recent enactment was Tasmania in 2014 [The Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Bill 2013].

**Table 6-2a: Australian Proceeds of Crime and Unexplained Wealth Legislation**

<u>Jurisdiction</u>	<u>Act Title</u>	<u>Enacted</u>	<u>Criminal</u>	<u>Civil</u>	<u>UW</u>	<u>Reverse Onus of Proof</u>
Commonwealth of Australia	Proceeds of Crime Act 1987 (Cth)	1987	Yes	No	No	No
	Proceeds of Crime Act 2002 (Cth)	2002	Yes	Yes	from 2002	from 2002
	Customs Act 1901	1901	Yes	Yes	No	No
Western Australia	Criminal Property Confiscation Act 2000 (WA)	2000	Yes	Yes	from 2000	from 2000
South Australia	The Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)	2009	Yes	Yes	Yes	Yes
	Criminal Assets Confiscation Act 2005	2005	Yes	No		
Victoria	Confiscation Act 1997 (Vic)	1997	Yes	from 2004	from 2004	from 2004
New South Wales	Confiscation of Proceeds of Crime Act 1989	1989	Yes	Yes	Yes	No
	Criminal Assets Recovery Act 1990 (NSW)	1990	Yes	Yes	Yes	No
Queensland	Criminal Proceeds Confiscation Act (Qld)		Yes	Yes	Partial 2009	Partial 2009
Northern Territory	Criminal Property Forfeiture Act 2002 (NT)	2003	Yes	Yes	from 2003	from 2003
Tasmania	Crime (Confiscation of Profits) Act 1993	1993	Yes	Yes	from 2014	from 2014

Source: individual legislation as per the Act Title column

<b>Table 6b: Unexplained Wealth Provisions by Jurisdiction</b>		
<u>Jurisdiction</u>	<u>Change Title</u>	<u>Date</u>
Commonwealth	The Proceeds of Crime Act (Cth)	2010
	Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act (Cth)	2015
Western Australia	Criminal Property Confiscation Act (WA)	2000
South Australia	Serious and Organised Crime (Unexplained Wealth) Act (SA)	2009
New South Wales	Criminal Assets Recovery Act (NSW)	1990
	Criminal Legislation Amendment (Organised Crime and Public safety) Act (NSW)	2016
Victoria	Justice Legislation Amendment (Confiscation and Other Matters) Act	2014
Queensland	Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act (Qld)	2013
Northern Territory	Criminal Property Forfeiture Act (NT)	2003
Tasmania	Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act	2013

Individual states, territories and Commonwealth forfeiture statutes vary particularly in areas of:

- “whether a link to an offence is required (through either a reasonable suspicion than an offence has occurred or that a person has obtained the proceeds of an offence);
- whether a court has discretion to make an order;
- whether unexplained wealth provisions form part of a State’s asset confiscation legislation or are in stand-alone legislation; and
- time limits on unexplained wealth orders” (PJCLE 2012, p65)

### **In Australia – POCA and UW Reviews**

The passage of the changes to Commonwealth legislation has been punctuated by several significant reviews that have produced recommendations in regard to the crafting and operation of forfeiture legislation and its delivery. Specifically, the:

- report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth) tabled in July 2006 by Tom Sherman AO pursuant to s 327(2) of that act (*'Sherman Report'*).
- Inquiry into legislative arrangements to outlaw serious and organised crime groups (2009), by the Parliamentary Joint Committee on Law Enforcement (*'PJCLE 2010'*),
- inquiry into Commonwealth unexplained wealth legislation and arrangements (2012) by the Parliamentary Joint Committee on Law Enforcement (*'PJCLE 2012'*),

### The Sherman Report

The Sherman report was initiated by the statutory instruction (sec 327) that accompanied the introduction of the Proceeds of Crime Act (POCA), 2002 (Cth) that the functioning of the act be reviewed after 3 years of operation<sup>125</sup>. The review was tabled in Federal Parliament in October 2006, leading eventually to the amendments in schedule 1 of the Crime Legislation Amendment (Serious and Organised Crime) Bill (no. 2) 2009. This bill was subjected to further review under PJCLE 2010.

Sherman commented that POCA 2002 was working better than its predecessor (POCA 1987) (p68), however, he recommended improvements based on submissions from Commonwealth agencies and other organisations, including non-government organisations (Executive Summary, piv). The nature of the recommendations broadly pertained to information access and sharing; extending the limitation for civil confiscation from six to twelve years; allowing for the making of ex parte orders; creating offences for failure to attend examinations and

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<sup>125</sup> The Terms of Reference for the Review were to:

- Gather information on the impact of the operation of the Act
- Identify and consider any factors which have limited the achievement of the objectives of the Act, and
- Make recommendations for any changes required to enable the Act to better achieve its objectives.

Minister for Justice and Customs, Senator Chris Ellison appointed Mr Tom Sherman AO to conduct this independent Review. Mr Sherman is a former President of the Legal Aid Commission (ACT) and Chair of the National Crime Authority. Prior to that, Mr Sherman was Commonwealth Crown Solicitor and Australian Government Solicitor.



providing false or misleading information. With respect to the institutional expertise utilised to investigate POCA and UW matters, recommendation 4, the access provision for the Australian Customs Service (ACS), the Australian Taxation Office (ATO) and Australian Securities and Investment Commission (ASIC)<sup>126</sup> to issue sec 213 notices, is important. Such notices allow an authorised officer to “provide a written notice to a financial institution requiring the institution to provide ...” (sec 213(1)), specified information which can then be used for determinations and ultimately as evidence.

### **Parliamentary Joint Committee on Law Enforcement Bill, 2010 (*PJCLE 2010*)**

The PJCLE reviewed the *Australian Crime Commission Act, 2002* (established under Part III) as part of a portfolio of inquiries into a range of national security matters including:

- The legislative arrangements to outlaw serious and organised crime groups (2009)
- Future impact of serious and organised crime on Australian society (2007)
- Amphetamines and Other Synthetic Drugs (AOSD) (2007)
- Review of the Australian Crime Commission Act 2002 (2005)
- Inquiry into the trafficking of women for sexual servitude (2005)
- Cybercrime (2004)
- Australian Crime Commission Establishment Bill 2002 (2002)

Crimes Legislation Amendment (serious and organised crime) Bill 2009 (CLA) typically espoused “targeting organised crime by strengthening criminal asset confiscation, including introducing unexplained wealth provisions, enhancing police powers .... Addressing the joint commission of criminal offences and facilitating greater access to telecommunications inception”. The amendments responded to the Sherman Report, drawing support from the PJCLE, 2010 report (which was tasked with reviewing the CLA Bill, 2009). Schedule 1

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<sup>126</sup> The main agencies involved in investigative work are the: Australian Crime Commission (ACC), Australian Customs Service (ACS), Australian Federal Police (AFP), Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO).

introduced unexplained wealth provisions targeting “wealth that a person cannot demonstrate that he or she has lawfully acquired”. Specifically, schedule 2:

- Introduced freezing orders to ensure assets are not dispersed
- Remove time limitations on orders
- Provide for non-conviction based restraint and forfeiture of instruments of serious crime
- Enhance information sharing
- Reimburse legal aid (Schedule 2 CLA, 2009).

Schedule 3 introduced model laws for controlled operations, assumed identities and witness identity protection. Schedule 4 extended the *Criminal Code Act 1995* to include “criminal liability in relation to persons jointly committing offences” (p3). The CLA Bill had its detractors who railed against three key areas of change, that, “the regime undermines the presumption of innocence by reversing the onus of proof ..... is subject to a very low threshold test, which creates the possibility of the laws being used to harass individuals and that it distorts the investigatory incentives of police” (Croke, 2010). The juridification apparent in the second two concerns, has a particular focus on evidence, in that the threshold of ‘suspect’ is used, rather than the higher test of ‘belief’ and the second, in that the potential for the use of UW investigations with civil tests of proof as alternatives to the more virulent proof required for criminal prosecution (the balance of probabilities as opposed to beyond reasonable doubt as previously discussed).

In order to obtain an UW order, an authorised officer must provide an affidavit that indicates there are “reasonable grounds to suspect that the person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired” (Amendment Act s 179B(2)) and that there are grounds on which the officer holds a “reasonable suspicion that a person’s total wealth

exceeds his or her lawfully acquired wealth” (Supplementary Explanatory Memorandum:3). This threshold was criticized as being too low by the Office of the Privacy Commissioner and the Law Council of Australia and Civil Liberties, Australia, in their submissions to PJCLE 2010<sup>127</sup>. The Act does not precisely define the test of suspicion, however, the common law test between a ‘suspicion’ and a ‘belief’ might provide guidance, in that, an officer “need only show that there is a possibility rather than a probability that the assets were illegitimately acquired”<sup>128</sup> (Croke , 2010, p154).

The concern with regard to the potential for the ‘lazy policing’<sup>129</sup> use of the lesser civil proof has arisen as a response to limited police resources and the abandonment of riskier prosecutions that carry the deterrent effect of prison. This thought predisposes the priority of law enforcement on criminal punishment, rather than, the use of forfeiture as another “tool in the armoury”<sup>130</sup> of law enforcement that facilitates a choice of the instrument that creates the greatest detrimental effect on criminal behaviour. That is, the very basis of UW-POC remedies is the greater harm caused to criminals by making their money and assets targets for removal.

In the absence of any obligation to inform the court regarding “the reason why a criminal prosecution has not been brought or, if brought, has failed”,<sup>131</sup> it has been suggested that the court should make sufficient efforts to assess the application, not taking on an inquisitorial role, “but merely buttressing the important oversight role that the courts have in relation to law enforcement authorities” (Croke 2010 p 155). This point is important, as it raises the

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<sup>127</sup> Office of the Privacy Commissioner 2009:2; Law Council of Australia 2009:17–18; Civil Liberties Australia 2009:3–4

<sup>128</sup> Suspicion is a ‘state of conjecture or surmise’ or a ‘slight opinion but without sufficient evidence’: *George v Rockett* (1990) 170 CLR 104, 115. The Privy Council has described the requirement of ‘reasonable grounds for suspicion of guilt’ as a very limited requirement: *Shaaban Bin Hussien v Chong Fook Cam* [1970] AC 942 at 949.

<sup>129</sup> LCALC Public Hearing, Senator George Brandis:29

<sup>130</sup> See Mark Burgess in evidence to LCALC:34 and also Mandy Newton in evidence to LCALC:58.

<sup>131</sup> LCALC Public Hearing, Senator George Brandis:40

question of how the court, under a system of adjudication rather than inquisition, has the resources (in quantity and skill set) to conduct an onerous oversight. In Ireland, for example, a specialised agency (The Criminal Assets Bureau, 'CBA') and a specialised court is appointed to manage their civil forfeiture regime. Sufficient, specifically trained officers (including forensic accountants) are allocated to advise the judiciary and to present and review evidence (CBA Annual Report, 2015). They are protected by statutory anonymity as a safeguard against threats from serious criminals. (*Criminal Assets Bureau Act*, Ireland, 1996, S 10).

### **Parliamentary Joint Committee on Law Enforcement Bill, 2012 ('PJCLE 2012')**

Whilst establishing a specialised forfeiture court has not been a realistic suggestion for the Australian legal landscape (particularly given the disparate views of the federal-state system), the concept of law enforcement using UW as a primary pre-emptive tool was a particular feature of the *PJCLE 2012*. The basis of this inquiry was that, in the first two years following the passing of the Amendment Act 2010, no cases were brought to the courts. This was seen as “mainly because [according to] the evidence of the Australian Federal Police, the Australian Crime Commission and others in state jurisdictions, is that, effectively, their legislation does not work” (*PJCLE 2012*, Senator Wright 10:31). The committee records a formal round table discussion with the leaders of state and federal police forces, the ATO and other such stakeholders<sup>132</sup>. The main reasons cited for the legislation not working, were the

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<sup>132</sup> The inquiry Chair was Senator Wright. The inquiry consisted of Senators Wright, Parry, Mason. The committee interviewed Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department, Mr Graham Ashton AM, Deputy Commissioner, Crime and Operations Support, Victoria Police, Mr Robert Atkinson, Commissioner, Queensland Police Service, Mr Michael Joseph Carmody, Chief Executive Officer, Australian Customs and Border Protection Service, Commissioner Michael D'Ascenzo, Australian Taxation Office; Board Member of the Australian Crime Commission, Ms Kathryn Gleeson, Solicitor for the Northern Territory, Mr Darren Leigh Hine, Commissioner, Tasmania Police, Mr Malcolm Hyde, Commissioner, South Australia Police, Mr John Lawler APM, Chief Executive Officer, Australian Crime Commission, Mr Kenneth Lay, Chief Commissioner, Victoria Police, Commissioner John McRoberts, Northern Territory Police, Fire and Emergency Services, Mr Greg Medcraft, Chairman, Australian Securities

lack of legislative and operational harmony between the states, territory and commonwealth<sup>133</sup> and the lack of certainty due to broad court discretion with regard to the application of UW orders<sup>134</sup>. One of the main issues that arose from the fact that there were no cases taken to court, often due to legal uncertainty, was the circular reference that the court was not given the opportunity to interpret and clarify questions of uncertainty and consequently no precedents within the legislative genre materialised as a basis for future certainty.

Alternatively, it was proposed that the police culture, particularly at the state level, was such that utilisation of UW remedies is contrary to “pursuing criminal elements, putting them behind bars because they have done the wrong thing, rather than taking away their assets and letting them walk down the street free” (Senator Parry, 2009, p22). Several State Police Commissioners agreed with the need to make a cultural shift to focus on forfeiture without other punitive measures, citing changes that target the profitability of crime in order to tackle the top echelon who only invest in crime. (Mr Ashton, 2012; Commissioner Negus, 2011). The Commissioners also raised practical issues such as the requirement for new expertise (for example, forensic accounting skills and experience) to move into this “problem-solving, preventive model” (Commissioner Hyde, 2011). Specifically, the Commissioner recognised the critical role of money and the “power of accounting in the interpretation of evidence and the presentation of a case”. The need for (forensic) accounting expertise was further noted, in order to understand the rapid movement of money particularly offshore (Commissioner Hyde, Mr Ashton, Senator Parry). As Commissioner Hyde stated:

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and investments Commission, Commissioner Tony Negus, Australian Federal Police, Mr Roman Quaedvlieg, Chief Police Officer, ACT Policing

<sup>133</sup> Three particular areas giving rise to this lack of harmony were cited as i) differences in legislation; ii) lack of clear asset sharing arrangements; and iii) limitations on information sharing.

<sup>134</sup> The court (Cwth) has discretion to make unexplained wealth orders, preliminary unexplained wealth orders and unexplained wealth orders even when relevant criteria have been satisfied or if the decision not to grant an order might be in the public interest.

.... you would need to have the specialised resources that are needed to get the outcomes you need. That would include forensic accountants and people with highly sophisticated computer skills as well, because a lot of the tracking of resources has a lot to do with finding a trail through technology. With that, of course, I am taking for granted that you do need investigative skills to go with it, so your detectives are going to have to operate in a new environment to deal with that. But that is not new. We are dealing with those things whether they are cyber investigations or just drug investigations in general. So you do need specialised people like forensic accountants and people with IT skills, but you need detectives that are going to complement all of that as well. (Commissioner Hyde, 2011, p22).

Further Commissioner Hyde raised the complexities in regard to state and commonwealth international links (treaties, agreements, protocols) specifically, the facilitation of the ability to reach out and retrieve funds that have gone offshore.

Whilst the PJCLE 2012 unanimously agreed that national UW/POCA legislative harmonisation was necessary, the most preferable delivery method continued to be debated. Proposals to rely upon enhanced referral powers were eventually superseded by the model statute approach where mirror legislation copies the same statute in each jurisdiction (similar to the uniform evidence and corporations law model legislation approach to evidence<sup>135</sup>). With this in mind the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill, 2014 was proposed. This bill presented eight of the PJCLE 2012's 18 recommendations, however the bill was not proclaimed until February 2015. The bill's effect was to remove the court's general discretion and to limit the court's discretion in to make orders if there are sufficient grounds to suspect that the amount of undisclosed wealth is greater than \$100,000 (Parliamentary Library Bills Digest No 57, 2014). There continues to be a lack of agreement amongst the states regarding the adoption of either a referral or mirror approach, or indeed any approach to harmonisation (Smith and Smith 2016).

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<sup>135</sup> The Uniform Evidence Act (Cwth) was drafted as model legislation, which, was then replicated by the states and territories. A similar strategy was applied to the harmonisation of corporations legislation (Corporations Act 2001).

## Forfeiture Legislation

### i. Court Orders

The general description of forfeiture laws covers forfeiture/confiscation orders, pecuniary penalty orders, restraining orders, unexplained wealth orders and literary proceeds orders. The court plays a core role in the operation of these orders as it is only through an application to a court that the enforcing authority may secure the order (Maxwell, 2011). In general, based on the *Proceeds of Crime Act 2002*:

- *restraining orders* prohibit a person from disposing or dealing with the subject property;
- *forfeiture/confiscation orders* which require a person to forfeit property to the Commonwealth;
- *pecuniary penalty orders* which require a person to pay money to the Commonwealth based on the proceeds they have received from crime;
- *literary proceeds orders* which require a person to pay money to the Commonwealth based on literary proceeds of crime; and
- unexplained wealth orders requiring payment of unexplained wealth amounts (POCA 2002 (Cth) s 7)

A court order is not necessary for every asset forfeiture as automatic forfeiture of property is specified in particular circumstances. For example, sec 228(1) of the Australian *Customs Act 1901* provides for the forfeiture of any ship or aircraft used in the importation of prohibited imports, and sec 229(1) provides for the forfeiture of the prohibited imports themselves. This measure has limited usage in the Australian context, however, similar acts have given rise to frequent and summary forfeitures in the U.S., such as the vehicles and contents used to

transport drugs between states<sup>136</sup> (US Department of Justice, 2013, 1994). POCA 2002 also establishes and regulates a number of coercive measures to assist in the investigation of proceeds of crime matters. Those measures are: examination orders, production orders, notices to financial institutions, monitoring orders and search warrants (Sherman 2006, p7). The process of obtaining court orders leading to confiscation, as described in the act, at Chapter 2, (The Confiscation Scheme) of POCA 2002, leans heavily on the testimony of expert witnesses, particularly in the form of forensic accountants. Whilst an expert witness has a primary duty to the court<sup>137</sup> there are four general perspectives requiring accounting expertise in the confiscation process being:

1. The investigating authority (for example, the Australian Federal Police) must present their evidence to the authority bringing the motion (for example, the relevant Department of Public Prosecutions) of a reasonable opinion that wealth is unexplained or linked to a predicate crime or history of criminal activity. This requires at least prima face investigative (accounting) evidence. Proving the threshold suspected amount of unexplained wealth to be above \$100,000, is important as to whether the court can utilise its discretion;
2. The prosecuting authority (for example the relevant Department of Public Prosecutions) must assess, interpret and present the evidence to the court. This requires an understanding of accounting integrated with legal requirements;
3. The Court must interpret the evidence within the context of the statute in order to make a decision to grant a confiscation order; and

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<sup>136</sup> Civil forfeiture in the United States is controversial with regard to the legal process being used by law enforcement officers to take assets from people suspected of involvement in crime or illegal activity without necessarily charging the owners with an offence. The civil forfeiture is in effect a dispute between the law and the property, that is the property is suspected as being involved in the crime.

<sup>137</sup> The duties and obligations of expert witnesses will be discussed in Chapter 5 of this research.



4. The person (or associated persons) affected by the confiscation order has (have) the opportunity to defend against the order, most likely by providing an accounting explanation of the legitimate source of wealth.

Specifically, the process of issuing an UW or POCA order varies according to the type of order (freezing, restraining, forfeiture, pecuniary or literary), however, there are process similarities pertaining to the presentation of evidence by an authorised officer<sup>138</sup>. In each case a supporting, sworn affidavit setting out the grounds for making the order must be presented. The affidavit must fulfil the specific requirements set out in the division describing how individual orders are to be obtained. The process requires initial investigation, at least to the extent that an authorised officer forms the reasonable opinion to support the claim being made for an order. That opinion must be based on expertise, most often forensic accounting expertise, which would be resident amongst the investigators. In practice, the report (forming the basis of the investigating officer's affidavit) is filtered through the prosecuting authority (the Commonwealth – or State/Territory – Department of Public Prosecutions ('DPP')). The DPP makes the decision whether to present the application to the court. It would be expected that the DPP includes forensic accounting expertise in its assessment of the investigator's report. However, the accounting qualifications of the authorised officer are not mentioned because it is the officer's formal authoritarian status (for example, their sworn position) that is the basis of their testimony, rather than their possession of expertise (for example, as is required for recognised expert witness testimony). More recent innovations (discussed in chapter 7) have seen the ability to prosecute some UW-POCA matters devolved directly to the Australian Federal Police. Early data indicates this has encouraged more successful UW-

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<sup>138</sup> An authorised officer is defined in POCA 2002 s 338, which covers 'certain persons performing functions under this Act for the Australian Federal Police, the Australian Commission for Law Enforcement Integrity, the Australian Crime Commission and Customs'.

POCA Orders that have been sought and granted (see the discussion on effectiveness in Chapter 7).

ii. The judicial function

Before considering the specific detail of individual forfeiture legislation, it is interesting to consider the aspects of judicial function that integrate the statute with the court. Maxwell J. (2011) addressed this issue with reference to the juridification of forfeiture laws, in that, their provisions may intrude into the court's naturally accepted process and liberties, for example, procedural fairness. Maxwell, J. referred to the Courts "taking the statutes as they found them" whilst the Parliament "takes the Courts as they find them" (2011, p5). The comment finds its basis in the Australian Constitution's separation of powers<sup>139</sup>. In this regard, the point is that Parliament has the prerogative to exclude procedural fairness despite the fact that procedural fairness may be applicable under normal circumstances. However, in doing so, the statute must be clear in its instruction, with language that illuminates the court's interpretive task. French CJ commented in the *International Finance Trust* (2009) case:

the conservative principle that, absent clear words, Parliament does not intend to encroach upon fundamental common law principles, including the requirement that courts accord procedural fairness to those who are to be affected by their orders (at 379-80)

Further

If parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity (at 349)

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<sup>139</sup> The Separation of Powers refers to the division among three separate branches: the legislative, the executive, and the judiciary branch. Under the separation of powers, each branch is independent, has a separate function, and may not usurp the functions of another branch. However, the branches are interrelated. They cooperate with one another and also prevent one another from attempting to assume too much power. This relationship is described as one of checks and balances, where the functions of one branch serve to contain and modify the power of another.

This is the ‘principle of legality’ that recognises the long history of common laws protecting individual rights and freedoms and the notion that if such protection is to be removed (such as, in forfeiture procedure or reversing the onus of proof), then it must be clearly instructed by the legislature. The parliament, rather than the legal profession, deploys their primary legislative legitimacy based on Parliamentary sovereignty.

Parliament has determined that an infringement of rights is necessary for the achievement of some public policy objective, and has done so with the requisite clarity of legislative expression, it is not for the courts to second-guess that policy choice. (Maxwell, 2011, p7)

Relating this notion to Victorian forfeiture law<sup>140</sup> the Victorian Court of Appeal (in DPP v Ali) said:

We have already concluded, for reasons set out earlier, that there is no ambiguity in the language of s 16 of the Act. It follows that there is no room for the application of principles dealing with strict interpretation of ambiguous legislative provisions dealing with forfeiture of property. Likewise, the plain and unambiguous meaning of the provisions leaves no room for the operation of the presumption against legislative interference with vested property rights. Plainly enough, the Act does interfere with property rights, and modifies many common law protections. Equally clearly, Parliament has done this deliberately. It has enacted a statute which contains its own procedures and protections. The fact that these procedures and protections are not as fair or comprehensive as those under common law does not mean the courts are at liberty to modify them so they accord with traditional values (at 54-55)

Therefore, in considering the specific details of the forfeiture statutes it is important to understand the role of the court in the maintenance of judicial oversight over enforcement proceedings, within the separate legislative instruction of the statute. Courts must respect their statutory instruction whilst administering legal decisions in a manner conducive to public confidence. The courts have been steeped in matters such as property rights, equity settlements, punitive incarceration and sentencing. As the Commissioner Hyde highlighted

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<sup>140</sup> Confiscation Act 1997 (Vic)

with regard to policing, the role of the court with respect to forfeiture, particularly UW requires a cultural shift in support of confiscation as a court remedy.

Forfeiture laws at the Commonwealth level are dealt with by the Federal Court of Australia and, if necessary by the High Court of Australia. These courts have 7 and 48 judges respectively all of whom have staff to assist them with research, interpretation and adjudication. Australian judges are appointed on the advice of government to the Governor-General. They are always lawyers, mostly barristers (Constitutional Centenary Foundation, 1999) hence their expertise is in law rather than accounting. Each judge has a staff who are mainly legally educated. Surveys of Australian magistrates and judges (Freckleton et al, 1999, 2001) highlight accounting expert evidence as some of the most difficult for legal professionals to understand, with generally the second highest concern (19%) being the difficulty in understanding technical language (including accounting). The conclusions of both the judicial and magistrate's research highlight the need for improved training of judicial officers in areas technical areas, specifically accounting. That is, increased judicial expertise and support in areas likely to arise in court adjudication outside the legal professional genre. In this regard, it is worth the reflection that many judicial adjudications are about, and settled by, money, which is the primary domain of the accountant.

## **Conclusion**

This chapter has reviewed the ancient origins of forfeiture statute, noting that this type of legislation fell into disrepute and generally out of use, until its recent resurrection targeted mainly at organised crime and the huge profits that can apparently be amassed from illicit drug trafficking. National and international support for forfeiture remedies, through vehicles such as United Nations conventions, have enhanced the juridification through the obligated

adoption of local confiscation statutes and provisions from template type legislative prescriptions.

Specifically, in the Australian context there have been several reviews over the past two decades, providing insights and reflection on the more pragmatic effects of forfeiture statutes, particularly their extension into UW remedies. Aligned with this extension is the juridification of legislation such as the reduction in the standard of proof for confiscation matters from criminal to civil and the reversal of the onus of proof to the defendant. Importantly, this chapter provides a direct context with respect to the statutes that provide a procedural reference point for the deployment of expertise that contributes to the court's adjudication on legislative orders. Forensic accounting expertise is required throughout the legislative process from investigation to interpretation, defence, judgement and implementation. A forensic accountant benefits from a solid understanding, not only of current forfeiture legislation, but from a balanced recognition of the legislation's gestation and the relative influence of the broad jurisdictional reflections and contexts that have influenced statutory development, its continued maturation and the resolution of individual differences between jurisdictions.

## Chapter 7: The Effectiveness of Forfeiture Legislation

### Introduction

This research considers the juridification of Proceeds of Crime ('POCA') and Unexplained Wealth ('UW') statutory provisions, with a focus on the role of forensic accounting evidence at the pragmatic level of the juridification process. Of significant importance to the juridification process is the legitimacy that POCA and UW statutes gain or lose based on how the lifeworld perceives the legislative fulfilment of their espoused purpose. This legitimacy is established both at the individual case level and at the institutional level, where aggregated reporting is collated, presented and explained. At the case level, the lifeworld scrutinises how forfeiture cases are decided, whether their adjudication is informed and fair and whether the decision can be justified. At the institutional level, the lifeworld views the pronouncements and public reporting of those institutions charged with the deployment of the relevant statutes. As shown in the research diagram (Chapter 3, Diagram 1, p420), the support of the lifeworld underpins the democratic support for the legislative process that, in turn, gives rise to statutory evolution (juridification). Chapter 5 explored the pragmatic aspects that validate forensic accounting evidence. However, juridification also requires the support of a broader validation of the statutes within the context of how they fulfil their espoused purpose, as considered by the lifeworld; in other words, how effective the legislative genre is in its contribution towards the community's benefit and enhancement. Specifically, broader validation of forfeiture statutes is found in the community's assessment of how effectively the POCA and UW statutes are institutionally deployed to achieve their espoused and, as they are introduced into the parliamentary process, democratically accepted objectives.

Measurements of effectiveness are particularly problematic in the Australian context, where nine separate jurisdictions and several multi-disciplinary task forces share responsibility for the legal aspects of various governments' forfeiture responses. The Commonwealth (Federal jurisdiction) shares the aims and objectives of criminal confiscation with six states and two territories, which, in turn, sometimes distinguish their inter-jurisdictional responsibilities between prosecution authorities (for example, the various government Departments of Public Prosecutions, or Attorneys General) and task forces with a specific focus on forfeiture. Such task forces usually combine multi-disciplinary, multi-agency skill sets, such as those relevant for investigations and prosecution of organised criminals; however, their establishment is relatively new (in the Australian Commonwealth since 2013), and not yet broadly accepted. This chapter maintains the discourse's primary focus on Commonwealth legislation, whilst also reviewing relevant data from other jurisdictions. This facilitates the discussion of how the data integrates or varies across the country. In this regard, it is sometimes difficult to establish a fully integrated picture of effectiveness, as criminals move seamlessly between jurisdictions, while authorities may experience provincial limitations that may impinge on the smooth operation of the law.

Based on the parliamentary commentary that accompanies the introduction of forfeiture legislation, it appears that the community-supported drivers of such legislation reflect the primacy of a "law and order" debate, rather than the evolution of legal principles (Clarke, 2002; Campbell, 2014). Parliament has not justified a "principled rationale" with "traditional notions of punishment, deterrence or reparation for victims of crime" (p82). Rather, the introductory narratives refer to the reversal of the economic benefits of criminal activity (with particular focus on organised criminal activity) in three areas:

1. The economic benefit that the perpetrators directly receive from the crime;
2. The economic capacity to prevent the funding of further criminal activity; and

### 3. The economic benefit arising from criminal activity.

It is therefore relevant to review the overall effectiveness of deprivation legislation with respect to the “policy concerns and public debates about the nature of organised crime and the threat that it poses to mainstream society and government” (Goldsmith et al., 2014, p115). To understand whether the amount of forfeiture seeks to satisfy any or all of the three variables, one might expect institutional measurements to be developed that show congruence between the reversal of the economic benefits of crime and the progressive quantitative and qualitative administration of the legislation. That is, the administration of forfeiture remedies applied to organised crime should adversely affect the criminal’s risk appetite, making the risk-reward rating unacceptable. Risk ratings are generally evaluated using a likelihood and consequence risk-rating matrix (see AS/NZS 43600 Series Joint Standards on Risk, 2004). If the threat of confiscation is to fulfil its narrative of affecting organised and serious crime, organised criminals must see the forfeiture disruption and denial as highly likely to occur (to them) and of significant consequence (or material loss/cost). The instigation narrative that accompanies forfeiture legislation inevitably applies this narrative to the senior crime figures who plan, finance and direct the criminal action, not those not directly involved in perpetrating the crime.

This chapter is organised as follows. The initial section reviews the claims regarding these three variables in terms of the parliamentary discourse and the preliminary narrative that has accompanied the introduction of confiscation legislation. The legislative objectives espoused at such times show little variation across jurisdictions, particularly throughout the Commonwealth of Australia and its states and territories. Similarly, the narratives of relevant task forces, bureaucracies and law enforcement and compliance agencies reiterate the discourses found in the political introductions, explanatory memoranda and the statutes’ introductory clauses (Explanatory Memorandum to the Crimes Legislation Amendment



(Unexplained Wealth and Other Measures) Bill, 2014; Dixson, 2012) (Queensland Parliamentary Library and Research Service, Unexplained Wealth Laws, research brief 2012/09).

The second section takes the form of assembly, aggregation, and quantitative analysis of measures of statutory effectiveness as the various responsible authorities across the Commonwealth of Australia and its states and territories have reported them. This information varies longitudinally due to jurisdictions adopting POCA and UW statutes at various times over the past 20 years; however, once the statutes are adopted, it is common for the lead prosecution agency (such as the relevant jurisdiction's Department of Public Prosecutions) to report annually within a section of their annual general report. These reports cover a wide range of the institution's duties and roles where their UW/POCA obligations are minimal relative to the total organisation's accountability. The POCA/UW reports therefore devolve to a quantitative list of various legislative actions taken under the POCA and/or UW provisions, such as freezing orders and confiscation orders followed by the total value of seizure. No direct alignment to litigation cases is identified other than most reporting agencies providing an illustrative example of performance. A standard of seven years' annual reporting (2008-09 to 2014-15) has been followed across the jurisdictions to facilitate comparison and aggregation that takes into account the more recent legislative changes discussed in Chapter 6. The chapter moves on to comment on the adequacy of such reporting with respect to the introductory claims and justifying discourse made when the confiscation statutes have been introduced or when major amendments have been passed. In particular, these measures of confiscation are compared to other measures for the economic impact of the type of crimes that the legislation is claimed to tackle, such as measures of organised crime sometimes produced by the same institutions that are accountable for POCA/UW reporting.

Further, the need for qualitative reporting measures is discussed with particular reference to actions taken to improve the outcome of the performance variables in jurisdictions where it has been recognised that the legislation's effectiveness was lower than expected (for example, NSW). This description reflects a broader shift in criminal asset recovery from one that is "punishment-oriented and criminal offence-focused to one that is developing new capabilities for crime prevention including disruption and the removal of incentives" (Goldsmith et al., 2014, p116). The need for qualitative measures is taken from political, judicial and academic commentary. Finally, an estimate of the effectiveness of forfeiture legislation is espoused, and a distinction is made between the timing of significant amendments whose clauses may have changed the performance of the legislation; that is, whether the changes to legislation (such as the inclusion of UW clauses) and the adoption of best practice (for example, the formation of multidisciplinary task forces) are working.

### **Principle Objects – Proceeds of Crime Act 2002, Cwth – Sect 5**

Section 5 of the Commonwealth Proceeds of Crime Act 2002 states the principle objects of the legislation:

(a) to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth or the non-governing Territories; and

(b) to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and

(ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and

(c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and

(d) to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and

(da) to undermine the profitability of criminal enterprises; and

(e) to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and

(f) to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and

(g) to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the self-governing Territories to be enforced in the other Territories. (Section 5)

These principle objectives fall into several groupings, such that, they may lend themselves to matters of quantification and qualification. Such groupings are:

1. To deprive persons of the benefits, reinvestment or commercialisation arising from the proceeds of crime;
2. To punish and deter persons from undertaking crime;
3. To enable law enforcement authorities to effectively trace the proceeds of crime; and
4. To give effect to Australia's obligations under international agreements.

Whilst these four groupings cover responses to criminal activity generally, the political introduction of POCA, and particularly UW clauses, raises a discourse targeted at serious and organised crime. More specifically, the Explanatory Memoranda for the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014, quotes its purpose as:

to amend the POC Act to strengthen the Commonwealth's unexplained wealth regime and improve the investigation and litigation of unexplained wealth matters (p2).

The amendments were passed on 9 February 2015 and included upgrading the purpose of the POCA, reiterating the intent that the 2010 Unexplained Wealth laws (statutory sections) were a part of “a suite of reforms to more effectively prevent and investigate organised crime activity, and target the proceeds of organised crime groups” (p6).

### **Articulated Objectives**

The Commonwealth Government's response to the Parliamentary Joint Committee on Law Enforcement (PJC-LE) (2012) stated that “Organised Crime is motivated by the huge profits that can be made through illegal activity. The Government is committed to ensuring that it has strong laws to target the criminal economy; not only to removing the proceeds of crime, but also preventing its reinvestment into further criminal activity” (p1). The Government agreed to 15 of the Committee's 18 recommendations, the key purposes of which were to “undermine the business model of serious and organised crime by eliminating criminal profits (PJC-LE, 2012, p1).

On the occasion of the second reading of the introduction of Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014, the Minister for Justice (Cwth) clearly positioned the legislation at organised crime. He stated, “The government is committed to ensuring our nation is safe and secure, and to taking tough steps to strike at the heart of organised crime. It is for this reason that we are today taking action to strengthen Commonwealth laws that target unexplained wealth.” He further targeted his speech toward preventing the “kingpins” of crime enjoying their tainted proceeds, reinforcing the reversal of proof necessary to avoid confiscation of illegitimate wealth. He confirmed that the PJC-LE (2012) found that the “Proceeds of Crime Act 2002 (POC Act) was not working as intended”.

He described the forthcoming legislative changes as “effective law enforcement framework.... Streamlining the processes for obtaining unexplained wealth orders...and...closing loopholes in the Act” (Hansard, 25 March 2014). Mr Keenan was subsequently supported by other members, including the member for Solomon, Natasha Griggs, who also focused on the use of the unexplained wealth provisions to target senior organised criminals (Hansard, 25 September 2014).

In earlier introductions to the POCA amendments (2010)<sup>141</sup>, the then-Attorney-General, Robert McClelland, outlined the purpose of the Bill:

It is important that we put strong laws in place to combat organised crime. We need to target the profits of crime and remove the incentive for criminals to engage in organised criminal activity. We also need to empower our law enforcement agencies to defeat the sophisticated methods used by those involved in organised criminal activity to avoid detection, often with the assistance of highly skilled professionals. New unexplained wealth provisions will be a key addition to the Commonwealth criminal asset confiscation regime. These provisions will target people who derive profit from crime and those whose wealth exceeds the value of their lawful earnings. In many cases senior organised crime figures who organised and derived profit from the crime are not linked directly to the commission of the offence. They may seek to distance themselves from the offence in order to avoid prosecution or confiscation action. Unlike existing confiscation orders, unexplained wealth orders will not require proof of a link to the commission of a specific offence and in that sense they represent a quantum leap in terms of law enforcement strategy (Hansard, 19 February, 2010).

The legislative focus on organised crime, the proceeds of crime and unexplained wealth has been reiterated by politicians in all Australian jurisdictions, as they have clearly spelt out the primacy of this statutory objective. In Queensland, the Parliamentary Library key research brief to members states that unexplained wealth provisions are introduced as a “multi-pronged approach to addressing organised crime and outlaw motor cycle gangs”, further noting that the targeted senior organised crime figures “fund and support criminal activities

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<sup>141</sup> Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010

but seldom carry them out”, hence the need to uncouple statutory provisions regarding unexplained wealth from convictions for specific offences (Dixon, 2012). The NSW Attorney-General, Hon John Hatzistergos, on introducing the NSW unexplained wealth amendments, stated, “[T]hese reforms will give law enforcement agencies new and expansive powers to go after the ‘Mr Bigs’ of organised crime who attempt to conceal the sources of their wealth. These reforms are part of a coordinated plan to target organised criminals and will complement similar schemes that, to this point, have been implemented only by the Commonwealth, Western Australia and the Northern Territory” (NSWPD, 19 May 2010). In this manner, the discourse from politicians characterises the proceeds of crime and unexplained wealth legislation as providing measures for the effective control of higher-end criminals and organised criminal groups. This message concurs with, but particularises, the purpose stated in the legislation as well as creating greater alignment with international treaties (see Chapter 5).

### **Hitting the Wrong Targets**

Civil Liberties Australia (CLA) (2011) has raised issues with respect to the use of confiscation and seizure laws, claiming that they are aimed at the wrong targets. The CLA asserts that the councils-of-state<sup>142</sup> (such as meetings between the various Australian Attorneys-General are influenced by “media frenzy” that results in one side of the bureaucracy gaining “ascendancy over balanced and measured thought debate”. The CLA refers to several Western Australian and Northern Territory cases where confiscation action has been taken against family premises as a result of small-time drug cultivation in and

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<sup>142</sup> “The best-known ‘ministerial councils’ are COAG (the Council Of Australian Governments, which involves the Prime Minister and the Premiers), and SCAG (the Standing Committee of Attorneys-General, made up of the AGs of Australia and New Zealand). However, there are more than 40 of these ‘council’ bodies” (CLA 2011).

around the home<sup>143</sup>. In effect, innocent parties such as wives and children are penalised in addition to the perpetrator's criminal sentence. Such cases do not reflect an attack on organised crime. Northern Territory Supreme Court Judge Dean Mildren spoke out against the misuse of forfeiture in the matter of Green (*DPP(NT) v Green*, 2009), stating, "The wide definition of crime-used property, particularly in s 11(1)(c)<sup>144</sup>, gives rise to the possibility that what may be forfeited, for a relatively trivial offence, may be the offender's own home if an act or omission was done in connection with the commission of a forfeiture offence on the offender's own property" (at 21).

Similar statements that question the appropriate targeting of confiscation legislation at targets of relatively low net worth have been made by several law societies (Law Council of Australia, 2009), especially in the Northern Territory, where examples include petty criminals of Aboriginal origin having their vehicles confiscated following alcohol-based convictions. This is similar to the United States experience, where law enforcement agencies have seen summary confiscation of motor vehicles as a quick remedy for minor drug offences (Burnett, 2008; Balko, 2014; Carpenter et al., 2015). In Western Australia, the highly publicised case of an elderly couple potentially losing their house after their son was convicted of growing marijuana in the back shed drew widespread condemnation (*BJF v Western Australia*, 2011). No research has been identified with regard to the appropriate targeting of forfeiture legislation; however, in light of this anecdotal evidence that confiscation laws are not being appropriately targeted, and therefore do not work effectively to address and prevent organised crime, this is an appropriate area for further research, as will be noted in Chapter 10. It is notable that the review of the agencies' annual reports on

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<sup>143</sup> *R v King* 2017 20170524; *BJF v The State of Western Australia* Supreme Court of Western Australia [2011] WASC 163

<sup>144</sup> Criminal Property Forfeiture Act 2002 (NT)

confiscation law outcomes does not show any real response to the Law Council's concerns, nor any direct reply to the legislation's organised crime reduction objectives.

### Target Drivers for the Control of Organised Crime

The Australian Crime Commission (ACC) is Australia's premier response agency for Organised Crime; however, its biannual public report, *Organised Crime in Australia (2015)*, does not refer to the use of forfeiture strategies generally, or unexplained wealth action specifically, in its core compliance section, "How are we responding?" (p9). Reference is made to the National Organised Crime Response Plan (NOCRCP) 2015–2018 as a plan for the targeted disruption of organised criminal activity. Initiative Five of that plan, "Tackling the criminal proceeds of crime", refers to "targeting wealth and assets" (p14). Confiscation is referred to as "an important mechanism for undermining serious and organised crime" (p14). However, the rhetoric is not matched with a methodology, unlike other initiatives. There is no mention of the indirect accounting approaches<sup>145</sup> necessary to properly fulfil the aims of the initiative; the focus instead appears to be on money-laundering responses to professional facilitators<sup>146</sup>.

Interestingly, echoing statements from reports into unexplained wealth legislation over the previous seven years, the internal Report of the Panel on Unexplained Wealth (2014), led by former commissioners Ken Moroney and Mick Palmer, is quoted as finding:

that current arrangements for dealing with unexplained wealth are not working effectively, particularly where criminal assets and activities are spread across multiple jurisdictions. The Report found that more needs to be done at a national level to seize more of the estimated billions of dollars in criminal proceeds in Australia, and effectively use unexplained wealth law to put criminal organisations out of business (NOCRCP, p14).

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<sup>145</sup> See Chapter 8.

<sup>146</sup> In the absence of AMI/CTF Tranche 2, such facilitators are not substantially captured by Australia's anti-money-laundering and counter-terrorism-financing (AML/CTF) regime.



The ACC has devolved its confiscation role to the Criminal Assets Confiscation Taskforce since that organisation's formation in January 2011. This means that the asset confiscation lead has been transferred to the Australian Federal Police (AFP), both as a general strategy and through specific strategies, such as the Eligo National Taskforce and Operation Zanella, which have targeted money-laundering networks used by organised criminals. The AFP Annual Report for 2015 claims seizures of \$26.6 million and restraint of \$246.6 million from these disruption activities. This compares to the target of restrained assets of \$65.6 million for 2015. No details are provided with regard to the number of cases or the type of matters leading to restraints, which makes the quantitative data rely on its own recognisance, unsupported by details such as the number of restraining actions taken under which statutory provision, the distribution of restrained amounts or the expected attrition levels before the high level of restrained assets can be counted as confiscations. Chart 7.1 highlights the increase in restrained assets, with particular reference to the period after the formation of the Criminal Asset Confiscation Taskforce. In this regard, without qualitative detail it is difficult to confirm that the formation of the taskforce has been responsible for the real significant increase in restrained amounts. It should be noted that the taskforce provides an alternative avenue for the Australian Taxation Office to apply for restraining orders, with the litigation process managed by the AFP rather than the Commonwealth Department of Public Prosecutions (DPP). There is no indication of any offsetting restraint activity that was previously undertaken under taxation legislation.

Chart 7.1: Criminal Assets Restrained under POCA (Cwth) 2008-09 to 2014-15 (reproduced from the 2014-15 annual report)

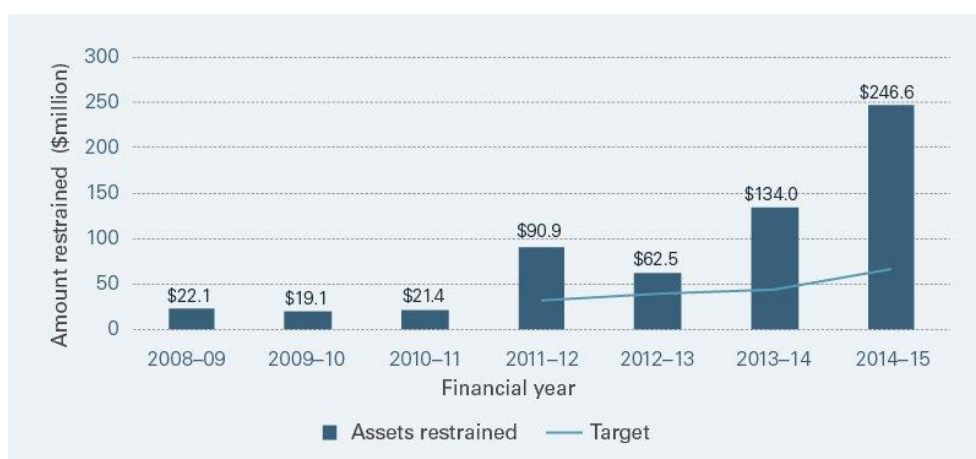


Table 7.1 covers a similar period with respect to asset confiscations.

Table 7.1: Commonwealth Forfeiture Reported from all sources for 2008-09 to 2014-15							
<b>Australian Crime Commission</b>	<u>2014-15</u> \$ mil	<u>2013-14</u> \$ mil	<u>2012-13</u> \$ mil	<u>2011-12</u> \$ mil	<u>2010-11</u> \$ mil	<u>2009-10</u> \$ mil	<u>2008-09</u> \$ mil
Assets Restrained	\$ 237.90	\$ 34.00	\$ 4.10	\$ 25.81	\$ 42.95	\$ 21.14	\$ 26.17
Assets Forfeited	\$ 52.40	\$ 76.10					
Percentage of forfeited assets to those restrained	22%	57%	249%	177%	32%	166%	73%
Wickenby (Tax)	\$ 100.00						
<b>Department of Public Prosecutions (Cwlth)</b>							
POC Act 1987 Total Forfeiture Recovered	0	0	0	\$ 0.18	\$ 0.13	\$ 0.12	\$ 0.89
POC Act 2002 Pecuniary penalty orders	\$ 0.19	\$ 0.15	\$ 0.81	\$ 23.19	\$ 2.17	\$ 13.88	\$ 10.04
POC Act 2002 Forfeiture orders	\$ 2.22	\$ 4.16	\$ 7.10	\$ 19.59	\$ 7.67	\$ 11.14	\$ 4.84
POC Act 2002 Automatic forfeiture	\$ 3.58	\$ 0.54	\$ 2.27	\$ 2.83	\$ 3.54	\$ 1.37	\$ 3.28
Money recovered without formal orders						\$ 8.48	\$ 0.01
POC Act 2002 total (including sundries)	\$ 5.99	\$ 4.86	\$ 10.19	\$ 45.62	\$ 13.81	\$ 34.87	\$ 18.31
Total Forfeiture, both Acts 2002 & 1987	\$ 5.99	\$ 4.86	\$ 10.19	\$ 45.80	\$ 13.95	\$ 35.00	\$ 19.20
Total Forfeiture DPP (Cwlth) & CACT	\$ 58.39	\$ 80.96	\$ 10.19	\$ 45.80	\$ 13.95	\$ 35.00	\$ 19.20
Source: DPP (Cwlth) Annual reports 2008-09 to 2014-15: Australian Crime Commission Annual Report 2013-14 to 2014-15 Legislative changes in January 2011 launched the Criminal Assets Confiscation Taskforce which allowed for the AFP to lead their own POCA 2002 prosecutions: Table expressed in \$ millions							

## Orders

As discussed in Chapter 5, the Commonwealth POCA/UW legislation provides for six types of orders under the second chapter of the confiscation regime:

- 2.1A Freezing Orders, against an account in a financial institution, or
- 2.1 Restraining Orders, against property, in relation to certain offences;
- 2.2 Forfeiture of Goods, forfeiting property to the Commonwealth if certain offences have been committed;
- 2.3 Forfeiture on Conviction of a Serious Offence, converting a restraining order to forfeiture to the Commonwealth unless the property is excluded from forfeiture;
- 2.4 Pecuniary Penalty Orders, ordering payments to the Commonwealth of amounts based on benefits derived from an offence or other unlawful activity;
- 2.5 Literary Proceeds Orders, to facilitate payment of literary proceeds that have arisen in connection with an offence; and
- 2.6 Unexplained Wealth Orders, requiring a person to pay an amount equal to so much of the person's wealth as the person cannot satisfy the court is not derived from certain offences

(Proceeds of Crimes Act 2002, Chapter 2)

The updated provisions of the 2010 Unexplained Wealth legislation introduced three types of orders relating to the explanation of unattributed wealth; that is, unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders. The description of the orders is set out in the Statement of Compatibility with Human Rights that accompanies the introduction to the amendments. Unexplained wealth restraining orders “are interim orders that restrict a person's ability to dispose of or otherwise deal with property. These provisions ensure that property is preserved and cannot be dealt with to defeat an ultimate unexplained wealth order” (p6). Therefore, numerical assessment of restraining orders does not necessarily directly lead to confiscation, as attrition can arise from the release

of orders or the funds sought under orders differing from the funds eventually subject to forfeiture.

The uncertainty of judicial discretion in not granting preliminary unexplained wealth orders has been a feature of 2010 legislative application. The 2014 amendments remove this discretion for unexplained wealth amounts reasonably estimated as greater than \$100,000. “Preliminary unexplained wealth orders are orders requiring a person to attend court to demonstrate whether or not his or her wealth was derived from lawful sources. If the court is not satisfied that the person's wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, it must then make an unexplained wealth order” (p6). The final court orders are Unexplained Wealth Orders made “payable to the Commonwealth an amount which, in the court's opinion, constitutes the difference between a person's total wealth and the value of the person's property which the court is satisfied was not derived from the commission of a relevant offence. That is, the difference between their total wealth and their wealth that has been legitimately acquired” (p7). Using orders as a measure of the effectiveness of the forfeiture regime should employ both qualitative and quantitative evaluation. In this regard the number of respective orders for each period forms the basis of a quantitative measure, whereas the use of such orders, accessibility, granting rates and reasons should provide richer qualitative knowledge. Such knowledge, although worthy of distinct academic investigation, is beyond the scope of this dissertation.

### **Attrition**

Put simply, forfeiture has two steps: restraint, which can be obtained relatively quickly, and forfeiture, which requires a more detailed argument. Although some applications can proceed directly to forfeiture, the issue of attrition from restraint to forfeiture is significant, as shown in Chart 7.2. That is, the value of assets reported as the subject of restraint orders varies

significantly compared to the value of assets eventually forfeited over each year. Whilst some forfeiture can be obtained directly the usual process is to obtain a restraining order prior to pursuing confiscation. This sometimes varies because of the long lead time between restraint and forfeiture, however there are other considerations worth noting and that require deeper quantitative and qualitative interpretation. With this in mind it is worth reflecting that physically the assets subject to both restraint and forfeiture may include property, cash, bank balances, cars, boats, jewellery and any other goods that may hold a reasonable value. When valuing assets for restraint orders there may be limitations on the financial investigation caused by a lack of due diligence (such as not recognising partial legitimate ownership of tainted assets), lack of resources and time due to the urgency in preventing the disposal of assets and the reliance on an early estimation of the benefits accruing from a particular crime in cases dependent on an estimation of proceeds arising from a specific criminal event. Chart 7.2 is a crude measure as this estimate fails to take into account a range of issues such as case completion times (from asset restraint to forfeiture), cases on hand between reporting periods, the relative size of individual forfeitures (smaller forfeitures more likely to be completely fulfilled than larger confiscation) and the nature of associated or predicate offences giving cause for forfeiture or confiscation (for example, forfeiture of cash from a drug activity compared to confiscation of tainted assets that have been otherwise invested (see Home Office Research Report 17, 2009, p7-8).

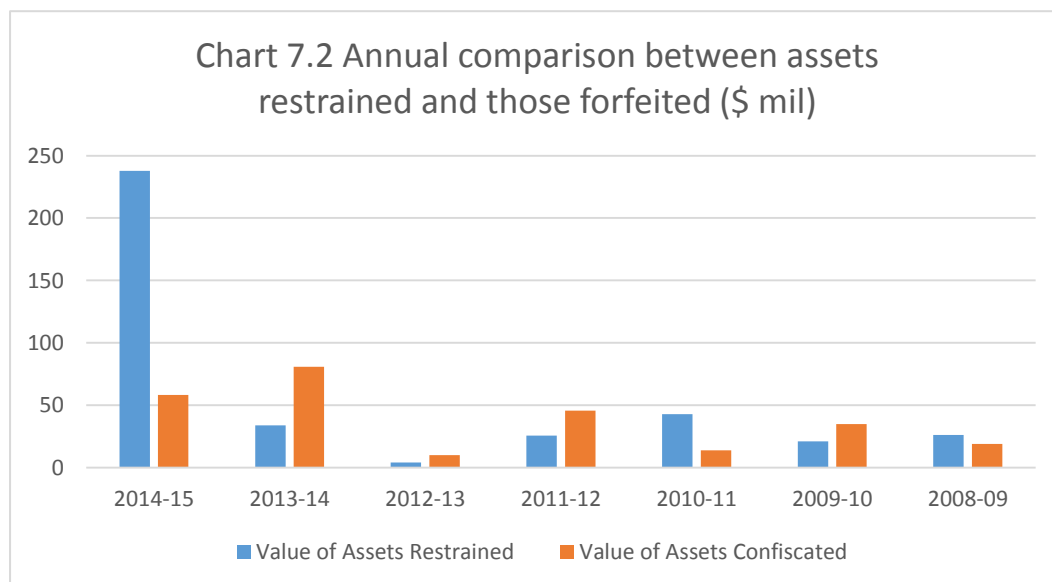


Chart 7.2, which compares assets restrained with those forfeited, shows a significant jump in assets restrained in 2014-5; this aligns to the formation of the multi-agency task force approach to enforcement. Full details of these results have not been made available therefore

it is impossible to fully explain the spike in results and is an area for post-doctoral research. The attrition levels between restraining orders and ultimate forfeiture in Australian jurisdictions are significant and unexplained in qualitative terms. The United Kingdom also noted that “there is significant monetary attrition in the confiscation order system”, which it deemed as artificial due to “the broad assumptions that can be applied in the calculation of criminal benefit” (Bullock et al., 2009, p1). The UK Home Office Research Report 17 noted the need for a more methodical, systematic and strategic approach to ensure confiscation and revisiting cases where the sums recovered have fallen short of expectations. The report identifies a number of reasons for attrition; these include the lack of court-recognised patterned principles to determine the wealth used in a criminal lifestyle (indirect or gap methodology), and the lack and inadequate use of investigative resources. This means that estimates produced for the court in the earlier stages of forfeiture do not necessarily match the actual figures obtained in the later phases of actual forfeit. The complexity of forfeiture cases also contributes to an attrition effect, particularly where indecision about taking a matter through the court process capitulates into an out-of-court decision, the basis of which is a confidential compromise that is not available for public scrutiny. Further research is recommended that carries on to the Australian scenario where agencies have neither undertaken research nor made explanations. This is despite frequent institutional comments to newspapers and similar media that inflate the potential value of confiscated assets <sup>147</sup>.

## State and Territory Jurisdictions

In general the Department of Public Prosecutions, or its equivalent department in each relevant state and territory, is responsible for reporting details of restraints and confiscations under POCA and Unexplained Wealth statutory provisions. Key Performance Indicators

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<sup>147</sup> See, for example, the Mokbel case in Victoria, where a significant number of assets were valued for forfeiture and publicised in the media at a top valuation. In one instance, the ketch *Edwina* was listed as being worth \$323,000, but was eventually sold for \$30,000.

(KPIs) reported by each jurisdiction generally provide numerical, enforcement interventionist goals, articulated as collated groups. Matters are almost always described collectively as disruption measures (see annual reports from the DPP in all States and the Commonwealth); however, the qualitative effects inherent in any concept of disruption are not articulated. For example, measures such as the amount of drugs seized, the amount of money forfeited, the number of cases brought or the number of people arrested form only a crude basis for the representation of reduction or prevention of organised criminal activity through its disruption. The purpose of a disruption strategy is to interrupt the flow of criminal activity. Mere numerical statistics provide little insight into the interruption effect of either significant individual prosecution events or the collective intervention of aggregated legislative action on criminal activity and attitudes. “Success in contemporary organised crime policing is increasingly becoming defined in terms of ‘harm reduction’ (often at the ‘community level’)” (Mackenzie and Hamilton-Smith, 2011). The primary objectives of modern forfeiture legislation are espoused in terms of the reduction in community harm, through the prevention of criminals’ ability to fund further activities and to inhibit the use and enjoyment of tainted assets (see Commonwealth and States and Territories DPP annual reports). However, the published measures of achievement focus on quantitative enforcement measures with minimal, qualitative analysis and no analysis of causal effects; for example, where an amount of drugs and money from drug trading is forfeited, what is the extended effect on drug availability or street pricing (note, the exception of the NSW Crime Commission 2014-15)?

This accountingization of performance indicators has been questioned (in the British context) as rewarding “formality over substance” (Collier, 2006). KPIs in law enforcement have tended to be unambiguous and somewhat meaningless when compared to the more complex objectives that require contextual evaluation concerning the impact of actions and the fear of consequences. The use of ‘proxy’ KPIs may not give a true indication of how the activity (in

this regard, forfeiture) essentially engages the target issues (such as crime prevention) (Keeney, 1992). Instead, statistical variances in quantitative measures of prosecution activity and aggregated forfeiture are deemed, without direct explanation, to provide a measure of disruption to the organised criminal’s network and mindset. Nevertheless, in the absence of better qualitative data, this research attempts to evaluate the effectiveness of forfeiture legislation in reducing organised crime, relying primarily on the published data of the responsible agencies.

## State and Territory Jurisdictions Reporting

### New South Wales (NSW)

The office of the NSW Director of Public Prosecutions (DPP(NSW)) reports its interaction with confiscation matters under the *Confiscation of Proceeds of Crime Act 1989 (CoPoCA)*. At the same time the NSW Crime Commission reports more significant confiscations from civil proceedings taken under the *Criminal Assets Recovery Act 1990 (NSW) (CAR Act)*. The NSW DPP pursues forfeiture after a conviction has been recorded, with the most common property confiscated being cash, followed by motor vehicles, computer equipment, mobile phones and hydroponic equipment. The NSW DPP reports annually based on the orders obtained under *CoPoCA* and the estimated value of their forfeiture. Table 7.2 summarises the amounts reported annually since 2008-09.

**Table 7.2: NSW Forfeiture: DPP (NSW) Reported Results 2008-09 to 2015-16 (\$ million)**

	<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>	<u>2009-10</u>	<u>2008-09</u>
Number of Applications	372	318	295	274	262	247	214	47
Estimated value of forfeiture	\$3.70	\$1.50	\$1.00	\$1.10	\$2.10	\$2.60	\$1.80	\$0.47

Source: DPP (NSW) Annual Reports produced each year from 2007-08 until 2015-16



The NSW Crime Commission pursues matters that are not conviction-based. It has noted the associated difficulties associated with “measuring the performance of its operations” (2015, p15); specifically, the nature of long-running investigations, the accumulation of sufficient evidence for arrests and prosecution and the cumulative effect on criminal activities of the its active investigative presence. Nevertheless, the NSW Crime Commission reports in a manner similar to other jurisdictions: through the aggregation of forfeiture events and proceeds. The Crime Commission reports that “the illicit drug trade in Australia from drug importation through to street level distribution continues to be the chief source of income for organised crime in Australia”. The 2014-15 annual report notes the qualitative trend towards substantial drops in the wholesale price of drugs, indicating the increased availability of larger quantities of successfully imported drugs. They also report on trends in ethnic organised crime and outlaw motorcycle gangs.

The Crime Commission notes the role of financial investigations in association with criminal investigations as a disruptive strategy that targets organised crime, with co-located investigative teams and forensic accountants to cross-pollinate between criminal investigative and financial investigative departments. The protocols of this relationship present challenges, particularly as confiscation proceedings are civil proceedings and a negotiated settlement may be preferable. In the case of a negotiated settlement the forensic accounting evidence may play a crucial role; however, the court is only notified of the forfeiture order, which is certified by the Commission to comply with the Management Committee Guidelines for negotiating the terms of settlement (2015, p21). The Commission reports on elements of the investigative process of forfeiture matters, as aggregated in Tables 7.3 and 7.4. Such elements include information-gathering powers that use summonses and notices to produce reports under the *Crimes Commission Act*.

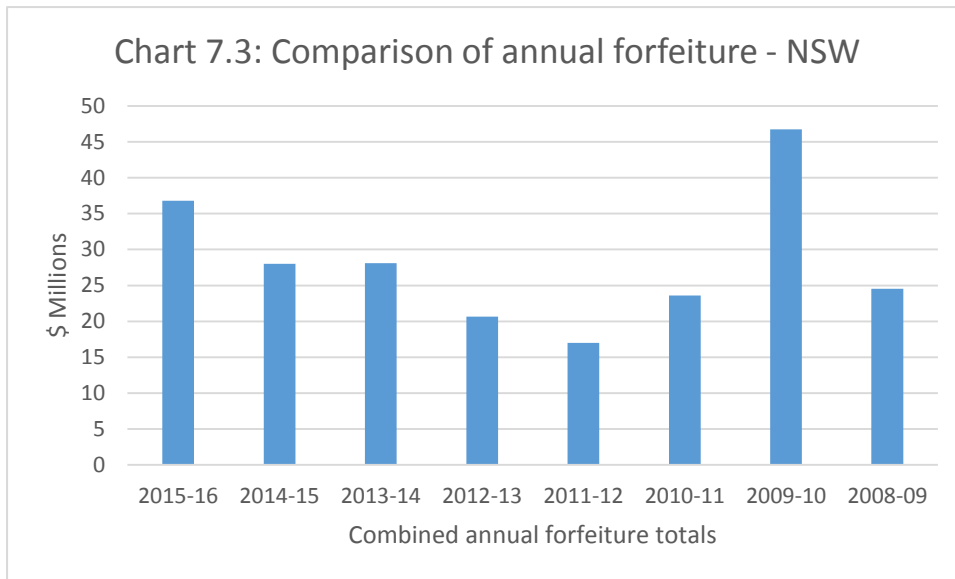
**Table 7.3: NSW Crime Commission Activity Measures – Reported 2008-09 to 2015-16**

		<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>	<u>2009-10</u>	<u>2008-09</u>
<u>Summons and Notices issued</u>									
<i>Crime Commission Act</i>	Summons (s24)	n/a	0	0	0	N/R	N/R	N/R	N/R
	Notice to Produce (s28)	n/a	15	13	16	N/R	N/R	N/R	N/R
	Notice to produce (s29)	n/a	1312	1192	1358				
<u>Orders</u>	Total summons and notices		1327	1205	1374	0	0	0	0
	Examination orders (s 12)	108	58	81	60	79	N/R	N/R	N/R
<i>CAR Act</i>	Examination orders (s 31D)	2	1	5	5	41	N/R	N/R	N/R
	Statement of affairs orders (s 12)	77	41	66	54	74	N/R	N/R	N/R
	Statement of affairs orders (s 31D)	1	1	1	5	3	N/R	N/R	N/R
	Production orders (s 33)	1	0	0	3	20	19	14	16
	Search warrants (s 38)	0	0	0	0	0	0	0	0
	Search warrants (ss 44 and 45)	31	27	33	25	39	49	38	50
	Monitoring orders (s 48)	0	0	0	0	0	0	0	0
	Total Orders	220	128	186	152	256	68	52	66

**Table 7.4: NSW Crime Commission Forfeiture Reports: 2008-09 to 2014-15 (\$ millions)**

	<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>	<u>2009-10</u>	<u>2008-09</u>
CAR Act restraining orders	91	54	81	61	82	106	88	126
Confiscation orders sought without a restraining order	11	18	12	16	15	11	15	0
Assets Forfeiture Orders made	27	42	41	36	27	49	28	63
Est'd realisable value of Assets Forfeiture Orders	\$11.36	\$ 18.20	\$ 16.12	\$ 12.60	\$ 5.46	\$ 13.56	\$ 15.50	\$ 12.88
Process Assessment Orders made	25	35	42	36	40	51	72	60
Est'd realisable value of Process Assessment Orders	\$16.24	\$ 7.91	\$ 7.76	\$ 5.56	\$ 7.87	\$ 7.42	\$ 29.42	\$ 11.12
Unexplained Wealth Orders made	8	3	5	3	2	See legislative changes 2010		
Est'd realisable value of Unexplained Wealth Orders	\$5.5	\$ 0.73	\$ 1.22	\$ 1.25	\$ 0.15			
Orders for breach of warranty	0	0	1	3	0			
Est'd realisable value of Orders for breach of warranty	N/A	N/A	\$ 2.00	\$ 0.13	\$ -			
Total no. of confiscation orders	60	80	89	78	69	100	100	123
Total est'd realisable value of confiscation orders	\$33.09	\$ 26.51	\$ 27.12	\$ 19.54	\$ 14.89	\$ 20.99	\$ 44.93	\$ 24.06
Unexplained Wealth as a % of Total Orders made	13%	3.8%	5.6%	3.8%	2.9%			
Unexplained Wealth as a % of Total Confiscation	17%	2.8%	4.5%	6.4%	1.0%			
Source: NSW Crime Commission Annual Reports - 2008 to 2015-16 Reported in \$ millions								

Chart 7.3 shows that NSW confiscations have steadily, but not dramatically, grown over the past five years. The reporting year 2015-16 shows a 28% increase; however it, is too early to confirm that this effect is due to the change in compliance structure. NSW appears to be the most effective state in terms of the implementation of forfeiture remedies. This is most likely due to their differentiated approach through the application of a multi-skilled task force approach that incorporates accounting and legal skill sets into a single task force unit covering casework from commencement to conclusion. Forensic accountants are directly integrated into the Crime Commission's case load, contributing to the criminal narrative, which is both used as direct evidence and leveraged to assist other approaches such as perpetrator interviews. Because of the complexity and delay in finalising cases, further research after three to five years should be able to provide a reasonable assessment of effectiveness of the multi-skilled task force system. Such research should include a focus on settlement cases that occur without the transparent light of public scrutiny.



### Victoria

The Victoria DPP has reported annually regarding its use of the *Confiscation Act 1997* since the Act's inception in 1998. Each year the annual report contains a section titled "Proceeds of Crime", where the general disruptive objectives are articulated and general comments about the competencies are brought to bear on criminal and civil confiscation. More recently (since 2013), these have included specialist solicitors and forensic accountants. In the 2010-11 annual report the DPP (Vic) flagged an increase in the use of civil forfeiture provisions (UW) as a method of addressing tainted assets without the need for linking prior criminal offences. This was followed in 2011-12 with the request for more funds to assist with confiscation cases, resulting in an increase in resources of \$3.15 million per annum for four years from 2012-13. Despite this increase, the results for the following year showed a decrease in confiscations of 29.5%. The 2014-15 results showed confiscations of \$19.9 million, up 91% on the previous year but similar to 2011-12.

The Victorian DPP claims to have been successful in using both criminal and civil confiscation legislation in response to significant criminal activity, such as in Project Entity (Drug Taskforce Unit), Project Parana (Outlaw Motorcycle Gangs) and the Mokbel

(significant criminal and his enterprise) matters, and in response to the Victorian gangland wars<sup>148</sup>. The DPP have actively encouraged referral and joint work with the Victorian Police Force; to this end, they provide ongoing training on how police can identify assets for potential forfeiture. The annual report of 2008-09 stated that “one of the most valuable tools available to law enforcement agencies is the power to confiscate proceeds of crime and to freeze and forfeit criminals’ assets” (p7); however, no distinctive confiscation strategy was articulated. Table 7.5 aggregates the Victorian annual results for confiscation, donations to the state fund for victims of crime and number of restraining orders. Each annual report presents its figures somewhat differently, with no comparative performance tables and little comparative information of any kind. However, some case study items are highlighted, which indicate areas for future study, such as the attrition rate between the amounts restrained under order and the amounts of eventual forfeiture. For example, Operation Entity successfully restrained \$18 million of assets, with only \$2 million of these being eventually confiscated, or 11% (in other words, 89% attrition). The 2014-15 report provides information about the average time taken to pursue forfeiture cases, which declined from 36.9 months in 2009-10 to 19.5 months in 2014-15 (p15). This still indicates that the average time taken to prosecute a forfeiture case exceeds a year and a half, and hence there is a delayed reporting effect of one to two years from the commencement date.

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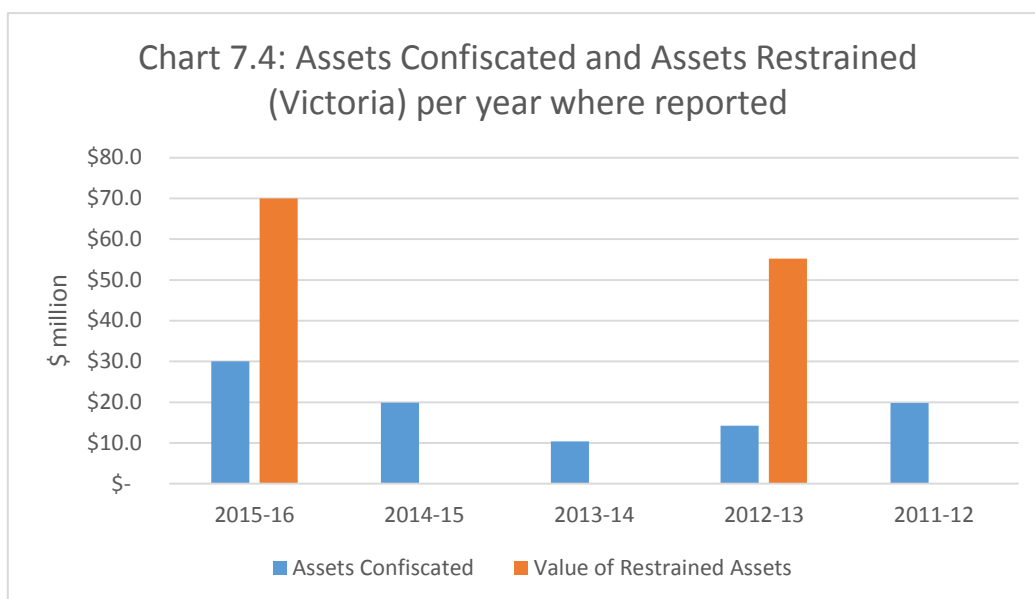
<sup>148</sup> The Victorian ‘gangland war’ was a series of tit-for-tat murders, commencing in 1998, which led to 27 deaths in Melbourne’s underworld (ergo.slv.vic.gov.au, 2016).

Table 7.5: Victorian Confiscations and Restraints					
	2015-16	2014-15	2013-14	2012-13	2011-12
Assets Confiscated	\$30.0	\$19.9	\$10.4	\$14.2	\$19.8
Contributions to Victims of Crime	\$2.0	\$1.4	\$1.7	\$0.5	\$6.4
Restraining Orders	113	114	120	101	N/R
Value of Restrained Assets	\$70.0	N/R	N/R	\$55.2	N/R
Source: DPP(Vic) Annual Reports extracted from text \$ millions: N/R = not reported					

The 2015-16 report notes that the VPP (Vic) contribution to “improv[ing] the effectiveness of the *Confiscation Act 1997*, including clarification that property acquired with loan proceeds is not lawfully acquired where that loan is repaid with proceeds of crime, regardless of whether that person has been charged with or convicted of that crime” (p13). In accordance with increased funding to pursue UW matters since 2013, and new laws enacted in 2014, nine UW cases were initiated in 2015-16 (the courts are still to finalise the matters). These matters broke new ground in the UW genre, in that they appeared to rely heavily on indirect accounting measurements “to restrain property based on a police member’s suspicion that the property owner is engaged in serious criminal activity or that a person has acquired their property unlawfully” (p13). Interestingly, the first confiscation of bitcoin was made for 25,000 units associated with a drug matter. Chart 7.4 indicates a 50% increase in asset confiscations, as expected under the new unexplained wealth funding model; however, it is too early to fully assess the model’s effectiveness. Further research should be undertaken to ascertain the effectiveness of the expected increased reliance on accounting techniques and negotiated civil settlements<sup>149</sup>.

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<sup>149</sup> Such settlements are by definition not reported individually in legal case references. Further research has been instigated to evaluate the increased role of forensic accounting in proceeds of crime and matters of unexplained wealth. It is noted that Victoria appears to be the only state taking active moves towards a pre-emptive strategy for unexplained wealth.



## Queensland

The Queensland DPP administers and reports on the *Criminal Proceeds Confiscation Act 2002*, which commenced on 1 January 2003. The DPP (Qld) also conducts prosecutions on behalf of the Queensland Crime and Corruption Commission (CCC). There are three principle and separate schemes in the Act: non-conviction-based schemes (Chapter 2); conviction-based schemes (Chapter 3); and conviction-based serious drug offender schemes (Chapter 2A). Chapter 2 schemes are not dependent on a conviction in connection with the confiscated property, whereas Chapter 3 schemes require a connection between the property and the criminal charges. The legislation was amended with effect from 6 September 2013 by introducing a scheme for recovering “unexplained wealth” (Chapter 2 Part 5A) and a serious drug offender confiscation scheme (Chapter 2A). At this stage, despite publicity about the targeting of “drug lords” and “bikie gangs” (ABC, 2015, 2016; Qld Government Press Release, 2015), there does not appear to be any significant change in the number of new matters or the amounts restrained or confiscated. There is a notable attrition between amounts restrained and those eventually confiscated. Whilst there is a recognised lag effect due to lengthy prosecutions, over the seven years reported in Table 7.6, 53% of restrained orders led to confiscation, a 47% attrition effect. No explanation has been provided for this attrition. Chart 7.5 indicates an increase in confiscations since the introduction of the 2013 unexplained wealth amendment; however case reviews (see Chapter 9) do not indicate that unexplained wealth methodologies are the basis for increased forfeiture.

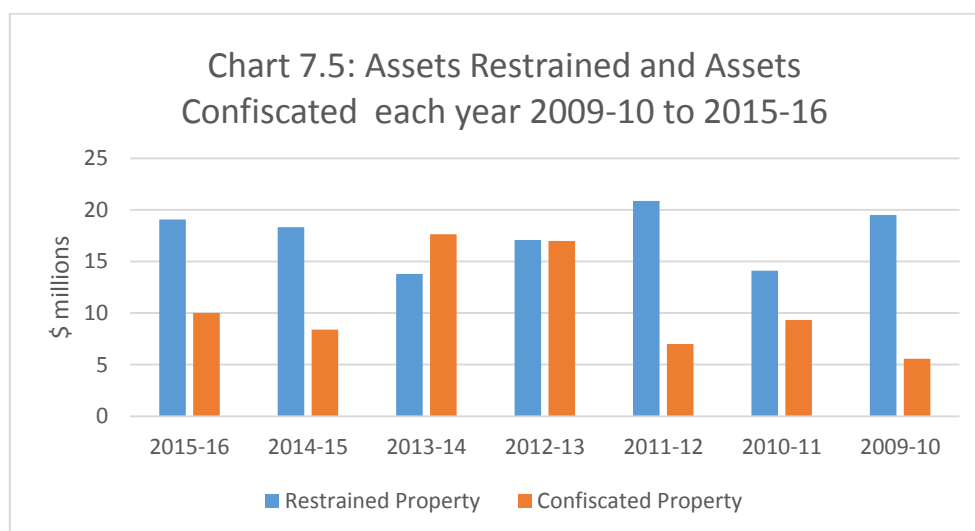
**Table 7.6: Queensland Forfeiture: Reported Results 2008-09 to 2014-15**

		<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>	<u>2009-10</u>
Chapter 2 and 2A	Restrained Property	\$ 19.05	\$ 18.32	\$ 13.80	\$17.09	\$20.85	\$14.11	\$19.50
	Confiscated Property	\$10.01	\$ 8.38	\$ 17.65	\$16.98	\$ 7.01	\$ 9.32	\$ 5.57
Outcomes	% of confiscation outcomes	52.5%	46%	128%	99%	34%	66%	29%
Chapter 3 Outcomes	Forfeiture Orders Collected	\$ 0.59	\$ 0.82	\$ 0.97	\$ 0.64	\$ 0.60	\$ 0.46	\$ 0.57
	Penalty Orders Collected	\$ 0.08	\$ 0.21	\$ 0.12	\$ 0.15	\$ 0.12	\$ 0.16	\$ 1.12
New confiscation proceedings		50	37	40	25	31	34	69
New restraining orders		73	88	65	48	64	44	97
Serious Drug Offence Certificates		582	315	9				
			Amended Legislation					

Source: DPP (Qld) Annual Reports 2008-09 to 2015-2016

Table expressed in \$ million.

Confiscation to restraint comparisons may have a delayed effect due to the time taken to resolve matters.



## South Australia

The DPP (SA) reports annually on the South Australian *Criminal Assets Confiscation Act 2005*. The report typically makes a general statement of the powers of the act followed by minimal statistical reporting. The confiscation amounts are consistently low, with no qualitative explanation as to why the amounts appear to be so low as not to make an impact on organised and serious crime. The amounts reported appear to support Commissioner Hyde’s frustration when, prior to retirement, he expressed concern that police could not integrate a confiscation strategy into their modus operandi, preferring “lock them up” type remedies (Inquiry into Commonwealth unexplained wealth legislation and arrangements,



2012, Chapter 4). Unusually, the 2008-09 report provided much greater detail on confiscation application outcomes (2008-09, p10-20); the data indicated a 60% confiscation resolution of matters (by numbers of matters). Table 7.7 summarises the reporting of DPP (SA) from 2008-09 to 2015-16, demonstrating the low value of confiscations compared to other jurisdictions. The trend is consistent and does not demonstrate any greater emphasis or outcomes with respect to confiscation in recent years.

<b>Table 7.7 : South Australian Forfeiture: 2008-09 to 2015-16</b>								
	<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>	<u>2009-10</u>	<u>2008-09</u>
Brief's Received	371	271	283	218	327	186	209	285
Brief's Finalised	246	236	269	247	195	214	167	256
Deposited to victims of crime fund	\$1.58	\$ 1.16	\$ 1.70	\$ 2.32	\$ 2.27	\$ 2.22	\$ 0.92	\$ 1.40
Source: DPP (SA) annual reports 2008-09 to 2015-16 Table expressed in \$million In SA all confiscated funds are deposited into the victims of crime fund								

## Western Australia

The Western Australian DPP reports annually on the various outcomes of matters under the Western Australian *Criminal Property Confiscation Act 2000*. This is despite the fact that WA Police may independently apply for Freezing Orders and Freezing Notices directly from a Magistrate or Justice of the Peace. The 2014-15 report notes that the number of notices and orders fell in 2013-14 due to a change of focus towards “high-end organised crime”, which is interesting considering that the objectives of confiscation have always been to target organised crime. As previously noted, WA was an early adopter of POCA legislation; however, they have had challenges in appropriately focusing prosecutions, leading to a public backlash in which the community has perceived such prosecutions to be poorly targeted (see, for example *Director of Public Prosecutions (WA) v Bowers*, 2010; Skead, 2016). Notably, the total orders received is down 60-69% on the 2008-09 figures. The change of focus toward organised crime appears to be reflected in the change in the contribution of drug confiscations to total confiscations, which declined to between 52-57% compared to the figure of 78% reported in 2008-09. This tends to indicate a change of focus from confiscations from small drug producers, to confiscations from those who accumulate tainted wealth by other means.

Without reporting qualification details it is difficult to apply these figures to an enlightening narrative. The WA emphasis on *in personam* and *in rem* confiscation has been a strong but controversial focus on property *linked* to crime rather than property *funded* by crime (Skead, 2016).

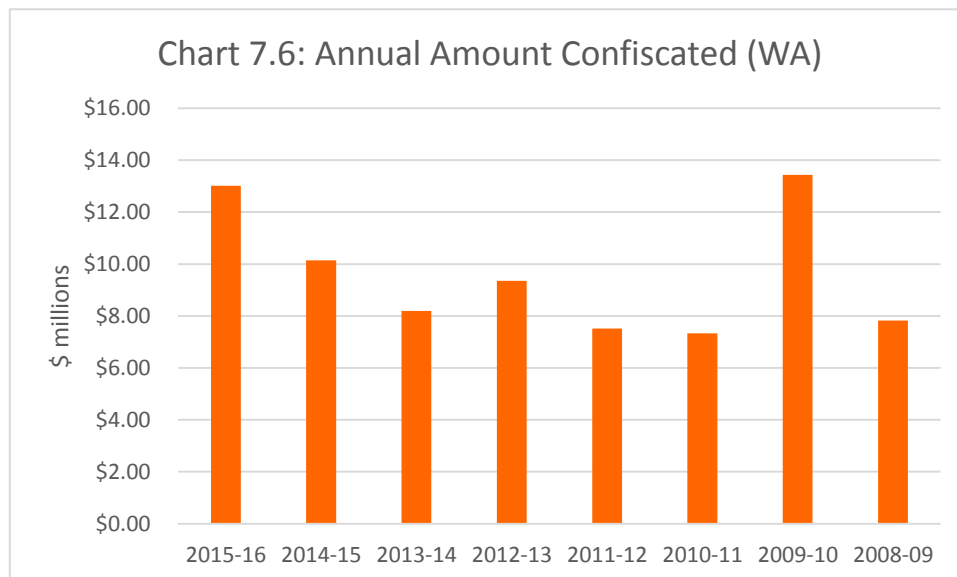
**Table 7.8: Western Australian Forfeiture Reporting: 2008-09 to 2015-16**

	2015-16 \$mil	2014-15 \$mil	2013-14 \$mil	2012-13 \$mil	2011-12 \$mil	2010-11 \$mil	2009-10 \$mil	2008-09 \$mil
Freezing Notices	185	186	158	250	246	218	231	263
Freezing Orders	13	9	11	14	14	3	13	17
Total	198	195	169	264	260	221	244	280
<u>Drug Traffickers</u>								
Declarations Made	75	107	96	94	73	84	111	120
Amount Received	\$ 7.69	\$ 5.76	\$ 4.26	\$ 5.77	\$ 5.23	\$ 5.19	\$ 10.05	\$ 6.07
<u>Crime Used or Derived</u>								
Declarations Made	45	42	49	66	39	54	34	20
Amount Received	\$ 5.26	\$ 3.89	\$ 3.60	\$ 2.99	\$ 1.54	\$ 1.54	\$ 3.21	\$ 1.24
	\$ 13.02	\$ 10.14	\$ 8.19	\$ 9.36	\$ 7.52	\$ 7.33	\$ 13.44	\$ 7.83

Source: DPP (WA) Annual reports 2008-09 to 2015-2016

Table expressed in \$ million.

Other sources of confiscation include the *Misuse of Drugs Act 1981*; *Criminal Benefits*, *Crime used substitution sections of the Act*.



## Tasmania

Tasmania's *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act* only came into effect on 1 March 2014. The Tasmanian DPP (2014-15, p3) has noted that a pilot program has identified considerable work in the area of investigating unexplained wealth.

The 2015-16 report gave the first outcomes:

Pecuniary penalty orders	\$37,490
Forfeiture orders	\$283,350
Unexplained wealth orders	\$823,200 (2015-16, P3)

## Northern Territory

The Northern Territory Department of the Attorney-General and Justice, including the Department of Public Prosecutions, which has carriage of proceeds of crime and unexplained wealth prosecutions, does not report such prosecutions separately in their annual reports. From published case judgements it is known that the Territory has pursued forfeiture as a proceeds of crime strategy; however, their strategies for dealing with unexplained wealth matters appear to have been limited to pursuing assets from criminals who have been classified as significant criminals after conviction for offences (usually drug trafficking) (Skead, 2016). It is estimated that the total amount of UW forfeited to the Northern Territory since implementation of confiscation statutes is \$3.5 million, including one large settlement of \$968,000 (Smith and Smith 2016).

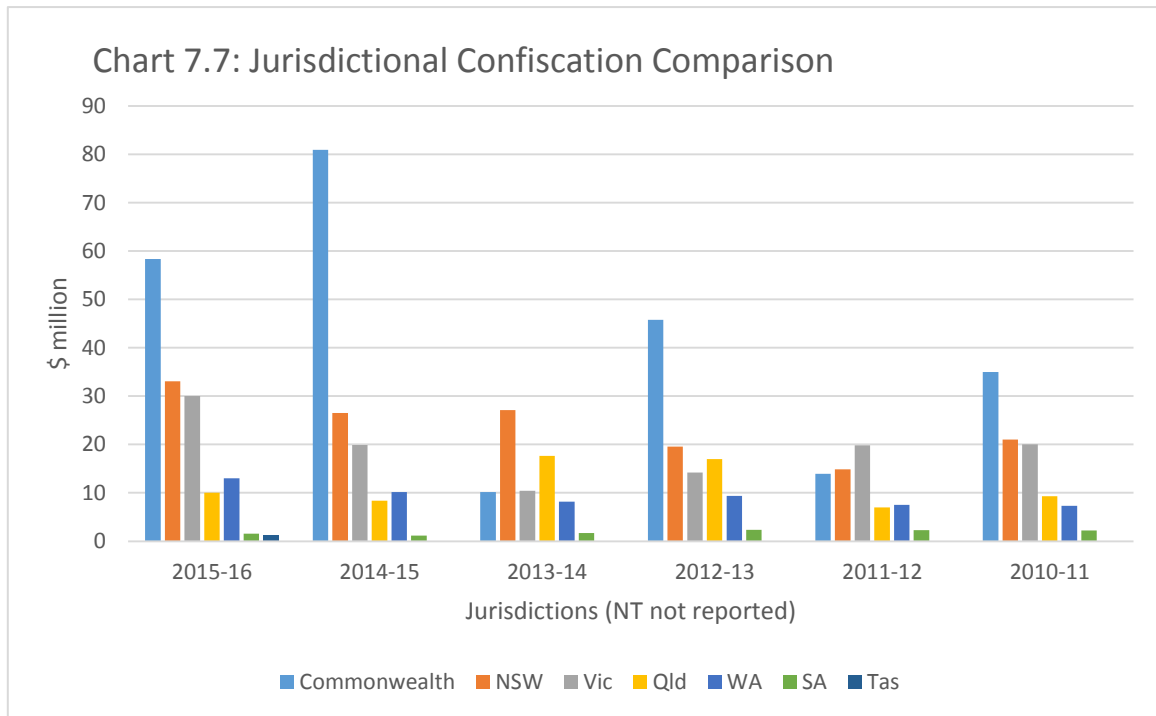
## Total Confiscations in all Australian Jurisdictions

Table 7.9 and Chart 7.7 detail the combined asset forfeiture outcomes across all reporting Australian jurisdictions from 2010-10 to 2015-16. In this context the Commonwealth is by far the leading protagonist in applying forfeiture as measured by total confiscated value. In most years the Commonwealth confiscated approximately double the value of the next jurisdiction, NSW, and approximately 35-40% of total confiscations. The most recent two years, 2014-15

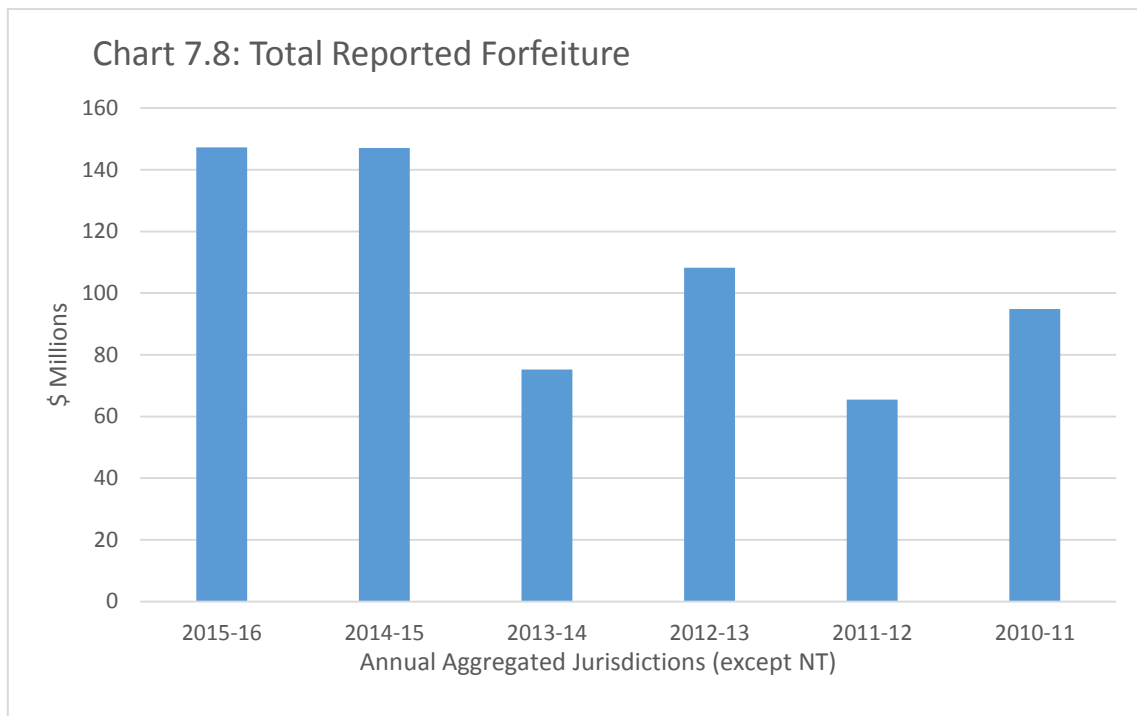
and 2015-16, show significant increases in the value forfeited. This correlates with the expected results from the Criminal Asset Confiscation Taskforce (2011). Further research is required to attribute the enhanced results to the integration of accounting skills into the taskforce approach. Overall the leading performances over the past two years – for the Commonwealth, NSW and Victoria – appear to be due to the task force approaches employed in those jurisdictions over that period; that is, including accounting skills and knowledge into the legal approach to the implementation of forfeiture strategies.

<b>Table 7.9: Jurisdictional Confiscation Comparison 2010-11 to 2015-16</b>						
Jurisdiction	<u>2015-16</u>	<u>2014-15</u>	<u>2013-14</u>	<u>2012-13</u>	<u>2011-12</u>	<u>2010-11</u>
	\$	\$	\$	\$	\$	\$
Commonwealth	58.39	80.96	10.19	45.8	13.95	35.00
NSW	33.09	26.51	27.12	19.54	14.89	20.99
Vic	30.00	19.90	10.40	14.20	19.80	20.00
Qld	10.01	8.38	17.65	16.98	7.01	9.32
WA	13.02	10.14	8.19	9.36	7.52	7.33
SA	1.58	1.16	1.70	2.32	2.27	2.22
Tas	1.16	0	0	0	0	0
NT	N/R	N/R	N/R	N/R	N/R	N/R
<b>Total Reported Forfeiture</b>	<b>147.25</b>	<b>147.05</b>	<b>75.25</b>	<b>108.2</b>	<b>65.44</b>	<b>94.86</b>

Source: Jurisdictional annual reports



The total forfeiture for the past two years across all jurisdictions was approximately \$147 million, up considerably from the previous periods (Chart 7.8). However, considering that one of the espoused aims of modern forfeiture jurisdiction is to increasingly disrupt organised crime, this amount pales into insignificance compared to estimates of organised crime in Australia of \$36 billion (ACC, 2014, p6). The confiscation value represents less than 0.5% of the estimated annual value applied to organised crime.



## The Measurement of Organised Crime

The measurement of organised crime is, by the surreptitious nature of the crime itself, problematic. Savona et al. (2003), in their assessment of the United Kingdom context, commented that such measurement has “traditionally been impeded both by a lack of clarity as to what defines organised crime and organised criminals...[and] concomitantly a lack of reliable police or criminal justice data with which to monitor official performance” (in MacKenzie and Hamilton-Smith, 2010, p10). Levi and Maguire (2004) also refer to traditional “situational”<sup>150</sup> policing measures as not being suitable to adequately measure the impacts of organised crime in Europe, stating that “organised crime is a notoriously difficult concept to define and to measure” (p397). Measuring organised crime and any mitigating impact of legislation depends, in this case, on the definition and aims of the forfeiture methods of criminal behaviour moderation, the ownership of the problem and precisely how

<sup>150</sup> In this regard the term ‘situational’ methods of crime recording and prevention refers to situations where specific changes are made to influence the offender’s decision or ability to commit crimes at a particular place or time. Situational crime prevention may not prevent crime but may displace criminal behaviour. Situational crime reporting is unitised, or accounting-like, in its collation and quantified presentation (see Joyce and Wain, 2010).

the impact of the interventions is determined. Specifically, any measure of the reduction of organised crime should contain the prevention of harmful acts and the diminution of organised criminal groups or formations involved in such acts. The impact of organised crime transcends that of smaller groups and individuals in that it benefits from the cumulative “reputational benefits and economies of scale”, creating a greater social threat (p398).

Measurement of the effectiveness of forfeiture legislation on its espoused objective to reduce and prevent organised crime should therefore be addressed according to its use against, and mitigating impact on, organised criminal groups, rather than on small criminal enterprises and individuals. The ACC nominates organised crime groups in Australia as ranging from outlaw motorcycle gangs to transnational syndicates based offshore. They also note that such groups use “professional facilitators and service providers to help or ‘facilitate’ their criminal activities” (ACC – Organised Crime Groups, 2016). The 2014 estimation of the cost of organised crime activity in Australia is \$36 billion annually, of which the direct cost of crimes such as illicit drug trafficking and organised fraud is estimated to be \$21 billion (ACC, 2014, p6). Organised fraud is estimated at \$6.3 billion per annum, targeting the financial, insurance and superannuation sectors; illicit drug activity is estimated to cost \$4.4 billion; consequential crimes (primarily arising from drug activities) \$6.2 billion; and illicit commodities, identity crime and enabling crime \$4.3 billion collectively. These costs have been estimated using collective statistical methodology that brings together the use of sensitive data and information that evaluates the serious and organised component of both detected and undetected crimes. This methodology is far more sophisticated than previous estimates based merely on a percentage of Gross Domestic Product. Earlier estimates had put the cost of serious and organised crime in Australia at \$15 billion dollars per annum. Whilst these numbers quantify the total impact of criminal activity, from the breakdown of costs presented in the 2013-14 report it is estimated that \$11 billion is the value of criminal

earnings that would give rise to the proceeds of serious and organised criminal activity (ACC, 2013-14). Table 7.10 reviews the estimation of the cost of different types of organised crime in Australia; however, the overwhelming focus of jurisdictional reporting of forfeiture and confiscation case analysis (see Chapter 9) is on the forfeiture of drug-trafficking proceeds or assets accumulated from the proceeds of drug trafficking. No jurisdictional reporting breaks down forfeiture results as applicable to types of organised crime. Similarly, discussion of organised crime over types of criminal activity does not refer specifically to the application of forfeiture strategies.

<b>Table 7.10: Consequential Serious &amp; Organised Crime Costs</b>			
<u>Crime Type</u>	<u>Estimated Cost</u>	<u>Crime Type</u>	<u>Estimated Cost</u>
Organised fraud	\$6.3 billion	Cybercrime	\$1.1 billion
Illicit Drugs	\$4.4 billion	Crimes against the person	\$.089 billion
Illicit Commodities	\$1.5 billion	Crime Enablers	\$.5 billion
Burglary	\$4.005 billion	Vehicle Theft	\$.3 billion
Identity Crime	\$1.2 billion	Conventional fraud	\$3.3 billion
Source: ACC 2013-14			

## **Ineffective Use of POCA and UW Confiscation as a Weapon Against Organised Crime**

From the above analysis, whilst recognising that quantitative measures alone do not provide a holistic view, it can be seen that the amount of confiscature is less than 1% of the amount estimated to be invested annually in the commission of, and profit from, organised crime in Australia. This low percentage casts doubt on whether POCA and UW legislation is having any significant effect on the commissioning of organised and serious crime, or the ‘Mr Bigs’ touted on the introduction of the statutes. Risk analysis (formally conducted or just as an assumed inherent assessment by perpetrators) would show both a low likelihood of being



brought to account and a low consequence of losing the use and enjoyment of the value of tainted assets. In summary, such a profile would be assessed as an acceptable risk, particularly if the form of crime is outside the realm of drugs and firearms.

## Reporting on the Strategic use of POCA and UW

In the UK it has been reported that the use of available POCA and UW powers in high-wealth cases was “patchy” and that “evidence of co-ordinated prioritisation of asset recovery was rare” (Research Report 17, 2009, p3). Whilst the recently formed NSW and Commonwealth task forces include POCA and UW in their disruption strategies, their actual role within such strategies is not independently assessed or reported. The ACC does report on organised crime strategic identification and impact. For example, 54 organised crime syndicates or senior individuals have been identified and profiled (Australian Criminal Intelligence Commission (CACIC), Criminal Syndicates, 2015). The ACIC also identifies criminal groupings, such as outlaw motorcycle gangs, professional facilitators, ethnic-based groups and transnational syndicates. If forfeiture legislation is to truly be deployed towards the prevention of organised crime, jurisdictional reporting should provide an end-to-end evaluation of the use of confiscation legislation that commences with forfeiture strategies that target the identified criminal syndicates in order to apply unexplained wealth provisions without the need for prior convictions. Police and task force leadership have previously commented on the difficulty for law enforcement to change their focus from criminal incarceration and detention strategies (Hyde, 2012); however, as portrayed in the juridification of POCA and UW statutes, confiscation provides a strong basis for a strategic response to serious and organised criminals.

Standardised national reporting would provide a strong binding element in the design and deployment of an effective cross-jurisdictional POCA and UW strategic response. Consistent

accountingization according to the attributes of similar legislative orders, as adopted, would provide the basis for an aggregated and comparative analysis. Qualitative analysis with regard to the application of POCA and UW remedies to criminal genres, the size and nature of criminal activity, attrition rates, settlement rates and conversion rates, expressed consistently, should be included in all jurisdiction's annual reports. Specifically, the development of direct POCA and UW strategies should be aligned to current organised crime measures and trends. Such strategies could include, for example, the automatic production and reporting of inventory in an offender's assets when they are given a drug-trafficker declaration (CPCA, 2000) and strategic confiscation action taken against all serious and organised criminals identified by the Australian Criminal Intelligence Commission, irrespective of prior convictions or the lack thereof. The state police commissioners have expressed their confidence in the financial analyst roles of forensic accountants in tackling organised crime in their submissions to the Senate Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements (see Chapter 3); however, the annual reporting of all forfeiture jurisdictions does not align confiscation strategies primarily led by forensic accounting analysis to their approach to the mitigation of organised criminal activities. Quantitative reporting, rather than mere examples, should be directly linked to prosecution matters, allowing for transparent review of quantitative validity and the recognition of attrition and its reasons. The reasons for the lack of forensic accounting strategies requires further research and is revisited in Chapters 9 and 10.

## Postscript

Chapter 7 was compiled for this dissertation between 2014 and 2015; however, when this dissertation as a whole was being compiled, a research article by Smith and Smith published in December 2016 was brought to light. This work triangulates much of the work presented in

Chapter 7, concurring with the analysis and conclusion. For example, they report that “the total value of assets confiscated in Australian jurisdictions between 199-96 and 2013-14 was approximately \$800 mil or \$44 mil annually as measured against the cost of organised crime in Australia of \$33 bil.” (p1). The current research found \$615 mil in the more recent six years 2010-11 to 2015-16. Nevertheless, the Smiths’ conclusion was that “the discrepancy between these two amounts clearly shows more needs to be done to target the profits of organised crime” (Smith and Smith, 2016, p1). The Smiths’ research included both analysis and interviews with those involved with unexplained wealth prosecutions.

The Smiths’ research reiterated the need for financial expertise through integration of forensic accountants and lawyers in a task force approach. They concur with this dissertation’s articulated barriers of lack of national collaboration, lack of focus on ‘follow the money’ approaches, case complexity and reluctance for prosecution agencies to follow through the legal action (civil or criminal). Despite calling for the text referral of statutory powers from state and territory jurisdictions to the Commonwealth, they note the lack of any Commonwealth prosecution with regard to unexplained wealth provisions. With respect to the higher performance of New South Wales, they claim that “more than 95 per cent of unexplained wealth matters in New South Wales are finalised through negotiated settlement, rather than by litigating the matter at trial”. In considering litigation, they report that the NSW prosecutors take into account “the likely success, the cost of litigation and the extent to which any confiscated assets are actually recoverable” (p4). Finally, the Smiths recommend “uniform national data collection” including “discrete data for unexplained wealth proceedings and data on the value of restrained assets, confiscated assets and funds recovered through the use of court orders and/or negotiated settlements” (p8).

## Chapter 8: Accounting Evidence

### Introduction

Earlier in this dissertation concepts of structural coupling between the accounting and legal professions (chapter 3) and patterned principles (chapter 3) were discussed. This chapter explores further the content of both structural coupling and patterned principles at a pragmatic level in order to inform the research in regard to the appropriate calculation narrative and accounting discourse suitable for forfeiture legislation. Throughout this thesis the role of the accounting expert as an expert witness has been positioned within the context of the legal profession who control accounting's entry into the adjudicative debate. This chapter, more specifically, reviews how the law has influenced the acceptability of particular accounting evidence beyond the specialised knowledge that is peer supported by the accounting profession<sup>151</sup>. In this regard, the discourse is about the content overlap between the professions rather than the professional overlap itself. Whilst the professional overlap has been considered by researchers (Greenwod et al, 2002; DiMaggio & Powell, 1983; Ruef & Scott, 1998; Gulati, 1995), mainly from the viewpoint of the interaction between the hegemony of each profession, the specific overlap of subject matter has not been researched other than with respect to the legal authority given to accounting standards through the Corporations Act 2000<sup>152</sup>.

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151 As the thesis's focus is on the deployment of accounting technologies the example technologies presented in this chapter are not claimed to be in of themselves specialist or specifically determinant of a class of accountants, being forensic accountants. Instead these accounting technologies have been selected because they are both in the form of accounting patterned principles and have at some stage been recognised by the courts. By nature the accounting patterned principles described would most likely be recognised by member professional accountants as rather 'simple and straight forward' however, this recognition is not shared by the legal profession, nor the lifeworld and hence their specific expression is required in this chapter. The techniques described are not exhaustive.

<sup>152</sup> The professional content overlap in this instance is with respect to the role and authority given to accounting standards arising from the CLERP9 process and sections of the Corporations Act 2000. It is not directly relevant to the current research discourse.

As recognised earlier, the legal process of empowerment arises from precedent judicial comment, that influences the acceptability and probity of the content presented as expert opinion. For example, an opinion based on certain criteria (potentially aligning to a specific patterned principle) that has been accepted in a particular judicial genre, holds disproportional weight when repeated in respect of similar facts and circumstances in another case, usually within the same genre. In this manner senior judges or combinations of judges of a higher court (for example, an appeals court or the full court compared to a single judge), provide precedential endorsement that can rely upon similar methodologies in similar contexts that arise in the future. Judges are under peer pressure to adhere to such precedents, often extensively quoting their previous peers to avoid critical dissention. This then, provides some dilemma in legislative genres that are relatively early in their gestation, based on new or considerably revamped (juridified) legislation, such as the POCA and UW legislation (based on the Australian Proceeds of Crime Act, 2002 Cwth, and state and territory aligned statutes). In summary, the newer the legislative genre is, the less likely that the statute has been subjected to judicial interpretation and precedent, and therefore the legal debate is more uncertain with respect to the application of legal direction, principles and norms (such as fairness) to specialised knowledge. That is, the patterned principles required to reproduce decisions (or to instruct expert testimony) are not readily available from within the relatively few cases of the new legislative genre.

This chapter is in three parts. Initially, it reflects on how the legal profession has intervened into accounting's specialised knowledge, to create new internal legal norms that influence the acceptance, providence and interpretation of accounting expert evidence (Part 1). This is important to recognise with respect to the structure of accounting methodologies that form the basis of evidentiary reports, because, these new norms provide the court's normative instruction, not only to the legal profession, or to the accounting profession, but to the

professional designations at the face of the structural coupling between the professions, that is, more specifically, forensic accountants. Viewed to the contrary, if a forensic accountant does not accommodate the legal genre's perspective, the accounting evidence runs the risk of being deemed irrelevant, therefore denying access to the court or diminishing probity (*Makita, 2001 (Australia) Pty Ltd v Sprowles, 2001, ('Makita')*). The chapter takes examples from areas of law outside the forfeiture objective, that nevertheless, have some alignment with the determination and redistribution of assets. For example, the 'value to the owner' concept in family law (that pertains to family wealth distribution); 'intuition' in settlement disputes (that integrates a logical 'feeling' with accountable facts and behaviours); asset tracing methodological nuisances in equity law (that pertain to fair economic resolution); and, equity compared to common law asset tracing and redistribution. This legal accommodation to normative closure covers the intersection between accounting and the courtroom and gives legal norms a distinctive flavour that caters for external references within the internal operations of the system. It is an autopoietic<sup>153</sup> response where the system takes care of itself, "connecting the internal and external references by internal operations" (Luhmann, 1989, p142).

In Part 2, the chapter moves on to review the peer accepted accounting methodologies that should comprise acceptable specialised knowledge for the purpose of confiscation matters under POCA/UW. Properly constructed, such methodologies should be given access to advise the court's adjudication in these matters. These accounting methods are supported by their precedent access to courts in other jurisdictions where the court is attempting to answer questions similar to those relevant to UW/POCA cases. For example, matters that concern undisclosed income have often been considered under Taxation legislation. S 167 of the

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<sup>153</sup> The legal extraction and adaption of particular norms instructing another profession's body of knowledge is autopoietic because it is made by the legal profession for use within the legal system and is done so without prior approval or reference to the profession who own the knowledge. It is based on an internal legal discourse of approval under consequential penalty of non-recognition by the legal profession.

Income Tax Assessment Act, 1936, allows the (Tax) Commissioner to “make an assessment of the amount upon which, in his or her judgement, income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of s 166<sup>154</sup>”. Further, assessments of undisclosed income have been considered in Family Law, Common Law and Equity Law, that provide precedents under their relevant statutes. The application of POCA and UW legislation to forensic accounting expert reports requires judicial interpretation within particular statutory clauses, however, judicial discretion remains informed by the broader context of methodologies recognised as similar to the application of the special knowledge of the forensic accounting opinion witness.

At the heart of this discussion is the legally acceptable content of accounting’s body of knowledge. This is important because, whilst the law shows strong acceptance of accounting expert witnesses who attest to complex matters of valuation and interpretation of financial concepts, the courts have not always been as accommodating of accountants who propose to testify with regard to lower level accounting expertise. Whilst accounting clearly claims ownership of expertise that recognises, applies and builds on the double entry accounting concept (generally attributed to Luca Pacioli, 1494), the courts have refused to grant expert knowledge access to double entry based accounting analysis, such as the interpretation of bank statements, citing the court’s opinion that such knowledge and skill is generally available to the community. Further, Part 2 builds on the deployment of both direct and indirect accounting analysis of undisclosed income, that submit their outcomes

based on the expert knowledge and skills notated in *Makita*. In this regard direct methodology refers to the analysis of transactions that directly reflect the movement of funds (such as those contained in bank statements) however they may have been misclassified (such

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<sup>154</sup> S 166 compels the Commissioner of Taxation to make an assessment with regard to the amount of taxable income, the amount of tax due with regard to that income and the taxpayer’s offsets and refunds.

as from private rather than business sources) or remain unbalanced. Indirect methodology applies accounting technology to the extent that it identifies and quantifies a gap in the explanation of the funds flow, the gap represents the unexplained income or wealth.

Part 3, introduces the legal and accounting content overlap when the ownership and control of assets is considered. Similar to the legal accommodation of accounting techniques within legal concepts, discussed in part 1, the formally recognised accounting control of entities is, in contrast, with the broader concept of control considered beyond the corporate veil. This concept can be complex and is the subject of legal discussion beyond the scope of this dissertation, however, a brief general consideration in this chapter paves the way for the application of control concepts when accounting concepts are deployed to assist the court adjudication in UW and POCA matters (See Chapter 9).

## **Part 1 – Expert Opinion Consistent With the Norms of the Legal Genre**

### **Legal Accommodation – Asset Tracing in Equity**

An example of the legal accommodation of accounting evidence, facilitated by principles arising from different legal genres, is in matters that concern the tracing of assets. The two legal genres at question are common law and equity. Similar to the accounting technologies deployed to support expert evidence, asset tracing is not, of itself, asset recovery or a legal remedy, but is a precursor to the assertion of a personal or a proprietary claim either at common law or equity (Stone and McKeough, 2003). It is a methodology deployed by skilled practitioners to identify assets so that a court can decide what distributive remedy to apply, however that deployment must be cognisant of the patterned principles applying to the appropriate legal genre, that is, either common law specificity or equity's unjust enrichment.

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Each of these genres provides its own underpinning philosophical guidance that assists to validate the patterned principles deployed in the reporting of the asset tracing. In common law the claimant relies heavily upon specific records of legal ownership, whereas in equity claimants rely on their equitable interest in an asset. The application of asset tracing methodologies in common law may be defeated if records of ownership are obscured, such as, through integration with other untainted property or otherwise legal transfer of title, whereas an equitable title to an asset may continue as a concept of rights, distinct from the common law (legal) rights. In equity “the body of principles constitute what is fair and right” (Black’s Law Dictionary, 2001, p241). It was held in *Walsh v Lonsdale* (1882) that “equity looks on as done that which ought to be done”. Asset tracing is distinguished from following an asset or claiming an asset. From an equity viewpoint tracing is the “process of identifying a new asset as the substitute for the old” (Bryan and Vann, 2012 pp347-8). Following is the process of tracking the same asset from point to point and if such asset is retrieved under common law then this precludes the claim for equitable compensation as it would be double recovery (*Creak v James Moore & Sons Pty Ltd*, 1912). ‘Claiming’ is the process of regaining the asset or its substitute through a personal claim or a constructive trust over the property<sup>155</sup>.

Legally tracing and claiming property at common law is more straightforward, but by the same account, limited. Common law claims are related to specific title for property, or for chattels, protected under actions of detinue, conversion or trespass<sup>156</sup>. Only detinue gives rise

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<sup>155</sup> Constructive trust is a court created, equitable remedy of implied trust to the benefit of a party who has been deprived of the property or rights by another who had no right to do so. It is a “relationship by which a person who has obtained title to property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisition or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it”  
(<http://legal-dictionary.thefreedictionary.com/constructive+trust> accessed December 2016).

<sup>156</sup> Detinue, conversion and trespass ([legal-dictionary.thefreedictionary.com](http://legal-dictionary.thefreedictionary.com)):

**Detinue:** the crime of wrongful detention of goods or personal possessions; one of the oldest forms of action in common law.

to specific restitution where a market substitute is unavailable (*Whiteley Ltd v Hilt, 1918*). By contrast, equity is more complex, with patterned principles having been established concerned with the tracing methodology presented to the court by appropriate experts. By necessity equity has developed rules for segmenting mixed property, such as a mix of legitimate and tainted funds in a bank account, provided that the plaintiff can prove they held equitable title in the property or funds. An expert reporting to the court regarding mixed property must first identify the party mixing the claimant's funds with other funds, secondly, the claimant must prove title to the mixed money, followed by proof regarding the history of the mixed funds after mixing. Further, equity courts have developed patterned principles through precedent, which inform asset tracing and are potentially relevant to an accounting expert's assessment of unexplained wealth. Briefly these principles are "the irrebuttable presumption" that the trustee has preserved trust money and spent his own first (*Hallett's Estate, 1880*, and approved by the High Court in *Brady v Stapleton, 1952*), a policy of preserving trust assets through substitutions of property (*Re Oatway, 1903*); "lowest intermediate balance" rule (*Loftus v McDonald, 1974*); "first in, first out" principle (*Clayton's Case, 1816*, with limitations<sup>157</sup>); the appreciated value of the property rule (*Scott v Scott, 2003*<sup>158</sup>); constructive trust giving proportionate share of the profit or loss after the date of judgement (*Foskett v McKneown, 2001*); 'rateable distribution', where money is distributed on a proportional basis and money used in general operations has been dissipated.

These principles are mainly concerned with the continuity of property rights and "its theoretical underpinning is property law, not unjust enrichment. The plaintiff's property right

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Conversion: a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein, or in derogation, exclusion, or defiance of such title or rights, without the owner's consent and without lawful justification.

Trespass: an unlawful intrusion that interferes with one's person or property.

<sup>157</sup> First in – first out (FI-FO) as applied in Clayton's Case may conflict with the own money first rule applied in Hallett's Estate. Therefore the FI-FO rule is applied where beneficiaries will share rateably in the remaining funds.

<sup>158</sup> In *Scott v Scott* claimed for the proportion of the investment which represents their contribution to the investment, thereby preventing the defendant from profiting from their own wrong (*Scott v Scott*).

to the traceable product is a response to and a vindication of the plaintiff's rights to the original asset." (Read and Herbert, 2002, at 119). Reflecting on Nozick's entitlement theory (chapter 3), the principle of justice in acquisition is injured by unjust transfer and should be rectified by compensation or readdressing past transgressions. Justice is broadly supported in the return of property wrongfully taken, however common law remedy depends upon the transactional proprietary links being established. With respect to unexplained wealth remedies this principle holds in reverse, in that the proprietary links are, by definition missing. There is a gap that is unexplained. Nevertheless the comment of McLure J still applies, in that, "it is necessary to have a clear understanding of the nature of the claimant's property interest and when and how it arose in order to assess whether the claimant can trace to the traceable product" (at 95). In regard to unexplained wealth, the understanding pertains to broader wealth accumulation. Evans (1999) advocates a causal approach where the central focus is value, that is, "to trace the claimant's value into the defendant's assets even where it is not possible to trace the claimant's value to any specific asset" (*Stone and McKeough*, 2003, p391). Tracing therefore assumes an expanded doctrine of restitution, that vindicates property rights and reverses unjust enrichment (Lord Millett in *Foskett v McKeown* at 129).

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### **Legal Accommodation – 'Value to the Owner'**

The legal genre of Family Law can be vexatious, leading to strong feelings of entitlement, often played out through the valuation of marital assets (Australian Law Reform Commission CPS1, 2009). In this context, and in the absence of a unique epistemological approach to valuation, the Family court has adapted the concept of valuation to suit its needs. To this extent, the concept of "value to the owner" has arisen (see *Reynolds and Reynolds*, 1985) to accommodate valuations, where the market concept of the fully informed hypothetical buyer and hypothetical seller who make a transaction in a hypothetical market (*Spencer v*

*Commonwealth*, 1907) is not independently valid. “Value to the owner” was developed from cases where, when a minority interest was held in a family company, the market test for the value of the shares, fails, as it can be argued that there is no market because no third party (outside the family) would buy the shares without any possibility of control. However, from a family assets point of view the shares may have a value and that value may be considerably enhanced by benefits received in the hands of the family member who owns the shares.

Business valuations in the Family Law genre are frequently determined using the Future Maintainable Earnings Methodology<sup>159</sup> where there is no ready market for shares, which determines the expected value of a future income stream to be generated by the business. This is not necessarily the price at which the shares of the business entity would change hands. From a Family Law viewpoint the value of the shares in the family business entity may provide other benefits such as employment, self-employment, lifestyle or links with other businesses. As explained in *Scott and Scott* (2006) her honour (after considering relevant precedents in *Hull and Hull* (1983), *Turnbull and Turnbull* (1991), *Reynolds and Reynolds* (1985) and *Sapir v Sapir (No 2)* (1989)) found: “I am satisfied in the context of proceedings under the Family Law Act that when a judge is determining the value of shares held by a party in a family company, she or he must look at the reality of the situation and value the shares on the basis of their worth to the shareholder. In this case, the husband’s shares can only be valued on the basis of their worth to him in the context of the Harrison family as a whole. That worth is substantial.”(at 45). Further, as noted by Watt J, in *Clarkson and Clarkson* (2008),

The authorities indicate that valuations performed pursuant to the value to owner objective consider benefits arising from ownership which encourage retention thereof for an indefinite period. It is therefore necessary to evaluate the likelihood

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<sup>159</sup> That is the use of a method that provides the present value of income received in the future from the business activities.

of the party opting to sell his or her shares. Cases such as *Hull, Reynolds and Ramsay and Ramsay* (1997) indicate that if a party is likely to retain his or her shareholding, the appropriate objective for valuation is value to owner, on the basis that a benefit is derived over and above an eventual sale price (at 208).

By the development of the value to the owner concept the Family court has given rise to a valuation ontology that recognises both the economic value of the family asset (usually shares) yet accommodates the legal notion of equalising the total relative benefit of share retention in marital asset redistribution. Therefore, the ontology instructs a patterned principle deployed by the accounting profession for the purposes of the legal profession's obligations under the Family Law Act.

### **Legal Accommodation – ‘Intuition’**

A significant indicator of the law accommodating concepts of equity rather than the application of accounting methodology is in the example of *Fitzpatrick v Cheal* (2012) and *Cheal Industries Pty Ltd* (2012, 2013) (*‘Chilli’*) where Ward J considered the various forensic accountants' evidence pertaining to the valuation of the business, preferring to rely upon her intuition instead. The matter concerned the actions of the husband who traded through an incorporated entity that the wife was an equal shareholder. The husband made surfboards under the name and trademark of “Chilli Surfboards” and the business, as valued (by accountants) according to its fundamental economic performance, had no goodwill. Motivated by his divorce, the husband, however, took significant steps to retain the Chilli Surfboards name and trademark within a new entity. Her Honour surmised that “There was presumably some perceived value in the use of the Chilli name (even if Mr Cheal's accountant dismissed it as non-essential) since otherwise there is no reason for Mr Cheal to have undertaken the steps he did to change the name” and further that the “method of valuation may be adapted to the dictates of fairness in the circumstances — determination of

nominal value not a strictly mathematical exercise, but involves an element of intuition” (*Fitzpatrick v Cheal* (2012) at 38).

The judgement in *Chilli* considered at length the legal concept of ‘fairness’ in valuation as distinct from the accounting concept of ‘fair value’. In this regard the principles of fairness are overlapping content of each profession, similarly termed, but, differentially described according to the underpinning legal or accounting ontology. In the legal sense, ‘fairness’ is the determination of “what would have been the value of the shares at the commencement of the proceedings had it not been for the effect of the oppressive conduct of which complaint was made” (*Scottish Co-operative Wholesale Society v Meyer*, 1959, at 369). Further, the process of legal ‘fairness’ is described as “in looking to the fair value one must look at all the circumstances of the case and seek to put the oppressed in the same position as nearly as can be as if there had been no oppression, erring, if there is to be any erring, on the side of the oppressed” (*ES Gordon Pty Ltd v Idameneo (No 123) Pty Ltd*, 1995, at 540) (also referencing *Re Associated Tool Industries Ltd*, 1963, at 70; *Re Golden Bread Pty Ltd*, 1977, at 55; *Coombs v Dynasty Pty Ltd*, 1994, at 102). Ward J’s consideration of ‘fairness’ in *Chilli* is instructive as it represents a considerable point of professional content confusion that arises as the legal and accounting professions structurally couple. The important consideration for accounting expert witnesses is that, in the courtroom, the confusion will mostly be resolved by the legal gatekeepers, consistent with the legal interpretation such as of ‘fairness’ rather than ‘fair value’.

## Part 1 – Conclusion

From the above review of the legal instruction with regard to the suitability of accounting methodology for specific legal genres, the forensic accountant recognises that the strength of their evidence is directly affected by its concurrent accommodation of both the legal

principles and the accounting methodology. This is important if the accounting evidence is to be validly accepted as relevant by the trier of fact and to influence the court's adjudication. Whilst specialist expertise and training is necessary to fulfil the *Makita* tests, the judicial weight of the accounting evidence reflects the structural coupling of the accounting process with appropriate legal norms aligned to specific legal genres. The relevance of such legal accommodation will be revisited in chapter 9, particularly aligned to unexplained wealth legislation and notions of economic or entity control.

Part 2 – Methodologies, Methods and Patterned Principles used by Accountants, as Expert Witnesses, to Identify Undisclosed/Unexplained Income<sup>160</sup>

Part 2 of this chapter articulates the various accounting methodologies relevant to the investigation of undisclosed income that may be relevant for transition to underpin expert accounting evidence in the POCA and UW legislative genre. Whilst Part 1 recognised that legal norms can adapt accounting evidence to the court's perspective, it is important to note the specific accounting methodologies and methods that are appropriate for such adaption. Following the argument in *Makita* and in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*, 2002, ('*Red Bull*'), it is important to demonstrate that forensic accounting evidence is based on an organised area of study as well as a peer recognised body of knowledge. In this regard, part 2 of this chapter, segments two types of accounting methodologies, those of direct estimation of unexplained wealth or proceeds of crime followed from documentation, connected with events, organisations and eventually a controlling entity or person, and those of indirect estimation that analytically establish and quantify a gap in the financial explanation where the gap is instructive of illegitimate wealth. Understanding the patterned principles deployed by both direct and indirect methodologies is important in both the legal arguments for court access and the court's probative assessment.

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<sup>160</sup> The selection of methodologies represents peer accepted methodologies for the professional estimation of unexplained wealth, deployed variously, given the sources and reliability of available information. These methodologies do not represent the totality of forensic accounting methodologies but are a comprehensive description of the patterned principles commonly deployed to establish unexplained wealth. Increasingly sophisticated computerised estimation techniques build on the manual principles as described.



## Accounting Expertise as Opinion Evidence

### Direct Methodologies - Basic Accounting Knowledge – Double Entry Bookkeeping

The double-entry accounting methodology basically views accounting transactions as having two balancing sides, that of a Debit and that of a Credit. The existence of one side gives rise to the existence of the other, such that the balancing of both sides is equal but opposite, resulting in a zero equation. Whilst there were some double entry records amongst accounting functionaries in western literature dating back to the 14<sup>th</sup> century (Italian Treasurer, Messari's accounts, 1340), there are claims that similar accounting technology was used in Korea (Goryeo Dynasty, 918-1392<sup>161</sup>) and in Muslim civilisations (Al Khawarizmy and Al Mazendarany receipts AD 976<sup>162</sup>). Essentially early trade between locations (such as each end of the silk road<sup>163</sup>) was enhanced by the double entry of accounts balancing from one end to the other. Luca Pacioli, a Franciscan friar is accredited with the codification of the double entry methodology in his book, *Summa de arithmetica, geometria, proportioni et proportionalita* (Summary of arithmetic, geometry, proportions and proportionality), published in 1494, and which has led Pacioli to be referred to as the 'father' of accounting (see, for example, accountants-day.info). Double entry accounting is an important recognition of the sources and application of funds moving into and out of an accounting system, recorded as balancing debits and credits.

There are two explanatory approaches to double entry accounting, either or both of which, are included in the university curriculum of early accounting subjects (see ACCY101, University of Wollongong). Competence in double entry methodology, as specified within these subjects, forms an integral part of the mandatory qualifications of an accountant, as

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<sup>161</sup> Developed in Korea during Goryeo dynasty (918-1392) when Kaesong was a centre of trade and industry at that time. The Four-element bookkeeping system was said to be originated in the 11th or 12th century (Pretvits and Wolnizer, 2011)

<sup>162</sup> Al Khawarizmy and Al Mazendarany in AD 976 which show receipts recorded on the right hand page and payments on the left hand page (Zaid, 2004)

<sup>163</sup> The Silk Road is a historically important international trade route between China and the Mediterranean.

evidenced through fulfilment of industry association entry specifications (see the membership requirements of CPA Australia, Institute of Chartered Accountants Australia and New Zealand membership specifications). In the traditional approach<sup>164</sup> to double entry accounting there are three account genres, ‘real accounts’ which relate to assets and liabilities such as the capital accounts of the owners; ‘personal’ accounts which relate to persons or organisations that deal with the accounting entity, such as debtors and creditors; and ‘nominal’ accounts that deal with funds received from trading such as revenue or income gains and funds spent by the business such as expenses and losses. Double entry technology demands that each financial transaction is recorded in at least two different ledger accounts, so that the total debits equals the total credits in the ledger, the accounts therefore balance. Double-entry accounting practice is rules driven, such that, real accounts create a debit for what comes in and a credit for what goes out; personal accounts debit the receiver and credit the giver; and nominal accounts debit all expenses and losses and credit all incomes and gains (Hyans, 1916). Ledgers such as day books do not individually balance with debits and credits however they are balanced when posted to the nominal accounts such as to sales and (represented by) cash at bank. The concept of a ‘day book’ can be broadly applied to include a criminal’s ledger or notebook, recording one side of a transaction (for example, a notebook record of ‘\$x’ from person ‘a’ on day ‘d’) is the same as recording daily sales which then should tally with other expenditure, banking or application of the funds.

Alternatively, the accounting equation approach<sup>165</sup> explains the same double entry methodology resulting in the same debit and credit rules. The accounting equation governs the technology, that is,  $Assets = Liabilities + Capital$ . This equation is then expanded to the five types of accounts that are assets, liabilities, income/revenue, expenses and capital. If there is an increase or decrease in one account, there will be an equal decrease or increase in

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<sup>164</sup> Also known as the British approach.

<sup>165</sup> Sometimes referred to as the American approach.

another account, which must be equal according to where the account is allocated to the accounting equation. In this regard:

- Assets Accounts: debit entry represents an increase in assets and a credit entry represents a decrease in assets. In this regard:
- Capital Account: credit entry represents an increase in capital and a debit entry represents a decrease in capital;
- Liabilities Accounts: credit entry represents an increases in liabilities and a debit entry represents a decrease in liabilities;
- Revenues or Incomes Accounts: credit entry represents an increase in incomes and gains, and debit entry represents a decrease in incomes and gains; and
- Expenses or Losses Accounts: debit entry represents an increase in expenses and losses, and credit entry represents a decrease in expenses and loss.

The importance of double entry accounting methodology for evidence is that it is scientific (it has its own set of principles and rules), systematic (it records financial transactions systematically), complete (it records all aspects of each and every transaction), accurate (Debit and Credit transactions correspond arithmetically align) and controlled (the opposing nature of debits and credits carry through to a balancing equation which can be used to confirm that transactions were accurately and completely recorded<sup>166</sup>). The double entry accounting methodology forms the basis of the patterned principles a forensic accountant would apply to a financial investigation. The properly executed balancing concept of double entry methodology is either the balanced locking key on the financial analysis or confirmation of the unexplained gap where a balance is not achieved. When deployment of these technologies do not balance then the gap is both detected and quantified before the gap

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<sup>166</sup> <http://accountlearning.blogspot.com.au> accessed Dec 2016.

is used to estimate unexplained cash, and put before the court as confirmation of unexplained wealth estimates<sup>167</sup>.

## Accounting Expertise as Opinion Evidence

### Direct Methodologies - Bank Statement Analysis

Whilst bank statements are designed for the lay person to be able to recognise the basic details of money transacted and held on their behalf, they form a vital component in both the bank's financial system and the client's financial system (Madinger and Zalopany, 1999, p199). The use of the double-entry method dictates that the cash and account transactions on the client's bank account are recorded at the same value, in the opposite debit or credit, than is recorded in the client's accounting system, they must match if the accounting systems are valid. This also applies to personal accounts, even where there is no formal business type accounting system being operated. The effect is that the bank's accounting system must balance with the client's banking system therefore the bank's account statement should reflect a balancing record of periodic transactions, detailed chronologically, recorded in the opposite direction to that of the client (that is, a debit to a credit and visa versa).

Prima facie, bank statements are merely a description of one set of debits and credits assembled within one real account of an accounting system, however, analysis of a bank statement by a skilled accountant recognises the deployment of an accounting technology that relates the personal and nominal accounts to each transaction entry on the bank account statement, either directly or through a string of related, balancing transactions. In this manner accounting technology takes transactions and binds them together into an informative narration of the financial performance (profit and loss) and the financial state (balance sheet) of a person, an entity or a set of transactions. In this sense the patterned principle, recognised

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<sup>167</sup> For example, Net Worth Analysis, Sources and Applications and Gross Margin Analysis. These methods will be discussed later in this chapter.

by accountants, is one of balanced debits and credits (often formally referred to as the ‘trial balance’).

Bank statements (produced by a financial organisation) and other business ledgers, such as accounts receivable and accounts payable, should balance to the entity’s accounts that form an interlocking system of double entry balances between organisations. Further they inform the narrative, such as, the entity’s net worth is represented by an amount of cash at bank, or that business ‘a’ is owed \$x from business ‘b’ which recognises that it has lent business ‘a’ \$x, where  $\$x = \$x$ . The double entry accounting system is about balance. If transactions fail to balance they fail the double entry methodology and therefore they beg explanation. Financial auditors use the interlocking double entry logic to verify transactions as validated by the bank statements, produced at arms-length from the business (Arens, Elder and Beasley, 2005, pp683-688). Such an explanation, presented by an expert, is usually informative to the court, particularly with respect to unexplained wealth and financial remediation. An experienced forensic accountant builds on the simple double entry model, recognising where the model may have been defeated (such as the removal of cash trading balanced by reduced gross margins), manipulated (such as revaluing assets to increase ownership capital) or remains unbalanced (such as a loss not being brought forward). The simplicity of double entry methodology is a basic tenant of the accounting profession, enabling expertise to be applied to stand alone ledgers and transactional analysis, through to complex financial interpretation. Willemse, 2004, (in Jordaan 2007) describes the analysis of bank account statements as forming part of the “chain which establishes a causal link” between a financial activity (or a crime), noting that the bank transactions inform the “profits there from and the benefit obtained as a result of these profits” (p23).

Bank statements have been accepted in evidence in a plethora of matters across a range of jurisdictions<sup>168</sup>. They attest to individual transactions, account balances and underpin the documentation of the flow of funds. For example, in *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* (2016), where an offshore transfer scheme, involving Israeli banks, was used to defeat creditors, specifically the Australian Tax Office. Transactions on bank statements were linked (by opposing debits and credits) to show a flow of funds between and out of the bank accounts of several entities including personal drawings. The bank statements were further used to sustain the narrative regarding the purpose of some of the entities involved such as Binqid Pty Ltd being “specifically set up for the purposes of borrowing money from IDB and then on-lending it to other entities for the purposes .....” (at 53). The narrative was sustained by the Binqid account’s bank statements only containing interest payments and withdrawals.

Reflecting on the Chapter 5 discussion, with regard to the admissibility of expert evidence, this dissertation relates the basic review of bank statements and the double entry accounting methodology, to the ‘tests’ of expert opinion provided in *Makita*, which were reaffirmed in *Red Bull*. The ‘tests’ that pertain to the acceptance and treatment of expert opinion evidence under s79 of the Uniform Evidence Act, do not form a “basis rule” but “nonetheless the Acts require that weight and relevance interact at common law” (Australian Law Reform Commission, 2004, at 9.65). In *Makita*, Heydon JA referred to “the interaction between considerations of weight and relevance” (at 9.68) and described seven elements of common law said to be enacted by s79 (see chapter 5). Of particular significance to the issue currently at hand (recognition of double entry methodology), is that there must be an agreed or demonstrated field of “specialised knowledge” and that “there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or

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<sup>168</sup> A search of the Westlaw database (Dec 2016) showed over 1,000 cases referring to bank statements in their judgements. The cases cover matters such as equity claims, real estate, taxation, financial disputes and liquidation.

experience, the witness has become an expert” (at 9.68). Further, the expert’s opinion must be wholly or substantially based on the specialised knowledge with the opinion properly anchored in identified facts. The expert must bring together the above in a demonstration of the intellectual basis for the opinion consistent with the application of the expert’s “specialised knowledge”.

*Makita* was a decision on whether an employer failed to provide a safe means of access between the car park and offices, via stairs. An expert gave evidence that dealt with the slipperiness of the stairs at the time of the accident. The expert tested the stairs that formed the basis of the opinion nine years after the accident which gave rise to judicial deliberation of both the forensic consideration and the evidentiary concern of the expert opinion. In *Red Bull* the expert testimony was brought into question regarding whether marketing was considered an area of expertise and whether an expert can give evidence on matters of common experience. The matter arose with respect to the distribution of products of a similar nature to Red Bull beverages and whether that distribution was deceptive conduct. The justices in *Red Bull* referred to Heydon JA in *Makita* as the commencement of their deliberations with respect to the expert testimony of Dr Beaton, a marketer. Whilst these cases do not, in and of themselves, refer to accounting expertise the patterned principles elucidated, that give regard to the respective experts, carry across to many fields of expertise that include accounting.

Application of the judicial principle for the acceptance of opinion evidence necessitates that there must be a field of “specialised knowledge” identified with respect to the analysis of bank statements. In this regard it is appropriate to consider the information contained on each statement as well as the process an expert should undertake in analysing bank statements, individually and as a group. The bank statements highlight details such as the name and contacts for the financial services provider, individualised account numbers and account

ownership details, with each statement page forming a numerically ordered, chronological list of transactions. These transactions are sorted in the language of accounting, that is, expressed in monetary terms, converted to a common currency and ordered under either a credit or a debit column. The debit or credit column informs the narrative as to whether the transactions represent the inflow or outflow of funds. The statement is prima facie a ‘personal’ account in the traditional accounting methodology because it is created by a third party associated with the account holder, and in that form is held in high regard from auditors to validate business and personal accounts<sup>169</sup>. The bank statement also informs the skilled reader of evidence that pertains to the trading of the account holder and the entries on the nominal and real accounts. In detail the transactions on the bank statement are ineradicably aligned to the account holder’s general ledger, or, if an individual, their purchases and expenditure relating to their net worth and their financial behaviour. The evidential narrative is informed by the detail of each transaction (such as supplier purchase, cash withdrawal, the card on which the withdrawal was made, the date and time of purchase or payment, transfers between accounts, transfers to other banks, e-transfers, bank assisted transfers or withdrawals, cash or cheque deposits, bank cheques, any individual client notations). Bank account statements contain more than just numbers detailing the period’s activities, fees and balances. Behind this data is valuable information that a skilled practitioner relies upon to enrich the evidential story through aggregation, consistent with double entry methodology, aligned with the general ledger accounts or a combination of like transactions (such as expenses, direct costs, income, wages etc.). Once aggregated, these accounts can be analysed for trends with commonality and difference compared between time frames, between the accounts themselves, between accounts from varying sources and amongst comparable attributes (*Gorr v McGrellis*, 2012).

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<sup>169</sup> Auditors recognise that bank statements have high reliability with respect to accuracy and completeness and therefore auditors use bank statements in their substantiation of business bank accounts and therefore the flow on to all forms of income and expenditure managed through the bank accounts. Auditors value the separation of duties between the management of client accounts and the bank accounts while recognising the indelible links between the accounts of both organisations conforming to the double-entry methodology.



In this regard what commences as a mere list of transactions on a third party statement leverages on the double-entry method to support increasingly complex vertical and horizontal accounting analysis<sup>170, 171</sup>.

Analysis of bank statements is not a skill generally held by non-accountants. Even amongst trainee financial investigators, Willemse (2003, 2005, in Jordaan, 2007), noted a lack of expertise in what to look for on bank statements, how to structure the data contained therein, how to analyse the data and how to effectively present the findings of the data effectively in court<sup>172</sup> (Jordaan, 2007). Jordaan reviewed the use of bank statement analysis in the South African legal system and advise of an appropriate patterned manner of bank statement analysis to establish evidence of illicit financial activity. In the U.S. the New Jersey Division of Criminal Justice Training Academy, white collar crime and investigation course, teaches a stepped process of analysing bank statements that includes instructions on how data is to be searched, sorted, totalled and reported in a consistent manner. Specific formulae are applied to determine significant depositors and payment recipients both in terms of frequency of deposits and amounts of deposits (Peterson, 2002) (see Appendices 7A and 7B). Further the explanation of how to use pattern analysis to establish usual and unusual patterns of receipts and payments is recognised as an accounting investigation skill (Peterson, 1998, p54). Some of the most common patterns are determined by general ledger coding, by reference, by date, by amount or by transaction destination (New Jersey Division of Criminal Justice, 2001, p228). ATM withdrawals also reveal location information that can provide an indication of

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<sup>170</sup> Vertical analysis is a method of financial statement analysis in which categories of accounts (for example assets, liabilities, profit or expenses) are compared to the total account or to the total of another account (for example expenses as a percentage of gross profit) ([www.investopedia.com/terms/v/vertical\\_analysis.asp](http://www.investopedia.com/terms/v/vertical_analysis.asp) accessed Dec 2016)

<sup>171</sup> Horizontal accounting analysis is a fundamental trend analysis in which an analyst compares ratios or line items in financial statements over a period of time ([www.investopedia.com/terms/h/horizontalanalysis.asp](http://www.investopedia.com/terms/h/horizontalanalysis.asp), accessed Dec 2016).

<sup>172</sup> Willemse made his comments based upon his experience training financial investigators at London's Financial Intelligence Centre's Financial Investigation Training Program where in 2004, 66 law enforcement officers were trained from 10 South African law enforcement agencies.

other activities such as a regular attendance at a club or hotel (Willemse, 2004, in Jordaan, 2007; Fargher expert evidence in *Gorr v McGrellis*, 2012).

The process of dealing with bank statement analysis is important because as Gleeson CJ emphasised:

“... the provisions of s79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question” (*HG v The Queen*, 1999 at 39).

The work of Jordaan, 2007, reviewed the performance of 20 financial investigators, interviews with senior financial investigators as well as relevant course material in the New Jersey, London and South African financial crime response jurisdictions, that lead him to articulate an ordered process for the analysis of bank statements, a process that has a logical flow and the pays attention to the requirements of form in order to produce an evidentiary report. The report, explains that the steps taken in the analysis should note the facts, assumptions and conclusions drawn by the expert analyst as the steps have been progressed. The analytical process is patterned and can be taught and learned in professional structured instruction, such that the analysis of bank statements suggests that it is appropriate for expert evidence. Specifically the analysis process is:

- Collation of the information contained in the bank account statements into an electronic format;
- Identification of significant payees and depositors;
- Compilation of summary statements which summarise the financial information in the bank statements;
- Examine the information contained in the bank account statements over a period of time to produce a time series analysis;

- Draw up various graphical charts to visually display the information contained in the bank account statements;
- Examine the bank account statements and the results of the previous stages of the analysis process to determine the patterns of activity with regard the accounts to determine any unusual activity;
- Report on the findings of the analysis of the bank account statements either by way of an affidavit, if the analysis is going to be used as evidence, or by way of a report, if the analysis is going to be used for intelligence purposes.

In the formation of a patterned process acceptable for the Australian jurisdiction one should add a point where the expert analyst discusses the selection of specific methods, any assumptions made in the selection of such methods or the rejection of other methods (“An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given”) (2.4 GPN-EXPT, 2016). Appendix 7B details the recommended patterned principle adapted<sup>173</sup> for the proper process of analysing bank statements under the Evidence Acts as applicable to Australian jurisdictions. Properly managed, the use of accounting expertise and interpretive skills applied to bank statements allows for supported inferences to be developed and confirmed in order to assist the court’s deliberation. The importance of expert analysis of bank statements is that the deductive inference is based on the information contained in the bank statement, the relationships linked to the bank statements and the facts under examination, not new facts, but expertly presented, information that is extracted and displayed to the court.

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<sup>173</sup> Adapted from the conclusions of Jordaan (2007) and the New Jersey Division of Criminal Justice (2001)

## Accounting Expertise as Opinion Evidence

### Direct Methodologies – Inter Entity Transactions

The double-entry methodology links transactions between entities such that a debit in one organisation gives rise to a corresponding credit in another. In Robson's (1992) parlance, accounting inscriptions allow for the transportation of funds where the value remains recognisable, constant and convertible. This facilitates the "follow the money" approach to a forensic accounting analysis. The flow of money is initially identified through the transactions that eventually form the patterns of funds that flow between entities for genuine and manufactured purposes. The nature of the entities vary from individuals to incorporated entities, trusts and joint ventures. The structure of entities can be very complex and include provisions for opaque blockages, such as, the use of bare trusts driven by agreements rather than people<sup>174</sup>, the use of corporate trustees<sup>175</sup>, incorporation of shell companies<sup>176</sup> and the registration of corporations in limited transparency jurisdictions (see, for example, Montessa Fonseca as a world-wide facilitator of such structures based in Panama, also known as 'the Panama Papers', 2016).

The follow the money approach requires the progressive identification of documentary evidence in one entity that relates and corresponds to transactions in another entity. The correspondence may be cross jurisdictional. Following the money is predicated on information transparency and access which can vary considerably (for example, under legal authority, court directed scrutiny, international treaties or simply limited access making discovery difficult). Specific legislation and treaties help to facilitate following the money

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<sup>174</sup> In such a bare trust the beneficiary has the absolute right to the capital and assets within the trust, with the legal and beneficial ownership of the property is separated by an agreement. The agreement details are usually stored in a low transparency jurisdiction.

<sup>175</sup> That is the trustee is an incorporated body rather than a person, providing an extra layer with respect to beneficial ownership and trust decision making.

<sup>176</sup> Incorporated shell companies (sometimes known as \$2 companies) have minimal assets, such as the 2 x \$1 paid up share entitlement. They provide a financial vehicle through which to wash funds.

trail, however this is a complex and pragmatic area, beyond the scope of this dissertation<sup>177</sup>. Follow the money techniques have gained significant prominence as a result of the Financial Action Task Force's emphasis on Anti Money Laundering over the past 20 years (see, for example, Australia's international obligations as a member under the FATF 40 plus 9 recommendations, 2003). The process of following the money in money laundering matters requires recognition of the placement, layering and integration phases. Placement describes the relocation of tainted funds, layering is the disbursement of such funds to confuse the money trail, with integration facilitating funds to be invested back into legitimate activities. As discussed in earlier chapters of this dissertation, the international focus on anti-money laundering programs has been a significant catalyst behind the juridification of unexplained wealth legislation, however, the subject of Money Laundering and Anti-Money Laundering accounting techniques is beyond the scope of this dissertation. Nevertheless, the money laundering typologies published by the FATF Training and Research Institute (TREIN) give potential accounting expert witnesses a reference platform from which to update their follow the money techniques in reflection of changes in the methods and trends of criminals as they respond to the evolution and implementation of protective financial standards (see <http://www.fatf-gafi.org/publications/methodsandtrends>). The study of typology reports is a legitimate skill acquisition technique that underpins a forensic accountant's expert knowledge (see, for example, the Austrac typologies and case studies report 2012, 2013, 2014).

### **Accounting Expertise as Opinion Evidence**

#### **Indirect Methodologies - Net Worth Analysis**

Forensic analysis of bank statements for the purposes of evidence is referred to by accountants as a direct methodology. This is because the record of transactions on the bank

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<sup>177</sup> For example, the harmonisation and recognition of international treaties with similar domestic prosecutions in all associated jurisdictions.

statements is inclusive and 'on account' because of the fact that each line item record is for each transaction. The alternative to direct methodology is indirect methodology which is most appropriate where there are insufficient records to undertake a direct methodological approach to a financial investigation. The indirect methodology assembles a structured framework for financial analysis that adheres to the patterned principles of debits and credits (that represents the inflows and outflows of funds), however the process is cognisant of the need to balance the profit and loss inflows and outflows (debits and credits) to the eventual balance sheet accumulation from one period to another. That balance is deduced in accordance with the rules of the indirect method being deployed. That is, the gap between the balancing of known debits and credits, is acclaimed as unexplained income, which can be quantified by the need to balance the monetary inflow with the outflow and net accumulation.

Net Worth Analysis ('NWA') is a method that expresses the financial gap between what a person is worth at one point in time and what a person is worth at a subsequent point of time, taking into account what funds have been brought into the person's financial equation and what funds have been spent by that person. NWA is most often used with respect to an individual rather than an incorporated entity and is often a procedure triggered by observation of an ostensible, exorbitant and lavish lifestyle apparently beyond the target individual's financial means. The NWA aims to establish evidence that an individual must have received funds from an unknown source and derives an estimation of the amount of funds received within a specified period. The evidence is portrayed through the gap that arises when there is a discrepancy between the assets owned by, and expenditure made by, an individual and their assets and income from known sources. Albrecht et al (2016) describe the NWA approach as:

An analytical method that estimates a suspect's unexplained income.  
Liabilities are subtracted from assets to give net worth, and then the  
previous year's net worth is subtracted to find the increase in net worth.  
Living expenses are then added to the change in net worth to determine a

person's total income, and finally the known income is subtracted from total income to determine the unknown income (p668).

Expressed in steps:

1. Assets – Liabilities = Net Worth
2. Net Worth – Prior Year's Net Worth = Net Worth Increase
3. Net Worth Increase + Living Expenses = Income
4. Income – Funds from Known Sources = Funds from Unknown Sources (p269).

The NWA method is a broadly used forensic accounting technique deployed by the U.S. Federal Bureau of Investigation, the US Drug Enforcement Administration (Albrecht, 2016, p269), the U.S. Internal Revenue Service (Dorrell and Gadawski, 2012, p257) and the Australian Taxation Office. It builds on accountancy's balancing principles and forms part of the knowledge and skills base of a forensic accountant (Dorrell and Gadawski, 2012). The NWA method is included in the curriculum of forensic accounting courses at both undergraduate and graduate level (see, for example, the University of Wollongong Master of Forensic Accounting subject curriculum for ACCY953 and ACCY954, undergraduate curriculum ACCY343). Appendix 7D describes the proper stepped deployment of the NWA method.

The net worth method was used by the forensic accountant in *R v Barker* (2014) where the issue was unexplained income arising from drug trafficking rather than income personally acquired from the running of car yard and pizza businesses. The forensic accountant undertook a net worth analysis in conjunction with a sources and application analysis for the financial year ending 30 June 2008, then up to the 23 April 2009. She found unexplained funds in the first period of \$151,000 and \$1.61 million in the second period, substantially assisted by the amount of \$995,000, in cash, found on the perpetrator's property. The sentencing judge did not accept the assertion that the funds were from cash reserves,

accumulated by the defendant, from previous legitimate sources over 12 years earlier. On appeal the perpetrator agreed that there was unexplained income however he disputed the quantum estimated by the forensic accountant. He put forward two alternative methods of calculating the unexplained wealth, one pertaining to the estimated annual purchases of his four known customers (described under surveillance) and the other based on extrapolation of the amounts received during the surveillance period<sup>178</sup>. In his appeal judgement, Phillippedes J, (supported by Carmody J) upheld the use of the net worth method against the alternative methods citing weaknesses in the ad hoc nature of the proposed alternative calculations. That is, the judges supported the validity of the patterned principles described as the Net worth Method, as accepted by the accounting profession, over proposed alternative calculations that failed to validate the reliability of their methodology.

The Australian Taxation Office ('ATO') utilises a variation on the net worth method known as the 'T' account method. Referring to the reasonable basis for a section 167 (Income Tax Assessment Act, 1936) default assessment:

68. The Commissioner may make a default assessment of a taxpayer's taxable income upon any basis that is reasonable and takes into account their particular circumstances. This includes the use of available external information, indirect audit methodologies, statistical information or extrapolation from previous years' returns. Examples of the bases that have been supported by the courts include 'T' accounts, asset betterment calculations and unexplained deposits in financial institution accounts.

69. Using a 'T' account, ATO personnel can compare cash available at the beginning of a period plus cash received during the period with cash expended during the period plus cash on hand at the end of the period. The two sides of the 'T' account should balance if ATO personnel have full and

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<sup>178</sup> If the applicant's proposed methodology was accepted this would have reduced the estimate of undisclosed income from \$1.6 million to approximately \$600,000.



accurate information. If the two sides of the 'T' account do not balance, it is likely there is undisclosed income. (PS LA 2007/24)

The T account method has been accepted in Australian courts and the Administrative Appeals Tribunal of Australia, particularly with respect to default taxation liability assessments. This method not only fulfils the Commissioner's obligation with respect to creating a method of tax assessment but it provides a measure of undisclosed (unexplained) income. In *Confidential v Federal Commissioner of Taxation* (2013) it was accepted as allowing "the Commissioner to compare: the cash available at the beginning of a period plus cash received during the period" (at 15) in a matter of undeclared cash assessment against a husband and wife. Branson J in *Favaro v Federal Commissioner of Taxation* (1996) noted that "... T accounts are a technique used as an indirect method of ascertaining a taxpayer's taxable income. They compare cash available at the beginning of a period plus cash on hand at the end of the period. With full and accurate information, the 2 sides of the exercise should balance. ..." (at 5) after which he went on to accept T account submissions from both the respondent (the Commissioner) and the Applicant (Favaro). This acceptance confirmed the acceptance of the T account method allowing the matter to focus on individual items within the calculation<sup>179</sup>. Further, in *Amirthalingham v Federal Commissioner of Taxation* (2012) the judgement notes that the Commissioner used the T account method to make the estimate of understated income and that the "The taxpayer had not sought to show that the T account method was flawed"(at 5). The tribunal affirmed the T account method as a valid methodology for determining and quantifying the taxpayer's undisclosed income.

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<sup>179</sup> At dispute were several sources of funds portrayed as loans in the applicant's T account.

## Accounting Expertise as Opinion Evidence

### Asset Betterment Analysis

Asset Betterment Analysis is similar to Net Worth Analysis, in that it broadly measures the net difference between legitimate and illegitimate funds based on the shortfall in explained earnings. Both methods are indirect methodologies. Asset Betterment is seen by the ATO as an alternative method to calculate default assessments under s167. “An alternative method to a T account available to ATO personnel is an asset betterment calculation. Under this method, the net worth of an entity at the end of each relevant year is compared with the net worth at the beginning of each of those years, and an estimate of annual asset growth is obtained. Non-deductible expenditure is added to this estimate and liabilities and exemptions are subtracted. A figure is then computed for total taxable income.” (PS La 2007/24 at 70). Asset betterment focusses on the difference between accumulated funds at one point in time and then at another, subsequent, point in time. The net asset position at each point represents a balance sheet, being a snapshot of the financial position at a point in time. The path between the two points is also mapped with operating expenses (personal and business) and loans offset against legitimate asset accumulation through realised capital and earnings. The asset betterment method is built upon both the fundamental double-entry method and financial accumulation and offset techniques which form part of the professional knowledge and skills of a recognised accountant. Accumulation of transactions is conducted under the rules of offsetting debit and credits, required to balance for completeness. On one hand assets are accumulated to the net extent of being reduced by liabilities. In the deployment of the asset betterment methodology, consideration of the net means during the points of accumulation measurement are made. For example income received and expenses incurred and paid are measured.

Asset betterment has been regularly used in the Australian taxation context<sup>180</sup>. The appeal from the Federal Court of Australia in the matter of *Commissioner of Taxation of the Commonwealth of Australia and Manuela Gashi* (2013) raised questions regarding the use of the asset betterment method. In summary the commissioner issued assessments from 2000 to 2006 based on deployment of asset betterment accounting technology with results summarised in table 8.1 below:

Table 8.1 Summary of Asset Betterment (snapshot 30/6/xx) results of unexplained income  
2000 to 2006

	1999	2000	2001	2002	2003	2004	2005	2006
Assets	230000	230512	897185	1760957	2065420	2636933	2606153	3061447
Liabilities	(112482)	(112482)	0	(177893)	0	(154845)	(159500)	(445347)
Net assets	117518	118030	897185	1583064	2065420	2482088	2446653	2616100
Increase		512	779155	685879	482356	416668	(35435)	169447
[Non assessable receipts]		0	0	(81167)	(7300)	(63900)	(6500)	0
[Expenditure/ Subsistence]		58663	327143	373424	610851	1150546	1253533	817791
Income		59175	1106298	978136	1085907	1503314	1211598	987238
Disclosed		(17466)	0	0	(25975)	(22980)	(49545)	0
<b>Undisclosed</b>		<b>41709</b>	<b>1106298</b>	<b>978136</b>	<b>1059932</b>	<b>1480334</b>	<b>1162053</b>	<b>987238</b>

Their Honours described the issuing of the amended assessments, in terms of the asset betterment method, as follows:

A letter accompanying the assessments explained to Mr Gashi that the assessments included understated income quantified in an Asset Betterment Statement. The Asset Betterment Statement was enclosed with the letter. The Asset Betterment Statement comprised two distinct parts. The first part took the form of a balance sheet. It identified assets on hand as at 30 June 1999 and then assessed the change in identified assets and liabilities from year to year. The assets listed included numerous bank accounts in Australia and overseas, motor vehicles and real property. The liabilities included

<sup>180</sup> A search of the use of the asset betterment method in the Westlaw.au database (Dec. 2016) highlighted 97 reported cases.

home loans. A net asset position was then recorded for each year. After calculating the net asset position, the Commissioner then addressed what might generally be described as a cash flow statement. The Commissioner identified non-assessable receipts (in the form of loan repayments and capital profits on the sale of a principal residence) which were available to fund Mr and Mrs Gashi's expenditure (and possibly, the increased assets). The Commissioner then identified expenditure by Mr and Mrs Gashi in each of the relevant years.

In each year, the increase in net assets was added to the amount identified as specific expenditure less the amount identified as non-assessable receipts. The Commissioner then deducted the taxable income disclosed in that year to calculate the amount that was, in his judgment, undisclosed income. In other words, the Commissioner identified the amount required to fund the increased assets and to fund the identified expenditure which was unable to be funded by the amounts disclosed. The understated amount was split equally between Mr and Mrs Gashi and formed the basis of the default assessments and amended assessments issued to Mr Gashi as 1, 2, 4, 10, 12, 14 and 16 in Annexure A.

The Asset Betterment Statement had 11 attachments which provided details of the calculations for specific items in the Asset Betterment Statement. So, for example, in Attachment B the Commissioner identified a bank account in Luxembourg with a closing balance of \$241,498 as at 30 June 2001. The attachment identified the balance at year end for the relevant period, the withdrawals from that account and the basis on which the Commissioner had calculated interest on the year end balances. Attachment C was the Commissioner's analysis of the expenditure by Mr and Mrs Gashi recorded on their credit cards. Attachment D was an analysis for the interest expenses incurred in relation to various home loans. Attachment E was an analysis of funds sent overseas. It listed each transfer by date and amount. The amounts were obtained from a review of Austrac records. Attachment F was a list of asset purchases by Mr and Mrs Gashi. Attachments G and H were analyses of their bank accounts. Attachment I was an explanation of the Commissioner's calculation of Mr and Mrs Gashi's personal living expenses. Attachment J analysed Mr and Mrs Gashi's overseas travel. Attachment K recorded the Commissioner's analysis of Mr Gashi's gambling losses. It will be necessary to refer to some of these attachments later in these reasons for judgment. For present purposes, it is sufficient to note that the Commissioner's assessment of Mr and Mrs Gashi's undisclosed income was not a figure plucked out of the air. It was an amount judged by the Commissioner to reflect the increase in their wealth which was not able to be explained by their level of disclosed income.

(at 9, 10 and 11)

The appeal rested on several grounds, two with respect to the asset betterment calculations. Firstly with respect to the undisclosed amount being of the nature of ordinary income (under its meaning s 6-5 (1) ITAA, 1936) and secondly that the use of asset betterment statement “were wrongly or without any proper evidentiary foundation” (at 58). The second ground of appeal was followed by specific calculations typical of an asset betterment statement, and included therein. Neither of these appeal grounds disputed the asset betterment method, but instead they relied upon taxation law with respect to the definition of ordinary income and the onus not to merely disprove an asset betterment statement but to (under s 14ZZO of the Tax Administration Act, 1936) “demonstrate the unexplained accumulated wealth in each of the relevant years was from non-income sources” (at 67) through identifying the source or sources of funds. The judges upheld the Commissioner’s use of asset betterment method as well as its application to s 167 (ITAA,1936) assessments. This judicial interpretation upholds the patterned principles of asset betterment methodology in the establishment and quantification of unexplained income, such that, the quantification is, in of itself, sufficiently valid not to have to further demonstrate a quantification of the application of funds removed from the income statement. For example the unexplained funds quantification did not have to rely upon an alternative explanation of the application of the missing funds, simply quantification of the unexplained gap was sufficient proof.

### **Accounting Expertise as Opinion Evidence**

### **Sources and Application of Funds Method**

The sources and application of funds method is one of the five indirect methods recognised by the U.S. Internal Revenue Service (IRM Formal Indirect Method 4.10.4.6.3). It’s advantages are that it is simple to compile and explain as it uses cash flows to “compare all known expenditures to all known receipts” (Dorrell and Gadowski, 1012, p257). Similar to

the net worth method and the asset betterment method, the sources are combined before being compared with the total applications, such that excess applications gives rise to a gap amount deemed to be from undisclosed or unexplained sources of funds. If the sources exceed the application then there is no unexplained income. Statistical methods are used to estimate some of the applications where there is a lack of application detail (such as the use of Australian Bureau of Statistics data to establish living costs).

The patterned principles utilised in the compilation of a sources and applications statement are similar to the corporate form (previously AAS12) which has now been subsumed into a company's statement of cash flows (AASB 107; IPSAS 2). However, the application of the sources and applications statement to gap analysis has also been accepted by the courts to assist to establish fraudulent behaviour. In *L&H New Developments v MYR Investments Pty Ltd* (2013) the Supreme Court of Victoria investigated the financial behaviour of company directors and partners in a residential property development project by inspecting all the partnership dealings and transactions prior to the date of dissolution. The sources and application method was used to advise the court regarding monies advanced by Westpac to the partnership (joint venture) and "how those funds were appropriated by the partnership" (at 11). The matter was complex with "the only way in which a reconciliation could be satisfactorily performed, and conclusions reached in respect to indebtedness due to each of the Partners, was for an analysis to be performed on a project by project basis with sources and application of funds and derivation of profits covering all of the projects that the two parties had undertaken" (at 163). To this aim the sources and application method was applied to recognise where funds had been sourced and applied as directly reasoned on a transaction by transaction basis. Applied in such a way, the sources and application method informed the court's narrative by tracking and allocating the funds and disentangling the mixture of funds to understand the purpose and relative project allocation. Sources and

application, through the narrative discards internal transactions, providing clearer focus on those transactions externally contributing to the enterprise (sources) and those external transactions paid out of the enterprise. The sources and application method therefore has attributes of both direct and indirect methodology, either by sustaining an improper inward transaction (such as funds received directly from an illicit activity) or confirming an inappropriate outward transaction (such as unapproved cash removal). Where sources or applications fail to balance transactions beg to be explained and may likely be the result of or benefit from illicit activity.

### **Accounting Expertise as Opinion Evidence**

#### **Gross Margin Analysis or Mark-up Method**

The gross margin / mark up method ('GMM') is an indirect accounting method of establishing what the gross profit of an organisation should be compared with what the declared gross margin has been reported. The issue is that if sales (predominantly cash) are not declared but the cost of sales is declared then the gross margin will suffer and will decline with respect to the real gross margin. This then flows onto the net margin after cost of goods sold and net profit which is established using normal accounting principles for calculation profit and loss (AASB 101, 2012). Over a period the balance sheet equity (net assets) is reduced through the lack of income inclusion and retention. This type of undisclosed income is referred to as "skimming" or "off book" (Dorrell and Gadawski, 2012; Kranacher et al, 2012). In practice the GMM establishes what the gross margin should be by analysing the cost price and the sale price of each product then multiplying that product by the percentage of sales that it represents. That is the net profit (sales price less cost price divided by sales price) for each product is multiplied by the percentage of each product in the sales portfolio. This method may cover all products or be mitigated as a shorthand method by calculating the

top 20% of products, relying on the Pareto Principle<sup>181</sup>, however in this abridged form the assumptions stating reliance on 20% of the products would cause the accountant's evidence to have reduced probity because the risk of error in the quantification is increased.

The use of gross margin analysis is well known to the courts, mainly with respect to compensation or damages claims where a reduction in gross margin is calculated and often multiplied by actual and damaged turnovers<sup>182</sup>. Other matters taking note of gross margin analysis include misleading and deceptive conduct, business valuation and liquidation claims. Calculation of gross margin and the consequent elements of a profit and loss report such as cost of goods sold, income streams, stock valuation, stock losses, operating expenses, depreciation, normal and abnormal income are within the special knowledge of accountants, governed by the application of processes referred to under accounting conventions, Generally Accepted Accounting Principles and Accounting Standards. Gross margin analysis and profitability ratios are a basic financial and internal audit review technique employed by auditors for both general and specific assurance (Moroney et al, 2011, p135). Gross margin analysis is an important, if more of an indicative technique, particularly relevant when demonstrating to courts predicate reasons (or symptoms) for investigations (Kranacher et al, 2012; Albretch et al, 2016).

## **Accounting Expertise as Opinion Evidence**

### **Unit and Volume Method**

The unit and volume method provides a benchmarking tool to analyse profitability based on benchmarking analysis of similar economic activity over a consistent input. For example, a

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<sup>181</sup> The Pareto Principle, also known as the 80/20 rule, is a theory maintaining that 80 percent of the output from a given situation or system is determined by 20 percent of the input.

<sup>182</sup> A general search referencing "gross margin" in Westlaw reported 147 reported cases where the gross margin was considered in some form, particularly with respect to damages claims. The courts have also routinely accepted discounted cash flow valuations of businesses which are based upon historic and projected gross and net margins (see Palepu et al, 1996)



taxi business may be benchmarked over the mileage travelled because the likely profitability (income less costs) has been accumulated and analysed over a large number of similar taxis operating in similar conditions. This method is particularly insightful where an input element is closely linked to the output unit that generates income. For example, throughput of Kebab wraps (one per Kebab) has a high correlation to the number of kebabs sold at a known sales price. The ATO has undertaken a longitudinal study of a large range of mainly high cash industries in order to establish unit and volume measures benchmarking reported profitability. The ATO analysis takes into account industry acceptable loss factors and they have made their results available to tax agents and therefore to the public. The ATO describes their program thus:

Small business benchmarks are a guide to help you compare your business's performance against similar businesses in the same industry.

The benchmarks:

- are calculated from income tax returns and activity statements from over 1.3 million small businesses and are verified as being statistically valid by an independent organisation
- account for businesses with different turnover ranges (up to \$15 million) across more than 100 industries
- are published as a range to recognise the variations that occur between businesses due to factors such as location and the businesses circumstances.

We update the benchmarks each year using the latest available data. The current data is from the 2013–14 financial year.

(<http://www.ato.gov.au/Business/Small-business-benchmarks/>)

The unit and volume method is an emerging indirect accounting methodology that needs to be used with caution such that variables are clearly explained together with the analytical

assumptions. Use of this method is increasing with the increased availability of big data and the computer power to process analytical accumulation and comparison variables. The courts have not yet held the unit/volume method as having a high degree of probity with its validity more appropriate to the civil test of on the balance of probabilities rather than the criminal test of beyond reasonable doubt.

## **Part Two Conclusion**

Part two of this chapter has considered a number of recognised forensic accounting techniques, which, when appropriately deployed by a properly trained and skilled accounting professional, can be validated against the *Makita* criteria. This is an important consideration in responding to the research questions. Chapter 9 will build on the peer accepted status of these accounting technologies to validate the application of appropriate patterned accounting principles to be applied when assisting the court's adjudication in the UW and POCA genre.

## **Part 3 – Entities and Beneficial Financial Control**

“A beneficial owner is a person who enjoys the benefits of ownership even though the title to some form of property is in another name. It also means any individual or group of individuals who, either directly or indirectly, has the power to vote or influence the transaction decisions regarding a specific security, such as shares in a company” (Investopedia, accessed Dec 2016). From an accounting point of view, the nature of ownership and equity is straight forward as it corresponds to the balance sheet and the financial entitlements of position holders, such as those held by shareholders or beneficiaries. Beneficial ownership includes less tangible behavioural aspects that nonetheless culminate in the receipt of an economic benefit, and in that regard the concept of beneficial ownership includes influence by a range of informal means such as through the provision of finance, intimate family relationships, contractual associations or through strategic decision

capabilities (FATF, Guidance on Transparency and Beneficial Ownership, 2014 pp14-16). The concept of beneficial financial control is an important consideration when addressing accounting evidence in matters such as UW or POCA, because of the opaque (non-transparent) means that may be employed to distract the reader from the normal transaction flow or purpose. To that end the matter of control will be further addressed in Chapter 9.

### **Recognised Forensic Accounting Methods – Inter Entity Transactions**

Accounting analysis of inter entity transactions commences at the interlocking, double entry method where a transaction in one entity balances with an opposing transaction in another entity, with the accounts of each entity being kept distinctly separate according to the entity structure. In this way one company produces their financial accounts separately to another. Similarly partnerships keep separate accounts to the partners but record partnership to partner transactions. Trusts recognise the trust financial accounts separately from the trustee and from the beneficiaries. The accounting and the audit standards proceed on the basis of separate entity structures albeit they recognise (and at times focus upon) appropriate recording of associated party transactions.

In the accounting sense the control of the entity is as defined by specific legislation such as in the *Corporations Act* (2000) with the roles and responsibilities of office holders, management and shareholders defined with respect to their status with the particular entity. The concepts of the separate legal entity principle is important as it protects shareholder rights, and is the prima face stance of the legal system (*Saloman v Saloman*, 1897). “When a company acts it does so in its own right and not just as an alias for its controllers” (Lord Sumner in *Gas Lighting Improvement Co Ltd v Inland Revenue Commissioners*, 1923, at 740). However, the

courts have been prepared to “pierce the corporate veil”<sup>183</sup> where there are significant economic or behavioural reasons. Categories for taking such action balance legal norms above structural factors due to issues which Jenkinson J described in five areas: agency, fraud, sham or façade, group enterprises and unfairness or justice (*Dennis Willcox Pty Ltd v Federal Commissioner of Taxation*, 1988). Similarly trusts legislation sets out control by responsibilities for the respective roles of trustee, appointor and beneficiary. However, the actual nature of control attributes may not reflect the formal structure and require the application of a behavioural recognition of actual control.

## Chapter Conclusion

It is important to recognise that the legal profession and the accounting profession overlap in their interpretive view of what are essentially accounting techniques. This is not in the matter of facticity, but in the sense of purpose as adopted by the court. Part One of this chapter provided some examples of how the normative values of the court and its legal purpose have provided conceptual direction for the deployment of accounting technologies, such that the genre of the court, is reflected in the ontology of the expert accounting evidence. The court justifies this oversight under the expert witness concept of relevance.

Further, the expert witness criteria for access and/or probity, requires the forensic accountant to produce an opinion that is within their expertise, that is, expertise based upon a body of specialised knowledge and training. Part Two of this chapter reviewed direct and indirect accounting methodologies accepted by the accounting profession and included in the training, and skillset, of forensic accountants. Importantly, the methods arising from these methodologies, when appropriately deployed, are accepted by professional peers, therefore

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<sup>183</sup> Broadly speaking the concept of the “piercing the corporate veil” is a legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders. The courts “disregard the separateness of the corporation and hold a shareholder responsible for the actions of the corporation as if it were the actions of the shareholder” (Ramsay and Noakes, 2001)

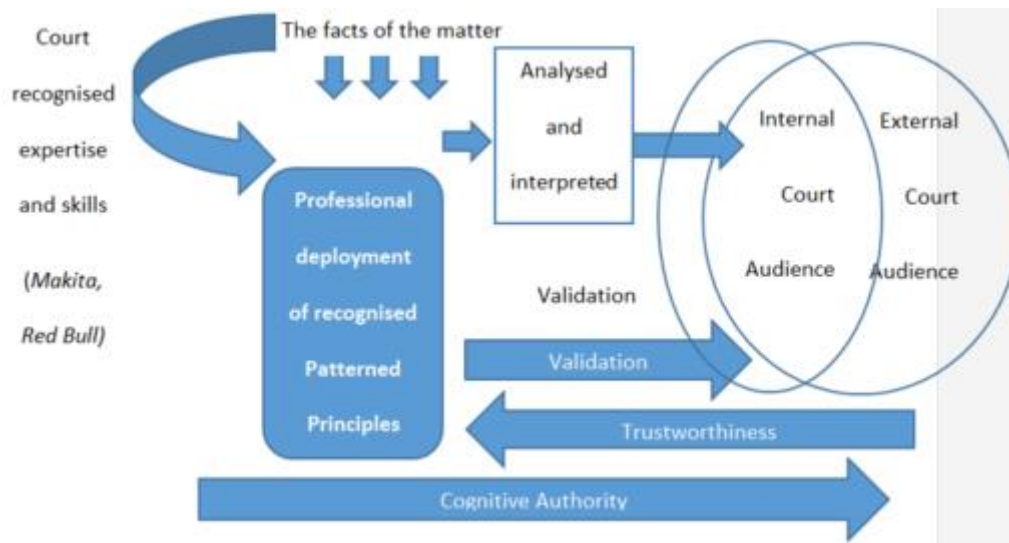
the determinants of expert testimony, as outlined in *Makita*, can be fulfilled. Finally the chapter considered the application of the key accounting and legal concept of beneficial fiscal control. The discussion noted the accounting view of control which has been extended for legal purposes and therefore its relevance in compiling accounting evidence extended from structural control to the recognition of beneficial control attributes. Chapter 7 will relate these three parts to specific consideration of the research questions under the UW and POCA legislative genre that include matters from the court and issues that relate to juridification.

## Chapter 9: Forensic Accounting Evidence for Forfeiture Matters

### Introduction

In preparation to address the research questions, this dissertation has considered the legal and social philosophy of a range of authors, particularly that of Jurgen Habermas, Nozick and Michels. Further, regard has been given to the application of these philosophies to the practice of accounting by authors such as Laughlin and Power, Arrington, Latour and Robson. Accounting has then been considered in its role as an expert technology presented to the court as applied to the adjudication of matters. The evolution of accounting, presented as expert evidence, prompted reflection upon accounting's cognitive authority in the expression of expert opinion evidence, such that, the accounting facts of the matter are understood both in order to assist with the court's adjudication and with the translation of judicial decisions. The translation role connects money with purpose, linked to lifeworld norms and community confidence. In particular, the validation of accounting evidence has been viewed with respect to its consistency with the *Makita* principles, accepted accounting peer practices and precedential judicial logic. The appropriate deployment of professionally accepted patterned principles has arisen as the key to the determination of valid forensic accounting evidence. Diagram 9-1 expresses this approach figuratively, in that, it outlines how the court's internal and external acceptance of trustworthy expert evidence is underpinned by properly deployed accounting techniques, applied to the facts of the matter at hand, through the implementation of patterned principles. The court and its interested external audience then validates the expertise, the proper use of patterned principles and their appropriate deployment in accordance with peer accepted principles (in this case, those of the accounting and legal professions), legal precedent (for example, the *Makita* principles) and community norms (for example, concepts of fairness and the correct verdict).

Diagram 9.1



In the accounting context, the expert opinion witness, is admitted to provide evidence that, using accounting inscriptions, interprets and translates the facts in a manner that inform the court and assist with the adjudicative discourse. The evidence has evolved from both professional accounting philosophy and instruction, and the legal system’s norms, as suitably implemented for the specific legislative genre. The cognitive authority applied, by the expert, to the evidence, utilises expertly deployed accounting knowledge, skills and technologies, offered up for validation (see chapter 4), and communicated in appropriate structure and form (see chapter 5), such that it leads to action by the receiver of the communication (communicative action). The accounting expert therefore manoeuvres in the content area overlapping between their accounting discipline and corralled by the legal system at a disciplinary level (as is deemed suitable to each legal genre).

In chapter 8, the dissertation considered how the Law influences accounting, in order to effect the definition of valid of accounting evidence, with respect to its acceptance within specific legal genres as well as consistent with peer accepted ontological knowledge, methodology

and methods. Examples of accounting evidence variations were considered that have arisen from legal categories such as taxation law, equity law and family law. However, these types of law are well practiced with a multiplicity of cases that have sought to test the limits of the law as applied to a variety of facts and as have been reviewed by the range of judicial and court seniority. Peer and court accepted accounting techniques, with the potential to be deployed to assess and quantify the proceeds of crime and unexplained wealth, have been discussed with respect to their accounting legitimacy and their acceptance in various jurisdictions. This chapter extends that discussion as specifically applied to the unexplained wealth and proceeds of crime legislative genre, which must be recognised as a relatively new body of law, albeit having been periodically extended by juridification (see chapters 1 and 2). Specifically, there have been a limited number of cases proceeding to judgement under POCA (Cth) and even less matters that have considered the application of the more recent unexplained wealth provisions. This research identified 48 Australian ‘unexplained wealth’ cases recorded by Westlaw arising from consideration of Proceeds of Crime or similar legislation.<sup>184</sup> Table 9.1 lists these cases with Table 9.2 providing a summary across Australian jurisdictions. Part 1 of this chapter summarises the findings of the review of these 48 judgements leading to the opinion that unexplained wealth provisions are being used to restrain assets and to forfeit the ‘low hanging fruit’, that is to forfeit assets already confiscated, such as cash money found in drug raids or in attempts to leave the country. This would not appear to be consistent with the objective to combat organised crime as discussed in chapter 7.

Part 2 of this chapter reviews sections within the Australian Commonwealth *Proceeds of Crime Act*, 2002, with respect to their application to the operation of forensic accounting

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<sup>184</sup> Cases were selected through a search of Westlaw.au such that they proceeded under Proceeds of Crime legislation within the Australian jurisdictions (Commonwealth, State and Territory). The search was further refined with respect to the use of Unexplained Wealth provisions within the POC legislation. The Appendix of Case References contains the case details.



techniques. This is important as forensic accountants deploy their skills and knowledge to assist in providing evidence that gives prosecutors confidence to bring appropriate matters to court, as well as to assist the court's adjudication and messages with regard to the court's judgement, as is consistent with the statute. Correct understanding of the forensic accounting evidence is also pertinent to the defence role of a forensic accountant, given the adversarial nature of the Australian legal system and the particular reversal of proof obligations relevant to forfeiture legislation. Built upon the accounting practices reviewed in chapter 8, and the forensic accountant's main role in confiscation, that of identifying value and quantifying forfeiture amounts arising from the proceeds of crime and unexplained wealth calculations, Part 2.4 - Division 2, Penalty Amounts, and Part 2.6 – Division 2, Unexplained Wealth Amounts, are particularly in focus. Consideration of these specific sections of the legislation is important to the statutory compliance of a forensic accountant's report.

Part 3 of this chapter recognises the importance of the legal stare decisis epistemology and in this regard it looks at the judicial obiter dicta pertaining to concepts contained in the forfeiture statute such as "derived" and "used". This is important as the forensic accountant needs to recognise the applicable scope of their inclusions and the most likely consideration the trier of fact may apply to the latitude of transactions and valuations included in their report. Part 3 further dissects the obiter dicta of specific issues with reference to both Australian and United Kingdom cases. Whilst there are a limited number of cases from which to glean legal precedent, the courts have commented upon matters such as double counting, quantifying penalty orders for accomplices, mixing tainted and non-tainted funds, multiple equity holders and calculations potentially not requiring expertise. Part 4 returns to the research questions, armed with the context of earlier chapters, the accounting and legal precedents of chapter 6 and the genre specifications of the earlier parts of this chapter. The chapter concludes by highlighting the role of patterned principles in the response to the

research questions, as they reflect the context of expertise, the legal requirements of recognition, precedent judicial consideration and forfeiture genre specifics.

## **Part 1 Review of Proceeds of Crime Matters that reference Unexplained**

### **Wealth activity**

As noted in the introduction to this thesis the research reviewed 48 matters that considered Proceeds of Crime legislation across Australian jurisdictions where unexplained wealth was considered. These cases were selected from Westlaw under the search parameter of “unexplained wealth”; cases; 2012 to 2016. The consideration of unexplained wealth issues under proceeds of crime and unexplained wealth provisions of the various acts were material to the deliberations of the court in these cases, however, the prosecutions were only rarely brought directly under the specific unexplained wealth provisions. For example, there were 11 Commonwealth cases considered however it is known that there have never been any matters brought before the court under the specific unexplained wealth provisions of the Commonwealth POC Act. The reported judgements of these cases were reviewed with specific emphasis on accounting related judicial comment. Part 1 of this chapter summarises the review with Part 3 providing a focus on specific issues noted in the review and referenced to specific judgements. Table 9.1 lists these cases with Table 9.2 providing a summary across Australian jurisdictions. Westlaw.au is a leading online law library and database providing authoritative online legal research solutions to law professionals, corporations, governments and universities. It is provided by Thompson Reuters and relied upon for its depth of information by over 50,000 Australian lawyers. Cases were selected through a search of Westlaw.au such that they proceeded under Proceeds of Crime legislation within the Australian jurisdictions (Commonwealth, State and Territory). The search was further refined

with respect to the use of Unexplained Wealth provisions within the POC legislation. Table 9.1 contains the case details.

<b>Table 9.1: Case List used for Judgement Review</b>		
	<b><u>Case Reference Name</u></b>	<b><u>Case Reference</u></b>
1	New South Wales Crime Commission v De Jonk	[2016] NSWSC 1668
2	New South Wales Crime Commission v Mogy	[2016] NSWSC 1667
3	R v Gibbs	[2016] SADC 144
4	NSW Crime Commission v Nehme	[2016] NSWSC 1410
5	Queensland v Deadman	[2016] QCA 218
6	Queensland v Deadman	[2015] QSC 241, (2015) 253 A Crim R 484
7	Director of Public Prosecutions (Cth) v Hart	[2013] QDC 60
8	New South Wales Crime Commission v Ayik	[2016] NSWSC 1183
9	Commissioner of the Australian Federal Police v Thasthahir	[2016] VSC 468, (2016) 313 FLR 358
10	Nguyen v The Queen	[2016] VSCA 198, (2016) 311 FLR 289
11	Commissioner of the Australian Federal Police v Surinder Kaur	[2016] VSC 423, (2016) 311 FLR 44
12	Re Commissioner of the Australian Federal Police	[2016] NSWSC 861
13	Director of Public Prosecutions (Tas) v Swan	[2016] TASCCA 9
14	Zanon v Western Australia	2016] WASCA 91,
15	New South Wales Crime Commission v Richards	[2016] NSWSC 838
16	New South Wales Crime Commission v Kane (No 3)	[2015] NSWSC 1963
17	Ruzehaji v Commissioner of the Australian Federal Police	[2015] SASCF 182,
18	R v Barker	[2015] QCA 215
19	New South Wales Crime Commission v Nhu	[2015] NSWSC 1643
20	Commissioner of the Australian Federal Police v Vo	[2015] NSWSC 1523 , (2015) 302 FLR 209
21	Re Commissioner of the Australian Federal Police (No 2)	[2015] NSWSC 1447
22	Commissioner of the Australian Federal Police v Heng Jie Zhang (Ruling No 1)	[2015] VSC 390,
23	New South Wales Crime Commission v Rashidi	[2015] NSWSC 995
24	New South Wales Crime Commission v Warburton	[2015] NSWSC 9
25	R v Versac	[2014] QCA 181
26	New South Wales Crime Commission v Tindle	[2014] NSWSC 879
27	Crime Commission (NSW) v Huang	[2014] NSWSC 642
28	Attorney-General (NT) v Emmerson	[2014] HCA 13,
29	Emmerson v Director of Public Prosecutions	[2013] NTCA 4, (2013) 33 NTLR 1
30	Director of Public Prosecutions (NT) v Emmerson	[2012] NTSC 60

Table 9.1: Case List used for Judgement Review		
31	New South Wales Crime Commission v Osman	[2014] NSWSC 312
32	Director of Public Prosecutions (WA) v Trajkoski (No 3)	[2014] WADC 32, (2014) 85 SR (WA) 199
33	Crime Commission (NSW) v Tran (No 2)	[2013] NSWSC 1854
34	New South Wales Crime Commission v Wenping He	[2013] NSWSC 1855
35	Lee v NSW Crime Commission	[2013] HCA 39, (2013) 251 CLR 196
36	Re Kim	[2013] VSC 465
37	Fuller v The Queen	[2013] NTCCA 10
38	New South Wales Crime Commission v Cassar (No 2)H	[2013] NSWSC 1011
39	New South Wales Crime Commission v Cassar	[2012] NSWSC 1170
40	New South Wales Crime Commission v Al Jannat	[2013] NSWSC 935
41	New South Wales Crime Commission v Choi	[2013] NSWSC 437
42	New South Wales Crime Commission v Choi	[2012] NSWSC 658
43	Commissioner, Australian Federal Police v Fysh	[2013] NSWSC 81
44	Director of Public Prosecutions (WA) v YeoC	[2012] WASC 440
45	Commissioner of Australian Federal Police v Dickson	[2012] NSWSC 1339
46	Director of Public Prosecutions v Grimm	[2012] NTSC 78, (2012) 269 FLR 322, [2013] ALMD 2356
47	New South Wales Crime Commission v Lee	2012] NSWCA 276
48	Director of Public Prosecutions (WA) v McPherson	[2012] WASC 342
Source: Westlaw.au case search "unexplained wealth"		

Table 9.2: Review Cases by Jurisdiction			
Commonwealth	Queensland	South Australia	Tasmania
11	4	2	1
New South Wales	Victoria	Western Australia	Northern Territory
19	2	4	5

Of the 48 review cases:

- 9 were with regard to formal confiscation of assets already seized as a result of their use in criminal activity (such as, cash being transported or drug ‘busts’);
- 9 were restraining orders only (requiring minimal accounting evidence other than an authorised officer presenting a case for reasonable suspicion of serious illegal activity);

- 5 were for forfeiture of assets because they were directly linked to proceeds of criminal activity (for example, in the production of drugs or fraud);
- 19 for other reasons (such as clarifying questions of law, variation of sentences or concurrence of evidence that might prejudice other ongoing cases).

Whilst it is difficult to fully understand the connections of individuals to organised crime from the descriptive content of judicial decisions, it would not appear that any of the reviewed cases were directly linked to organised crime. For example, there was no separate mention of target organised criminal groups such as outlaw motorcycle gangs, criminal family ties or organised criminal structures. No reference was found to complex economic structures such as multiple, linked, incorporated entities or trusts that are normally utilised for asset protection. On the contrary, the forfeited assets were referenced directly to individuals or simple shareholding in small business entities or property. There was a high incidence of apparently ethnic Asian defendants (as indicated by name). As necessitated by the statutes, statements by authorised officers were the primary accounting evidence presented, however, the judgements referred only to the direct outputs, such as, economic value, rather than any extended accounting methodology such as gap analysis. No jurisdiction showed signs of, or reference to, a strategic methodological approach to unexplained wealth forfeiture based upon any broad historical form of unexplained earnings analysis for example, a net worth analysis.

In summary, the more complex judgements only referred to straight forward unexplained wealth with respect to known, closely linked, criminal activity. For example, known and convicted drug traffickers who had purchased property with funds but had no legitimate capacity to make the purchase. Drug linked convictions accounted for 22 of the 48 cases with 3 cases being follow through from the automatic forfeiture contained in the Northern Territory's determination of a person being a drug trafficker. Whilst the civil provisions of POC legislation encourage out of court settlements, it is not known how prevalent such

settlements are in any jurisdiction. 4 cases were merely a judicial sign off of negotiated forfeiture agreements brokered with law enforcement agencies, usually for assets restrained during other actions (such as, drug seizures)<sup>185</sup>. Of interest are the asset freezing actions that have not been followed up by formal forfeiture cases<sup>186</sup>. The areas of civil forfeiture settlements, attrition between freezing and forfeiture, the strategic use of unexplained wealth gap identification methodologies and inquiry into the use of asset preservation entities are all avenues requiring further and more detailed research.

## **Part 2 Proceeds of Crime and Unexplained Wealth Statutory Application**

### **The Commonwealth POCA/UW Statute (2002)**

Whilst this dissertation has been focused on the deployment of accounting technology to assist POC/UW adjudication, review of case details (chapter 7) shows that most forfeiture penalties, under a proceeds of crime authority, have relied upon the easy route (from an accounting point of view), of applying s 54, *POCA (Cth)*. S 54 allows that property merely has to be “in the person’s possession at the time of, or immediately after, the person committed the offence” (s 54(b)) for the property to be forfeited. In such situations contrary evidence must be presented that shows “that the property was not used in, or in connection with, the commission of the offence” for the court to reverse its presumption that the property was used in, or in connection with, the commission of the offence (s 54(c). “In any other case--the court must not make a forfeiture order against the property unless it is satisfied that the property was used or intended to be used in, or in connection with, the commission of the offence” (s 54(d)). In summary, s 54 only requires evidence of existence rather than

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<sup>185</sup> In this regard issues of lack of transparency arise as details remain confidential and not available for public scrutiny.

<sup>186</sup> In this regard the freezing order presumably expires or a negotiated settlement is pursued. In most jurisdictions a confiscation order is required to be applied for within 28 days of a freezing order being granted. Such an application requires greater evidence to be put before the court that provided for a freezing order.

accounting evidence in order to apply a forfeiture order. For example, in *Re Commissioner of the Australian Federal Police*, 2016, a sum of \$4,164,525 was found in a drug supplier's vehicle, frozen, then forfeited to the Commonwealth of Australia, as the perpetrator fled Australia after completing their period of incarceration.

### Legislative Discretion

Legislation concerning repatriation of the proceeds of crime and unexplained wealth (see chapter 6) has been criticised for allowing administrators to have too much discretion (Leighton-Daly, 2015; ALRC Report 87, 1999; Fisse, 1989). This is contrary to the legal principle that “certainty in the law is fundamental to the rule of law” (Pagone J, in Raz, 1977). Certainty requires that the formal conception of the law is delivered “through the medium of general rules (rather than particular commands) that are couched in sufficiently specific and objective language to make it clear to the subject what is required, prohibited or permitted” (Campbell, 2013, p138). Alternatively, the substantive conception of the law, which aims to protect citizens by building on morally supported community norms, instructs the rule of law within an administrative latitude, that informs citizens as to what is required, permitted or prohibited based upon meeting certain moral requirements (Leighton-Daly, 2015)<sup>187</sup>. In summary, the offences created by *POCA*, 2002, which include those with respect to unexplained wealth, provide interpretational latitude by the administration (for example, the Department of Public Prosecutions) and the courts. This is particularly relevant to the establishment of a judicial quantification of “benefits derived” and “wealth” (matters of importance to a forensic accountants’ deployment of accounting technology).

Fisse, 1998, observed, with regard to proceeds of crime legislation that,

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<sup>187</sup> Further discussion of the seminal legal theories regarding formal (thin) or substantive (thick) law is beyond the scope of this dissertation. In this regard the reference of Professor Campbell in Flores and Himma (2013) may provide further insight.

The war declared against organised crime in Australia has generated a new despotism in Commonwealth criminal law. We are now beginning to see major offences defined in such sweeping terms that the scope of liability depends very little on law and very much on administrative discretion. This despotism has gone to the extent of exposing lawyers, accountants, stockbrokers and financial institutions to an unwarranted risk of prosecution in their everyday professional or business lives (p5).

He concluded that:

The rise of money-laundering and related offences under POCA has been accompanied by the fall of basic principles of criminal liability. This is a regrettable legislative achievement, of totalitarian bent. Doubtless, the wise exercise of prosecutorial discretion will do much to minimise the risk of injustice, but the discretion of the Director of Public Prosecutions and his officers is no substitute for the guarantees provided by rule of law (p10).

Fisse, 1998, calls out a warning with regard to the DPP's strong discretionary rights, however pragmatic review of those matters brought to court shows that the DPP in most jurisdictions have failed to pursue matters where there is an adverse risk of successful prosecution, a side effect of which, is that the judiciary are not presented with matters that may benefit from judicial consideration, advice and comment. Consideration of the concepts defined in s 4 of POCA, 2002, of "benefit" and "tainted property" illustrate the difference between the more tightly defined "tainted property" and the broad consideration of "benefit". "Tainted property" means "property used in, or in connection with, the commission of the offence", or proceeds that is "any property that is derived or realised, directly or indirectly by any person from the commission of the offence" (s 4). Therefore the concept of "tainted property" is exclusively defined, with the concept of proceeds being inclusively defined to include benefits arising. Justice Kirby in *Saffron v DPP (Cth)*, 1989, noted that a derived benefit to the applicant was included in the tainted property concerned, over and above the exclusive definition of tainted property. Therefore, for the purpose of POCA pecuniary penalty order provisions, a "benefit" must be able to be quantified but is not necessarily "property in an enforceable sense" (Leighton-Day, 2015, p7). This position is further supported when the



remedy sought is a civil provision rather than a criminal provision, where the traditional convention of mens rea is problematic as attached to the use of property<sup>188</sup>. In *DPP (Cth) v Jeffrey*, 1992, the applicant, convicted of a serious drug offence, had restraining orders made more generally in relation to property in which he had an interest. It was deemed that because tax had not been paid on the money used to purchase the property then the applicant had obtained a benefit from the use of funds that otherwise should have been used to pay tax. The monetary value of the tax that was not paid was deemed tainted funds arising from an indirect benefit (hence proceeds), that was the personal use of such money instead of the payment of tax. The quantification of the monetary value requires the appropriate deployment of accounting technology that recognises the original value of the instrument of the illegality, the direct benefit arising from the illegal activity, and the indirect benefit that flows from the direct benefit.

#### **Part 2.4 – Division 2, Penalty Amounts**

POCA Div 2 legislatively describes matters to be considered when determining penalty amounts. Of initial concern is, if the offence to which the order relates is, or is not, a serious offence. A serious offence is defined at *POCA* s 338, however, it's broad definition can be summarised with regard to committing an indictable offence punishable by imprisonment for 3 or more years<sup>189</sup>. This important differentiation requires the expert accountant's quantification to be limited to the benefits the person derived from the offence (under subdivision B), less any allowable deduction (under subdivision C), if the indictable offence is not serious. Whereas, for a serious offence, quantification can be broadly extended to include "the commission of any other offence that constitutes unlawful activity" (s

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<sup>188</sup> See Division 5 of Part 2.2 Chapter 2, *Criminal Code*

<sup>189</sup> Specific money laundering and drug offences are also nominated.

121(3)(a)(ii)). S 123, Value of benefits derived for a non-serious offence, and s 124, Value of benefits derived for a serious offence are included in full in Appendix 9A and Appendix 9B.

In the matter of the *Commissioner of the Australian Federal Police v Fysh* (2013) (*'Fysh'*), which concerned indictable offences for insider trading, the question arose as to the quantification of the amount of deprivation that should form the penalty for the illegal activities (at 1). The defendant, Dr Stuart Fysh, had been found guilty of offences that pertained to the purchase and subsequent sale of 250,000 shares in Queensland Gas Company Pty Ltd. Following Dr Fysh's sentencing for the insider trading matter, an application was made by the Commissioner under s 116 of *POCA*, 2002, for a penalty order that amounted to \$1,437,500. Dr Fysh contended that the appropriate amount was the net amount of \$640,857, which represented the profit from the insider trading transactions after the original cost of the share purchases had been deducted. McCallum J reviewed the tension within Division 2 of the *POCA*, 2002, that includes the concept of "benefit" in ss116 and 121 of the Act, the phrase "expenses and outgoings" in s 126 of the Act, as well as the "mischief sought to be addressed by the introduction of the Act and the desirability of coherence of the whole body of law in which it is to operate" (at 6). Importantly, after considering the intent of the confiscation law, the language of the Act and the general principle of legality<sup>190</sup>, his honour pointed out that "to construe the Act as having, as an object, punishment and deterrence, beyond confiscation or the denial of profits unlawfully earned, would duplicate the objects of sentencing in criminal proceedings and so expose offenders to double punishment" (at 14).

His honour reiterated that the court must quantify a pecuniary penalty order in accordance with Div 2 of Pt 2.4. As discussed above, s 121 in Div 2 raises the distinction between those offences classified as "serious offences" and those that are not. Where the offence is a serious

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<sup>190</sup> The principle of legality "holds that Parliament is presumed not to have intended to interfere with common law rights and freedoms except by clear and unequivocal language" (*Commissioner of the Australian Federal Police v Fysh*, 2013, at 7; see also *Clissold v Perry*, 1904, at 373)

offence quantification can look beyond that offence “to confiscate benefits derived from any other unlawful activity” (at 18). S 122 provides a list of matters to be considered for quantification of the benefits arising from the offence and unlawful activity:

**Evidence the court is to consider**

- (1) In assessing the value of benefits that a person has derived from the commission of an offence or offences (the illegal activity), the court is to have regard to the evidence before it concerning all or any of the following:
  - (a) the money, or the value of the property other than money, that, because of the illegal activity, came into the possession or under the control of the person or another person;
  - (b) the value of any other benefit that, because of the illegal activity, was provided to the person or another person;
  - (c) if any of the illegal activity consisted of doing an act or thing in relation to a narcotic substance:
    - (i) the market value, at the time of the offence, of similar or substantially similar narcotic substances; and
    - (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar or substantially similar act or thing;
  - (d) the value of the person's property before, during and after the illegal activity;
  - (e) the person's income and expenditure before, during and after the illegal activity.

It is noted that subsections (d) and (e) instruct the court to take into account changing levels of assets (property), income and expenditure over the relevant period, including pre and post the illegal activity. Sections 123 and 124, as applied to serious and non-serious offences adopt a gain or net increase approach to quantifying the value of the relevant benefit to be

penalised by forfeiture. With the expansive definition in s 124 his honour pointed out that “the person may ultimately be required to pay a greater pecuniary penalty than the net increase in their position over the period of illegal activity as a result of expenses and outgoings incurred in relation to the illegal activity that are not deductible by virtue of s 126. That is, the expenses and outgoings, taken as their ordinary meaning (and not hijacked by extraneous accounting issues<sup>191</sup>), are limited in relation to the specific illegal activity” (at 24).

S 126, in part, states:

**Matters that do not reduce the value of benefits**

In assessing the value of benefits that a person has derived from the commission of an offence or offences (the illegal activity), none of the following are to be subtracted:

- (a) expenses or outgoings the person incurred in relation to the illegal activity;

His honour did not include initial capital in the definition of expenses or outgoings, consistent with the accounting differentiation between capital investment and the cost or expense of operation. Similarly he distinguished between the term “profit” and “benefit”, noting that “benefit” does not mean “gross income”, but “permits more various subtleties of meaning , depending on the context” (at 34 and at 54). Again the context of *Fysh* was of share purchases, where it was undisputed that the capital used to purchase the shares was from legitimate sources. His honour applied in the context where Dr *Fysh* invested untainted funds, that he had “little difficulty in concluding that the value of the benefit derived from the sale of shares purchased unlawfully with inside information was the net amount received upon sale of the shares after deducting the original purchase price” (at 21).

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<sup>191</sup> His honour made this point portraying the section to “foreclose the unseemly prospect of the court’s assessment of the value of the relevant benefits being hijacked by accounting issues and expanded to become a complex, costly auditing exercise” (at 29)

In contrast the judicial opinion applied to the drug cases of *R v Nieves* (1991), *R v Peterson* (1992), *R v Fagher* (1989) and *R v Pederson* (2011), was the assessment of the benefit as the total amount of the trade. This is an important consideration in regard to the deployment of accounting technology to value the appropriate forfeiture penalty as the “benefit” calculation should not be reduced by costs (such a brokerage or cost of operation), in concurrence with s 126 but should only reflect the deduction from gross proceeds of legitimately obtained capital investment. The consideration (deduction) of capital investment may be included where the capital investment is not, in of itself, an illegal activity. For example, in *Fysh* the investment purchase of shares was itself legal, whereas in the examples of drugs cases, the purchase of a quantity of drugs for resale was not, itself, a legal activity.

#### **Part 2.6 – Division 2, Unexplained Wealth Amounts**

The juridification of the *POCA*, 2002, continued with the 2010 amendments that introduced unexplained wealth provisions<sup>192</sup>. As previously discussed the amendments went further than the civil law provision to reverse the onus of proof (see chapter 6). If the appropriate court is satisfied that there is reasonable suspicion to suspect that the person cannot lawfully explain their total accumulated wealth, then it may (or under certain circumstances, must) compel the person to attend court and prove, to the civil standard, that their wealth was not derived from offences under Commonwealth jurisdiction. If the person fails to do so then the court can order the person to pay, to the Commonwealth, the difference between his or her total wealth, and their lawfully obtained wealth, or that wealth obtained from certain offences. This may include the court making an order for a particular asset or group of assets, or a cash substitution to the value of assets. Application of this forfeiture is a two-step process with the initial court request for the preliminary unexplained wealth order preceding the forfeiture

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<sup>192</sup> Part 2-6 of the Proceeds of Crime Act, 2002 by the Crimes Legislation Amendment (Serious and Organised Crime) Bill, obtaining royal assent: 19 February 2010.

order. The preliminary unexplained wealth order is considered by the court on evidence provided by an authorised officer (with either accounting expertise or advised by an expert accountant) as to the suspicion that the “person's total wealth exceeds the value of the person's wealth that was lawfully acquired” (s 179B (1) (b)) and the grounds on which that officer holds the suspicion (s 179B (2) (b)). The court must grant the order if the estimates of the “person's total wealth exceeds by \$100,000 or more the value of the person's wealth that was lawfully acquired” (s 179B (4)).

It may be expected that the of the authorised officer’s supporting affidavit is similar to the net worth or asset betterment methods, in that it compares an opening and closing wealth calculation (accumulated assets) in a calculation of total wealth minus known legitimate wealth (the gap shortfall in net worth analysis), however, from judicial comments, it appears that the authorised officer’s report may more often rely upon interview type evidence that produces a supporting narrative connected to an asset or group of assets rather than a total unexplained sum approach (for example a net worth analysis). This appears to have been the case in *New South Wales v Kane (No 3)*, 2016, where the court tested the “reasonable grounds” for the authorised officer’s suspicion that a property was acquired using the proceeds of crime arising from a fraud committed by a minority – 10% - shareholder. The authorised officer’s reasoning was found insufficient (at 42) as it was based on interview evidence rather than transactional explanation<sup>193</sup>. Leighton-Daly, 2013, agrees that the 2002 Act’s unexplained wealth provisions are “more analogous to the Australian Tax Office’s asset betterment test than any previous federal forfeiture of criminal property law in Australia” (Pt 2, 2014, p576-577). The mere statement by an authorised officer of their suspicion that the proceeds of crime have been used to acquire an asset, or have contributed to unexplained

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<sup>193</sup> The court also analysed eight tests for considering the concept of “reasonable suspicion” as it is required to be held by an authorised officer. These tests arise from nominated precedent cases and are supported by elements of the explanatory memorandum to the *Criminal Assets Recovery Amendment Act (Unexplained Wealth) Act 2010* (NSW).

wealth, appears to have been sufficient to obtain restraining or freezing orders, particularly where money or assets have been seized or particular property targeted. However such cases are “low hanging fruit” in the potential consideration of confiscation remedies (see, for example, *New South Wales Crime Commission v Richards* 2016; *Commissioner of the Australian Federal Police v Surinder Kaur*, 2016; *New South Wales Crime Commission v Galloway*, 2017; *New South Wales Crime Commission v Tan*, 2017; *New South Wales Crime Commission v De Jonk*, 2016; *New South Wales Crime Commission v Calvert*, 2017). Considering the recent dates of the examination orders that accompany most of these cases, it is expected that further unexplained wealth forfeiture matters will be heard over the near future, matters that should provide rich judicial comment for research.

## **Part 2 – Conclusion**

The prima facie construction of the Australian forfeiture statutes, and their attendant explanatory memoranda, appear to provide for both an expedient manner of obtaining a restraining or freezing order based merely on suspicion, and a more complex asset betterment type analysis of a person’s unexplained wealth. The legislation appears to have been successfully used in its simplest capacity, by prosecuting agencies, however the case examples show that the targets for forfeiture are mainly limited to matters where cash and assets have been seized in and around direct criminal activity that gives rise to tainted funds from directly identifiable sources. Such cases would appear to be straight forward, in that they leverage the narrative in support of the authorised agent’s suspicion of illegal activity. This, in turn, supports the judicial issue of mandatory orders and the court’s demand for compulsory attendance at a financial examination. Alternatively, the use of an accounting patterned principle approach to establishing unexplained wealth by gap analysis does not appear to have been used other than to a basic extent. The lack of asset betterment based confiscations arising from examinations is notable, however the recent spate of successful

examination orders (2016, 2017), together with the enhanced accounting capacity of the task force approach to managing organised criminal responses, should give rise to broader use of patterned principles approach to unexplained wealth evidence and hence fodder for further academic research, in concurrence with comments in chapter 10.

### Part 3 Legal Stare Decisis and the Application of Key Concepts

As previously noted the development of credible patterned principles, accepted as valid evidence, requires the support of the precedential pronouncements of eminent judges (or groups of judges, such as a full court). Pronouncements arise from matters under consideration, where issues are either new or call for reiteration and refined explanation (see chapter 8 with regard to the principle of stare decisis). This chapter reviews the obiter dicta<sup>194</sup> expressed in cases involving forfeiture judgements under Australian statutes and, where relevant, statutes from overseas jurisdictions. Without a significant or mature base of matters that have been considered in the Australian forfeiture jurisdictions, it has been necessary to consider issues that have arisen in other matters, which may be influential in responding to the research questions, as well as practical issues arising from the legislation itself. In this regard judicial comment from the United Kingdom has particular effect, whereas matters that emanate from the United States (either at their state or commonwealth level) may have limited application due to the peculiarities of those jurisdiction<sup>195</sup> and high dependency on direct cash and asset forfeiture as a compliance source of funds.

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<sup>194</sup> *Obiter dictum* (plural *dicta*) refers to the judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent; said in passing; made as comments, illustrations or thoughts

([legal-dictionary.thefreedictionary.com/obiter+dicta](http://legal-dictionary.thefreedictionary.com/obiter+dicta))

<sup>195</sup> It should be noted that various U.S. statutes have given rise to sundry forfeiture exercised similar to an "on the spot fine system", where the confiscated money and assets contribute directly to the costs of providing local legal services. This has sometimes led to an explosion of small matter confiscations (such as, the confiscation and sale of a van used to convey drugs between states). In this regard the U.S. use of forfeiture remedies is not aligned with its use in British based statutory regimes. (see Worrall, 2001)



## Degree of Use or Derivation

The interpretation of “use” or “derivation” from the *POCA* statutes is important to an expert accountant when making decisions about the extent to which a transaction or groups of transactions are associated with illicit funds or illegal activity. The ordinary meaning of “use” is taken to be “employ for a certain end or purpose” ([www.dictionary.com/browse/use](http://www.dictionary.com/browse/use), accessed 2017). When used “in connection with”, such as when reference is made to the commission of an offence, it has “long been held to be a wide phrase which, depending on the context, can describe the spectrum of relationships between two things ..... ranging from direct and immediate to tenuous and remote” (at 105; see also *Collector of Customs v Pozzolamic Enterprises Pty Ltd*, 1993, at 288). This can cover transactions before and after the confiscation offence. Macfarlane J (Canadian jurisdiction) commented:

One of the very generally accepted meanings of ‘connection’ is “relation between things one of which is bound up with or involved in another”; or again “having to do with” The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principle thing. (*Nanaimo Community Hotel Ltd v British Columbia*, 1944, at 639).

Therefore the transactions to be considered in establishing forfeiture penalties should be legitimised using the ordinary meaning of ‘used’, applied with a wider scope than merely being employed in the commission of an offence and validated in the connection to a crime by fact and degree<sup>196</sup>. The connection of transactions and the unlawful activity therefore, for the accounting expert considering whether to include, or not to include, transactions connected between the “use and unlawful activity”, the link:

- does not have to be substantial, but has to be more than slight or negligible (George Doyle CJ in *DPP v George*, 2008);
- does not require a causal link ( in *Chalmers v R*, 2011);

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<sup>196</sup> “It is not necessary for it to be established that there is a ‘substantial’ connection or that the crime could not have been committed without using the property” (*Hart* at 77)

- must be direct or immediate, in a very real sense (Carter J in *Re Application Pursuant to the Drugs Misuse Act*, 1986);
- must not be tenuous or remote (Riley CJ in *Dickfoss v DPP*, 2012);
- must not be accidental or incidental (Hunt CJ in *Jeffrey v DPP No 1*, 1995).

(Hart, 2016, at 110, 113)

## “Derived”

The word ‘derived’ is commonly used in the *POCA*, 2002, statute, such as in s 102(2)(c)<sup>197</sup> and deserves recognition by the accounting expert to the extent that it informs the inclusion of transactions for the quantification of a restraining or penalty order. The use of the word “derived” was considered in *Hart*, 2016, (at 114 to 165) where its instruction under normal definition is that (from the accounting perspective) proceeds are to be “traced from a source, or to show their origin from something” (at 216; also see Hunt CJ in *Jeffrey No 1* at 320). In this sense “derived” has a broader context than merely “acquired” (Cole JA in *Jeffrey No 2*; also in *Director of Public Prosecutions (Cth) v Corby*). Reiteration of s 336, notes that the derivation of proceeds includes a reference to both the person and “another person at the request or direction of the first person” (at 166, see s 336(b)). For example, the accounting expert would be expected to confirm the derivation of transactions both directly with respect to the appropriate person, or at the instruction, or under the control of the appropriate person, as traced back to an original source that has been used in connection with unlawful activity, or in the instance of orders relating to the relief of forfeited property, that the original source has not been used in connection with unlawful activity. In a practical sense Redlich JA, in *Markovski v DPP*, 2014, considered the appellant’s contention that specified funds used to purchase a vehicle came from a nominated bank account. His Honour was requested to adjudicate whether the trace back to the bank account (which demonstrated acquisition) was

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<sup>197</sup> 102 (2)(c) the applicant's interest in the property is not *wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence* or an instrument of the offence.

sufficient to satisfy the extended concept of derivation. His consideration was that the lawful providence of the funds deposited into the bank account was required as well as the funds expended to validate lawful derivation, stating:

..... if the property is acquired by the use of funds that are the proceeds of criminal activity, the transaction by which the property was acquired will not be lawful. It would be inconsistent with those provisions were the term 'lawfully acquired' to be construed as excluding from consideration the source of the funds and their effect upon the lawfulness of the transaction (*Markovski* at 81).

The forensic accountant therefore has an obligation to explain the providence of funds (by transaction) coming into the account as well as going out of the account. Consideration needs to be made of how far back the tracing of funds needs to go. In this regard Nourse J in *Davenport v Chilver*, 1983, commented:

Property may, therefore, be regarded as derived indirectly as a result of the commission of an offence where it has been acquired, for example, through a betting or dealing transaction financed by the proceeds of drug trafficking. In my opinion, the process of tracing to an indirect source may go back through a number of transactions (*Davenport* at 300).

McGarvie J respectfully agreed that tainted funds would endure when "(i) unlawful funds being used to acquire a property (even as a loan), and that being paid off by lawful funds; and (ii) unlawful funds being used to repay lawful finance that was used to acquire a property" (Hart at 163).

Of further note, McGavie J, in *Director of Public Prosecutions v Allen*, 1998, in determining the relative source of funds used to purchase a vehicle were from gambling or from drug trafficking, stated that "The source of the property is to be determined not as a legal concept but by the concepts of ordinary people" (*Allen* at 10; *Hart* at 146). This, of necessity, raises the issue of partial derivation as may be demonstrated by the derivation or trace back. His

Honour, Morrison JA (in *Hart*), went on to comment that “the connection between the derivation and the unlawful activity is slightly different from that for ‘use’ (at 138) followed by his elements to be considered in connection with “derived” to be:

- does not have to be substantial, but has to be more than slight or negligible;
- does not require a causal link;
- can be indirect;
- must not be tenuous or remote;
- must not be accidental or incidental. (*Hart* at 138).

To return to McGavie J’s concepts of the ordinary person, a claim for the mixed use of untainted and tainted funds must be supported by multiple sources of funds. In regard to the balance between tainted and untainted funds it is substantially one of relative quantification, in line with the evidence of derivation (as above) for each source of funds. Morrison JA (in *Hart*) noted that under a 102(2) or (3) of *POCA* the applicant for relief “bears the onus of showing that the property is not derived from an offence” (*Hart* at 148). Tracking the provenance of “derived” may be a complex forensic accounting job, that involves constructing a narrative supported by transactional evidence, in all its detail, as linked to tainted and untainted sources and funds flow. Professional recognition of the balancing nature of debits and credits should support the proportionalisation of legitimate and illegitimate funds both progressively and as finally deposited onto the asset in consideration for forfeiture.

## **Part 4 Specific Issues and Judicial Obiter Dicta**

### **Calculation of Unexplained Wealth - Not Requiring Special Skill?**

It has been recognised that the dispensation to give opinion evidence is dependent on the recognition of the witness having expert skills and that the evidence offered is consistent with the application of those skills (see chapters 5; *Makita*, 2001). This point was tested with

respect to the estimation of unexplained wealth in *Fuller v the Queen*, 2013. In this matter the expert accountant gave evidence of unexplained wealth arising from five notebooks that “contained a number of entries referring to weights of drugs, types of drugs and calculations of projected profits from drug deals” (at 9) as well as evidence of real property purchases. “There was more than sufficient evidence for the jury to have been satisfied beyond reasonable doubt that the five notebooks were authored by the appellant (perpetrator) and that they proved consistent drug selling over the period of the indictment” (at 11). Their honours, Riley CJ, Barr J and Hiley J were asked to adjudicate if “the learned trial judge erred in allowing the police forensic evidence of Mr Wall's purported expert opinion in relation to values contained in the journals found at the appellant's premises” and that “the learned trial judge erred in allowing the evidence of Superintendent Noy purporting to be expert opinion evidence in relation to the notations contained in the journals” and further that “the learned trial judge erred in failing to direct the jury as to how they should approach and evaluate the expert evidence of Robert Wall and the exhibits that were used by Mr Wall so they could make an independent assessment of the opinion and its value” (at 12.3, 12.4 and 13). Mr Wall's evidence was essentially a mathematical exercise, referring to data and making assumptions to reach dollar figures (at 50).

Mr Wall performed two such exercises. One was to reach a figure of \$976,200 as being the net profit that would have been derived by the appellant on the assumptions that 4881 units of drugs were sold during the indictment period at an assumed price of \$1000 per unit and that the appellant would have received \$200 per gram/unit profit. We shall refer to this as the net profit exercise.

The other exercise was to identify expenditure by the appellant during the indictment period, which Mr Wall could not readily identify as having a legitimate source. We shall refer to this as the unsourced funds exercise. In the course of performing that exercise he examined bank records, credit card statements, tax returns and working papers in relation to the tax returns of the appellant and his wife (all of which were in evidence) and he looked for any record therein that identified the source of funds used for a number of

purchases. Mr Wall identified a number of purchases or other forms of expenditure for which he could not find a source and added the figures for those items to reach a total figure of \$847,108.21. That did not include another \$207,517.61 in cash deposits for which he could not find any source (at 51, 52).

In his evidence, Mr Wall demonstrated his methodology, including by identifying the particular records he had regard to, his assumptions and the calculations he made (at 61).

Mr Wall also submitted his evidence for validation through cross-examination and the trial judge “gave extensive directions as to the way in which the jury should assess and treat expert evidence, including Mr Wall's evidence. The court, and subsequently the appeals court, accepted the expert evidence albeit with a judicial summary that focused on the purpose and evaluation of an expert witness. At several points her Honour pointed out that the jury could reject the opinions of an expert where not satisfied of underlying facts or assumptions” (at 68). Similarly the allied evidence of Superintendent Noy regarding the interpretation of common drug terminology was supported based on his expertise in drug investigation. The importance of this case to an expert witnesses, is that, in applying accounting expertise to informal records (for example, the notebooks), the calculation of amounts such as profits from drug sales requires mathematical estimates and extensions that are not entirely consistent with the accepted tradition of transaction allocation as deployed in the assembly of a profit and loss or balance sheet report. Nevertheless it is an accounting exercise that, if it is adequately explained, through the articulation of assumptions and their calculative effect may be accepted by the trier of fact (judge or jury). In this regard the validation of the expert opinion is enhanced by reducing the exclusivity of the expert’s cognitive authority through adequate explanation and validation, linked to the facts of the matter, in this case, the informal (drug) nomenclature to the patterned principles of a profit calculation. The calculation of profit is an accounting exercise, therefore the assumptions and arithmetic that form part of the calculation arise from a valid base of expertise with its

probity dependent on the adequacy of the accountant's reasoning and explanation, aided by concurrence with the proper deployment of patterned principles of accounting.

### Structure of Deposits

S 19(d) of *POCA*, 2002, provides that a restraining order must be made if there are reasonable grounds to suspect that the property is the proceeds of an indictable offence or an instrument of a serious offence. An authorised officer must provide an affidavit explaining reasonable grounds for their suspicion. In the matter of the *Commissioner of the Australian Federal Police v Nguyen* (2013), in the supreme court of New South Wales, McCallum J held that the pattern of numerous deposits of \$10,000 into four bank accounts held in the names of the defendants (as detected by AUSTRAC<sup>198</sup>) was sufficient to meet the s 19 reasonable grounds for suspicion that the funds were associated with illegitimate sources. The affidavit presented was principally (if not solely) supported by accounting evidence including bank statements and information from the relevant banks that allowed for quantification (at 5). In this regard the indictable offence referenced s 142(1) of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006. The court's satisfaction under the terms of s 19 allowed for the making of a restraining order without identifying any particular offender (s 19(4)) (at 4). The expert accounting evidence presented a narrative of 94 "non-threshold deposits", that is, just below the \$10,000 reportable limit<sup>199</sup>. The narrative was quantified to a total of \$724,681 by addition of the bank deposits according to bank records. In this regard the evidence was presented in support of reasonable suspicion held by an appropriate officer. In *Commissioner of Australian Federal Police v Minh Duc Pham*, 2015, Beech-Jones J held that "property standing in a bank account which was deposited as part of a so-called structured transaction, that is, a transaction

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<sup>198</sup> AUSTRAC – Australian Transaction Reports and analysis Centre is Australia's financial intelligence agency with regulatory responsibility for anti-money laundering and counter-terrorism financing. They identify threats and criminal abuse of the financial system, and act to protect Australia's economy (<http://www.austrac.gov.au/about-us/austrac> ).

<sup>199</sup> The relevant reportable amount of \$10,000 provided for in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ('AMLCTFA Act')

designed to avoid the reporting requirements of the *AMLCTFA*<sup>200</sup>, constituted property that was either wholly or partly realised or derived, whether directly or indirectly, from the commission of an offence constituted by the structuring of transactions to avoid the reporting requirement” (at 37)<sup>201</sup>. Therefore the aggregation of such amounts in the bank account, or that flow forward from that account, in total, can be subject to a restraining order, and further to a forfeiture order. Again the inference for the forensic accounting expert is that the court views the transactional narrative as being casual with respect to forfeiture which is strengthened through the patterned accumulation of transactions which have an individual, yet common purpose. Accounting inscription allows for the accumulation of these amounts characterised as either debits or credits. A Forensic accountant may be called upon to defend the single purpose narrative alongside the summation of transactions.

### Double Counting

The determination of unexplained wealth is fraught with the danger of double counting. That is an amount, or an accumulation of amounts are combined (as both debits, or both credits) rather than having been offset (one amount as a debit and then another as a credit). In particular this can happen when an amount is included within the unencumbered value of an asset (for example, a property) and then also included as money used to make payments on a loan which in turn was used to make payments on the asset (for example, home loan repayments). An expert accountant must take particular care to recognised the effect of mixing income type transactions with capital assets, ensuring that the appropriate liabilities are matched against the purchase value of the property, accounting for the repayments. Further any capital gain made whilst the property has been held must be recognised as not being directly funded from revenue (for example, proceeds of criminal activity) but as an

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<sup>200</sup> *AMLCTFA* refers to the Anti-Money Laundering and Counter Terrorism Financing Act, 2006.

<sup>201</sup> Also cited in *Re Commissioner of the Australian Federal Police*, 2016, NSWSC 1327



indirect economic benefit that may arise from the utilisation of tainted funds already allocated to the original asset purchase. In this regard the capital benefit that arises from the asset needs to be apportioned in accordance with the proportion of tainted funds.

McCallum J, in *New South Wales Crime Commission v Ayik*, 2016, referred to s 28B of the *Criminal Assets Recovery Act 1990* (NSW), as providing “a simple mathematical formula for the calculation of the amount in which an unexplained wealth order must be made”. The Court is required first to calculate the “current or previous wealth” of a person by calculating the sum of the values of certain matters specified in subs (4) as follows:

The “current or previous wealth” of a person is the amount that is the sum of the values of the following:

- (a) all interests in property of the person,
- (b) all interests in property that are subject to the effective control of the person,
- (c) all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means),
- (d) any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person, whether acquired, disposed of or provided before or after the commencement of this section and whether within or outside New South Wales.” (s 28B).

Further that “Subsection (2) provides that the “unexplained wealth” of a person is, in effect, that part of the sum of the values calculated in subs (4) as to which the defendant has failed to discharge the onus of proving that the current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity. The mechanism is accordingly one which turns critically on the discharge by the defendant of an onus of proof.” (at 11).

He noted, in this instance, that the respondent had not put on a defense or any evidence and was known to have left the country. Nevertheless, his Honour recognised the issue of double counting in the forensic accounting evidence which had been presented on the basis of a simple asset sources and applications statement. He recorded one issue in the application of the formula provided for in s 28B(4) that is “open to the possibility that certain values contributing to a person's “current or previous wealth” within the meaning of the Act might be double counted. Indeed it is clear from a close consideration of the evidence in the present case that, that has occurred here, there being for example inclusion of the value of a property and the value of loan repayments made to acquire the property” (at 15). Further, that the construction of the sources and applications accounting technology, deployed under s 28B(6) provides, where the value of anything to be included as part of the calculation relates to wealth that has been expended, for the court undertaking the calculation to count the greater of the value at the time the wealth was acquired and its value immediately before the wealth was expended. Similarly, subs (b) of subs 28B(6) requires the person undertaking the calculation to count the greater of the value of wealth at the time it was acquired and its value at the time of the application for the unexplained wealth order.” (at 17). The matter of *New South Wales Crime Commission v Kelaita*, 2008, was also referenced with respect to the same accounting construction issue in respect of s 28A and s 28B. It is important then, that the deployment of patterned principles for sources and applications methodology, properly accounts for the wealth that has been expended in the net incremental or detrimental value of assets.

In the matter of *Director of Public Prosecutions (WA) v Bridge*, 2005, McLure J cautioned against double counting of unexplained wealth that arises from the value of property “in its different exchange forms” (at 34).

... valuing a person's total wealth (and their total lawfully acquired wealth) is part of the process of calculating a person's unexplained wealth under s 144 of the Act<sup>202</sup> .... It cannot be the legislature's intention that regard be had to property in its many exchange manifestations ("related property") in calculating a person's wealth. On the other hand, there is no reason in principle or policy to give primacy to property owned at the time of the declaration over previously owned property. To the contrary, to adopt the respondents' construction would exclude from the wealth calculus property that had been transferred for inadequate consideration (at 34).

Having noted the wide and inclusive language of s 13(2), 13(3), 19(2), 19 (3) and s 143(1)(d) which define the economic inclusions he noted:

In my view, where specified property is no longer available but can be traced to related property owned by the respondent at the time of the declaration, the State can select the property to be valued and that will determine whether s 13(2) or (3) (or s 19(1) or (2)) applies. However, no account should be taken of the value of related property in the calculation of the value of unexplained wealth if that would lead to multiple counting of the same value. The selection of the property will be affected by whether the related property is of a lesser or greater value than the original property (at 35).

Forensic accountants need to recognise that forfeiture statutes are necessarily written in wide language, which the courts have not seen to read down or to substitute for the language of the legislation, instead, keeping their interpretation in line with the broad discussion in explanatory memoranda<sup>203</sup>. Such language grants the accountant flexibility to include a variety of transactions when formulating an unexplained wealth valuation. However, such valuation is not unlimited and must take into account the balancing narrative, where credit funds transfer to, and offset, debit applications and visa versa. Mere addition of monetary amounts to form asset totals without appropriate offsetting is not proper deployment of

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<sup>202</sup> In reference to the *Criminal Property Confiscation Act 2000* (WA)

<sup>203</sup> See *Director of Public Prosecutions v Logan Park Investments Pty Ltd*, 1995, for further discussion of this point from a legal perspective.

accounting technology, nor the appropriate application of the patterned principle of funds flow analysis methodology.

## Effective Control

*POCA*, 2002, departs from traditional structural ownership that accountants use to define equity. Whilst the meaning of “effective control” is not fully defined in *POCA* (*Commissioner of the Australian Federal Police v Hart (Hart)*, 2016, at 258) the Act ignores corporations and trusts law as it relates to the ownership of property by introducing a broader definition of “effective control” of property that may be subject to forfeiture. To this end s 337 states:

### Meaning of effective control

- (1) Property may be subject to the *effective control* of a person whether or not the person has:
  - (a) a legal or equitable estate or interest in the property; or
  - (b) a right, power or privilege in connection with the property.
- (2) Property that is held on trust for the ultimate benefit of a person is taken to be under the *effective control* of the person.
- (4) If property is initially owned by a person and, within 6 years either before or after an application for a restraining order or a confiscation order is made, disposed of to another person without sufficient consideration, then the property is taken still to be under the effective control of the first person.
  - (4A) In determining whether or not property is subject to the *effective control* of a person, the effect of any order made in relation to the property under this Act is to be disregarded.
- (5) In determining whether or not property is subject to the effective control of a person, regard may be had to:
  - (a) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property; and
  - (b) a trust that has a relationship to the property; and

- (c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and other persons.
- (6) For the purposes of this section, family relationships are taken to include the following (without limitation):
- (a) relationships between de facto partners;
  - (b) relationships of child and parent that arise if someone is the child of a person because of the definition of child in section 338;
  - (c) relationships traced through relationships mentioned in paragraphs (a) and (b).
- (7) To avoid doubt, property may be subject to the *effective control* of more than one person.

Notions of economic control commonly used by accountants rely upon some form of ownership that eventually relates an individual to the property in question. This may be a direct ownership, such as when a person is a sole trader or is recognised as the individual owner of property through a registration process (for example, a State government property register), or indirectly through the owner being an incorporated entity (a company) with a majority of shares in the company being held by an individual (for example, recorded as beneficially held on the ASIC share register). Accountants commonly use the equity method of treating investments as assets, that give rise to income which is recorded on financial statements in accord with the proportional share of the investment, and equities on financial balance sheets in accord with their proportional valuation (see Morris, 2004; AASB 128, Investments in Associates and Joint Ventures, 2011). Slightly more opaque ownership may be attributed to other structures such as partnerships, joint ventures and trusts, where property is held on behalf of individuals based on a form of agreement (for example, a partnership agreement or a deed of trust) that may or may not be governed according to a specific statute

(for example, trust law which has evolved in Australia connected with company law, family law and taxation<sup>204</sup>). Part 1(a) of s 337 covers this traditional definition of equitable control.

More recently, hybrid entity structures (for example, multiple interrelate trusts with corporate trustees), exploitation of international jurisdictions (for example, offshore companies in low transparency countries), nominee directors (where a director may be nominated according to a separate agreement, terms or conditions) and shell companies (where a company does not hold any assets of its own) have been used as economic vehicles to obscure asset trails. The purpose of these complex and remote entity structures is to hide assets often arising from tainted sources or to avoid taxation (see Richardson 2015; Blackburn et al, 2012; Potas, 1993). Assets held within such structures are difficult to quantify, trace and restrain due to the lack of a clear “line of sight” between the real owner and the ultimate asset<sup>205</sup> (see for example, Basel Institute on Governance, 2009). The juridification of *POCA (Cth)* as demonstrated in s 337 which from 1 (b) extends the equitable control to any “right, power or privilege in connection with the property”. This is further broadened by reference to several types of family, domestic and business “relationships” in subsections 5 and 6.

In normal terms effective is defined as “actual, existing in fact rather than theory” and control as “under the command of” (Oxford Dictionary, 2003). Consistent with the Financial Action Task Force’s guidance on transparency and beneficial ownership (2014), subsection 2 “Property that is held on trust for the ultimate benefit of a person is taken to be under

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<sup>204</sup> A detailed discussion of trust law is beyond the boundaries of this dissertation, however it should be recognised that the general law of trusts evolves the duty, obligation or fiduciary relationship that a trustee has to the beneficiaries of a trust arrangement (Re *Scott (deceased)*, 1948)

<sup>205</sup> Exploration of this topic would bring into consideration topics of tax evasion, money laundering and asset tracing retrieval treaties. For the purposes of this dissertation it suffices to recognise that the growing use of opaque economic structures to obscure the real ownership of assets (property) has been the driving force behind the legislature’s move to more broadly define ownership to include the effective control of property.

the *effective control* of the person” brings the ultimate benefit test<sup>206</sup> under the effective control definition. The consequence for the accounting expert witness is that they must consider the scope of deployment of their accounting technology to encompass a broader context than mere equitable ownership when defining property for unexplained wealth quantification. That is, the patterned principle must consider the meaning of effective control outside the accounting consideration of financial control. This means the recognition of, consideration of and detail with respect to controlling relationships, decision making, influence and behaviours. Of further note is the timing when effective control must exist, which is not specified in the legislation. In respect to this, consideration by the Queensland Court of Appeal in *Hart*, 2016, was that effective control ceases when “a restraining order, and other orders, take effective control away from the person” (at 259) and the property has not been excluded from forfeiture. The commencement of control is a matter of fact when the observation or structure of control was initially portrayed.

### **Period of Deployment**

A standard concept considered when deploying accounting technology is that of the opening and closing dates of a period. For example, in the Australian context, financial reports such as profit and loss, balance sheet and cash flow statements consider a ‘financial year’ period commencing 1 July X1 and ending 30 June X2. Whilst this period is influenced by taxation requirements, nevertheless the concept of an opening period and a closing period as a rigid inclusion (if within) or exclusion (if outside) of transactions by date is an accepted accounting practice (see AASB 108, 2015). Subsection 4 refers to “within 6 years either before or after an application for a restraining order or a confiscation order” as the period with respect to divestiture of property that can be rolled back into the definition of effective control. This

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<sup>206</sup> That is, the person (s) who are the ultimate beneficiaries of the assets or the income arising from the assets.

period may represent a convenient period for the deployment of the accounting technology, however, in order to meet validation criteria (see chapter 5) other considerations need to be balanced against the mere duration of deployment. For example, the conditions of sufficient enquiry; scope and accuracy, are more important to fulfil before the patterned principle required for validation can be accepted. In this regard the accounting technologist needs to establish and adhere to an opening and closing boundary for transactions, consistently applied to both credit and debit entries from all sources, but the actual duration of the quantification period has greater dependency on legitimate enquiry requirements, such as the availability of adequate and accurate transactional evidence (Michels, 2011). The patterned principle remains one of sufficient enquiry, such that, further investigation, applied to either an extended opening or closing period, would not materially effect the expert's conclusion (p116). Consistent with evidentiary and professional direction the accounting expert needs to explain their opinion, in order to validate the choice and application of opening and closing periods against alternative periods.

McCallum J considered s 124 of *POCA*, 2002, in the *Commissioner of the Australian Federal Police v Fysh*, 2013, noting that the section “adopts a gain or net increase approach” to determining the “value of the relevant benefit in the case of serious offences”. Subsection 124(1) describes that “the court is to treat the value of the benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess during or after the illegal activity, as exceeds the value of their property before the illegal activity” (*POCA*, 2002, s 124 (1)). “Put shortly, the starting point is the net increase in the person's financial position” (*Fysh*, 2013, at 24).



## Accounting for Other Interests in Forfeited Property

It is important, particularly from an accounting evidence point of view, that account is taken of legitimate and untainted interests in a property or assets which are subject to a forfeiture order. Accounting evidence segmenting the tainted and untainted equity in a property may be material in the apportionment of an asset or proceeds from the sale of an asset. S 55 reasons that the court may specify other interests in property under a forfeiture order where:

- (a) the amount received from disposing of the combined interests would be likely to be greater than the amount received from disposing of each of the interests separately; or
- (b) disposing of the interests separately would be impracticable or significantly more difficult than disposing of the combined interests (s 55).

In this regard the court may make “such ancillary orders as it thinks fit for the protection of a person having one or more of those other interests” (s 55(2)). As described at s 55(3) and (4) accounting for an ancillary order should include valuation of “the nature, extent and value of the person's interest in the property concerned” (s 55(3)(a)). This value may be expressed in percentage or dollar terms. S 73 allows for the making of exclusion orders such that a specified interest is excluded from forfeiture. In this regard an accountant calculating the exclusion must be specific in identifying the “nature, extent and value (at the time of making the order) of the interest concerned” (s 73 (2)(a)) and explicitly explain that the interest is not the proceeds of unlawful activity nor the instrument of a serious offence (s 73(1)(i) and (ii)). Recognition of an interest in forfeited property may be otherwise compensated for under a compensation order directing the Commonwealth to make restitution for “an amount equal to that proportion of the difference between the amount received from disposing of the property and the sum of any payments ... in connection with the forfeiture order” (s 77(2)(d)(ii)).

Again, an accountant valuing the separate untainted interest must be specific in defining such interest for the court.

### **Mixture of Tainted and Non-Tainted Funds**

The mixing of tainted assets with non-tainted assets is a common reintegration strategy<sup>207</sup> or may simply be the outcome of business dealings where the legally obtained funds of one person or entity are mixed with tainted funds for a single purpose, such as the purchase of a property. In this regard the statutory provisions with respect to accounting for other interests may be the most appropriate consideration for segregating tainted and non-tainted funds. Where a single individual has mixed their funds from legitimate and illegitimated sources they can be distinguished either by separation or as a proportion of the realised value of the forfeited property. The role of accounting is important to determine the proportional separation between tainted and untainted funds, particularly where an asset involves an intangible component (such as in the purchase of a business). Procedurally the sections discussed above in regards to accounting for other interests in forfeited property are relevant in seeking relief for mixed, untainted funds, however s 94A should also be recognised as a means to attain compensation. The accounting role is specifically linked to s 94A(2)(a), in advising the court as to the specific proportion found by the court to be untainted source funds.

### **Value of Property**

Under s 56 forfeiture orders must specify the value of forfeited property at the time the forfeiture order is made (s 56). Such value is made as if it has been derived at the time of

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<sup>207</sup> In this regard money laundering strategies may be employed that include placement, layering or integration in combination with legitimate funds or activities. Such strategies may be considered as an individual activity for in confiscation or forfeiture matters rather than a holistic approach under AML-CFT or financial legislation. Whilst money laundering may arise in forfeiture matters it is not the focus of this dissertation.

assessment (s 125(1)). The court may also take into account the time value of money in the declining purchasing power of money between “the time when the benefit was derived and the time the court makes its assessment” (s 125(2)). Bearing in mind the aforementioned discussion regarding the broad recognition of a benefit arising from tainted assets, the contemporary nature of the assessment process allows for tainted assets to be valued at market value at the time of assessment, inclusive of capital gain. In the case of property or shares the capital gain could be considerable, representing a benefit arising due to the control and use of tainted funds that exceeds the funds themselves. S 122(d) notes that the value of the person’s property includes that arising “after the illegal activity” (s 122(d)).

### **Penalty Orders and Accomplices**

An interesting issue arose in the UK jurisdiction that puts Australian forensic accountants and those considering POCA/UW penalty orders on notice. Where there are partners in crime, that is accomplices, who have jointly been involved in the commission of a crime that resulted in property being acquired by them together, what is the proper approach for the court to adopt, and the proper orders for the court to make with regard to confiscation? (Doig, 2014). The cases that considered the issues in the United Kingdom Supreme Court, were *R v Ahmad*, 2014 (*Ahmad*) and *R v Fields*, 2014 (*Fields*). In *Ahmad* the two appellants had been involved in carousel fraud with a benefit figure of 16.1 million pounds. A confiscation order was made in respect of each appellant for that sum, that is, a combined confiscation amount of 32.2 million pounds. In the matter of *Fields* there were three appellants who had each been assessed for the full amount arising from a credit agreement fraud worth 1.6 million pounds. “Both appeals turned on the ruling by the court of Appeal that each appellant should be separately liable for the whole amount of the confiscation order” (Doig, 2014). This is consistent with the joint and several liability concept accountants would attribute to

partnership activities or that may be applied in a compensation case for negligence<sup>208</sup>. The courts upheld the individual liability for the whole amount and recognised that the overall aim of POCA was to “recover assets acquired through criminal activity” (see UK POCA, 2002; *Fields* at 38). However, as that effectively doubled (or tripled) the total forfeiture, the courts ruled that any moneys paid by one appellant would reduce the liability of all who were subject to the related confiscation order. The court cautioned that the finding of joint involvement in criminal activity should not be conflated as a matter of convenience (at 51), such that an accomplice with minimal involvement may be limited to confiscation of their ‘fee’ for their activities.

### **Forfeiture not Confined to Compensation**

The issue of the value of property forfeiture being limited by the amount required to compensate the community for the “cost of investigating and prosecuting the crime and that the court could not properly make a restraining order without an estimate of the cost of the amounts expended” in investigation and prosecution, was considered by Kelly J, in *DPP v Wolfgang Grimm*, 2012. This matter was brought under the (NT) Criminal Property Forfeiture Act, and concerned the forfeiture of a property storing stolen goods. His honour extinguished the argument stating “It is clear from s 10(3) of the Act that, contrary to the objector’s submission, the object of the forfeiture provisions of the Act are not confined to ‘compensation’. They include compensation to the Territory for the cost of deterring, detecting and dealing with criminal activities, prevention of unjust enrichment and deterring

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<sup>208</sup> In cases of joint and several liability, a person who was harmed or wronged by several parties could be awarded damages and collect from any one, several, or all of the liable parties. When two or more parties are jointly and severally liable for a tortious act, each party is independently liable for the full extent of the injuries stemming from the act. This type of liability may apply to business partners who form a general partnership, or to two or more people.

See: [https://www.law.cornell.edu/wex/joint\\_and\\_several\\_liability](https://www.law.cornell.edu/wex/joint_and_several_liability)

crime (at 19). This extinguishment is an important consideration for accountants valuing the appropriate forfeiture penalty, particularly in the context of jurisdictions increasingly establishing forfeiture accounts to directly fund law and community resources.

## **Part 4: The Research Questions**

In order to answer the research questions this chapter has considered the specific *POCA/UW* legislative context, its inherent orientation towards the validation of accounting technologies as put forward in chapter 8 and judicial consideration of specific issues arising from the application of the statutes to case details.

To restate the research questions:

1. Descriptively, how has the application of accounting technologies in forfeiture law cases evolved?
2. What are the attributes of “appropriate” accounting technologies described in question (1)?

In responding to the first question, accounting technologies have evolved in a contributory sense, over a variety of legislative genres, however, accounting’s evolution with respect to the forfeiture genre has been largely subordinate to the legal narrative. Accounting has provided lower level support through straight forward transactional documentation, rather than in a strategic sense, as may have been expected considering the crime prevention role of economic confiscation outlined in the explanatory memoranda accompanying the introduction of forfeiture statutes. That is, crime control strategies through forfeiture, have not been commenced from the foundation of accounting technologies where the financial gap provides the basis for litigation. This is despite the strategic use of asset betterment, net worth analysis and sources and applications analysis under taxation statutes, where these

methodologies have sustained the need for the taxation commissioner to rely upon an assessment method to form his opinion.

In response to the second research question, this dissertation responds with consideration of appropriate accounting content from the theoretical, legal, peer professional and legislative viewpoints. From the theoretical perspective the accounting technology must be deployed with the dual purpose of contributing to the court's internal adjudication and the court's external communication, from the legal perspective the accounting knowledge deployed must fulfil the court's access and probity requirements (previously discussed as the *Makita* rules), from a peer professional perspective the accounting technology must be consistent with generally accepted and practiced professional accounting methodologies, and from the legislative perspective the ontological approach to deployment must be consistent with statutory provisions and judicial interpretation. The concept of properly applied and presented patterned principles has arisen as the fulcrum enabling validation of the accounting outputs offered to the court and to the community. Pragmatically the composition of forfeiture statutes allude to the acceptability of accounting analysis ranging from the application of transactional flows to criminally employed and attained assets, to those methodologies with attributes that allow for the identification of gaps in the legitimate acquisition of wealth. Appropriately deployed accounting techniques such as asset betterment, sources and applications and net worth analysis should assist the court's adjudication with respect to the sources and application of tainted funds, and the consequent quantification of appropriate redistribution remedy through confiscation. Simplified gap quantification should assist with the alignment of forfeiture remedies to community norms that ultimately support legislative validity and justify juridification.

## Chapter 10: Conclusion and Further Research

### Response to the Title

The title of this dissertation has two tranches; *Accounting as a Medium of Juridification* and in respect of *The Pragmatic Context of Forfeiture Law and Its Application*. This conclusion will look at these two tranches separately in reflection of what this thesis has discovered and argued. The first tranche presents accounting as a medium of juridification. In this regard the role of accounting in its enhancement and strengthening of active communication from the legal system to the community has been theoretically argued to support the democratic validity that underpins the context necessary for the juridification of statutes. This is an important aspect of the parliamentary process necessary as the legislation gains traction and is properly administered by the system, through the implementation of the government's policies within the lifeworld. Habermasian and other philosophical arguments have been examined to enlighten this role of accounting as a tool of validation and expertise when appropriately deployed. Further, accounting has been used as a lever by politicians and supporters of juridification in their public garnering of support for increased legislative remedies and statutory changes. The thesis finds support in this argument, as articulated in a stepped process (the research argument) and through examination of the economic reasoning with respect to "the deprivation of the use and enjoyment of tainted funds by criminals". The thesis recognises both the theoretical and practical role that accounting plays as a medium to justify economic remedies, which capitalises on stable and accepted accounting principles. Accounting is recognised as a legitimate fulcrum both within and outside the courtroom that can be properly positioned to move juridification forward.

When the thesis addressed the second tranche, *The Pragmatic Context of Forfeiture Law and Its Application*, it found that the use of accounting as a fulcrum is not as readily apparent in

practice, as would be expected given the plethora of agency endorsement of “follow the money” and identification of “big boys” tainted funds, as articulated strategic objectives. Examination of the competent deployment of accounting technology in a range of legislative genres demonstrated that forensic accounting ontologies are suitable approaches to the control of crime through economic mediums. Specifically, the thesis reviewed a number of appropriate methodologies that have been accepted for the development of expert opinion by the courts, as well as the articulation of the proper deployment of the principles patterned into these professionally deliverable methods. The dissertation has argued that juridification of forfeiture legislation, such as the introduction of unexplained wealth provisions and the reversal of the onus of proof, is overtly supported by the deployment of the recognised patterned principles of accounting technologies. Further, that the design of the unexplained wealth clauses of the mostly uniform Proceeds of Crime Acts (in each jurisdiction) are constructed such that accounting gap methodologies are compatible with the ontology behind the drafting of the legislation. However, when individual case judgements are reviewed it becomes apparent that this is not being converted into action at the case level. Income gap analysis accounting methods are not being strategically targeted towards estimations of accumulations of unexplained wealth, with matters utilising unexplained wealth provisions being aimed at ‘low hanging fruit’ such as money found in drug houses, cash confiscated while being illegally transported across borders or assets being directly funded by the proceeds of a criminal act. Submissions to the Australian Senate enquiries into unexplained wealth discussed earlier lament the law enforcement priority for ‘lock ‘em up’ crime control strategies, relegating ‘follow the money’ processes to after a conviction has been obtained or where an assurance process has specified the location of funds (for example after drug raids or when funds are transmitted across borders). It is notable that neither of the recent high profile unexplained wealth related matters currently being brought for prosecution (not under



POCA provisions as yet) were detected through forensic accounting strategies, despite evidence of considerable illicit funds and obvious conspicuous consumption (see, for example, the Koubaridis, the Cranston matter, 2017; and Miranda, the Commonwealth Bank v Austrac money laundering matters, 2017).

The reasons for the lack of accounting led strategies may be due lack of forensic accounting capability, particularly within the legal profession, or lack of confidence in accounting gap methods that could be used to provide evidence of unexplained wealth (for example, with regard to the assumptions within the execution of the methods, or the methodology itself) or due to lead agencies' perception that the risk of a litigation failure is too high (such as the various DPP's wishing to protect their prosecution records). This dissertation is therefore important in its contribution to the easing of tension in all three of these areas, in that, it articulates both the specific forensic accounting purposes, ontology and methodology with direct relevance to the dilemma of providing evidence of unexplained wealth. This dissertation, particularly chapters 8 and 9, should assist the legal profession in gaining confidence in the purpose and use of accounting technologies deployed to address unexplained wealth prosecution objectives. In some regard this may be rectified with the increased funding and compilation of multi-disciplinary task forces. As discussed, the failed deployment is contrary to the espoused objectives of government ministers, notably the various Attorney-Generals in state and federal jurisdictions, and of the legislation itself. Therefore, it represents a failure of government policy to be delivered at the bureaucratic level. The policy failure has been recognised by creation of multifunction task forces and the very recent discussion that recognises that "state and Commonwealth legislation should be allowed to co-exist .... through a text based referral of legislative power from the states to the Commonwealth". Further Smith and Smith (2016) notes an authoritative view that Commonwealth legislation should be amended to enable the Commonwealth to extend its

jurisdiction to the states and territories (p52). The lack of deployment of pre-emptive and ongoing accounting strategies is an important area for future research as it is widely acknowledged amongst Australian jurisdictions that an effective unexplained wealth regime is being hampered by “complexity and practical difficulties” (Smith and Smith, 2016, p51).

This thesis may also serve to better articulate the role of accounting expertise and its potential impact on forfeiture litigation by emphasising accounting’s validation attributes. Of particular note, is the chapter 8 discussion on the scope of accounting expertise focused on the narrative that arises from bank statements which should prove useful against challenged admission arguments based on the ‘every man’ nature of bank statements. The author is aware of the argument in this thesis being prepared in the defence for the entry of an accounting expert witness report that was being challenged under *Makita* and *Red Bull* specialised expertise conditions. Unfortunately, the matter was settled on the steps of the court so it evaded judicial consideration.

### **Response to the Research Questions**

Notwithstanding the above recognition, that income gap accounting methods are not being deployed as a strategic approach to forfeiture cases, the research questions can still be answered through the arguments of this thesis. Specifically this dissertation set out to respond to the two research questions:

1. Descriptively, how has the application of accounting technologies in forfeiture law cases evolved?
2. What are the attributes of “appropriate” accounting technologies described in question (1)?

These questions have been considered broadly with respect to their external and internal context (inside and outside the court), and their epistemological validity. More specifically,

attention has been addressed towards the questions' legislative genre, their ontological rationality (relational acceptability between law and accounting) and instructional obiter dicta that has arisen from forfeiture and similar jurisdictions.

The response to the first question has been addressed both from a theoretic and practical viewpoint. Initially, the response was framed by consideration of theoretical approaches to the law and accounting, with the critical area of investigation being the intersection of both the accounting and legal professions. In this regard the philosophy of eminent authors such as Habermas, Nozick, Robson, Latour, McLaughlin, Clegg, Michels and others was considered in light of the purposeful deployment of accounting technology to assist with the court's adjudication process and in order to assist with the communication of the court's legitimate and 'right' decisions. Here consideration of concepts of truth and validity were examined with respect to the purpose of maintaining the cognitive authority of expertise, in this case that of the forensic accountant as an expert witness. The circular dependency of the validation process, such that the linguistics of the law, articulating systemic norms, is synergistically supported by the facticity of accounting that underpins the requisite conditions for continuing juridification. An informed and cognisant community, democratically upholds changes and additions to legislation, as advocated by their representatives, and through communicative action accepts the judicial remedies implemented by the courts.

The manner in which the court and community is informed and advised by the proper deployment of accounting technology was then reviewed with the recognition that accounting provides stable, transportable analysis of the facts of a matter for the very real monetary resolution of matters, such as in financial penalties, fines, compensation and economic settlements. However, before matters can be resolved the accounting story must be told to the court, and in this regard the legal profession controls the access gateway and the important measure of initial probity of the expert evidence. Pertinent compliance with the rules of

evidence as articulated in both evidence statutes and legal obiter dicta that have arisen from precedential cases such as *Makita*, must be recognised by the expert accounting witness if they are to exercise influence on the adjudication. These areas of the discussion may be referred to as the external context that must be considered when the forensic accountant addresses the research questions, significant considerations for the appropriate management of their cognitive authority.

Further, the dissertation reflected on the more specific authoritative content of the forensic accountant's presentation to the court, consistent with precedential requirements in the area of the opinion witness exemption and with respect to the active communication objective. The importance of ontological validation of the forensic accountant's presentation was highlighted, particularly in an environment estranged from direct community experience. The community's reliance on peer accepted pronouncements and prescribed patterns of applying accounting technologies, provides a surrogate for first-hand experience, that allows the community the confidence of methodological accuracy as a judgement is digested, implemented and relied upon. Therefore it is important that the forensic accountant's expertise and methods are soundly deployed in order to sustain epistemological justification. Specifically, the forensic accountant must pre-empt avail themselves for validation of their speech act by the court and the community, such as through cross-examination or judicial commentary.

In the broader legislative context of the forfeiture genre in Australia, the dissertation reviews the espoused objectives of the statutes both as written and through contemporary commentary, pre and post royal assent. This review highlights the complexities in legislative variance, bureaucratic accountability and reporting across the Australian jurisdictions. This jurisdictional broth of commonwealth, state and territorial responsibilities and approaches has served to inhibit holistic strategic forfeiture approaches to the management and control of

organised crime. It has encouraged jurisdiction shopping and ad hoc application of confiscation remedies. Reporting measures appear limited to unitised counting and periodic comparison, rather than reporting against an agreed and articulated objective. That is, measured as a considered response to organised crime across the continent. In this regard the recent establishment of the Criminal Assets confiscation Taskforce and the Commonwealth Serious Financial Crime Taskforce, including in-house forensic accountants and taxation evasion information linkages and responses, is encouraging, deserving further research with regard to their strategies, practices and outcomes. Of future research interest would be the transfer of forensic accounting knowledge and skill recognition to the legal fraternity's interface in the areas of investigation, prosecution and internal court proceedings. This includes the future judicial expression of acceptable forensic accounting practices in judgements that, through their own credibility, become reported precedents. Current law enforcement practice does not appear to have evolved past 'picking off the low hanging fruit'. For example, the propensity for unexplained wealth orders to target already confiscated cash and assets on the reasoning of associated serious criminal activity, rather than, the deployment of accounting technologies such as asset betterment to establish a 'ground up' response to those criminals who display conspicuous wealth and effective control of a range of lucrative assets<sup>209</sup>.

The specific issue of "control" within the meaning and application of forfeiture legislation deserves research and comment (particularly judicial obiter dictum), initially from the accounting facts to the legal interpretation and meaning. This is important in implementing strategies that commence with establishing control in both a practical and evidentiary sense before amalgamating the assets under control, against which to test net worth and asset

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<sup>209</sup> For example, the effective control of night clubs, construction service businesses, gambling businesses, consultancies and money laundering placement businesses. Such criminals are often referred to in the media as "colourful identities" or similar euphemisms.

betterment methods. The particular focus for future confiscation remedies should be on the untainted liquidity of active business assets compared with progressive capital accumulation and ability to fund lifestyle commitments. Once compared with taxation attestations and the reasonably expected legitimate return on investment from such business investments the validity of reporting obligations can be assessed. The application of gap analysis (using expert forensic accounting knowledge) to such legitimisation strategies should detect and provide evidence of unexplained wealth to be brought to and tested in court.

The first research question is informed by the contextual discussion, however, as the forfeiture genre is relatively new, few matters that have been brought before the courts that utilise the full possibilities of deploying accounting techniques as the main basis to making confiscation decisions. Confiscation appears to have been mainly deployed around the edges of organised criminal wealth. For example, there are 38 identified ‘one percent’<sup>210</sup> outlaw motorcycle gangs described as significant organised crime groups<sup>211</sup> (representing 4,500 patched members, 900 prospects and over 2500 associates), none of which have been brought to account before the courts for their unexplained incremental wealth, despite claims that unexplained wealth legislation would directly target members of gangs “by forcing them to explain the source of specified assets, suspected of being acquired through illegal means” (Atkinson, 2009). Therefore discussion regarding the detail alignment of professional appropriate accounting evidence draws on accounting technologies that address similar matters of tainted or unexplained wealth applicable under other legal genres (such as taxation or equity). The foundation of valid forensic accounting evidence has its basis in the

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<sup>210</sup> “one percent” members is a reference to motorcycle clubs that can be distinguished by a "1%" patch worn on the colours. This is said to refer to a comment by the American Motorcyclist Association (AMA) that 99% of motorcyclists were law-abiding citizens, implying the last one percent were outlaws.

<sup>211</sup> See Australian Criminal Intelligence Commission report *About Crime*, <https://www.acic.gov.au/about-crime/organised-crime-groups/outlaw-motor-cycle-gangs>. Outlaw Motorcycle Gangs represent about 4,500 patched members, 900 prospects and over 2500 associates.

requirement for recognised accounting expertise (*Makita*), which may be validated by its acceptance in alternative legal spheres and/or its recognition through proven peer practice.

Specifically, in responding to the second research question: “What are the attributes of “appropriate” accounting technologies described in question (1)?” the role of the proper utilisation of peer accepted patterned principles is recognised as stable and portable, that arrange the quantitative nature of accounting, such that, it organises and enhances the description of issues to be considered by the trier of fact (such as the judge or jury). Patterned principles do not have the authority of *stare decisis*<sup>212</sup> but they should be a powerful influence in the *ratio decidendi* (reason of deciding) of a case. Patterned principles are born out of the professional accounting body of knowledge, requiring skilful implementation to be appropriately employed in response to the matter at hand. Patterned principles that best apply to forfeiture matters are those whose ontological approach suit the quantification of a gap analysis. That is, the alignment of accounting knowledge, what is known, can be organised such that there is an identifiable and measurable gap in the knowledge, the unexplained gap. As accounting is an incremental discipline that facilitates the aggregation of numbers, quantities and facts into a narrative, it is the gap in that narrative that provides its own story by begging an explanation. Forfeiture laws put the onus of explaining the gap on to the accused, however this may be relatively easily fulfilled by a simple *prima facie* response (such as an inheritance or gambling wins). The forensic accountant’s narrative purporting to articulate an illegitimate gap, may be crucial in compelling the court to require a detailed explanation regarding the source of funds and acquisition of assets.

The gap analysis is applicable to accounting know-how focused at the transaction level (such as, missing or inconsistent transaction details), at the aggregation level (such as, missing

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<sup>212</sup> The doctrine of *stare decisis* means to “stand by decided matters”, that is, cases should be decided in a consistent manner when their material facts are the same. It is the doctrine of precedent. (Williams, 2013)

transactions in a series), at the methodological level (such as, the results from a net worth analysis, sources and application flow or asset betterment calculation) and at the logical level (such as, a cash component, gross margin or trading conditions analysis). Therefore an important attribute of accounting technologies suitable for forfeiture matters is that they clearly define the gap between what are explained earnings and acquisitions, and what are unexplained. Similarly when applied to capital accounts the important attribute of the equation is to differentiate the gap between tainted and untainted assets. This gap may be distinguished in terms of separate assets (for example, where a particular purchase is funded from the proceeds of a crime) or in terms of separate periods of time (for example, for assets purchased in a period after a date when criminal activity was known to commence) or across separate geographic locations (for example, when transactions are associated with a particular locale or business site). Specific accounting technologies ranging from basic transaction alignment through to differential wealth assessments (such as asset betterment, sources and applications, net worth analysis) have been discussed in chapter 6 as suitably transferable for application in confiscation matters. Chapter 7 further articulated issues that a forensic accountant should consider in adapting accounting technologies to the forfeiture genre.

### **Importance for the Legal Community**

This thesis has explored the content located within the overlap of the accounting and legal professions, that is, forensic accounting. The legal profession's role as the court's gatekeeper needs to respect both the context of statutory law and community norms, thus maintaining the credibility that ultimately, through democratic process, validates the proper application of new and existing laws. This is not an autopoietic task. It must be referenced across the professional boundaries of the accounting profession, that is, within the forensic accounting overlap. Recognition of the synergistic effect of the proper deployment of factitious, stable, transportable accounting quantification, when structurally coupled with the legal narrative



(integrated with the facts of the matter), is an important tenant of the smooth functioning of the legal system and its active communication with its internal and external communities.

Accounting is an integral stakeholder in court decisions involving money. Therefore it is important that the legal profession recognise appropriate accounting principles and their ontological orientation, such that they can be validly applied to the adjudication of specific matters within identified legislative jurisdictions. Specifically, the application of patterned accounting principles that narrate and calculate the fiscal gap are applicable for confiscation and forfeiture matters, particularly with respect to unexplained wealth decisions. This dissertation has directly positioned methodologies and methods enabling gap analysis as having the appropriate attributes for determining unexplained wealth by expert opinion witnesses. Legal professionals can refer to these methods and methodologies in fulfilling the *Makita* criteria for expert witnesses.

### **Importance for Forensic Accountants**

This dissertation centrally positions the forensic accountant in the role of expert opinion witness, discussing the technicalities of the function, along with the recognition of the tension cognitive authority inherently brings with it. Accounting expertise has both an internal advisory and external communication roles within and outside the court. Within the legal system accounting evidence remains subservient to the legal structures that define the delivery of evidence, its probity and validity testing through cross-examination. This research theoretically discusses the friction between the legal and accounting professions, eventually prioritising the structurally coupling effect of professional combination rather than conflict. From this the attributes of professional consideration have been discussed from both the accounting and legal viewpoint in order for the forensic accountant to be cognisant of both their facts and the legal and community norms within which they apply those facts.

Recognition of particular patterned principles suitable to be relied upon in matters of various jurisdictions has arisen as the primary validation process able to accommodate accounting technicalities within the specific legal chronicle required for that legislative genre.

Peer accepted accounting principles and practices support the methodologies and methods consistent with the recognised patterned principles. To this end, this dissertation has reviewed gap analysis methodologies that display suitable attributes for reliance upon in confiscation matters and that have been accepted in court. It is important for forensic accountants to recognise that particular patterned principles must guide the deployment of gap analysis methodologies in keeping with the judicial interpretations applicable to specific legal genres and to tailor accounting methods accordingly. Important examples of areas from the Australian forfeiture statutes and cases that may influence moulding of accounting methods (such as the breadth of inclusion due to the application of “derived”; the expanded definition of “effective control”) for the confiscation judicial genre have been discussed in chapter 7.

### **General Importance**

Of general importance to both the legal system and the community (or lifeworld) is the recognition that the juridification of legal statutes requires the circular support of active communication. Where legal decisions involve monetary remedies, such as economic redistribution, accounting has significant capacity to translate both for the adjudication process and in communicating the court’s final determination. Accounting positions itself as a reliable validation tool, able to remain stable when interpreted by a variety of stakeholders, enhancing the valid speech act presented by the accounting expert in assisting the court. This stability comes from the proper application of patterned principles of accounting, supported by peer attested methods, objectively targeted towards the facts of the matter at hand. It is important for active communication to reference the appropriate deployment of patterned

principles in order to gain the confidence of the listener, rather than merely articulate the quantification of a remedy. Accounting expertise enriches the narrative validating its reception as a correct and true response.

### **Policy Reform**

Whilst the research per se does not call for policy reform, it does add impact to the call for policy reform to better enable the performance of unexplained wealth provisions. The research (independently confirmed by Smith and Smith, 2016) shows that the Australian forfeiture regime is not fulfilling its stated purpose therefore policy change is required in order to reinvigorate and appropriately facilitate improvement. Policy change is required in the form of structure (to integrate broader skill sets), funding (such that complex cases can be brought through the costly court process), risk acceptance (such that prosecuting agencies engage with the prosecution with a balanced assessment of the risk of failure rather than complete reluctance), with respect to the transfer of intelligence between agencies and with respect to common or harmonised statutory jurisdictions.

The research has explained the need for multifaceted expertise in order to progress unexplained wealth strategies, specifically the need to engage forensic accountants for the duration of the investigation and prosecution. The advent of the multi-skilled task force approach in NSW and the Commonwealth jurisdictions is relatively new and is showing early signs of success, particularly in NSW. This research adds impact by highlighting the purpose of accounting evidence that reaches above the immediate perpetrators to those with control of the tainted funds. Further the research informs the proper ontological and methodological approaches to integrate accounting technologies with the legal objectives suitable for such targeted prosecution. A Deputy Commissioner of the NSW Crime Commission once referred to the need for more forensic accountants, because they were “keepers of the dark arts” that

enabled his investigators to release the “purgators” when they interviewed suspects<sup>213</sup>. This research has policy implications in that the forensic accounting ‘dark arts’ should become more main stream, recognised in ‘follow the money’ strategies and involved in the design as well as commission of forfeiture programs and strategies. This requires the institution of multi-faceted task forces in policy concepts that target the ‘Mr Bigs’ of crime, complimented by appropriate government funding.

Further this research has noted the uncertainty around the exercising of proceeds of crime legislations between jurisdictions. The dissertation supports the growing policy argument towards the establishment of a “text-based referral of legislative power from the states and territories to the Commonwealth to allow agreed Commonwealth legislation to be used to confiscate unexplained wealth located in states and territories” (Smith and Smith, 2016, p8). Smith and Smith (2016) also call for a national forum to “clarify issues (that block a national approach) and move towards an agreement on the wording of the legislation, operational processes, interagency cooperation and responsibilities, initiatives, financial intelligence, and analysis, and the improvement of intelligence sharing at the national level, particularly through the Criminal Asset Confiscation Taskforce” (p8). In chapter 7 this research recognised the shortcomings of the Australian forfeiture regime to date, with chapter 8 strengthening the ontological connection between accounting and law that gives greater certainty to the adoption of a national approach to the deployment of unexplained wealth provisions<sup>214</sup>. These matters in turn provide a supporting influence with respect to the validity of the Smiths’ call for policy change that expands the national approach to legislative referral.

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<sup>213</sup> This reference was to the ‘purgators’ in the Harry Potter movies, that is the effect of the guilty mind and other pressures that can be manipulated in an interrogation scenario. Unrecorded discussion with Assistant Commissioner, Legal, 2013.

<sup>214</sup> For example, the integration of accounting gap methodologies whose expert interpretation has already been accepted in the Commonwealth taxation arena.

## Further Research

Throughout chapter 7 and this concluding chapter, 10, a number of issues have been noted for further research. There appear to be two specific directions for further research; validation of quantification reporting, and qualification of structurally coupled strategies directed at achieving the forfeiture objectives of serious and organised crime prevention. In this regard the first research direction is important because it brings to account those bureaucratic overseers of the state confiscation objectives in such a manner that connects real outcomes with those objectives. Issues such as the attrition between the inflated forfeiture estimates in introductory orders or press releases and the actual realised value of forfeited property should be transparent and responsive. Qualitative research should be undertaken to transparently assess the applicability of “best practice” solutions such as task force operations and a higher utilisation of accounting led strategies to target serious and organised criminals.

## Concluding Comments

Throughout this research it has been recognised that the forfeiture genre is relatively new and therefore suffers from the lack of stare decisis (precedent decisions), a vital technique of legal reasoning. Legal reasoning under the stare decisis doctrine requires decisions of higher courts within a jurisdiction to provide the stability and certainty of binding precedent authority. As described by Benjamin Cardozo (1921) in his treatise, *The Nature of the Judicial Process*:

It will not do to decide the same question one way between one set of litigants and the opposite way between another. “If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.” Adherence to precedent must then be the rule rather than the exception

if litigants are to have faith in the even-handed administration of justice in the courts. (at 33-34, including quote from Miller, 1903, at 335).

In the absence of a binding precedent the legal argument may be constructed by relying on a non-binding precedent from another jurisdiction, by crafting an argument from first principles or by developing an argument that the decided cases have evolved to a general principle (which can be applied to the current circumstances. In the absence of an effective body of precedents, this research should assist both the application of precedents from other jurisdictions to forfeiture cases and to the construction of a legal argument based upon the first principles validation of accounting evidence. It is only by bringing matters to court that judicial precedents can arise, be tested and decisions made which give confidence in building the critical mass of unexplained wealth forfeitures that allow the statutes to fulfil their ambitious promise to bring redress to organized crime and the associated criminals.

It remains to be seen if the recently established, multi-agency, Commonwealth Serious Financial Crime Taskforce can invigorate the unexplained wealth focus as a viable tool in regard to preventing the use and enjoyment of tainted funds by organized criminals. With the wind down of Project Wickenby<sup>215</sup> and renewed focus on Phoenix activity<sup>216</sup> and the misuse of trusts and superannuation funds, it does not appear that any strategic approach to the use of unexplained wealth remedy will arise. If the laudable comments of those politicians that introduced the UW/POCA legislation to the various houses of parliament in Australian and who subsequently supported juridification amendments, are to be brought to effect, a strategic approach needs to be implemented. Such a strategy would require the harmonization of legal and forensic accounting operatives, accommodating their professional facts and norms as they

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<sup>215</sup> Project Wickenby focused on tackling offshore tax evasion and crime. <https://www.acic.gov.au/about-crime/taskforces/commonwealth-serious-financial-crime-taskforce>

<sup>216</sup> Phoenix fraud involves a company deliberately liquidating assets to avoid paying creditors, taxes and employee entitlements. <https://www.acic.gov.au/about-crime/taskforces/commonwealth-serious-financial-crime-taskforce>

investigate from first principles the unexplained wealth controlled by known criminal groups and individuals. Deployment of the accounting patterned principles that pertain to gap analysis such as asset betterment methods are necessary tools in the fight against organized crime in Australia.

## Post Script

This dissertation has carried the case that crime prevention strategies need to adopt more complex methodologies such as gap measurements based on the deployment of forensic accounting skills. Confronting more sophisticated, senior criminals requires detailed pre-emptive and evidentiary work. This means policy decisions must be supported by politically approved budgets for agencies deploying more complex strategies such as costly, integrated multi-skilled task forces. Therefore it is topical, but disappointing that the retiring head of the NSW Crime Commission, Peter Hastings, claimed that “we won’t improve our control of organised crime if we continue down the path of reducing budgets”. Despite the NSW Crime Commission being Australia’s best performing unexplained wealth and proceeds of crime authority, he noted that “the budget is not matching the growth in crime”. Further, that “the work we are doing is more resource-intensive at the same time the budget is being reduced” (Morri, Daily Telegraph, 31 October 2017). These comments from the outgoing NSW Commissioner, after five years at the helm, reinforce the importance and currency of this thesis in arguing the need for, and process of, implementing more complex anti-organised crime strategies and the political acceptability for the funding the cost of the necessary combination of investigation skills, such as forensic accounting.

## Appendices

### Appendix 1A: Unexplained Wealth Case Selection

Case List used for Judgement Review (Also Table 9.1)		
	<u>Case Reference Name</u>	<u>Case Reference</u>
1	New South Wales Crime Commission v De Jonk	[2016] NSWSC 1668
2	New South Wales Crime Commission v Mogy	[2016] NSWSC 1667
3	R v Gibbs	[2016] SADC 144
4	NSW Crime Commission v Nehme	[2016] NSWSC 1410
5	Queensland v Deadman	[2016] QCA 218
6	Queensland v Deadman	[2015] QSC 241, (2015) 253 A Crim R 484
7	Director of Public Prosecutions (Cth) v Hart	[2013] QDC 60
8	New South Wales Crime Commission v Ayik	[2016] NSWSC 1183
9	Commissioner of the Australian Federal Police v Thasthahir	[2016] VSC 468, (2016) 313 FLR 358
10	Nguyen v The Queen	[2016] VSCA 198, (2016) 311 FLR 289
11	Commissioner of the Australian Federal Police v Surinder Kaur	[2016] VSC 423, (2016) 311 FLR 44
12	Re Commissioner of the Australian Federal Police	[2016] NSWSC 861
13	Director of Public Prosecutions (Tas) v Swan	[2016] TASCCA 9
14	Zanon v Western Australia	2016] WASCA 91,
15	New South Wales Crime Commission v Richards	[2016] NSWSC 838
16	New South Wales Crime Commission v Kane (No 3)	[2015] NSWSC 1963
17	Ruzehaji v Commissioner of the Australian Federal Police	[2015] SASCF 182,
18	R v Barker	[2015] QCA 215
19	New South Wales Crime Commission v Nhu	[2015] NSWSC 1643
20	Commissioner of the Australian Federal Police v Vo	[2015] NSWSC 1523 , (2015) 302 FLR 209
21	Re Commissioner of the Australian Federal Police (No 2)	[2015] NSWSC 1447
22	Commissioner of the Australian Federal Police v Heng Jie Zhang (Ruling No 1)	[2015] VSC 390,
23	New South Wales Crime Commission v Rashidi	[2015] NSWSC 995
24	New South Wales Crime Commission v Warburton	[2015] NSWSC 9
25	R v Versac	[2014] QCA 181
26	New South Wales Crime Commission v Tindle	[2014] NSWSC 879
27	Crime Commission (NSW) v Huang	[2014] NSWSC 642
28	Attorney-General (NT) v Emmerson	[2014] HCA 13,
29	Emmerson v Director of Public Prosecutions	[2013] NTCA 4, (2013) 33 NTLR 1
30	Director of Public Prosecutions (NT) v Emmerson	[2012] NTSC 60



**Case List used for Judgement Review (Also Table 9.1)**

31	New South Wales Crime Commission v Osman	[2014] NSWSC 312
32	Director of Public Prosecutions (WA) v Trajkoski (No 3)	[2014] WADC 32, (2014) 85 SR (WA) 199
33	Crime Commission (NSW) v Tran (No 2)	[2013] NSWSC 1854
34	New South Wales Crime Commission v Wenping He	[2013] NSWSC 1855
35	Lee v NSW Crime Commission	[2013] HCA 39, (2013) 251 CLR 196
36	Re Kim	[2013] VSC 465
37	Fuller v The Queen	[2013] NTCCA 10
38	New South Wales Crime Commission v Cassar (No 2)H	[2013] NSWSC 1011
39	New South Wales Crime Commission v Cassar	[2012] NSWSC 1170
40	New South Wales Crime Commission v Al Jannat	[2013] NSWSC 935
41	New South Wales Crime Commission v Choi	[2013] NSWSC 437
42	New South Wales Crime Commission v Choi	[2012] NSWSC 658
43	Commissioner, Australian Federal Police v Fysh	[2013] NSWSC 81
44	Director of Public Prosecutions (WA) v YeoC	[2012] WASC 440
45	Commissioner of Australian Federal Police v Dickson	[2012] NSWSC 1339
46	Director of Public Prosecutions v Grimm	[2012] NTSC 78, (2012) 269 FLR 322, [2013] ALMD 2356
47	New South Wales Crime Commission v Lee	2012] NSWCA 276
48	Director of Public Prosecutions (WA) v McPherson	[2012] WASC 342

Source: Westlaw.au case search "unexplained wealth"

## Appendix 7A: Significant Payees and Significant Depositors

The New Jersey Division of Criminal Justice documented scientific process to determine significant payees or depositors.

### Identifying Significant Payees and Depositors

The required task is to sort the data into groups for payees and depositors using a scientifically defensible method.

### Determining and Listing Primary Payees (p218)

One of the analysis techniques used when evaluating the data obtained from the bank account statement is the identification and listing of the primary payees for the accounts under examination. According to the New Jersey Division of Criminal Justice (2001 p213), there are two primary methods to determine the primary payees for an account.

The first method involves identifying primary payees by means of identifying larger than average payments for the account, and the second involves identifying primary payees through more numerous than average payments for the account. These are detailed below:

- *Determining Primary Payees Using the Larger than Average Payments Method*

The formula for determining primary payees using the larger than average payments method is as follows:

$$T / N = P$$

T is the total amount paid from the account under the period in review;

N is the number of payees for the account; and

P is the average payment for the account.

A primary payee is determined by the formula  $(P \times 2) + 1$ .

To illustrate the use of this formula, the following example is used. If \$150,000 is paid to 23 payees then  $P = \$150,000.00/23 = \$6,521.74$ . Thus a primary payee is  $(\$6,521.74 \times 2) + 1 = \$13,044.48$ . Thus any payment of \$13,044.48 or greater is considered a primary payee for the account.

- *Determining the Primary Payee Using the More Frequent than Average Payments Method*

The formula for determining primary payees using the more frequent than average payments method is as follows:

$$T / P = N$$

T is the total number of payments made from the account;

P is the total number of payees for the account; and

N is the average frequency of payments for a debit.

A primary payee is determined by the formula  $(N \times 2) + 1$ . The answer should always be rounded up. To illustrate the use of this formula, the following example is used. If 1,234 payments are made to 987 payees the  $N = 1,234/987 = 1.25$ .

Thus a primary payee is  $(1.25 \times 2) + 1 = 3.5$ . The result is rounded up to 4, thus a primary payee is any payee that has received 4 or more payments during the period under examination.

Having identified the primary payees for an account, the data must be compiled for use. A list should be drawn up containing the name of the payee, how many payments they received, the date span over which they received the payments and the total amount of payments received. The list should also indicate the total amounts paid to all the primary payees.

It is, in addition, recommended that a summary also be included for the primary payee for the account, which should indicate the total amount paid from the account, the total amount paid to primary payees, and the percentage that the payments to primary payees represents of the total payments.

### Determining and Listing Deposits to Account by Source (p219)

Determining the primary depositors of deposits into an account is a critical component of the analysis process in bank account transaction record analysis. There are two methods used to analyse the

deposits to account by source. The first method involves identifying primary depositors by means of identifying larger than average payments for the account, and the second involves identifying primary depositors through more numerous than average deposits into the account. These are detailed below:

- *Determining Primary Depositors Using the Larger than Average Deposits Method*

The formula for determining primary depositors, using the larger than average deposits method, is as follows:

$$T / N = D$$

T is the total amount paid into the account under the period in review;

N is the number of deposits for the account; and

D is the average deposit into the account.

A primary depositor is determined by the formula  $(D \times 2) + 1$ .

To illustrate the use of this formula, the following example is used. If \$150,000 is paid into the account by 23 deposits then  $D = \$150,000/23 = \$6,521.74$ . Thus a primary source is  $(\$6,521.74 \times 2) + 1 = \$13,044.48$ . Thus any deposit of \$13,044.48 or greater is considered a primary deposit for the account.

- *Determining the Primary Depositors Using the More Frequent than Average Deposits Method*

The formula for determining primary depositors using the more frequent than average deposits method is as follows:

$$T / P = N$$

T is the total number of deposits made into the account;

D is the total number of deposits into the account; and

N is the average frequency of deposits for a depositor.

A primary depositor is determined by the formula  $(N \times 2) + 1$ . The answer should always be rounded up.

To illustrate the use of this formula, the following example is used. If 1,234 deposits are made from 987 sources then  $N = 1,234/987 = 1.25$ . Thus a primary source is  $(1.25 \times 2) + 1 = 3.5$ . The result is rounded up to 4, thus a primary depositor is any source that has made 4 or more deposits during the period under examination.

Having identified the primary sources of income for an account, the data must be compiled for use. A list should be drawn up containing the name of the source, how many deposits they made into the account, the date span over which they made the deposits and the total amount of deposits made. The list should also indicate the total amounts deposited by all the primary sources.

It is, in addition, recommended that a summary also be included for the primary sources for the account, which should indicate the total amount paid into the account, the total amount deposited by primary sources, and the percentage that the deposits by primary sources represents of the total deposits into the account.

## Appendix 7B: Bank Statement Analysis

Details the recommended patterned principle for the proper process of analysing bank statements under the Evidence Acts applicable to Australian jurisdictions

1. Collation of the information contained in the bank account statements into an electronic format;
2. Identification of significant payees and depositors;
3. Compilation of summary statements which summarise the financial information in the bank statements;
4. Examine the information contained in the bank account statements over a period of time to produce a time series analysis;
5. Draw up various graphical charts to visually display the information contained in the bank account statements;
6. Examine the bank account statements and the results of the previous stages of the analysis process to determine the patterns of activity with regard the accounts to determine any unusual activity;
7. Discusses the selection of specific methods used in the above steps noting any assumptions made in selecting such methods or the rejection of other methods.
8. Report on the findings of the analysis of the bank account statements either by way of an affidavit, if the analysis is going to be used as evidence, or by way of a report, if the analysis is going to be used for intelligence purposes.

## Appendix 7C: Bank Deposits and Expenditure Method

### Bank Deposits and Expenditure Method

#### United States of America - Internal Revenue Service

#### Practice Manual

#### Part 9 Criminal Investigations

#### Chapter 5 Investigative Process

#### Section 9 Methods of Proof

#### 9.5.9.6 (11-05-2004)

#### Expenditures Method of Proving Income

1. The expenditures method of proving income utilizes circumstantial evidence, i.e., several material facts which, when considered in their relationship to each other, tend to establish the existence of the principal fact, to establish a subject's understatement of taxable income. The expenditures method of proof is, in theory, closely related to, if not identical to, the net worth method of proof. This method is based on the theory that if the subject's expenditures during a given year exceed his/her reported income, and the source of the funds used to make the expenditures is unexplained, it may be inferred that such expenditures represent unreported income.
2. The similarity between the net worth and expenditures methods of proof is further demonstrated by the fact that the same items or accounts used in determining taxable income by the net worth method are also considered when the expenditures method is employed.
3. Judge Goodrich defined the Expenditures Method of Proof in *United States v. Caserta*, 199 F. 2d 905, 907 (3d Cir 1952), as follows:

It starts with an appraisal of the subject's net worth situation at the beginning of a period. He may have much or he may have nothing. If during that period, his expenditures have exceeded the amount he returned as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received. Of course it is necessary, so far as possible to negate nontaxable receipts by the subject during the period in question.

#### 9.5.9.6.1 (11-05-2004)

#### Authority for Using the Expenditures Method

1. Like the net worth method, there is no statutory provision defining the expenditures method of proof and expressly authorizing its use by the Commissioner. There are, however, many investigations in which the courts have approved the use of this method. The following is a list of some of the more prominent investigations:
  1. *United States v. Johnson*, 319 US 503, 517 (1943)
  2. *United States v. Caserta*, 199 F. 2d 905, 907 (3d Cir. 1952)
  3. *Taglianetti v United States*, 398 F. 2d 558, 565 (1st Cir. 1968), *aff'd*, 394 US 316 (1969)
2. These investigations outline the broad principles governing the prosecution and review of investigations based on the expenditures method of proving income.

#### 9.5.9.6.2 (11-05-2004)

#### When and How the Expenditures Method is Used

1. The expenditures method of proof is used when the subject's net worth does not substantially increase during the period under investigation, or when significant extravagant living expenditures are apparent. Therefore, when a subject has spent substantial income on consumable goods and

services such as food, vacations, travel, gifts to third parties, etc., as opposed to durable and tangible property such as stocks, bonds, or real estate, the expenditures method of proof would be an appropriate method of proving income.

2. In investigations where the subject has several assets (and liabilities) whose cost basis remains the same throughout the prosecution period, the expenditures method may be preferred over the net worth method because a more concise presentation can be made of the computation of taxable income. This is true because assets and liabilities which do not change during the investigation period may be omitted from the expenditures statement.
3. The expenditures method is used most often in investigations where the subject spends income to support a lavish life-style and has little, if any, net worth.
4. In an expenditures investigation, it is desirable to prepare a complete net worth statement which may be required to rebut a defense that the funds in question came from the conversion of some asset not considered in the expenditures computation.
5. In submitting a prosecution report based upon an expenditures investigation, the special agent should also submit proof of the subject's unreported taxable income using the net worth method of proof. Because these two methods of proof are so similar, in that they require the same investigative steps be taken, proving unreported income through both methods substantially strengthens the prosecution recommendation.
6. If both methods are shown, the trial attorney can make the final decision as to which method of proof best presents the investigation to the jury.

#### **9.5.9.6.3 (11-05-2004)**

##### **The Expenditures Method of Proof Formula**

1. The expenditures method of proof formula is as follows:

Expenditures (Money Spent or Applied)

Less: Non-Taxable Sources of Funds

Equals: Corrected Adjusted Gross Income

Less: Itemized/Standard Deduction  
Personal Exemptions

Equals: Corrected Taxable Income

Less: Reported Taxable Income

Equals: Additional Taxable Income (Unreported Income)

#### **9.5.9.6.4 (11-05-2004)**

##### **Establishing the Starting Point**

1. To establish a starting point, the subject's assets at the beginning of the tax periods under investigation should be identified and monitored to determine if any assets were converted for use as personal expenditures.
2. While establishing a starting point, special agents may prefer to use a net worth analysis, depending upon the facts and circumstances surrounding the investigation. (*See IRM 9.5.9.5.5, Establishing the Starting Point.*)

### **9.5.9.6**

#### **Expenditures Method of Proving Income**

##### **9.5.9.6.5 (11-05-2004)**

#### **Expenditures Summaries Prepared by the Special Agent**

1. See *Exhibit 9.5.9-2, Expenditures Statement*, to view an expenditures statement which may be used to summarize the evidence supporting the computation of taxable income.
2. The following steps have been found helpful in the preparation of an expenditures statement:
  1. Prepare a net worth statement.
  2. Determine the amount of increase or decrease in each asset and liability appearing on the net worth statement in each taxable year (for instance, if the beginning and ending bank balances for a taxable year were \$4,500 and \$150, respectively, it would be determined that this asset has decreased by \$4,350. The amounts so determined and the amounts appearing as adjustments to net worth increases or decreases are then posted to the expenditures statement.)
3. Money spent or applied on nondeductible items, i.e., personal living expenses, Federal income tax payments, etc., should be posted to the following sections:
  1. increase in assets
  2. decrease in liabilities
4. Nontaxable source items i.e., gifts, inheritances, etc., received by subject should be posted to the following sections:
  1. decrease in assets
  2. increase in liabilities

##### **9.5.9.6.6 (11-05-2004)**

#### **Defenses in Expenditures Method Investigations**

1. The defenses regarding the net worth method of determining income are equally applicable to the expenditures method. (*See IRM 9.5.9.5.9, Common Defenses.*)

##### **9.5.9.7 (11-05-2004)**

#### **Bank Deposits Method of Proving Income**

1. The bank deposits method of proving income utilizes bank account records to establish a subject's understatement of taxable income. When there is no, or insufficient, direct evidence of income and/or expenses, the government can still make its investigation indirectly through the use of circumstantial evidence.
2. The theory behind the bank deposits method of proof is simple. There are only three things a subject can do with money once it is received, i.e., he/she can spend it, deposit it, or hoard it. Accounting for these three areas considers all funds available to the subject. If non-income sources are eliminated, the remaining currency expenditures, deposits, and increases in cash on hand will equal corrected gross income.
3. The bank deposits method of proof requires the special agent to conduct a thorough analysis of the deposits and canceled checks which relate to any and all bank accounts controlled by the subject. Additionally, the special agent must document the subject's currency expenditures and cash on hand.

4. If the subject reported income on the accrual basis, adjustments should be made in the bank deposits method to reflect accrued income and expenses.
5. The following represents an overview of the bank deposits method of proof formula. This particular overview illustrates the steps taken if the subject had business income and expenses.

Total Deposits \$

Add:     Currency Expenditures  
           Increase in Cash on Hand

Subtract: Non-Income Deposits and Items

Equals:   SUBTOTAL

Subtract: Cost of Goods Sold

Equals:   GROSS INCOME

Subtract: Business and Rental Expenses

Equals:   TOTAL INCOME

Subtract: Adjustments to Income

Equals:   ADJUSTED GROSS INCOME

Subtract: Personal Deductions and Exemptions

Equals:   CORRECTED TAXABLE INCOME

Subtract: Taxable Income Reported

Equals:   ADDITIONAL TAXABLE INCOME

**9.5.9.7.1 (11-05-2004)**

**Authority for Bank Deposits Method**

1. There is no statutory provision defining the bank deposits method of proving income and specifically authorizing its use by the Commissioner. The bank deposits method of proof is not defined by the USC or regulations. It is primarily based upon the Supreme Court 's decision in *Gleckman v. United States*, 80 F. 2d 394 (8th Cir. 1935), which affirmed a lower court ruling that recognized the bank deposits method as an acceptable method of proving income.

**9.5.9.7.1.1 (11-05-2004)**

**Legal Requirements to Establish a Prima Facie Bank Deposits Investigation**

1. As a result of the Gleckman decision, the following evidentiary facts are used to establish a prima facie bank deposits investigation:
  1. The subject was engaged in an income-producing business, activity, or profession.
  2. The subject made periodic deposits of funds into his/her bank accounts, or into nominee bank accounts over which he/she exercised control.



3. The deposits into the above referenced accounts reflect current year income and an adequate investigation of deposits was made by the investigating special agent to negate the possibility that deposits arose from nontaxable sources.
4. Unidentified deposits have an inherent appearance of income.
2. The fact that a subject deposited a sum of money in a bank account does not prove the funds deposited therein were taxable. The fact that the subject received and cashed a large check, in and of itself, does not prove the funds received were taxable. In order to establish those funds represented taxable income, the following must be shown:
  1. The subject has a business or other regular income source.
  2. The subject made regular deposits into an account.
  3. The subject draws against the account for personal use.
  4. There is testimony that the subject has income.
  5. Deposited amounts exceed exemptions and deductions.
3. The courts have held there is no necessity to disprove the accuracy of the subject's books and records as a prerequisite to the use of the bank deposits method.

#### **9.5.9.7.2 (11-05-2004)**

##### **When to Use Bank Deposits Method**

1. The bank deposits method of proof is recommended as the primary method of proof when:
  1. The subject's books and records are not available.
  2. The subject's records are not complete and do not adequately reflect their correct income.
  3. The subject deposits most of his/her income and uses bank deposits to calculate gross receipts on their return.
2. In addition to being a primary method of proving income, the bank deposits method is also used to corroborate other methods of proof and to test-check the accuracy of reported taxable income.

#### **9.5.9.7.3 (03-19-2012)**

##### **Method of Accounting**

1. The use of the bank deposits method of proof is not affected by the subject's method of accounting. The bank deposit analysis may reflect the subject's corrected taxable income by whichever method of accounting is used by the subject. Reflecting a certain accounting method in the bank deposit computation is accomplished by including certain accounts in the bank deposit analysis and omitting others. For instance, to compute the income of a physician who uses the cash basis method, patient accounts receivable and business accounts payable at the beginning and end of each year would be omitted. If the physician used the accrual method of accounting, these accounts would be included in the bank deposit analysis.
2. When a subject reports income on the accrual basis, adjustments must be made in computing gross receipts and deductions to account for accrued income and accrued expenses.
3. Under the accrual basis, credit sales are included in income when the sales are made, not when the money is collected; purchases and expenditures are deducted when the liability is incurred rather than when the account is actually paid.
4. These accounting adjustments are made by adding or deducting the increase or decrease in receivables and payables. Rather than compute the increase or decrease in the account receivables

during a year, simply add the ending accounts receivable figure and deduct the beginning accounts receivable figure in computing gross income. The beginning accounts receivable figure is subtracted from the bank deposits computation of income because the accounts were collected and the proceeds deposited during the year. The ending accounts receivable figure is then added to the bank deposits computation because the funds are taxable and have not been accounted for in the subject's deposits, expenditures, or cash hoard.

5. The same rationale applies to beginning accounts payable which were deducted in the prior year and ending accounts payable that need to be deducted in the taxable year in which they are accrued.

#### **9.5.9.7.4 (03-12-2012)**

#### **Complete Bank Deposits Method of Proof Formula**

1. The full bank deposits method of proof formula is followed by sections that explain each formula heading and subheading:

#### **BANK DEPOSIT METHOD OF PROVING INCOME**

##### **TOTAL DEPOSITS**

bank accounts: (Business/Personal/Nominee)

checking accounts

savings accounts

IRA and Keogh accounts

credit union

investment trusts

other accumulation accounts

brokerage accounts

certificates of deposits

##### **ADD: INCREASE IN CASH ON HAND**

##### **ADD: NON-NEGOTIATED INSTRUMENTS PURCHASED OR RECEIVED DURING YEAR AND HELD AT YEAR END**

cashier's checks

money orders

customer's checks

US savings bonds

##### **ADD: OTHER**

amounts automatically withheld from wages

withheld taxes, health/life insurance premiums

retirement funds, savings, other payroll deductions

##### **ADD: CURRENCY EXPENDITURES**

business

personal (including cash gifts)

capital (investment)

##### **ADD: NON-CASH INCOME**

payments in kind

forgiveness of debt in lieu of payment

property in lieu of payment

constructive dividends

ending accounts receivable (if on accrual basis)

**BANK DEPOSIT METHOD OF PROVING INCOME**

**SUBTOTAL (TOTAL FUNDS AVAILABLE)**

**LESS: NON-INCOME DEPOSITS AND ITEMS**

currency withdrawals  
transfers between accounts and re-deposited items  
checks to cash (and cashed third-party checks)  
loans, gifts, inheritances received  
beginning accounts receivable (if on an accrual basis)  
decrease in cash-on-hand  
exclusions under IRC  
return of capital (Basis of stock and capital items)  
capital losses — carry forwards  
bank errors and missing checks  
returned customer checks  
Federal tax refunds and insurance proceeds  
savings accounts withdrawals  
IRA and Keogh payments  
life insurance proceeds  
US savings bonds redeemed  
social security payments received  
veterans benefits received  
nontaxable portion of pensions and annuities  
cost basis of property sold  
child support payments received  
travel expense reimbursement  
repayments of loans made by others

**ADD: CAPITAL LOSSES EXCEEDING \$3,000**

**EQUALS: SUBTOTAL GROSS INCOME (if there is no cost of goods sold)**

**LESS: COST OF GOODS SOLD**

beginning inventory  
Add: purchases  
Less: ending inventory  
Equals: cost of goods sold

**EQUALS: GROSS INCOME**

(if cost of goods sold is involved)

**LESS: TOTAL BUSINESS EXPENSES**

Add: business expenses per bank records  
Add: additional expenses identified  
Add: depreciation  
Add: ending accounts payable re: business expenses (if accrual basis)  
Less: fraudulent expenses identified  
Less: beginning accounts payable re: business expenses (if accrual basis)  
Equals: total business expenses

**EQUALS: TOTAL INCOME**

**LESS: ADJUSTMENTS TO INCOME**

IRA deduction

## **BANK DEPOSIT METHOD OF PROVING INCOME**

spouse IRA deduction  
moving expenses  
one half self employment tax  
self employed health insurance deduction  
Keogh retirement plan and SEP deduction  
penalty on early withdrawal of savings  
alimony paid  
total adjustments to income

**EQUALS: CORRECTED ADJUSTED GROSS INCOME**

**LESS: ITEMIZED DEDUCTIONS/STANDARD DEDUCTIONS (AS CORRECTED) AND PERSONAL EXEMPTIONS (AS CORRECTED)**

**EQUALS: CORRECTED TAXABLE INCOME**

**LESS: REPORTED TAXABLE INCOME**

**EQUALS: ADDITIONAL TAXABLE INCOME FOR CRIMINAL PURPOSES**

### **9.5.9.7.4.1 (11-05-2004)**

#### **Total Deposits**

1. In the analysis of bank deposits, the sums deposited (or credited) to all of the subject's various accounts are totaled to determine gross deposits. This includes any interest and dividends credited to the subject during the investigation period. When the subject holds bank accounts in fictitious names, or with special titles such as trustee account or trading account, deposits to those accounts must also be included in the subject's total deposits. The analysis of bank deposits is not limited to bank checking and savings accounts, but includes deposits to:
  1. savings and loan accounts
  2. credit union accounts
  3. brokerage accounts (all credits to accounts)
  4. investment trusts
  5. individual retirement accounts and Keogh plan accounts
  6. certificates of deposits
2. If the subject itemized checks on a deposit slip and then deducted an amount for "less cash," only the net amount deposited should be considered in computing income.

### **9.5.9.7.4.1.1 (11-05-2004)**

#### **Unidentified Deposits**

1. The source of individual deposits can often be identified by the subject's admissions, deposit slips, bank ledger sheets, transfer letters, bank microfilm, and the testimony of witnesses.

2. In the event there are unidentified bank deposits, the following elements are required before treating unidentified bank deposits as current taxable receipts:
  1. evidence showing the existence of an income-producing business or activity
  2. regular or periodic deposits having the inherent appearance of current receipts; occasional or irregular deposits may also be considered as current income if evidence supports this assumption
3. In the Gleckman investigation, deposits were principally derived from unidentified sources and the investigation was successfully prosecuted. It is far easier to present a bank deposits investigation to a jury when many of the deposits have been specifically identified as current taxable income. For example, when multiple specific omitted sales are traced to the subject's bank accounts, but other deposits of a similar nature remain unidentified, the government's investigation is strengthened immeasurably. Through the specific identification of multiple omitted deposits, the special agent's assertion that unidentified deposits of a similar nature are current taxable income becomes more credible.

#### **9.5.9.7.4.1.2 (11-05-2004)**

##### **Currency Deposits**

1. Currency deposits are subject to claims that the source of the deposits came from a cash hoard. If the subject raises this claim and it cannot be refuted, the amount of cash deposits in question must be included under "Non-income Deposits and Items" and subtracted from the bank deposits computation.
2. However, this type of claim can often be refuted. By firmly establishing the beginning cash on hand, a special agent can rule out the cash hoard defense.
3. The computation of gross receipts is based upon the assumption that most deposits are derived from a taxable source. The subject should be interviewed to determine whether or not there were any deposits made into the accounts from non-taxable sources. The special agent should follow-up on any lead offered by the subject or uncovered during the course of the investigation that indicates certain deposits were from a non-taxable source.

#### **9.5.9.7.4.1.3 (11-05-2004)**

##### **Starting Point**

1. In a bank deposits investigation, the starting point refers to the cash on hand at the beginning of the first year under investigation.
2. Establishing a firm starting point is necessary in all bank deposits investigations involving cash deposits, currency expenditures, and increases or decreases in cash on hand. The special agent has the same obligation to firmly establish beginning cash on hand while employing the bank deposits method of proof as in the net worth method of proof. He/she is required to show that the income being charged to the subject is current taxable income and not funds accumulated in prior years in the form of a cash hoard. Additionally, establishing a firm ending cash on hand will enable the special agent to determine whether there has been an application of cash (in the investigation of an increase in cash on hand) and/or whether the subject has a source of non-taxable funds (in the investigation of a decrease in cash on hand). (*See IRM 9.5.9.5.5, Establishing the Starting Point.*)

#### 9.5.9.7.4.1.4 (11-05-2004)

##### Brokerage and Security Accounts

1. Deposits (credits) to a brokerage account are not treated any differently than any other type of deposits. However, when analyzing security account deposits, it is necessary to be familiar with what documents are available and with the terms associated with these statements. These include:
  1. **Confirmation slips** — issued by brokerage houses to verify purchases and/or sale of stocks.
  2. **Margin account**— a type of brokerage account through which the account holder is extended credit. Stocks can be purchased at a given percentage of their actual cost, the balance being owed to the brokerage firm. The account holder maintains a debit balance in this account.
  3. **Cash account** — within a certain number of days (usually 3 banking days) after purchasing stocks, the account holder must remit the entire purchase price to the brokerage firm. No credit or debit balance is maintained.
  4. **Street holdings** — an account holder can purchase stocks through his/her brokerage firm and leave those stocks in the account. These shares are held by the brokerage firm on behalf of the account holder. The actual certificates being in the name of the brokerage firm. These stocks appear on the brokerage statements as security holdings or are noted as securities positions (PSN).
  5. **Personal holdings** — after purchasing stocks through a brokerage firm, an individual may have those stocks delivered to him/her to become personal holdings. Certificates in the person's name are issued and sent to him/her along with a cover letter or securities delivered slip. Those shares will no longer appear on the brokerage statements as securities positions. Personal holdings of an individual must be traced through the appropriate stock transfer agent. Use the Moody's Handbook of Common Stocks as a reference to determine the stock transfer agent for a particular stock.
  6. **Securities delivered** — noted as SEC DEL, indicates when the stocks were delivered or sent to the account holder to become personal holdings.
  7. **Securities received** — noted as SEC REC, indicates when the account holder send funds to the brokerage firm to cover the purchase of stocks or a debit balance. It does not necessarily mean currency.
  8. **Cash disbursed** — noted as CSH DSB, indicates when the brokerage firm issues a check to the account holder.
2. One important difference between many brokerage statements and bank statements is that, when a stock is sold, the amount of the sale appears as a credit to the account on the date of the sale. If the account holder requests a portion of the proceeds of the sale to be paid to him/her by check, those proceeds are then shown as cash disbursed/check for that same date. The net deposit amount does not appear on the statement. When analyzing brokerage statements, the special agent must manually make the computation to net the deposit. Only the net amount should be picked up as a deposit.

#### 9.5.9.7.4.2 (11-05-2004)

##### Cash on Hand Increase

1. An increase in the subject's cash on hand is treated as a currency expenditure. Since the subject may contend that the unexplained deposits into the bank accounts came from a cash hoard, it is crucial to thoroughly establish and document any increase in the subject's cash on hand.
2. The special agent must begin by documenting the cash on hand at the starting point and then document cash on hand at the end of each year under investigation. The cash on hand increase (or decrease) is then determined for the first year of the investigation by subtracting the cash on hand

at the starting point from the cash on hand at the end of the first investigative year. (Cash on hand decreases will be discussed later.)

3. It is important to interview the subject early in the investigation to accurately identify a maximum cash accumulation for each year under investigation. (*See IRM 9.5.9.5.5.(11).*)
4. All of this information is necessary to establish the consistency and reliability of the subject's statements. Usually, no direct evidence of cash on hand is available. Statements made about the source, amount, and use of funds can be corroborated or refuted with additional evidence.

#### **9.5.9.7.4.3 (11-05-2004)**

##### **Non-Negotiated Instruments Purchased During the Year and Held at Year-End**

1. Non-negotiated instruments purchased or received during the year and held at the end of the year must be properly accounted for in the bank deposits formula. Non-negotiated instruments include:
  1. cashier's checks
  2. money orders
  3. US savings bonds
  4. travelers checks
  5. non-negotiated income checks
2. When non-negotiated instruments are purchased by check, total deposits are increased by the amount of the non-negotiated instruments. Non-income items are increased by a like amount. This is similar to a transfer as money deposited in the bank is being converted to a non-negotiated instrument.
3. If the subject receives a monetary instrument as a gift and has not negotiated it at year-end, total deposits and non-income items are each increased by the amount of the instrument.
4. Total deposits are not increased to reflect the value of non-negotiated instruments purchased in currency. This amount is included as a currency expenditure in the bank deposits formula.
5. Technically, if a cash basis subject received checks as income and had not negotiated them at year-end, they must be added to total deposits to accurately calculate income. The checks are income in the year they are received. However, if this is the subject's normal business procedure, then the relevance of this "timing" issue should be discussed with the Criminal Tax (CT) Counsel.

#### **9.5.9.7.4.4 (11-05-2004)**

##### **Amounts Automatically Withheld from Wages**

1. Amounts that are automatically withheld from the subject's wages must be included when using the bank deposits method, unless they are included in deposits to another account. These items include withheld taxes, health and life insurance premiums, retirement fund contributions, savings account allotments, Federal Insurance Contributions Act (FICA), child support and or alimony payments, loan payments, and any other payroll deductions made by the employer for the benefit of the employee. The special agent should include only those items that are not included elsewhere in the computation. An example of an item that may appear elsewhere in the computation would be automatically withheld savings account allotments. These allotments would be picked up with the total deposits to the savings account.

#### **9.5.9.7.4.5 (11-05-2004)**

##### **Currency Expenditures**

1. All documented cash expenditures, regardless of the source of the currency, are added to total deposits. Even in the most thorough investigations, there are certain currency expenditures that are impossible to document. These expenditures, i.e., groceries, laundry, meals, gasoline, etc., cannot be added to total deposits unless they are fully documented. Only those currency expenditures which are documented, either directly or indirectly, can be included in the bank deposit computation.
2. If the subject claimed business expenses on his/her return in excess of the amount of business expenses he/she paid by check, the balance should be treated as a cash expenditure and included in the bank deposits computation.
3. If the subject alleges additional currency business expenses not claimed on the return, these should be allowed, after adding a like amount to the cash expenditures figure in the computation.
4. Any documented expenditure made by the subject (business or personal) should be analyzed to determine what portion of that expenditure was made by check. If the amount of the expenditure exceeds payments made by check, the balance should be considered a cash expenditure and included in the bank deposits computation.

#### **9.5.9.7.4.6 (11-05-2004)**

##### **Non-Cash Income Items**

1. In addition to currency expenditures, all non-cash items should be added to deposits. These items include:
  1. payments in kind
  2. forgiveness of debts in lieu of payments
  3. property received in lieu of payments
  4. constructive dividends
  5. accounts receivable increase, if the subject is on the accrual basis

#### **9.5.9.7.4.7 (11-05-2004)**

##### **Non-Income Deposits and Items**

1. All potential nontaxable sources of funds should be discussed with the subject during the initial interview. If the subject refuses to communicate with the special agent outside the presence of an attorney, consider contacting the subject's attorney. Explain to the attorney that if their client has received funds from nontaxable sources that could explain the apparent understatement of income, it would be to the subject's advantage to come forward with this information.
2. It is the government's responsibility to elicit all available information concerning the subject's claims as to his/her nontaxable sources of funds. The special agent should attempt to obtain this information early in the investigation. The sooner the subject's claims can be verified or refuted, the sooner the special agent can determine whether or not there is a viable investigation.



3. All potential nontaxable sources of funds should be thoroughly investigated by questioning the subject's spouse, relatives, friends, and associates.
4. The special agent should examine all available documents, i.e., (banking records, public records etc.) and follow-up leads that could identify potential nontaxable sources of income and/or commingled funds.
5. The special agent should determine the source or disposition of funds related to the acquisition and/or sale of assets.
6. Nontaxable items will often appear as large or unusual deposits in the bank accounts.
7. All funds from nontaxable sources must be accounted for when using the bank deposits method of proof to calculate the subject's potential understatement of income.
8. Deducting nontaxable funds ensures that all deposits, cash expenditures, and increases in cash on hand which are included in the subject's gross income are derived from taxable sources. Failure to eliminate all known non-income deposits and items results in an overstatement of income and could prove fatal to the criminal investigation. Examples of non-income deposits and items include:
  1. income earned in prior years
  2. cash on hand decrease
  3. loan proceeds received
  4. repayments of loans made to others
  5. gifts
  6. inheritances
  7. re-deposited items
  8. transfers between accounts
  9. return of capital
  10. cashed third party checks
  11. checks to cash and currency withdrawals
  12. other non-income deposits and items specifically excluded by the USC
  13. life insurance proceeds
  14. tax-exempt interest
  15. Federal income tax refunds
  16. US savings bonds redeemed (cost basis)
  17. Social Security payments
  18. veterans' benefits
  19. nontaxable portion of pensions and annuities
  20. payments made to individual retirement accounts

#### **9.5.9.7.4.7.1 (11-05-2004)**

##### **Checks to Cash and Currency Withdrawals**

1. Currency withdrawals from accounts and checks payable to cash are generally treated as non-income items and must be discarded when computing gross income. Unless there is strong evidence to the contrary, the government usually cannot disprove the defense that the currency was:
  1. re-deposited by the subject later in the tax period
  2. used as a source of currency expenditures already included in the bank deposits computation
  3. used for a business expense paid in currency not previously claimed
  4. used to increase cash on hand

#### **9.5.9.7.4.7.2 (11-05-2004)**

##### **Automated Teller Machines and Debit Card Transactions**

1. Automated Teller Machines (ATM) withdrawals are considered to be currency withdrawals. However, when an ATM card is used as a debit card to pay a merchant, the amount debited and paid to that merchant is not considered a currency withdrawal. (This is really an electronic check.)

#### **9.5.9.7.4.8 (11-05-2004)**

##### **Cash on Hand Decrease**

1. Cash on hand is one of the most common and troublesome areas in any indirect method computation. Because a cash hoard defense is so difficult to refute, subjects frequently claim their cash hoard was of a sufficient amount to account for any understatement of income. The special agent must anticipate this potential defense and be able to prove that the subject had a large sum of cash which is not represented in the bank deposit computation.
2. Evidence that may negate the existence of a cash hoard includes:
  1. written or oral admissions of the subject to the special agent(s) which indicate a small amount of cash on hand
  2. financial statements prepared by the subject showing a low net worth
  3. compromises of overdue debts by the subject
  4. foreclosure proceedings against the subject
  5. collection actions against the subject
  6. tax return (or no returns filed) indicating little or no income in prior years
  7. loan records
  8. consistent use of checking and savings accounts
  9. recurring overdraft on NSF charges or other bank penalties.
  10. minimum payments on credit card balance

3. It may be possible to reconstruct the subject's cash on hand from prior earnings records. If cash on hand for an earlier period can be reasonably established, income earned from that period forward to the starting point could be used to establish a maximum available cash on hand. ( *See IRM 9.5.9.5.5.1, An Indirect Approach for Establishing a Starting Point.*)
4. If an investigation discloses an increase or decrease in cash on hand during the prosecution period, an adjustment to the bank deposits formula must be made. If there is an increase to cash on hand, it is added to deposits and currency expenditures in the bank deposits computation; at the same time, any decrease in cash on hand is considered a non-income item.

#### **9.5.9.7.4.9 (11-05-2004)**

##### **Loan Proceeds**

1. Loan proceeds received by the subject must be accounted for as a non-income item. The key word in the above sentence is "received." The subject must have physically received the funds.
2. If a subject has a mortgage on his/her home, the mortgage was paid directly by the lender to the seller of the home. Since no funds passed through the subject's hands, there is no need to account for any loan proceeds in this transaction.
3. However, if the subject had obtained a loan from a lender and actually received the loan amount in cash, a check that was subsequently cashed, or by way of a transfer of funds to the subject's account, the loan proceeds must be accounted for as a non-income item.

#### **9.5.9.7.4.10 (11-05-2004)**

##### **Loan Repayments Received**

1. If the subject made a loan in prior years and contends that part of the understatement of income is in fact a repayment of that loan, the special agent must document the repayment of principal by contacting the borrower. All repayments of principal loaned by the subject should be treated as a non-income item.

#### **9.5.9.7.4.11 (11-05-2004)**

##### **Gifts and Inheritances**

1. Monetary gifts, cash, checks, etc. must also be included as a non-income item in the bank deposits formula.
2. The special agent should document the gift and determine whether the donor was financially able to make the gift. Obtain all of the necessary documents and other information from the donor. Check for filed gift tax returns, if applicable.
3. If the subject received an inheritance, obtain all necessary documents and information from the executor or administrator of the estate to verify the inheritance. Check for filed estate tax returns and check the probate records of deceased relative's estate. Any such inheritance is also treated as a non-income item.

#### 9.5.9.7.4.12 (11-05-2004)

##### Transfers Between Accounts

1. Transfers between accounts should be classified as non-income items.
2. A subject who maintains several accounts, or one who has opened and closed accounts during the years under investigation, generally will have transfers between accounts. A detailed examination of deposit slips and account statements should be made to determine all possible transfers between accounts.

#### 9.5.9.7.4.13 (11-05-2004)

##### Return of Capital

1. Generally, any return of capital is classified as a non-income item in the bank deposits method. However, the treatment of assets sold in a bank deposits investigation differs depending on the nature of the asset, i.e., whether it was a personal asset, a business asset, or stock.
2. When the subject sells a personal asset there is no allowable loss relative to the transaction. Instead, such transactions are treated as a return of capital which is limited to the cost basis or adjusted basis of the asset, if there is a gain, or the sale price if there is a loss. The following example is an illustration:

If the subject purchased a vehicle in 1995 for \$20,000 and sells it in 1996 for \$15,000, the special agent would treat the \$15,000 as a return of capital in the bank deposits formula for 1996. If the subject managed to sell the same vehicle for \$30,000, the special agent would allow the subject a \$20,000 return of capital reduction to the bank deposits computation.

3. The above stated tax treatment applies only to personal assets that are sold. Using the same example above, if the subject traded in the 1995 vehicle on a 1999 model that cost \$30,000, there is no return of capital. The subject did not physically receive the money. The return of capital was rolled into the new vehicle.
4. The sale of a business asset or of stock is treated somewhat differently because it can result in an allowable taxable loss. The proper way to treat these assets is to use the cost (or adjusted basis) as the return of capital.
5. When stocks and/or other business assets are sold, and the sale results in a net capital loss, that loss must be limited to \$3,000 in accordance with USC loss limitations. This is done by adding back any disallowed loss to the bank deposits formula. See ADD: Capital losses exceeding \$3,000 in the formula. (*See IRM 9.5.9.7.4, Complete Bank Deposits Method of Proof Formula.*)
6. In order to compute the return of capital on a stock transaction, the special agent must first determine the subject's basis in the stock. If the stock sale (gain or loss) was reported on the subject's return, use the method the subject elected on their return when computing the gain or loss for the stock transaction.
7. If stock sales are not reported on the return, and stock sales have been made during the period under investigation, the special agent should analyze any available evidence and determine if it is possible to identify the shares that were sold. If the subject only bought the stock on one occasion, then multiply the number of shares purchased by the purchase price and add in the sales commission. The total is divided by the number shares purchased to arrive at the basis per share. This figure is then multiplied by the number of shares sold to arrive at the basis for the shares sold. This figure is then subtracted from the sales price realized, not including the sales commission, and the resulting figure is the subject's gain or loss on the sale.

8. An attempt to identify the shares sold can also be made by contacting the brokerage firm and comparing the date on the stock certificates being held with the information available on the statements. An example of this would be if the subject purchased 200 shares of SAYS stock in January 1996 with a basis of \$10 per share. Then, in February 1996, the subject purchases 50 more shares of stock with the basis of \$5 per share. In March 1996, the subject sells 100 shares of stock. It cannot automatically be assumed the 100 shares sold were the initial 100 shares purchased. However, if the brokerage firm is contacted and they are holding only the certificate for the 50 shares purchased in February 1996, then it can be concluded that the subject did indeed sell the initial 100 shares purchased.
9. If the brokerage firm is not holding the stock certificates, and the special agent cannot determine from the available records which shares were sold, the special agent must resort to computing the gain or loss using the method which is most advantageous to the subject. This involves computing the basis of the stock using the Last-in, First-out (LIFO), First-in, First-out (FIFO), and Average methods. The sales commission should be included when computing the basis of the stock purchased. However, when stock is sold, the commission is not included in the computation. This computation is only made when the basis of the stock cannot determine the basis from available records.

#### **9.5.9.7.4.14 (11-05-2004)**

##### **Cost of Goods Sold**

1. When dealing with a subject who reports business activity through a Schedule C, it may be necessary to include a cost of goods sold computation when utilizing the bank deposits method.
2. A reduction in inventory is a situation where there is a deduction and no cash outlay. Whenever inventories are a factor in determining income, it is necessary to make an adjustment for changes in inventory, unless the subject ignored them on the return. This requires that the special agent compute the cost of goods sold. This is done by adding purchases to the beginning inventory and subtracting the ending inventory. The cost of goods sold is then included in the computation of gross income. These steps are illustrated in the bank deposits formula.

#### **9.5.9.7.4.15 (11-05-2004)**

##### **Business Expenses**

1. All business expenses and costs must be allowed to the subject whether paid by check or in cash. If the analysis of checks or other evidence leaves doubt about the disbursements, it is preferable to allow all items, except those which are undeniably nondeductible, i.e., items such as personal expenses, investments, and gifts. When canceled checks are not available for analysis and classification, every effort should be made to identify any and all items which constitute allowable expenses whether paid out of a bank account or from undeposited cash.
2. Often, the total business expenses on a Form 1040, Schedule C will exceed the expenses for which checks or specific evidence of cash disbursements are found. In these instances, the amounts claimed by the subject should be allowed by assuming the difference was paid in cash. Increasing currency expenditures in the bank deposits formula offsets the effect of allowing business expenses paid in cash as a deduction.
3. If personal or capital expenditures are improperly classified as business expenses, the deduction for business expenses will be overstated, gross receipts will be unaffected, and net taxable income will be understated. Without proof that personal or capital items were claimed fraudulently as business expenses, they cannot be disallowed.

4. The allowable depreciation on all known depreciable assets must also be deducted. Depreciation is treated separately, since this is a deduction from which no cash outlay is required in the year the deduction is taken.

#### **9.5.9.7.4.16 (11-05-2004)**

##### **Adjustments to Income**

1. All the available adjustments to income must be allowed in computing adjusted gross income. This would include applicable Individual Retirement Plan (IRA), Keogh and Simplified Employee Pension Plan (SEPP) deductions, moving expenses, one half of the self employment tax deduction, the self employed health insurance deduction, penalty on early withdrawal of savings, and alimony paid.

#### **9.5.9.7.4.17 (11-05-2004)**

##### **Personal Deductions and Exemptions**

1. All allowable personal deductions, itemized or standard, and exemptions must be deducted from adjusted gross income to arrive at taxable income.
2. Per statute, itemized deductions and personal exemptions may be subject to limitation or phase out depending on the subject's income. The special agent should make adjustments to these amounts as necessary.

#### **9.5.9.7.4.18 (11-05-2004)**

##### **Technical Adjustments**

1. In a criminal investigation, reported taxable income can be increased only by the amount of the criminal adjustments. If an error was made in the preparation of a subject's return and income is understated, the amount must be included as a non-income item in arriving at taxable income for criminal purposes.
2. If the subject unintentionally overstated expenses, no adjustment is necessary. The subject would be allowed the expenses per the return. Each non-fraud item must be separately allowed as claimed on the return or as corrected whichever is to the best interest of the subject. Technical adjustments in favor of the government cannot be made, offset, or netted against technical adjustments in favor of the subject.

#### **9.5.9.7.5 (11-05-2004)**

##### **Schedules and Summaries in Bank Deposits Investigation**

1. The schedules and summaries in Exhibits 9.5.9-3 through 9.5.9-6 are illustrative of those which may be submitted during trials when the bank deposits method of proof is used.
2. Exhibit 9.5.9-3, Bank Deposit Statements — Schedule A, shows the computation of taxable income of John and Mary Roe. The computation of this same income by the net worth method was previously shown in Exhibit 9.5.9-1, Net Worth Statement.
3. Comparison and study of these two schedules will be beneficial since corrected taxable income can be calculated using multiple methods of proof, one tending to corroborate the other.

4. See *Exhibit 9.5.9-4, Bank Deposits Statement — Schedule B*, to see how a computation may be used to determine the amount of currency disbursements to be added to total deposits.
5. See *Exhibit 9.5.9-5, Summary — Analysis of Checks and Currency Disbursements*, for a summary of disbursements made by check and by currency. This schedule should be studied together with the net worth statement and the bank deposits schedule.
6. An analysis of deposits is the vital part of a bank deposits investigation and too much importance cannot be placed upon its accuracy. See *Exhibit 9.5.9-6, Analysis of Deposits to Checking Account*, for an illustrative of a schedule that may be used to show the results of this analysis.

#### **9.5.9.7.6 (11-05-2004)**

#### **Defenses in Bank Deposits Investigation**

1. The chief defense contentions in bank deposits investigations (other than lack of criminal intent) are:
  1. that the sporadic nature or unconventional amounts of the deposits indicate that prior accumulated funds, not current receipts, or non-taxable funds are involved
  2. that the deposits reflect, in whole or in substantial part, non-income items or income items attributable to other years
  3. that the deposits are a duplication of current year income items already accounted for by the subject
2. The proof concerning what cash a subject had on hand at the beginning of the taxable year in question is relevant to the bank deposits method of proof.
3. If the deposits or expenditures are from funds accumulated in prior years, they do not represent current income.
4. The lack of proof of the amount of cash on hand would not preclude prosecution if all the requirements are met set forth in IRM 9.5.9.7.4.8, Cash on Hand Decrease.

## Appendix 7D: Net Worth Analysis Method

### Description of the proper stepped deployment of the Net Worth Analysis method.

#### United States of America - Internal Revenue Service

Practice Manual  
Part 9 Criminal Investigations  
Chapter 5 Investigative Process  
Section 9 Methods of Proof

#### **9.5.9.5 (11-05-2004)**

##### **Net Worth Method of Proof**

1. An investigation utilizing the net worth method of proof differs from a specific item method in that direct comparisons of income, expenses, and credits can not be made. The net worth method of proof utilizes evidence of income applications such as asset accumulation, liability reduction, expenditures, and other financial data to indirectly establish correct taxable income.
2. An accounting is made showing how funds generated from income were applied by identifying increases to net assets and various expenditures.
3. After making adjustments for exemptions, itemized deductions, nontaxable income, and nondeductible losses, the courts permit the IRS to infer, indirectly, that the remainder is taxable income.
4. By comparing this to taxable income reported on the subject's return, if a return was actually filed an understatement of taxable income can be determined.
5. The net worth method is a very effective way of proving taxable income in criminal income tax investigations. The formula for calculating the subject's correct taxable income can be broken down into four steps:
  1. The special agent must first calculate the change in a subject's net worth (assets less liabilities). This is done by determining the subject's net worth at the beginning and end of a period of time (a taxable year or years) and then subtracting the beginning period's net worth figure from the ending period's net worth figure. This computation will yield a change in net worth (either an increase or decrease in net worth).
  2. The amount of this change in net worth is then adjusted for personal living expenses, nondeductible losses, and nontaxable items to arrive at a corrected adjusted gross income figure.
  3. The corrected adjusted gross income figure is then adjusted for itemized deductions or the standard deduction amount, and then for exemptions, to arrive at a corrected taxable income figure.
  4. Finally, by comparing the corrected taxable income figure with the taxable income reported on the tax return, the special agent can determine whether the subject failed to report any taxable income.

#### **9.5.9.5.1 (11-05-2004)**

##### **Authority for Net Worth Method**

1. There is no statutory provision defining the net worth method and specifically authorizing its use by the Commissioner. However, every judicial circuit has endorsed the net worth method of proof



and the Supreme Court has approved its use in a number of investigations. The following is a listing of some of the more prominent of those investigations:

1. Holland v. United States, 348 US 121 (1954)
  2. Friedberg v. United States, 348 US 142 (1954)
  3. Smith v. United States, 348 US 147 (1954)
  4. United States v. Calderon, 348 US 160 (1954)
  5. Massei v. United States, 355 US 595 (1958)
  6. United States v. Johnson, 319 US 503 (1943)
2. These investigations outline the broad principles governing the prosecution and review of investigations based on the net worth method of proving income.

#### **9.5.9.5.1.1 (11-05-2004)**

#### **Legal Requirements to Establish a Prima Facie Net Worth Investigation**

1. The Supreme Court, while firmly approving the net worth method of proof, cautioned, in Holland v. United States, 348 US 121, 125 (1954), that " it is so fraught with danger for the innocent that the courts must closely scrutinize its use."
2. The Supreme Court set forth three requirements that the government must satisfy prior to using the net worth method of proof:
  1. establish an opening net worth with reasonable certainty
  2. negate reasonable explanations by the subject inconsistent with guilt
  3. establish that the net worth increase is attributable to currently taxable income - Id. at 132 - 137.
3. Net worth increases are determined by establishing a net worth at the beginning of a given year and then comparing this beginning net worth with the net worth at the end of the year. The opening net worth is the point from which net worth increases are measured. While every effort should be made to identify all of the assets and liabilities of the subject at the starting point, the government does not have to establish the opening net worth with mathematical certainty.
4. Without a doubt, determining how much cash an individual has "on hand" at the beginning or end of a year is an extremely difficult task. To require mathematical certainty would eliminate the possibility of using the net worth method of proof.
5. The thoroughness of the investigation is crucial in determining whether the government has established the subject 's opening net worth with reasonable certainty. When the government chooses to proceed against a subject using the net worth method of proof, " the government assumes special responsibility of thoroughness and particularity in its investigation and presentation." United States v. Hall, 650 F. 2d 994, 999 (9th Cir. 1981).
6. Success in overcoming attacks on the legal sufficiency of the evidence supporting an opening net worth is directly related to the extent and thoroughness of the investigation. Although not a model, the Mastropieri investigation does furnish an excellent example of a number of steps that must be taken to establish an opening net worth. US v Mastropieri, 685 F. 2d 776, 779 (1982). For example, in Mastropieri:
  - The special agent canvassed 47 banks, 71 brokerage firms, and 13 lending institutions. In addition, the special agent searched the local property records of Bronx, Nassau, Queens, Kings, and Suffolk counties for the years during the investigation and prior to 1967.

- The special agent checked records of the IRS and the county clerk and interviewed unnamed friends and relatives of the subject.

#### **9.5.9.5.2 (11-05-2004)**

##### **When to Use the Net Worth Method**

1. The net worth method of proof is most often used when one or more of the following conditions exist:
  1. the subject maintains no books and records
  2. books and records are not available
  3. books and records are inadequate
  4. subject withholds books and records
2. The fact that the subject's books and records accurately reflect the figures on the return does not prevent the use of the net worth method of proof. The government can look beyond the self-serving declarations in the subject's books and records and use any evidence available to refute the accuracy thereof.
3. In addition to being used as a primary method of proving taxable income in civil and criminal income tax investigations, the net worth method can be used:
  1. to corroborate other methods of proving income
  2. to verify accuracy of reported taxable income

#### **9.5.9.5.3 (11-05-2004)**

##### **Method of Accounting**

1. The net worth method of proof is not limited by the subject's method of accounting. The net worth statement may reflect the subject's corrected taxable income by whichever method of accounting (cash, accrual, etc.) is appropriate. Reflecting a certain accounting method in the net worth computation is accomplished by including certain accounts in the net worth statement and omitting others. For instance, to compute the income of a physician on the cash basis, patient accounts receivable and business accounts payable at the beginning and end of each year would be omitted. If the physician used the accrual method of accounting, these accounts would be included in the net worth computation.
2. In preparing a net worth statement or summary for use in a criminal investigation, special agents should ensure that:
  1. The subject's method of accounting is used.
  2. The cost of assets and actual amounts of liabilities are used and that values other than cost, i.e., market value or reproduction value, are not considered in the net worth computation.
  3. Estimated nondeductible expenditures are eliminated from the net worth computation, unless the subject agrees to the estimated amount or it is proper to include some minimum estimated personal living expense figures.
  4. Generally accepted accounting principles are followed.

5. Technical adjustments that increase income are eliminated, e.g., unintentional errors or omissions relating to capitalized expenses, depreciation, revaluation of the basis of property, and changing inventory basis, or doubtful items such as unidentifiable commingled funds.

#### **9.5.9.5.4 (11-05-2004)**

#### **Overview of the Net Worth Method of Proof Formula**

1. The net worth formula expanded:

**Assets:**

Cash on hand

Cash in accounts

Checking

Savings

Brokerage

Securities

Vehicles (motor homes, airplanes, motorcycles, etc.)

Business equipment

Real estate investments

Personal items

Negotiable instruments

**Subtract: Liabilities and Accumulated Depreciation**

Loans

Notes

Accounts payable

Credit card balances

Mortgages

Accumulated depreciation

**Equals: Net Worth**

**Subtract: Prior Year's Net Worth**

**Equals: Increase (Decrease) in Net Worth**

**Add: Adjustments for Personal Expenditures and Nondeductible Losses**

**Assets:**

**Note:**

Personal living expenses (including payments that may later be allowed as itemized deductions or adjustments to arrive at adjusted gross income)

Federal income taxes paid

Life insurance premiums

Nondeductible portion of capital losses

Gifts of property made by subject

Losses on the sale of personal assets

**Subtract: Adjustments for Nontaxable Items**

Federal tax refunds

Gifts and inheritances received by subject

Veteran 's benefits

Nontaxable portion of pensions and annuities

Tax-exempt interest

Capital loss carryover

Net operating loss carryover

Honest mathematical and bookkeeping errors

IRA and Keogh Plan payments

Other nontaxable income

**Equals: Corrected Adjusted Gross Income**

**Subtract: Allowable Itemized Deductions or Standard Deductions**

Personal exemptions

**Equals: Corrected Taxable Income**

**Subtract: Reported Taxable Income**

**Equals: Unreportable Taxable Income**

2. In determining the value of assets, all assets in the computation are entered at cost or other tax basis. Fluctuations in fair market value are of no consequence in determining taxable income. Paper gains or losses resulting from changes in fair market value of assets are not taxable or deductible until said gain or loss is realized.

#### 9.5.9.5.5 (11-05-2004)

##### Establishing the Starting Point

1. The key to a successful net worth investigation is establishing a reliable beginning net worth (opening net worth) which includes all of the assets and liabilities on hand. It is this starting point from which all future increases or decreases will be calculated. This starting point is normally referred to as the base year. In a net worth computation, it is extremely important to firmly establish a beginning net worth (starting point or base year) with the best evidence available.
2. In calculating annual net worth, be aware that an inverse relationship exists between one year and the next. If the subject's opening net worth is understated, there is a resulting overstatement of the increase in net worth for the following year. Conversely, if the subject's opening net worth is overstated, there would be a resulting understatement of the increase in net worth for the following year.
3. The first step to establishing a firm starting point is to determine the date (opening or base year) best suited for the investigation. The interview with the subject will strengthen the starting point. While questioning the subject, the special agent should attempt to develop all information relating to the subject's assets and liabilities for the years involved. The subject should be questioned about the value of any item which cannot be determined from available books and records, e.g., cash on hand as of a particular date, personal living expenses, assets held in the names of others, gifts, inheritances, loans, and other nontaxable sources of income.
4. The establishment of cash on hand is critical. The inability to establish a firm and accurate amount of cash on hand can be fatal to the investigation. Uncertainty about the amount of cash on hand is a common defense in net worth investigations. It will be easier to refute this defense if the special agent has established a firm beginning and an ending cash on hand amount is established. Cash on hand is almost always proved by circumstantial evidence.
5. The best source of information in establishing an accurate cash on hand figure may be obtained from the subject during an interview. The special agent may not always have the opportunity to interview the subject in every investigation. However, when the opportunity does exist, the special agent should attempt to establish the beginning and ending cash on hand. In determining a firm cash on hand figure, the following subsections offer insight into possible techniques to employ during a subject interview.
6. During the subject interview, the subject should be questioned in detail about cash on hand. The questioning should be preceded with an explanation of what constitutes cash on hand and elicit the subject's answer as to cash on hand. Cash on hand is coin and currency (bills, Federal Reserve notes, etc.) in the subject's possession, i.e., on the subject's person, in the subject's residence, or other place, in nominee hands, or in a safe-deposit box. It does not include any money the subject has on deposit in any account with any type of financial institution.
7. The special agent should use caution in using terms such as cash because people often refer to money on deposit in banks as cash on hand. The special agent should be specific and explain that he/she is referring to undeposited coin and currency in all locations.
8. Most people have difficulty recalling specific dates and amounts, especially when several dates are involved, and they extend back for a number of years. Direct questions, such as "How much cash on hand did you have on December 31, \_\_\_\_" will frequently be answered with "I don't know" or "I can't remember that far back". In such investigations, the special agent should persist in questioning about whether the subject had a depository for coins or currency and/or whether the subject placed any coins or currency in the possession of another person. The special agent should obtain a description of the depository. If the depository is a safe-deposit box or home safe, the special agent should relate the questions to when and where the box was rented or purchased. The

special agent should obtain a description of the depository and a description of the funds (their denomination and quantity) to determine whether it was possible to have such a sum of money in that particular depository.

9. The special agent may determine the amount of cash on hand by asking questions about the maximum amount of cash that the subject could possibly have had at any particular time. For example, such questions as, "Did you ever have more than \$100 in cash on hand? More than \$5,000? More than \$10,000?" may result in admissions that can establish the total amount of cash on hand at a particular date.
10. Discussing the accumulation and purpose of the cash on hand may establish the minimum and maximum amount on a particular date. Determining the ultimate disposition of this cash on hand can provide a lead to a specific amount of cash on hand on a particular date. For example, a statement like "I used all my cash on hand to pay for my house in 1994" indicates how much cash the subject had on the date of payment. It also provides a cut-off date for cash on hand, since the subject evidently had no more cash after using all the cash on hand to pay for the house. The special agent should question the subject further to elicit an admission that the subject did not have any additional cash on hand as of the specified date.
11. The special agent's questioning should be directed toward developing:
  1. the maximum amount of cash on hand (undeposited currency and coin) claimed at the starting point and at the end of each year under investigation
  2. the amount of cash on hand at the date of the interview (This data is sometimes useful in computing cash on hand for earlier years.)
  3. how was the cash on hand accumulated and from what sources
  4. where the cash was kept
  5. who knew about the cash
  6. whether anyone ever counted the cash
  7. when, where and for what was any cash spent
  8. whether any record is available with respect to the alleged cash on hand
  9. the denominations of the cash on hand
  10. was the cash shown on any net worth or personal financial statements
  11. ask to see the cash on hand
12. In addition to questioning the subject about cash on hand, also:
  1. question the subject about prior years' earnings
  2. obtain prior years' tax returns to determine if no return was filed or if the returns indicate little or no income in prior years
  3. determine if the subject had financial difficulties prior to the starting point, e.g., compromises of overdue debts by the subject; foreclosure procedures against the subject; collection actions against the subject, etc.
  4. obtain copies of financial and or net worth statements
  5. question the subject as to the contents of any safe-deposit boxes
  6. question the subject concerning all taxable and nontaxable sources of income

7. obtain loan records
8. determine consistent use of checking and savings accounts
9. determine if there are recurring overdrafts on non-sufficient funds (NSF) charges or other bank penalties
10. determine the minimum payments on any credit card balances
11. determine if there was ever a divorce and division of assets
13. In addition to interviewing the subject, the following investigative steps should be taken when establishing a firm starting point in a net worth investigation:
  1. The special agent should interview the subject's spouse, relatives, and close associates to determine if the subject received loans, gifts, or inheritances in prior years. The interview of the subject's spouse should include cash on hand and sources of taxable and nontaxable income so that the subject cannot claim the increases resulted from funds the spouse received.
  2. The special agent should canvass banks and stockbrokers to determine whether the subject has or had any accounts that could be a source of funds, or whether he/she submitted any financial statements to the financial institution. When reviewing bank records, the special agent should determine whether the subject has ever had checks returned for insufficient funds.
  3. The special agent should examine financial statements presented for credit or other purposes at a time prior to or during the periods under investigation. The special agent can obtain these types of documents from banks, loan companies, bonding companies, and the other operating divisions of the IRS (offers in compromise and financial statements).
  4. The special agent should check the following records for potential assets, liabilities, and sources of funds:

real estate records to determine if the subject owns or has owned property that could be a source of funds

bankruptcy, foreclosure, and repossession record (If the subject filed for bankruptcy, this could be used as a starting point for net worth)

divorce records

social security records for prior earnings and receipt of any funds from social security

welfare records

probation records

5. The special agent should determine the subject's borrowing habits, especially borrowing at high interest rates.
6. The special agent should analyze available Federal and state tax returns. Tax returns can be obtained from the IRS, the state where the subject resided, the subject's accountant and/or return preparer, or financial institutions where the subject has applied for and/or obtained loans.

7. In the event the special agent is unable to firmly establish a starting point through the above-described steps, the special agent may have to rely upon an indirect approach to establishing a starting point. This can be accomplished by using a Source and Application of Funds computation.

#### 9.5.9.5.5.1 (11-05-2004)

#### An Indirect Approach for Establishing a Starting Point

1. Another method of establishing a starting point for cash on hand is to analyze the subject's available finances for the years leading up to the starting point. Such a "source and application of funds" approach can also be used to bridge the years to the starting point from some point in time when cash on hand has been firmly established. The following is an example of how a source and application of funds computation can be used to establish a firm starting point in a net worth investigation.
  1. The subject filed bankruptcy in 1993. Immediately following the bankruptcy, the subject did not have any assets or liabilities. The starting point for the investigation is December 31, 1996, the prosecution years are 1997 and 1998. For the purposes of using the source and application of funds computation in determining a firm starting point (cash on hand figure on December 31, 1996), the years 1993 through 1996 would be treated as one unit.
  2. First, the special agent must determine the total amount of funds available (taxable and nontaxable) during 1993 through 1996. From this amount, he/she will subtract the subject's personal expenditures for the period. This will yield the maximum amount of funds available for the subject's net worth at the beginning of 1997.
  3. Second, the special agent subtracts the subject's beginning net worth figure (the amount the investigation revealed as of December 31, 1996, without the cash on hand figure) from the total funds available for net worth. This will account for non-personal living expenditure payments by reflecting the payments made to increase assets and decrease liabilities.
  4. Funds used to purchase assets disposed of prior to the starting point can be included as funds applied, if their disposition is traced and the funds from the disposition are accounted for as funds available. The advantage of using this method is that the beginning net worth can be used as funds applied. If the subject has a large beginning net worth, it may be possible to overcome the subject's reported income for prior years and show that he/she could not have had cash on hand at the starting point. This can also be used to establish a maximum possible cash on hand figure. It is important that the subject be given credit for all sources of funds available (both taxable and nontaxable) in the period for which the source and application method is used.
  5. When using the one unit source and application of funds method to establish a firm starting point, the beginning net worth must be adjusted for any asset purchased and completely paid for prior to the source and application years. This is necessary because no funds were applied during the source and application period to purchase the asset. This point is illustrated in the following example:
    1. The subject purchased and paid off a residence 10 years prior to the starting point. The cost of the residence \$20,000, is included in the beginning net worth. The source and application of funds only covers a period of six years prior to the starting point. The beginning net worth must be adjusted by subtracting the cost of the residence because the residence was purchased with funds acquired by the subject prior to the years included in the computation. This is illustrated as follows:

Funds available (1991–1996)	\$105,000
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Less: Funds applied to personal living expenses	-50,000
Equals: Maximum funds available for an increase in net worth	55,000
Beginning net worth per investigation	\$72,000
Less: Cost of residence purchased prior to 1991	-20,000
Funds applied by the subject to acquire the adjusted beginning net worth	\$52,000
Maximum funds available for an increase in net worth	\$55,000
Less: Funds applied by the subject to acquire the adjusted beginning net worth	-52,000
Equals: Maximum possible cash on hand at starting point 12/31/1996	\$ 3,000

6. This method can be used to establish cash on hand at the starting point if the subject does not cooperate during the investigation, or to corroborate the subject's admission of cash on hand. A source and application of funds cannot be used in every investigation but, in certain instances, can be a valuable tool in determining possible cash on hand.

#### **9.5.9.5.5.2 (11-05-2004)**

##### **Presenting Cash on Hand Figures**

1. As mentioned earlier, the cash on hand figure is often the most difficult item to establish. Whenever possible, it is best to establish specific cash on hand figures for each year. However, after exhausting all of the various leads, contradictions may still exist or the special agent may have no specific information at all. In order to work around this issue, approximate figures are often used; however, this may not be the best solution. In investigations where no cash on hand information can be found, the special agent can enter beginning cash on hand as zero.

#### **9.5.9.5.5.3 (03-22-2005)**

##### **The Dash Theory**

1. In situations where the subject had some available currency which was used in previously identified currency transactions, a constant figure of an unknown amount represented by a dash (-) can be used in a net worth calculation to symbolize cash on hand.
2. The dash (-) indicates that the "inventory" of undeposited coin and currency cannot be quantified, but that facts and circumstances, i.e., evidence in the investigation, indicate that cash on hand or inventory of undeposited currency either remained constant or increased during the period. *United States v. Giacalone*, 574 F.2d 328, 333 (6th Cir. 1978) ("The recognition of a cash bankroll treated as a constant, together with proof which would support a finding that no significant cash hoard existed, [is] a sufficient accounting for cash in the opening net worth computation. ") See also *United States v. Sabino*, 274 F.3d 1053, 1072 (6th Cir. 2001). The Sixth Circuit makes clear the dash method cannot be used to overcome the defense of a cash hoard, or as a way to avoid determining an opening balance of cash on hand.

#### 9.5.9.5.6 (11-05-2004)

#### Taxable Source of Income

1. In order for income to be taxable, it must come from a taxable source, *Commissioner v. Glenshaw Glass Co*, 75 S. Ct. 473 (1955). In the Holland investigation, the Supreme Court opined that, an "Increase in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. . ." *Holland*, supra at 138.
2. Following the Holland decision, it appeared that proof of a likely source was necessary in every net worth investigation. This premise was clarified by the Supreme Court in *United States v. Massei*, 78 S. Ct. 495 (1958) when it stated:  
In *Holland* we held that proof of a likely source was "sufficient" to convict in a net worth investigation where the government did not negate all the possible nontaxable sources of the alleged net worth increases. This was not intended to imply that proof of a likely source was necessary in every investigation. On the contrary, should all possible sources of nontaxable income be negated, there would be no necessity for proof of a likely source.
3. In view of these decisions, it appears that the government must either prove a likely source of taxable income or negate all nontaxable sources of income. In investigations where the government resorts to negating all nontaxable sources of income, it is even more critical to establish a firm starting point, particularly with reference to cash on hand.
4. Proof of a likely taxable source of income has been found sufficient in a number of criminal investigations by:
  1. Showing that the subject did not report certain income on the tax returns. *United States v. Chapman*, 168 F. 2d 997 (7th Cir 1948).
  2. Showing that the subject did not report certain income for years prior to indictment period. *United States v. Skidmore*, 123 F. 2d 604 (7th Cir 1948).
  3. Comparing the business operations and profits of the subject for the years under investigation with profits or prior operations for a comparable period. In the *Holland* investigation, the Supreme Court pointed out that the business of the defendant, a hotel, apparently increased during the years in question, whereas the reported profits fell to approximately one quarter of the amount declared by the previous management in a comparable period.
  4. Effectively contradicting the subject's assertions as to nontaxable sources.
  5. Opportunities of the subject to receive graft.
  6. The nature of the business has the capacity to produce income in amounts determined by the net worth method.
5. A likely source of income is established in net worth investigations by showing the source of income identified by the subject had the potential to produce income substantially in excess of that reported.
6. Negating nontaxable sources of income may be accomplished by substantiating the subject's admissions as to the receipt or non-receipt of loans, gifts, and inheritances. If the subject alleges to have received nontaxable sources of income, the special agent should verify the claim by reviewing Federal gift tax returns filed by the alleged donor or probate records of the deceased relatives' estates. Additionally, the special agent should interview the person who allegedly made the gift to the subject. However, if the subject advances a specific explanation as to the sources of nontaxable funds expended, the government does not have to pursue other possible nontaxable sources of income when the one given is proven false.

#### **9.5.9.5.7 (11-05-2004)**

##### **Investigation of Leads**

1. When a subject offers leads or information during a net worth investigation that, if true, would establish his/her innocence, such leads must be pursued. This also applies if the subject offers leads or information after the completion of an investigation but within sufficient time before trial.
2. During the trial, if the government fails to show an investigation into the validity of the leads provided by the subject, the trial judge may consider the defendant's information as true and the government's investigation insufficient to go to the jury.
3. Most leads refer to cash hoards, gifts, inheritances, and loans. These leads should be checked as routine steps taken during the investigation.
4. The courts have held that the government does not have to investigate leads that are not reasonably verifiable. This is a question of judgment and, in the final analysis, is always a matter for the court to determine.

#### **9.5.9.5.8 (11-05-2004)**

##### **Summaries and Appendices Prepared by the Special Agent**

1. In investigations utilizing a detailed computation of net worth, the factual data may be best presented via a summary of the details broken down into at least one main appendix and various sub-appendices.
2. An appendix is a document developed to summarize and present, in a concise manner, voluminous information that is contained in the exhibits of an investigation. A sub-appendix supports the main appendix and is generally prepared when there are a number of items of a particular type of asset, liability, or other adjustment. Sub-appendices are also used when there are numerous witnesses or exhibits to support a particular net worth item. Keep the main appendix as simple and brief as possible to aid in its presentation and clarity. While there is no set format for a sub-appendix, it should be organized in a manner which presents the information in a clear and concise manner.
3. A copy of each appendix and sub-appendix must accompany each copy of the final prosecution report. The exhibits to the investigation accompany only the original report. If sub-appendices are used, they must refer to the proper witness, the exhibit number, and a description of the evidence used to support the item.
4. Sub-appendices are prepared to summarize the pertinent information that is found in the exhibits. The totals from the sub-appendices are forwarded to the main appendix, where the information is summarized. The main appendix is then cited in the body of the final report. Multiple main appendices are common in net worth investigations.
5. During a trial of an income tax investigation involving the net worth method of proving taxable income, the special agent may introduce the sub-appendices and main appendix used to support the final report. It is important to remember that the special agent's work product (main appendix and supporting sub-appendices) is not evidence. These schedules and appendices should summarize documents and testimony already admitted into evidence during the trial. These schedules and appendices are admitted for the purpose of aiding and assisting the jury in considering the evidence admitted. The admissibility and use of appendices and summaries are discussed in IRM 9.6.4, Trial.
6. The special agent should become most familiar with the appendix or summary showing the computation of taxable income. (*See Exhibit 9.5.9-1.*)

7. In addition to appendices, schedules, and summaries, net worth computations have been presented to the jury through the use of graphs and charts.

#### **9.5.9.5.8.1 (11-05-2004)**

#### **Adjustments to Net Worth**

1. After the special agent has established a firm starting point and identified the amount of cash on hand, the next step is to calculate the subject's change in net worth for the prosecution years. Once the change (increase or decrease) in the subject's net worth has been determined, the special agent makes adjustments to that figure and arrives at the subject's corrected adjusted gross income. Perhaps the most difficult phase in calculating a subject's corrected taxable income is identifying, documenting, and correctly applying the adjustments to the subject's change in net worth for the nondeductible and nontaxable items. These adjustments are necessary in arriving at the subject's corrected adjusted gross income figure from the calculated increase or decrease in net worth. The following paragraphs will identify common adjustments to the calculated increase or decrease in a subject's net worth.
2. The following are examples of adjustments for personal expenditures and nondeductible items which are added to the subject's change (increase or decrease) in net worth:
  1. personal living expenses
  2. Federal tax payments
  3. nondeductible portion of capital loss
  4. losses on sale of personal assets
  5. gifts made
  6. life insurance premiums
3. The following are examples of adjustments for nontaxable items which are subtracted from a subject's change (increase or decrease) in net worth:
  1. for capital gain transactions see the appropriate instructions and forms for statutory inclusions and exclusions
  2. gifts received
  3. inheritances
  4. nontaxable pensions
  5. veterans benefits
  6. non-taxable portion of social security income
  7. tax exempt interest
  8. proceeds from life insurance
  9. disability income received (USC §104–§106)
  10. errors in subject's records (in his favor) which relate to honest mathematical and bookkeeping errors found in the subject's books and records, and which tend to account for part of the understated income

11. gains on the sale of a personal residence (depending upon the date of the sale, the gain could be entirely non-taxable) pursuant to the applicable law concerning these transactions and to the extent of whatever non-taxable gain the subject may have received
  12. net operating loss carry-back and carry-forward
  13. allowed capital loss carry-over
  14. Federal income tax refunds
4. No adjustment is necessary to net worth increase or decrease for:
1. net short-term capital gain
  2. deductible portion of net short-term capital loss
  3. excess of net short-term capital gain over net long-term capital loss

#### **9.5.9.5.8.2 (11-05-2004)**

#### **Adjustments to Corrected Adjusted Gross Income to Calculate Corrected Taxable Income**

1. The adjustments to corrected adjusted gross income are the standard or itemized deductions and the personal exemptions.
2. Due to the calculated increase in adjusted gross income, the special agent should increase the itemized deductions for items allowed which the subject failed to claim. Likewise, the special agent should also decrease the itemized deductions for threshold items affected by an increase in adjusted gross income.
3. Corrected adjusted gross income less the itemized deductions and personal exemptions results in the subject's corrected taxable income. When the taxable income that was reported on the income tax return is deducted from the corrected taxable income, the final figure is additional taxable income based on the net worth method of proof.

#### **9.5.9.5.9 (11-05-2004)**

#### **Common Defenses in Net Worth Investigations**

1. Special agents can overcome the following common defenses in net worth investigations by thoroughly investigating them at the onset of the investigation.

#### **9.5.9.5.9.1 (11-05-2004)**

#### **Lack of Willfulness**

1. Defense counsel usually contends there is no evidence of willfulness. This contention may be overcome by evidence outlined in IRM 9.1.3, Criminal Statutory Provisions and Common Law.

#### **9.5.9.5.9.2 (11-05-2004)**

##### **Cash on Hand**

1. The subject usually claims that there was a large amount of cash on hand which the government has not considered in the beginning net worth. The subject also may claim that cash balances are wrong for years subsequent to the base year.
2. In all investigations where the net worth method is the primary method of proving income, the special agent should anticipate this defense and accurately establish the cash on hand figure for the starting point and throughout the prosecution years to negate this defense.
3. Admissions by the subject are most effective to determine the cash on hand amount and should be obtained during the initial interview or early in the investigation. (*See IRM 9.5.9.5.5, Establishing the Starting Point.*)
4. In most investigations, the subject's spouse should also be questioned about cash on hand, as well as other matters. In order to avoid any misunderstanding by the subject, it is suggested that the meaning of cash on hand be explained prior to discussing the matter.
5. The subject (and spouse) should be questioned regarding their financial history from the time they were first gainfully employed. This information will serve in many investigations to check the accuracy of the subject's statements about cash on hand.
6. In addition to admissions, evidence used to establish the beginning net worth will most often be sufficient to refute the defense of cash on hand.

#### **9.5.9.5.9.3 (11-05-2004)**

##### **Failure to Adjust for Nontaxable Income**

1. The usual sources of nontaxable income claimed by the subject are gifts, loans, and inheritances. Negating evidence of the type will often be sufficient to overcome these claims as described in the subsections listed below:
  1. *see IRM 9.5.9.5.6, Taxable Source of Income*
  2. *see IRM 9.5.9.5.7, Investigation of Leads*

#### **9.5.9.5.9.4 (11-05-2004)**

##### **Inventories Overstated**

1. Special agents should not rely upon inventory figures on the subject's returns as prima facie evidence to establish the values of assets in the net worth computation. Some subjects, either through ignorance or for other reasons, report inventory at retail value instead of at cost or some other value. (In a net worth computation where the assigned value of the inventory used exceeds cost and is larger at the end of the investigative period than the beginning, income will be overstated.) To resolve this, the special agent should attempt to corroborate the inventory figures shown on the subject's returns by admissions of the subject, statements of employees who took the inventory, copies of inventory records, amounts shown on state or local property tax returns, etc.

#### **9.5.9.5.9.5 (11-05-2004)**

##### **Holding Funds or Other Assets as Nominee**

1. In certain investigations, a subject may falsely claim to be holding, as nominee of another (usually unidentified) individual, funds or other assets the government included in the subject's net worth computation. Special agents should interview the subject about this matter in the early stages of the investigation.

#### **9.5.9.5.9.6 (11-05-2004)**

##### **Net Operating Loss Carry-Forward**

1. This defense is usually based upon a net worth computation of taxable income made by the subject's accountant for years prior to the starting point. This computation will show an operating loss prior to the prosecution. The defense strategy is to carry forward the loss to the prosecution years and reduce the alleged tax deficiency as much as possible.
2. To overcome this defense, special agents should make a net worth determination of income for several years prior to the prosecution period and then on the basis of this computation either:
  1. allow the carry-forward loss, or
  2. show the incorrectness of the accountants' determination

#### **9.5.9.5.9.7 (11-05-2004)**

##### **False Loans**

1. The objective of this defense is to reduce taxable income by claiming nonexistent loans, usually from the subject's friends or relatives. This defense may be overcome by showing that the alleged lender was financially unable to lend the amount claimed. The special agent should attempt to obtain and then corroborate the details of the claimed loans by interviewing the individuals who allegedly made the loans to the subject.
2. The matter of loans should be covered during the initial subject interview.

#### **9.5.9.5.9.8 (11-05-2004)**

##### **Jointly Held Assets of the Subject and Spouse**

1. In some investigations, the subject and spouse may report income on separate returns, but assets they acquired are held jointly. If the jointly held assets are included in the net worth computation, the claim may be made that they were acquired with the spouse's income.
2. This defense can be overcome by tracing the invested funds back to the subject and showing the disposition of the spouse's income.
3. There may be investigations in which the funds of the subject and spouse are so intermingled that it is not possible to trace the invested or applied funds to either party. In such investigations, use the net worth method of proof to determine the corrected taxable income of both the subject and the spouse, and then deduct the taxable income of the spouse to arrive at the subject's corrected taxable income.

4. There are several states that have community property statutes. Under community property laws, income, assets and liabilities are equally divided between spouses. If the subject and/or his/her spouse reside in a community property state, the appropriate laws must be applied to compute the subject's income, expenses, assets, and liabilities.

**Reference: IRM 9.5.9 Subsection 9.5.9.5**

NET WORTH STATEMENT				
John and Mary Roe				
Dayton, Ohio				
ASSETS		12/31/--	12/31/--	12/31--
1.	Cash—First National Bank	\$ 4,500.00	\$ 150.00	\$ 2,500.00
2.	Cash on hand	25.00	25.00	25.00
3.	Inventory, Liquor Store	4,800.00	13,000.00	29,000.00
4.	U.S. Savings Bonds	-0-	3,750.00	-0-
5.	Note Receivable, Frank Roe	-0-	-0-	300.00
6.	Note Receivable, Roger Jones	-0-	-0-	16,000.00
7.	Accounts Receivable, Doc's Market	-0-	1,600.00	-0-
8.	Lot on Dayton Road	1,000.00	1,000.00	1,000.00
9.	Ohio Tourist Camp	12,000.00	12,000.00	12,000.00
10.	Residence, 1100 Vine Street	2,800.00	2,800.00	-0-
11.	30 Acre Farm, East Dayton	-0-	7,400.00	7,400.00
12.	150 Acre Farm, North Dayton	-0-	-0-	7,000.00
13.	Equipment—Liquor Store	800.00	800.00	800.00
14.	Ace Automobile	2,800.00	2,800.00	2,800.00
15.	Farm Truck	-0-	-0-	800.00
16.	Farm Equipment	-0-	1,250.00	2,250.00
17.	Livestock on Farm	-0-	900.00	1,300.00
	<b>Total Assets</b>	<b>\$28,725.00</b>	<b>\$47,475.00</b>	<b>\$83,175.00</b>
LIABILITIES				
18.	First Federal Savings & Loan Assn.	\$ 2,400.00	\$ 1,800.00	\$ -0-
19.	First National Bank	2,900.00	2,700.00	-0-
20.	Depreciation Reserve	2,500.00	3,200.00	4,300.00
	<b>Total Liabilities</b>	<b>\$ 7,800.00</b>	<b>\$ 7,700.00</b>	<b>\$ 4,300.00</b>
	<b>NET WORTH</b>	<b>\$20,925.00</b>	<b>\$39,775.00</b>	<b>\$78,875.00</b>
	Less: Net Worth of Prior Year		20,925.00	39,775.00
	Increase in Net Worth		\$18,850.00	\$39,100.00
ADJUSTMENTS				
	<b>Add:</b>			
21.	Living Expenses		\$ 2,500.00	\$ 2,500.00



22.	Life Insurance Premium		300.00	500.00
23.	Federal Income Taxes Paid		750.00	900.00
	<b>Less:</b>			
24.	Long-Term Capital Gain on Sale of Residence (50%)		-0-	(500.00)
25.	Inheritance		-0-	(10,000.00)
		Adjusted Gross Income	\$22,400.00	\$32,500.00
		Less: Standard Deduction	1,000.00	1,000.00
		Balance	\$21,400.00	\$31,500.00
		Less: Exemptions (4)	2,400.00	2,400.00
		Taxable Income	\$19,000.00	\$29,100.00
		Less: Taxable Income Reported	6,100.00	6,400.00
		Taxable Income Not Reported	\$12,900.00	\$22,700.00

## Appendix 7E: Asset Betterment

### Asset Betterment Analysis as a Reasonable basis for section 167 default assessments, including statistical information

68. The Commissioner may make a default assessment of a taxpayer's taxable income upon any basis that is reasonable and takes into account their particular circumstances. This includes the use of available external information, indirect audit methodologies, statistical information or extrapolation from previous years returns. Examples of the bases that have been supported by the courts include 'T' accounts, asset betterment calculations and unexplained deposits in financial institution accounts.

69. Using a 'T' account, ATO personnel can compare cash available at the beginning of a period plus cash received during the period with cash expended during the period plus cash on hand at the end of the period. The two sides of the 'T' account should balance if ATO personnel have full and accurate information. If the two sides of the 'T' account do not balance, it is likely there is undisclosed income.

70. An alternative method to a 'T' account available to ATO personnel is an asset betterment calculation. Under this method, the net worth of an entity at the end of each relevant year is compared with the net worth at the beginning of each of those years, and an estimate of annual asset growth is obtained. Non-deductible expenditure is added to this estimate and liabilities and exemptions are subtracted. A figure is then computed for total taxable income.

71. Whatever the source of the information, each step in the process of estimating the taxpayer's taxable income must be recorded, so that the decision or decisions will be supported if the resulting assessment is contested.

72. Statistical information from compliance improvement research, corporate databases or external sources such as the Australian Bureau of Statistics (ABS) may form an important part of decision-making. However, such information, its source and the rationale for any calculations based upon it must be fully documented. Additionally, the statistical information should be related to the circumstances of each particular taxpayer. In the past, where properly recorded decision-making has been presented in evidence, the use of information such as ABS cost-of-living figures has been successfully argued in support of section 167 default assessments.

73. The application of this approach may be demonstrated through the reference to ABS Household Expenditure Survey data in *Favaro v. Federal Commissioner of Taxation* (1996) 34 ATR 1 at 6. In that case, Branson J held that the taxpayer's tastes 'were not, it seems, universally frugal' before accepting that the ATO's reliance upon the data was supportable. This was an answer to the taxpayer's [unsupported] argument that their lifestyle was less extravagant 'than the hypothetical average individual'.

74. This approach is supported by the Privy Council in *Gamini Bus Co Ltd v. Commr of Income Tax, Colombo* (1952) AC 571, (1952) TR 44 which involved a comparison with available statistical data on the performance of taxpayer companies in the same area of similar size and scale.

75. Additionally, a similar result was found in an Australian Board of Review case, (1951) 2

TBRD *Case B1*, where the taxpayer's earnings were estimated by comparison with the earnings of other taxi drivers, although the assessment was reduced on the basis of evidence of greater than average fuel consumption for that particular taxpayer.

## Appendix 7F: Unit and Volume Method

### Unit and Volume Method

#### United States of America - Internal Revenue Service

Practice Manual  
Part 9 Criminal Investigations  
Chapter 5 Investigative Process  
Section 9 Methods of Proof

#### **9.5.9.9 (11-05-2004)**

##### **Percentage Markup Method of Proving Income**

1. This method is a computation whereby determinations are made pursuant to the use of percentages or ratios considered typical of the industry or business under investigation. By reference to similar businesses or situations, percentage computations are secured to determine sales, cost of sales, gross profit, and net profit. Likewise, via the use of some known base and the typical percentage applicable, individual items of income or expense may be determined.
2. The percentage markup method is used on a limited basis.

#### **9.5.9.9.1 (11-05-2004)**

##### **Use of Percentage Markup Method**

1. Special agents should resort to the percentage markup method of proof only when other traditional methods of proof have proven unsuccessful.
2. With respect to specific applications of the percentage markup method of proof, its use should be limited principally to retail establishments, rather than illegal businesses, because more reliable information regarding opening and closing inventories, and the appropriate percentage markup, is generally available for retail establishments.
3. An exception to these preferences may be narcotics trafficking investigations so long as substantial inside evidence from members of the narcotics organization is available to account for the pertinent variables inherent in narcotics trafficking and this method of proof.
4. Special agents should include an explanation of efforts made with respect to the utilization of the traditional methods of proof and an explanation for the inadequacy or inapplicability of those methods.

#### **9.5.9.9.2 (11-05-2004)**

##### **Application of Percentage Markup Method**

1. The percentages used in the percentage markup method may be externally derived or may be internally derived from the subject's accounts for other periods or from an analysis of subsidiary records.
2. Percentages may be secured from the examination of the subject's records even though such records are only partially available.
3. Gross profit percentages may be determined by comparing purchase invoices with sales invoices, price lists, and other similar data.
4. Other years not covered by the investigation, or portions of years under investigation, may indicate typical percentages applicable to the entire year or years under investigation.

5. Substantial internal evidence from which a reliable percentage markup computation can be obtained is strongly emphasized. Testimony of employees, accountants, or sales managers with direct knowledge of sales prices is important in determining not only the actual percentage markup employed in a given investigation, but also opening and closing inventories.
6. Consideration should be given to obtaining internal documents, such as operating memoranda and subsidiary books and records.
7. The questionable tax returns and the amounts stated therein for sales and costs of goods sold should not be used in determining the appropriate percentage markup. Use of such returns contradicts the theory that both sales and cost of goods sold are fraudulently reported on the tax returns.

#### **9.5.9.9.3 (11-05-2004)**

##### **Limitations on Percentage Method**

1. Although the percentage method may be useful in determining or verifying income, especially when the books and records are inadequate, special agents must ensure that the comparisons are made with situations that are similar to those under investigation. Some of the factors to be considered are as follows:
  1. Type of merchandise handled—In order for a proper comparison to be made, the businesses must be dealing in the same type of merchandise or service. Comparison of the gross profit of a restaurant with that of a grocery store would be of little value and should not be used.
  2. Size of operation—In many instances, gross profit, cost of goods sold, and net profit percentage on sales will vary according to the size of a business. This is especially true with respect to expense items and the net profit compared with sales. The percentage of net profit to sales of a large department store might vary considerably from that of a small independently-owned general store.
  3. Locality—Markups and costs of operations will normally vary with the size of the city or the location of the businesses in the city. As an example, a small business in a community of 5,000 may use newspapers as a means of advertising, whereas a business doing the same volume in a city of 500,000 will normally find the cost prohibitive and confine advertising to some other medium.
  4. Period covered—Since gross profit ratios and expense ratios will tend to vary year to year with economic conditions, the comparison should normally be made with similar periods covered by the investigation.
  5. General merchandising policy—Comparison should not be made between businesses having different merchandising policies. Some businesses may operate on a large volume with a small markup and little customer service, while other businesses have the opposite merchandising policy. In situations of this kind, comparisons should be made only with those businesses having similar merchandising policies.

#### **9.5.9.9.4 (11-05-2004)**

##### **Examples of Percentage Method**

1. *See Exhibit 9.5.9-7, Examples of Percentage Method*, for an example of the computation of the percentage markup method. The percentages used are arbitrary and are not necessarily applicable to the businesses mentioned.

#### **9.5.9.10 (11-05-2004)**

##### **Unit and Volume Methods**

1. In many instances the determination or verification of gross receipts may be computed by applying price and profit figures to the known or ascertainable quantity of business done by the subject. This method is feasible when special agents can determine the number of units handled by the subject and also when the price or profit charged per unit is known.

2. The number of units sold or quantity of business done by the subject may be determined in certain instances from the subject's books, since the records may be adequate with respect to cost of goods sold or expenses, but inadequate as to sales.
3. There may be a regulatory body to which the subject reports units of production or service. For example:
  1. A funeral director is required to report each burial to the city or town where the burial takes place.
  2. A garment manufacturer with union employees buys union labels to be sewed into the garments it manufactures.
  3. A subject may be required to report production and payroll to a trade association allied with the labor union.
  4. There are instances where the fees paid for leased machinery is based upon the units of production.
  5. A piecework system of wages for production workers might give an accurate measure of units produced.
4. The use of this method lends itself to those businesses in which only a few types of items are handled, or there is little variation in the type of service performed, since the charges made by the subject for the merchandise or services are relatively the same throughout the taxable period.
5. The following example is illustrative of the unit and volume method of computation:

Volume of Merchandise (Manufacturer):

Number of machines manufactured	92
Average sales price	\$1,100
Computed total sales	\$101,200
Sales reported	\$93,500
Omitted sales	\$7,700

**Reference: IRM 9.5.9, subsection 9.5.9.8**

The following examples are illustrative of the percentage method of computation. The percentages used are arbitrary and are not necessarily applicable to the businesses mentioned.

<b>(a) Gross Profit on Sales:</b>	
Retail sporting goods store:	
Net sales (determined from books or by other means)	\$50,000
Gross profit percentage	28.6%
Gross profit as computed	\$14,300
<b>(b) Sales on Cost of Sales:</b>	
Bar and tavern:	
Cost of liquor	\$20,000
Cost of beer	15,000
Cost of food (determined from books or by other means)	5,000
	40,000
Cost of sales—liquor	331/3%
Cost of sales—beer	662/3%
Cost of sales—food	50%
Sale of liquor	\$60,000
Sale of beer	22,500
Sale of food	10,000
Total sales as computed	92,500
<b>(c) Net Profit on Sales:</b>	
Filling Station:	
Net sales (determined from books or by other means)	\$30,000
Net profit percentage	8%
Net profit as computed	\$2,400
<b>(d) Miscellaneous Ratios:</b>	
Waitress:	
Sales by restaurant	\$30,000

Number of waitresses employed	3
Percentage of tips received	10%
Average sales handled by waitress	\$10,000
Income from tips as computed	\$1,000

## Appendix 9A: Section 123 POCA (Cth) 2002 –

### Value of benefits derived- non-serious offences

(1) If:

(a) an application is made for a pecuniary penalty order against a person in relation to an offence or offences (the *illegal activity*); and

(b) the offence is not a serious offence, or none of the offences are serious offences; and

(c) at the hearing of the application, evidence is given that the value of the person's property during or after the illegal activity exceeded the value of the person's property before the illegal activity;

the court is to treat the value of the benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

(2) The amount treated as the value of the benefits under this section is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to the illegal activity.

## Appendix 9B: Section 124 POCA (Cth) 2002 –

### Value of benefits derived- serious offences

(1) If:

(a) an application is made for a \* pecuniary penalty order against a person in relation to an offence or offences (the *illegal activity* ); and

(b) the offence is a \* serious offence, or one or more of the offences are serious offences; and

(c) at the hearing of the application, evidence is given that the value of the \* person's property during or after:

(i) the illegal activity; or

(ii) any other \* unlawful activity that the person has engaged in that constitutes a \* terrorism offence; or

(iii) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;

exceeded the value of the person's property before the illegal activity and the other unlawful activity;

the court is to treat the value of the \* benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

(2) The amount treated as the value of the \* benefits under subsection (1) is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to:

(a) the illegal activity; or

(b) any other \* unlawful activity that the person has engaged in that constitutes a \* terrorism offence; or

(c) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;

(3) If evidence is given, at the hearing of the application, of the person's expenditure during the period referred to in subsection (5), the amount of the expenditure is presumed, unless the contrary is proved, to be the value of a \* benefit that, because of the illegal activity, was provided to the person.

(4) Subsection (3) does not apply to expenditure to the extent that it resulted in acquisition of property that is taken into account under subsection (1).



(5) The period for the purposes of subparagraph (1)(c)(iii), paragraph (2)(c) and subsection (3) is:

(a) if some or all of the person's property, or property that is suspected of being subject to the \* effective control of the person, is covered by a \* restraining order--the period of 6 years preceding the application for the restraining order;

(b) otherwise--the period of 6 years preceding the application for the \* pecuniary penalty order;

and includes the period since that application for the restraining order or the pecuniary penalty order was made.

## Legislation

### Table of Legislation

1	Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth)
2	Australian Crime Commission Act 2002 (Cth)
3	Australian Crime Commission Establishment Bill 2002 (2002)
4	Australian Customs Act 1901(Cth)
5	Business Names Registration Act 2011 (Cth)
6	Competition and Consumer Act 2010 (Cth)
7	Comprehensive Drug Abuse Prevention and Control Act of 1970 (US)
8	Confiscation Act 1997 (Vic)
9	Confiscation of Proceeds of Crime Act 1989 (NSW)
10	Corporations Act (Cth), 2001
11	Crime (Confiscation of Profits) Act 1993 (Tas)
12	Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014
13	Criminal Assets Confiscation Act 2005 (ACT)
14	Criminal Assets Recovery Act 1990 (NSW)
15	Criminal Proceeds Confiscation Act (Qld)
16	Criminal Property Confiscation Act 2000 (WA)
17	Criminal Property Forfeiture Act 2002 (NT)
18	Criminal Assets Confiscation Act (SA) 2005
19	Customs Act 1901
20	Evidence (National Uniform Legislation) Act 2011
21	Evidence (National Uniform Legislation) Act 2016 (NT)
22	Evidence Act 1906 (WA)
23	Evidence Act 1929 (SA)
24	Evidence Act 1977 (Qld)
25	Evidence Act 1995 (Cth)
26	Evidence Act 1995 (NSW)
27	Evidence Act 2001 (Tas)
28	Evidence Act 2008 (Vic)
29	Evidence Act 2011 No. 12 (ACT)
30	Evidence Amendment Act 2007 (NSW)
31	Evidence Amendment Act 2008 (Cth)
32	Family Law Act
33	Income Tax Assessment Act, 1936
34	Judiciary Act 1903 (Cth)
35	Proceeds of Crime Act 1987 (Cth)
36	Proceeds of Crime Act 2002 (Cth)
37	Racketeer Influence and Corrupt Organisation Act ('RICO') (US)
38	Tasmania in 2014 (The Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Bill 2013).
39	The Crime Legislation Amendment (Serious and Organised Crime) Bill (no. 2) 2009.
40	The Criminal Assets Bureau Act, 1996, Ireland

### Table of Legislation

41	The Proceeds of Crime Act, 1996
42	The Proceeds of Crime Act, 1996
43	The Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)
44	U.S. Federal Rules of Evidence (1975),

## Case References

### Table of Referenced Cases

-	<u>Case</u>	<u>Date</u>	<u>Ref</u>
1	Adam v The Queen	2001	207 CLR 96
2	Adams in Bradley	1988	
3	Al-Kateb v Godwin	2004	219 CLR 562.
4	Allstate Life Insurance Co v ANZ Banking Group Ltd (No 5)	1996	136 ALR 627
5	Archer Capital 4A Pty Ltd v Sage Group plc (no 3)	2013	FCA 1160; 306 ALR 414
6	Arnotts Ltd v Trade Practices Commission	1990	21 FRC 313
7	ASIC v Rich and Ors	2005	218 ALR 764
8	ASIC v Rich, 2004a	2004	NSW SC 951
9	ASIC v Rich, 2004b	2004	NSW SC 963
10	ASIC v Rich, 2004c	2004	NSW SC 1062
11	ASIC v Rich, 2005	2005	NSW SC 149
12	ASIC v Vines	2003	NSWSC 1095
13	Australian Securities and Investments Commission v Southcorp Ltd	2003	FCA 804; 46 ACSR 438
14	B&B (No 2)	2000	26 FLR 437
15	Bank of Valletta PLC v National Crime Authority	1999	165 ALR 60
16	Basic Inc v Levinson	1998	485 U.S. 224
17	BBH v The Queen	2012	245 CLR 499
18	Best and Best	1993	FLC 92 418
19	BJF v The State of Western Australia Supreme Court of Western Australia	2011	WASC 163
20	BJF v Western Australia	2011	WASC 163
21	Bonython v R	1948	75 CLR 589
22	Browne v Dunn	1893	6 R. 67, H.L
23	Buckley v Rice	1554	1 Plowd 118 at 124; 75 ER 182
24	Buller v Cripps	1703	6 Mod 29
25	Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 8)	2008	CA 470
26	Cairns Regional Council v Sharp	2013	QCA 297
27	Calero-Toledo v. Pearson Yacht Leasing Co.	1974	416 U.S. 663, 681 19 A Crim R 41
28	Carroll v The Queen, 1985	1985	

**Table of Referenced Cases (Cont'd)**

29	Carter v Boehm	1876	97 ER 1162
30	Casley-Smith v Evans & Sons Pty Ltd (No 1)	1988	49 SASR.
31	Cheal Industries Pty Ltd – Fitzpatrick v Cheal	2012	NSWSC 262
32	Clark v Ryan	1960	103 CLR 486
33	Daubert v. Merrell Dow Pharmaceuticals	1993	509 U.S. 579
34	Davie v Magistrates of Edinburgh	1953	SC 34, SLT 54
35	Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh 1953 SC 34	1953	SC34
36	Dixon	2012	FMCAfam 119
37	Doe d Jenkins v Davies	1847	10 Q. B. 314
38	DPP v Ali	2009	23 VR 203, 218
39	DPP v Green	2010	NTSC 16
40	DPP(WA) v Bowers	2010	WASCA 46 Monash University Law
41	Dugan v Mirror Newspapers Ltd	1977	Review 14
42	Dupas v The Queen	2010	241 CLR 237
43	Eagles v Orth	1976	Qd R 313
44	Evans Deakin Pty Ltd v Sebel Furniture Ltd	2003	FCA 171
45	Frye v United States	1923	293 F 1013
46	General Electric Co v Joiner	1997	522 U.S. 136
47	George v Rockett	1990	170 CLR 104
48	Gilligan v Criminal Assets Bureau and Others	1998	3 IR 185
49	Gray	2012	QCA 144
50	Hamod v Suncorp Metway Insurance Ltd	2006	NSWCA 243.
51	Henschke and Co v Rosemount Estates Pty Ltd	1999	FCA 1561
52	HG v Queen	1999	197 CLR 414
53	Hickman v Peacey,	1945	AC 304
54	Hollingham v Head	1858	4CB(NS) 388, 140 ER 1135
55	Hull and Hull	1983	FLC 91-360
56	Idoport v National Australia Bank	1999	50 NSWLR 640
57	International Finance Trust Company Limited v NSW Crime Commission	2009	240 CLR 319,370-80 [141] (Cth) 79 Australian Journal of Criminal Review 514
58	Jeffrey v DPP	1995	72 US 144
59	Kennedy v Mendosa	1963	72 US 144
60	Kumho Tire Co v Carmichael	1999	526 US 137
61	Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage	2013	NSWCCA 114
62	Lakatoi Universal Pty Ltd v L A Walker	1999	NSWSC 113
63	Lithgow City Council v Jackson	2011	244 CLR 352
64	Makita (Australia) Pty Ltd v Spowles	2001	52 NSWLR 705
65	Marriage of Reynolds	1984	10 Fam LR 388
66	McKay v Page and Sobloski	1972	2 SASR 117

**Table of Referenced Cases (Cont'd)**

67	Miller v United States	1871	78 U.S. (11Wall.) 268, 305
68	Murphy v R	1989	167 CLR 94
69	MWJ v The Queen, 2005; National Justice Compania Naviera SA v Prudential	2005	80 ALIR 329
70	Assurance Co Ltd (The Ikarian Reefer)	1993	20 FSR 565
71	Osland v The Queen	1998	197 CLR 316.
72	Perpetual Trustee Co Ltd v George	1997	unreported
73	R v Adams	1996	2 CR App R 467, CA
74	R v Bonython	1984	38 SASR 45
75	R v Bradbury	2014	NSWSC 1753
76	R v Burton	2013	NSWCCA 335
77	R v C	1993	60 SASR 47
78	R v Cox (No 1)	2005	VSC 157
79	R v Cox (No 2)	2005	VSC 224
80	R v Cox and Sadler	2006	VSC 443
81	R v Ferguson	2009	VSCA 198, 24 VR 531
82	R v Gallagher	2001	2001, NSWSC 462
83	R v Gilmore, 1977	2011	WASC 163 210 A Crim R 262
84	R v Harris (No 3)	1990	VR 310 at 318
85	R v Jamieson	1992	60 A Crim R 68
86	R v King	2017	20170524
87	R v Kobina Amponsem	2014	Unreported
88	R v Lewis	1987	88 FLR 104
89	R v Lockyer	1996	89 A Crim R 457, 459
90	R v Lucas	1992	2 VR 109
91	R v MAP	2006	QCA 220
92	R v Masih	1986	Crim.L.R. 395
93	R v McLeod	2007	16 VR 682 [14] – [23]
94	R v Runjanjic	1991	56 SASR 114
95	R v Schultz	1985	5 A.Crim.R. 234, 237
96	R v Shamouil	2006	66 NSWLR 228 (NSWCCA)
97	R v Tang	2006	123 A Crim R 506
98	R v Turner	1975	QB 834
99	R v Clark	2001	NSWSC 488
100	Ramsay and Ramsay	1997	FLC 92-742
101	Ritz Hotel Ltd v Charles of the Ritz Ltd	1988	15 NSWLR 158
102	Sapir and Sapir (No 2),	1989	FLC 92-047
103	Scontas v Citizens Ins. Co.	1996	253 A.2d 831, 833
104	Scott & Scott FamCA 1379	2006	FamCA 1379
105	Shea v TruEnergy Services Pty Ltd (No 5)	2013	FCA 937
106	Shoshana Pty Ltd v 10th Cantanae Pty Ltd	1987	18 FCR 285
107	Smith v R	2001	206 CLR 650
108	Spencer v Commonwealth of Australia	1907	5 CLR 418

**Table of Referenced Cases (Cont'd)**

109	Studman v Commonwealth DPP Sydneywide Distributors v Red Bull Australia Pty	2007	NSWCA 285
110	Ltd	2002	FCAFC 157
111	The Palmyra	1827	25 US (12 Wheat) 1,14
112	Thorn v Worthing Skating Rink	1876	6 Ch D 415
113	Turnbull v Turnbull	1991	FLC 92 258
114	United States v 92 Buena Vista Ave	1993	507 U.S. 111
115	United States v Ward	1980	448 US 242
116	Velevski v The Queen	2002	HCA 414
117	Wall and Wall	1999	EA83
118	Weal v Bottom	1966	40 ALJR 436
119	Wilkes v Wood	1763	Lofft 1 at 19; 98 ER 489
120	Yates Property Corporation v Boland	1999	HCA 64

## Government Reports

### Table of Annual Reports

#### **Western Australia Department of Public Prosecutions**

Western Australia Department of Public Prosecutions Annual Report 2014/2015,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2014\\_2015.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2014_2015.pdf)

Western Australia Department of Public Prosecutions Annual Report 2015/2016,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2015\\_2016.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2015_2016.pdf)

Western Australia Department of Public Prosecutions Annual Report 2013/2014,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2013\\_2014.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2013_2014.pdf)

Western Australia Department of Public Prosecutions Annual Report 2012/2013,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2012\\_2013.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2012_2013.pdf)

Western Australia Department of Public Prosecutions Annual Report 2011/2012,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2011\\_2012.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2011_2012.pdf)

Western Australia Department of Public Prosecutions Annual Report 2010/2011,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2010\\_2011.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2010_2011.pdf)

Western Australia Department of Public Prosecutions Annual Report 2009/201,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2009\\_2010.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2009_2010.pdf)

Western Australia Department of Public Prosecutions Annual Report 2008/2009,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2008\\_2009.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2008_2009.pdf)

Western Australia Department of Public Prosecutions Annual Report 2007/2008,  
[http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2007\\_2008.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2007_2008.pdf)

#### **South Australian Department of Public Prosecutions**

<https://www.dpp.sa.gov.au/publications/annual-reports/>

South Australian Department of Public Prosecutions Annual Report 2015/2016

South Australian Department of Public Prosecutions Annual Report 2014/2015

South Australian Department of Public Prosecutions Annual Report 2013/2014

South Australian Department of Public Prosecutions Annual Report 2012/2013

South Australian Department of Public Prosecutions Annual Report 2011/2012

South Australian Department of Public Prosecutions Annual Report 2010/2011

South Australian Department of Public Prosecutions Annual Report 2009/2010

South Australian Department of Public Prosecutions Annual Report 2008/2009

#### **Victorian Office of Public Prosecutions**

<http://www.opp.vic.gov.au/Resources/Publications>

Victorian Office of Public Prosecutions Annual Report 2015/2016

Victorian Office of Public Prosecutions Annual Report 2014/2015

Victorian Office of Public Prosecutions Annual Report 2013/2014

Victorian Office of Public Prosecutions Annual Report 2012/2013

Victorian Office of Public Prosecutions Annual Report 2011/2012

Victorian Office of Public Prosecutions Annual Report 2010/2011

Victorian Office of Public Prosecutions Annual Report 2009/2010

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<http://www.odpp.nsw.gov.au/docs/default-source/annual-reports/>

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New South Wales Department of Public Prosecutions Annual Report 2014-2015

New South Wales Department of Public Prosecutions Annual Report 2013-2014

New South Wales Department of Public Prosecutions Annual Report 2012-2013

New South Wales Department of Public Prosecutions Annual Report 2011-2012

New South Wales Department of Public Prosecutions Annual Report 2010-2011

New South Wales Department of Public Prosecutions Annual Report 2011-2012

New South Wales Department of Public Prosecutions Annual Report 2010-2011

New South Wales Department of Public Prosecutions Annual Report 2009-2010

### **Australian Crime Commission**

Australian Crime Commission, 2016, Organised Crime Groups,

<https://crimecommission.gov.au/organised-crime/organised-crime-groups>, accessed May 2016.

Australian Crime Commission, 2015, Organised Crime in Australia 2015

<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>

Australian Crime Commission, 2013, Organised Crime in Australia 2013

<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>

Australian Crime Commission, 2011, Organised Crime in Australia 2011

<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>

Australian Crime Commission, 2014, The Costs of Serious and Organised Crime in Australia 2013-2014

<https://crimecommission.gov.au/sites/default/files/CoSOCA%202015>

Australian Crime Commission, 2009, Organised Crime in Australia 2009

<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>

Australian Crime Commission, 2008, Organised Crime in Australia 2008

<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>

Australian Crime Commission Annual Report 2015-16

<https://www.acic.gov.au/about-us/corporate-documents/annual-reports/australian-crime-commission-annual-report-2015-16>

Australian Crime Commission Annual Report 2015-16

Australian Crime Commission Annual Report 2014-15

Australian Crime Commission Annual Report 2013-14

CrimTrac Annual Report 2015-16

<https://www.acic.gov.au/about-us/corporate-documents/annual-reports/crimtrac-annual-report>

CrimTrac Annual Report 2013-14

CrimTrac Annual Report 2014-16



## Table of Annual Reports

### **Tasmanian Department of Public Prosecutions**

[http://www.crownlaw.tas.gov.au/dpp/annual\\_reports](http://www.crownlaw.tas.gov.au/dpp/annual_reports)

Tasmanian Department of Public Prosecutions Annual Report 2015-16

Tasmanian Department of Public Prosecutions Annual Report 2014-15

Tasmanian Department of Public Prosecutions Annual Report 2013-14

### **Queensland Department of Public Prosecutions**

<https://publications.qld.gov.au/dataset/office-of-the-director-of-public-prosecutions-annual-reports/>

Queensland Department of Public Prosecutions Annual Report 2015-16

Queensland Department of Public Prosecutions Annual Report 2014-15

Queensland Department of Public Prosecutions Annual Report 2013-14

Queensland Department of Public Prosecutions Annual Report 2012-13

Queensland Department of Public Prosecutions Annual Report 2011-12

Queensland Department of Public Prosecutions Annual Report 2010-11

Queensland Department of Public Prosecutions Annual Report 2009-10

### **Commonwealth Department of Public Prosecutions**

<https://www.cdpp.gov.au/about-us/2015-16-annual-report>

Commonwealth Department of Public Prosecutions Annual Report 2015-16

Commonwealth Department of Public Prosecutions Annual Report 2014-15

Commonwealth Department of Public Prosecutions Annual Report 2013-14

Commonwealth Department of Public Prosecutions Annual Report 2012-13

Commonwealth Department of Public Prosecutions Annual Report 2011-12

Commonwealth Department of Public Prosecutions Annual Report 2010-11

Commonwealth Department of Public Prosecutions Annual Report 2009-10

### **Miscellaneous Government Reports**

Australian Law Reform Commission (ALRC), 1985, *Evidence Interim Report* (No. 26)

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRC/1985/26.html?stem=0&synonyms=0&query=alrc%20evidence>

Australian Law Reform Commission (ALRC), 1987, *Evidence Final Report* (No. 38)

<http://www.austlii.edu.au/au/other/lawreform/ALRC/1987/38.html>

Australian Law Reform Commission (ALRC), 2005, *Uniform Evidence Law Report* (No. 102)

<http://www.austlii.edu.au/au/other/lawreform/ALRC/2005/102.html#03>

NSW Law Reform Commission (NSWLRC), 2006, *Uniform Evidence Law* (Report No. 112)

<https://www.alrc.gov.au/publications/Executive%20Summary/uniform-evidence-law>

Australian Law Reform Commission (ALRC), 1987, *Review of the Proceeds of Crime Act*, (Report No. 87).

<https://www.alrc.gov.au/report-87>

## Table of Annual Reports

Parliamentary Joint Committee on Law Enforcement (PJCLE), 2010, *Inquiry into legislative arrangements to outlaw serious and organised crime groups*

[https://www.aph.gov.au/binaries/senate/committee/acc\\_cte/laoscg/report/report.pdf](https://www.aph.gov.au/binaries/senate/committee/acc_cte/laoscg/report/report.pdf)

Parliamentary Joint Committee on Law Enforcement (PJCLE), 2012, *Inquiry into Commonwealth unexplained wealth legislation and arrangements.*

[https://www.google.com.au/search?q=Parliamentary+Joint+Committee+on+Law+Enforcement+\(PJCLE\)%2C+2012%2C+Inquiry+into+Commonwealth+unexplained+wealth+legislation+and+arrangements.&oq=Parliamentary+Joint+Committee+on+Law+Enforcement+\(PJCLE\)%2C+2012%2C+Inquiry+into+Commonwealth+unexplained+wealth+legislation+and+arrangements.&aqs=chrome..69i57.3007j0j4&sourceid=chrome&ie=UTF-8](https://www.google.com.au/search?q=Parliamentary+Joint+Committee+on+Law+Enforcement+(PJCLE)%2C+2012%2C+Inquiry+into+Commonwealth+unexplained+wealth+legislation+and+arrangements.&oq=Parliamentary+Joint+Committee+on+Law+Enforcement+(PJCLE)%2C+2012%2C+Inquiry+into+Commonwealth+unexplained+wealth+legislation+and+arrangements.&aqs=chrome..69i57.3007j0j4&sourceid=chrome&ie=UTF-8)

Attorney-General's Department, Australian Government, 2013, *Government response to the Parliamentary Joint Committee on Law Enforcement's inquiry into Commonwealth unexplained wealth legislation and arrangements*

<https://www.ag.gov.au/Publications/Pages/GovresponsetotheParliamentaryJointCommitteeonLawEnforcementsInquiryintoCommonwealthunexplainedwealth.aspx>

Attorney-General's Department, Australian Government, 2006, *The Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)* ('The Sherman Report')

<http://trove.nla.gov.au/version/43428110>

## Submissions

Submissions received by the Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements.*

Crime and Misconduct Commission  
Police Federation of Australia  
Police Federation of Australia - Supplementary Submission  
Law Council of Australia  
Law Council of Australia - Supplementary Submission  
Victoria Police  
Australian Taxation Office  
Attorney-General's Department  
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Australian Crime Commission - Supplementary Submission 1  
Australian Crime Commission - Supplementary Submission 2  
Australian Federal Police  
Australian Federal Police - Supplementary Submission  
Northern Territory Police  
Northern Territory Police - Supplementary Submission  
Queensland Law Society

Source:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Law\\_Enforcement/Completed\\_inquiries/2010-13/unexplained\\_wealth/submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/2010-13/unexplained_wealth/submissions)

## References

### Table of References

- 1 Abbott, A. 1988, *System of Professions: An Essay on the Division of Expert Labour*, University of Chicago Press, Chicago.
- 2 ABC 2015 <http://www.abc.net.au/news/2015-12-02/anti-bikie-laws-target-six-groups-with-no-local-members/6995916>  
<https://www.qld.gov.au/.../new-criminal-bikie-gang-laws>
- 3 ABC 2016 <https://www.qld.gov.au/.../new-criminal-bikie-gang-laws>
- 4 Accounting and Professional Ethics Standards (APES 110), 2010, *Code of Ethics for Professional Accountants*
- 5 Accounting and Professional Ethics Standards (APES 215), 2009, *Forensic Accounting Services*
- 6 Accounting and Professional Ethics Standards (APES 215), 2013, *Forensic Accounting Services*
- 7 Accounting and Professional Ethics Standards (APES 225), 2008, *Valuation Services*
- 8 Accounting and Professional Ethics Standards (APES 225), 2012, *Valuation Services*
- 9 Accounting and Professional Ethics Standards (APES 225), 2013, *Terms of Engagement*
- 10 Accounting and Professional Ethics Standards (APES 225), 2015, *Terms of Engagement*
- 11 Accounting and Professional Ethics Standards Board, *Statement of Purpose*, 2016
- 12 Ackerman, B. 1977, *Private Property and the Constitution*, New Haven: Yale University Press.
- 13 Ahrens T. Chapman C. 2006, Doing qualitative weld research in management accounting: Positioning data to contribute to theory. *Accounting, Organizations and Society* 31 819–841.
- 14 Albrecht, W.S. Albrecht C.O. Albrecht C.C. and Zimbelman M.F. 2016, *Fraud Examination*, Cengage Learning, Boston, US.
- 15 Allen, M. 2016, *Fundamental Principles of Criminal Liability - Actus Reus and Mens Re*, 14th Ed, Oxford University Press
- 16 Alonso, P. 1984, Introduction in Alonso, P. and Starr, W. (eds), 1984, *The Politics of Numbers*, New York: Russell Sage Foundation
- 17 Anderson, 1997, *Australian Medical Association, Guidelines for Doctors Acting as Expert Witnesses*
- 18 Anderson, T. 2014, *Defend Yourself: Facing a Charge in Court*, 3rd edition, The Federation Press in Sydney, Australia
- 19 Angeles, D. 2012 *Top 15 Crime Bosses and Drug Lords in 2012*, <http://listverse.com/2012/06/05/top-15-crime-bosses-and-drug-lords-in-2012/>
- 20 Arenson, K. and Bagaric, M. 2007, *Rules of Evidence in Australia Text & Cases*, 2nd Edition Lexis Nexis Butterworths, Australia
- 21 Arrington C.E. and Francis J.R. 1989, Letting the chat out of the bag: Deconstruction, privilege and accounting research, *Accounting Organisations and Society*, 14(1-2):1-28
- 22 Arrington C.E. and Puxty A.G. 1991, Accounting, interests, and rationality: A communicative relation, *Critical Perspectives on Accounting*, 2(1):31-58
- 23 Arrington, C. E. and Puxty, A. 1991, Accounting, interests and rationality: a communicative relation, *Critical Perspectives in Accounting*, Vol 2 No1 pp 31-58
- 24 Asset Recovery Agency, 2006, *ARA Annual Report 2005/06* London UK: The Stationery Office
- 25 Australian Auditing Standards (ASA 200), 2009, *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards*.

Auditing Assurance Standards Board

- 26 Australian Crime Commission, 2008, *Organised Crime in Australia 2008*,  
<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>
- 27 Australian Crime Commission, 2009, *Organised Crime in Australia 2009*,  
<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>
- 28 Australian Crime Commission, 2011, *Organised Crime in Australia 2011*,  
<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>
- 29 Australian Crime Commission, 2013, *Organised Crime in Australia 2013*,  
<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>
- 30 Australian Crime Commission, 2014, *The Costs of Serious and Organised Crime in Australia 2013-2014*, <https://crimecommission.gov.au/sites/default/files/CoSOCA%202015>
- 31 Australian Crime Commission, 2015, *Crime in Australia 2015*
- 32 Australian Crime Commission, 2015, *Organised Crime in Australia 2015*,  
<https://crimecommission.gov.au/publications/intelligence-products/organised-crime-australia>
- 33 Australian Crime Commission, 2016, *Organised Crime Groups*,  
<https://crimecommission.gov.au/organised-crime/organised-crime-groups>, accessed May 2016.
- 34 Australian Criminal Intelligence Commission, 2017, *Crime Taskforces*,  
<https://www.acic.gov.au/about-crime/task-forces>
- 35 Australian Criminal Intelligence Commission, 2017, *Criminal Syndicates*,  
<https://www.acic.gov.au/about-crime/organised-crime-groups/criminal-syndicates>
- 36 Australian Criminal Intelligence Commission, 2017, *Organised Crime - Professional Facilitators*, <https://www.acic.gov.au/about-crime/organised-crime-groups/professional-facilitators>
- 37 Australian Criminal Intelligence Commission, 2017, *Organised Crime Groups*,  
<https://www.acic.gov.au/about-crime/organised-crime-groups>
- 38 Australian Criminal Intelligence Commission, 2017, *Organised Crime in Australia*,  
<https://www.acic.gov.au/publications/intelligence-products/organised-crime-australia>
- 39 Australian Criminal Intelligence Commission, 2017, *Outlaw Motorcycle Gangs*,  
<https://www.acic.gov.au/about-crime/organised-crime-groups/outlaw-motor-cycle-gangs>
- 40 Australian Criminal Intelligence Commission, 2017, *The Costs of Serious and Organised Crime in Australia*, <https://www.acic.gov.au/publications/intelligence-products/costs-serious-and-organised-crime-australia>
- 41 Australian Federal Police, 2012, Submission 9, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements*, Parliamentary Joint Committee on Law Enforcement
- 42 Australian Institute of Criminology, 2008, Confiscation of the proceeds of crime: federal overview. *Transnational Crime Brief no 1*
- 43 Australian Law Reform Commission Report 102, 2006, *NSWLRC Report 102*
- 44 Australian Law Reform Commission, 1985, *ALRC report 26* into Evidence (Interim)
- 45 Australian Law Reform Commission, 1987, *ALRC report 38* into Evidence
- 46 Australian Law Reform Commission, 2006, *ALRC report 102* into Uniform Evidence Law
- 47 Australian Law Reform Commission, 2015, *ALRC Interim Report 127*, Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, s 11 Burden of Proof
- 48 Balkin, J. 2003, The Proliferation of Legal Truth, *Harvard Journal of Law and Public*

- 49 Balko, R. 2014, Rep. Tim Walberg introduces bill to curb asset forfeiture abuse, *Washington Post*. Retrieved October 11, 2014.
- 50 Ball, P. 2009, *Nature's Patterns: a tapestry in three parts. 1:Shapes. 2:Flow. 3:Branches*. Oxford. ISBN 978-0199604869.
- 51 Ball, P. 2009, *Nature's Patterns: a tapestry in three parts: 1 shapes, 2 Flow, 3 Branches*, Oxford, London
- 52 Bartels, L. 2010, *A review of confiscation schemes in Australia. Technical and background paper no. 36*. Canberra: Australian Institute of Criminology.
- 53 Baxter, H. 2002, Habermas' Discourse Theory of Law and Democracy, *Buffalo Law Review* Vol. 50,
- 54 Baxter, H. 2011, Habermas: The Discourse Theory of Law and Democracy, Stanford University Press, Stanford, CA.
- 55 Beckett, S. 2012, Recent decisions on evidence: Evidence update on the application of the rule of Browne and Dunn in criminal trials, *Criminal Law Masterclass*, Forbes Chambers
- 56 Beran, R. 2009 The role of the expert witness in the adversarial legal system, 17 *Journal of Law and Medicine* 133
- 57 Berger, P. and Luckmann, T. 1966, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Garden City, NY: Anchor Books
- 58 Bleijie, J. 2013, Opinion: Queensland Attorney-General on aligning the wheels of justice, *Courier Mail*, 19 October.
- 59 Blichner, L. and Molander, A. 2005, *What is juridification?* Working paper, ARENA Centre for European Studies, University of Ohio
- 60 Blocker, J. 2003, ed. *Alcohol and Temperance in Modern History: An International Encyclopedia*. ABC-CLIO
- 61 Blom-Cooper, L. QC, 2006, Historical Background in Sir Louis Blom-Cooper (ed) *Experts in the Civil Courts*, Oxford University Press, Oxford, United Kingdom.
- 62 Bohman, J. and Rehg, W. 2014, Jurgen Habermas, *Stanford Encyclopedia of Philosophy*: <http://plato.stanford.edu/entries/habermas/> accessed November 2015.
- 63 Boje, D. and Rosile, G. 2001, Where is the Power in Empowerment? *Journal of Applied Behavioural Science* Vol 37, Issue 1.
- 64 Bolman, L. and Deal, T. 2003, *Reframing Organisations: artistry, choice and leadership*, Jossey-Bass, San Francisco
- 65 Botha, E. 2009, Why metaphor matters, *South African Journal of Education*, Vol 29, Iss 4, Pp 431-444.
- 66 Boudreaux, D. and Pritchard, A. 1996, Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition, *Missouri Law Review*, 61, 593
- 67 Bradley, W. 2005, *Professionalism as Interpretation*, 99 *Northwestern University Law Review*. 1167,1191.
- 68 Bradley, W. 1988, The Constitutional Theory of the Fourth Amendment, *Paul Law Review*, s8, 817
- 69 Briers, M. and Chua, W. F. 2001, The role of actor-networks and boundary objects in management accounting change: a field study of an application of activity-based costing, *Accounting, Organisations and Society*, 26(3):237-269
- 70 Broadbent J. and Laughlin R. 1994, Moving towards an accounting that will be enabling: Accounting, Habermas and issues of gender, *Proceedings of the Fourth Interdisciplinary Perspectives on Accounting Conference*, University of Manchester, July 1.3.1-1.3.18
- 71 Bromwich, M. and Hopwood, A. 1992, *Accounting and the Law*, Prentice Hall International Hertfordshire, UK.
- 72 Bronstein, D. 1999, *Law for the Expert Witness*, CRC Press, 2nd Ed.

- 73 Brown and da Silva Rosa, 1998, Australia's Corporate Law Reform and Market for Corporate Control, *Agenda: A Journal of Policy Analysis and Reform*, Vol 5, No 2 pp179-188
- 74 Brown, A, 1993, Professional judgment and accounting standards. *Accounting, Organizations and Society*. 18. 275-289.
- 75 Bullock, K. Mann, D. Street, R. and Coxon, C. 2009, Examining attrition in confiscating the proceeds of crime. *Home Office Research Report 17*, London Home Office, <http://www.homeoffice.gov.uk/rds/pdfs09/horr17c.pdf>
- 76 Burnett, J. 2008, Seized drug assets pad police budgets, *NPR*, <http://www.npr.org/templates/story/story.php?storyId=91490480>
- 77 Cambridge English Dictionary, accessed 2016, <http://dictionary.cambridge.org/>
- 78 Campbell, J. 2014, Victoria's worst offenders face tougher penalties under proposed new laws, *Herald Sun*, 2 April.
- 79 Campbell, L. 2007, *Theorising Asset Forfeiture in Ireland*, JCL 71
- 80 Carpenter, D. Knepper, L. Erickson, A. and McDonald, J. 2015, *Policing for Profit: The abuse of civil asset forfeiture*, 2nd Ed. Institute for Justice. <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>
- 81 Carrigan, A. 2000, The Bill of Attainder Clause: A New Weapon to Challenge the Oil Pollution Act of 1990, *Boston College Environmental Affairs Law Review* 28:119
- 82 Carr-Saunders, A. M. & P. A. and Wilson, 1933, *The Professions*, Clarendon Press, Oxford
- 83 Carter, D. 2006, Your Honours, An appeal: Re-litigating 'Accounting on Trial' Ph D Thesis, *School of Accounting and Commercial Law*, Victoria University of Wellington, New Zealand
- 84 Cassella, S. 2002, Forfeiture of Terrorist Assets Under the USA Patriot Act of 2002, *Law & Policy of International Business*, 34, 7
- 85 Cassella, S. 2006, *Asset Forfeiture in the United States*, Huntington, NY, US: Juris Publishing
- 86 Cassella, S. 2009, An overview of asset forfeiture in the United States, in Young, S. *Civil Forfeiture of Criminal Property – Legal Measures of Targeting the Proceeds of Crime*, Edward Elgar Publishing, Cheltenham, U.K.
- 87 Catlett, G. R. 1960, Relation of acceptance to accounting principles. *Journal of Accountancy*, 33–38
- 88 *Chain of custody Log*  
[www.lexisnexis.com/applieddiscovery/lawLibrary/ModelOrders/Sample\\_ChainOfCustodyLog.pdf](http://www.lexisnexis.com/applieddiscovery/lawLibrary/ModelOrders/Sample_ChainOfCustodyLog.pdf)
- 89 Chambers, R. 1966, *Accounting, Evaluation and Economic Behavior*, New Jersey: Prentice-Hall.
- 90 Chambers, R. 1980, The myths and the science of accounting, *Accounting, Organizations and Society*, Volume 5, Issue 1, 1980, Pages 167-180
- 91 Chambers, S. 1996, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse*, Ithaca: Cornell University Press
- 92 Charrett, D. 2015, The rules of expert evidence in Australia, *Australian Construction Law Newsletter*, #163
- 93 Chea, A. 2011, Fair Value Accounting: Its Impacts on Financial Reporting and How It Can Be Enhanced to Provide More Clarity and Reliability of Information for Users of Financial Statements, *International Journal of Business and Social Science*, November 2011, Vol 2, No 20.
- 94 Chua, W.F. 1986, Radical Developments in Accounting Thought, *The Accounting Review*, 61(4):601-632
- 95 Civil Liberties Australia, 2011, *Special Report: Australia's property seizure laws hitting the*

- wrong targets: major national legal reform needed.* <http://www.cla.asn.au/News/special-report-australia-s-property/> accessed 12/8/2016
- 96 Clapham, J. 1910, The last years of the Navigation Acts. *English Historical Review* 25.99
- 97 Clark, J. 1985, The Juridification of Industrial Relations: A Review Article, *Industrial Law Journal* 14 (1): 69-90
- 98 Clarke B. 2002, Confiscation of ‘unexplained wealth’: Western Australia’s response to organised crime gangs. *South African Journal of Criminal Justice* 15: 61–87
- 99 Clarke B. 2004, 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). *Criminal Law Journal* 28: 263–286
- 100 Clegg, S. 1989, *Frameworks of Power*, Sage Publications, London
- 101 Coleman, J. 2002, *Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, Oxford, United Kingdom
- 102 Collier, P. 2006, In search of purpose and priorities: police performance indicators in England and Wales, *Public Money & Management*, Vol. 26 No. 3, p165-72.
- 103 Commonwealth of Australia, 2009, *Explanatory memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (Cth)*. Canberra: Australian Government
- 104 Cooke, M. 1994, *Language and Reason: A study of Habermas's Pragmatics*, MIT Press, Cambridge, Massachusetts.
- 105 Cooper N. 1977, Justice and Historical Entitlement, *Canadian Journal of Philosophy*, 7, 799
- 106 Cooper, C. and Puxty, A. 1994, Reading Accounting Writing, *Accounting Organisations and Society*, Vol 19, Issue 2, P127-146
- 107 Craig, R. and Reddy, P. 2004, Assessments of the Expert evidence of Accountants, *Australian Accounting Review*, Vol 14, 32, p 73-80
- 108 Cranny, G. 2011, Confiscating your client’s assets: The takeaways from State and Commonwealth Acts, *Proctor*, June, p24-26
- 109 Croke, C. 2010, Civil Forfeiture: Forfeiting Civil Liberties? A Critical Analysis of the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth) *Current Issues in Criminal Justice*, Vol 22 No.1
- 110 Crumbley, L. Heitger, L. Smith, G. 2005, *Forensic and Investigative Accounting*. (Third Edition) CCH Group.
- 111 Dambrin, C. and Robson, K. 2009, Multiple measures, inscription instability and action at a distance: performance measurement practices in the pharmaceutical industry. <http://www.hec.edu/var/fre/storage/original/application/20a282c650cd62e0c77284659592ee96.pdf>
- 112 Davies, G. Hon. 1997, The Changing Face of Litigation *Journal of Judicial Administration* 179.
- 113 Dayman, S. 2009, Is the patient expected to live? UK civil forfeiture in operation, in Young, S. *Civil Forfeiture of Criminal Property – Legal Measures of Targeting the Proceeds of Crime*, Edward Elgar Publishing, Cheltenham, U.K.
- 114 Dick, A. 2011, The substance of punishment under the bill of attainder clause, *Stanford Law Review*, 1177
- 115 Dixon, N. 2012, Research Brief No. 9 - Unexplained Wealth Laws, *Queensland Parliamentary Library and Research Service*, <http://www.parliament.qld.gov.au/documents/explore/researchpublications/researchbriefs/2012/rbr201209.pdf>
- 116 Dixon, N. 2012, Unexplained Wealth Laws, *Research Brief 2012/9*, Queensland Parliamentary Library Research and Information Service, Brisbane.
- 117 Dodd, N. 1994, The Sociology of Money. *Economics, Reason and Contemporary Society*, Cambridge U.K.



- 118 Doyle, J. 1987 Admissibility of Opinion Evidence, *The Australian Law Journal*, Vol 61 pp 688-694
- 119 Duignan, B. 2014, *Encyclopaedia Britannica*, www.britannica.com, accessed June 2014.
- 120 Duncan, O. 1982, *Social Measurement*, New York: Russell Sage Foundation.
- 121 Dwivedi, Y. Wade, M. and Schneberger, S. 2012, Information Systems Theory: Explaining and Predicting our Digital Society Vol 2, *Springer Science and Business Media*, New York
- 122 Dwyer, D. 2008. *The Judicial Assessment of Expert Evidence*, Cambridge University Press
- 123 Edgely, M. 2010, Criminals and (Second-class) Citizenship: Twenty-first Century Attainder? *Griffith Law Review*, Vol. 19, No. 3, 2010: [403]-437
- 124 Egbu, C. Botterill, K. and Bates, M. 2001, The influence of knowledge management and intellectual capital on organisational innovations, in *Proceedings of ARCOM 17th Conference*, p547-555
- 125 Eggleston, R. 1983, *Evidence, Proof and Probability*, 2nd Edition
- 126 Fairclough, N. 1992, *Discourse and Social Change*, Polity Press Cambridge, UK
- 127 Fargher I. and Cooper K. 2009 Forensic accounting; a strategic response for the Accounting Profession to survive the fallout from surprise corporate failure. *British Accounting Association*, Cardiff, UK
- 128 Federal Bureau of Investigation (FBI), United States, 2012, *FBI Forensic Accountants*: <https://www.fbi.gov/news/stories/fbi-forensic-accountants>
- 129 Financial Action Task Force, 2012, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – the FATF Recommendations*, www.fatf-gafi.org/recommendations
- 130 Financial Action Task Force, 1970, *FATF Recommendations*, <http://www.fatf-gafi.org/publications/fatfrecommendations>
- 131 Financial Action Task Force, 1990, *FATF Recommendations*, <http://www.fatf-gafi.org/publications/fatfrecommendations>
- 132 Financial Action Task Force, 2012, *FATF Recommendations*, <http://www.fatf-gafi.org/publications/fatfrecommendations>
- 133 Finkelstein, J. 1973, The Goring Ox, *Temple Law Quarterly* Vol 46
- 134 Finlayson J. 2005, *Habermas: A Very Short Introduction*, Oxford University Press, Oxford, United Kingdom.
- 135 Fisse, B. 1992, Confiscation of Proceeds of Crime: Funny Money, Serious Legislation in Fisse, B. Fraser, D. and Coss, G. (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting*, Law Book, 74.
- 136 Flores, I. and Himma, K. 2013, *Law, Liberty and the Rule of Law*, Springer science and Business Media
- 137 Foucault, M. 1975, *Discipline and Punish: the Birth of the Prison*, New York: Random House
- 138 Foucault, M. 1980, *Power/Knowledge: Selected Interviews and Other Writings 1972-77*, ed C Gordon, Harvester Press, Brighton, United kingdom.
- 139 Foucault, M. 1986, *The Foucault Reader*, ed P Rabinow. Penguin, Harmondsworth.
- 140 Foucault, M. 1988, *Politics, Philosophy, Culture: Interviews and Other writings, 1977-1984* ed Kritzman, L. Routledge, New York.
- 141 Fraser C. 2011, John Rawls, Robert Nozick and the Difference Principle: Finding Common Ground, *Student Pulse* Vol 3, No 04.
- 142 Freckelton, I and Selby, H. 2013, *Expert Evidence*, Thompson Reuters Lawbook co.
- 143 Freckelton, I. Reddy P. and Selby H. 2001, (eds) *Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study*, Australian Institute of Judicial Administration, ("Magistrates' Study").

- 144 Freckelton, I., Goodman-Delahunty, J., Horan, J., & McKimmie, B. 2016, *Expert Evidence and Criminal Jury Trials*. New York: Oxford University Press.
- 145 Freckelton, I., Reddy, P., & Selby, H. 1999, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*. Melbourne: Australian Institute of Judicial Administration.
- 146 Freckelton, I. and Selby, H. 1999, *The Law of Expert Evidence*, LBC, Sydney
- 147 Freeman, S. (editor), 2003, *The Cambridge Companion to Rawls*, Cambridge: Cambridge University Press.
- 148 Frege, G. *The Foundations of Arithmetic*, Blackwell, Oxford.
- 149 French, R. J, 2008, *Expert testimony, opinion argument and the rules of evidence (FCA)*, Federal Judicial Scholarship
- 150 Friedlander, R. Howard S. Levie, Kristen E. Boon, Lovelace, D. 2010, *Terrorism: Commentary on Security Documents*, Oxford University Press, United Kingdom
- 151 Gaffikin, M. 2008, *Accounting theory: research, regulation and accounting practice*. (1 ed.). Frenchs Forest, NSW: Pearson Education
- 152 Gallhofer, S. and Haslam, J. 1991, The Aura of Accounting in the Context of a Crisis: Germany and the First World War, *Accounting, Organizations and Society* 487-520
- 153 Garretson, H, 2008, Federal Criminal Forfeiture: a royal pain in the assets, *Southern California Review of Law and Social Justice*, <http://ssrn.com/abstract=2023472>
- 154 Gergen, K. 1999, *An Invitation to Social Construction*, Sage Publications
- 155 Gibson, S. 2009, The effortful citizen: Discursive social psychology and welfare reform, *Community and Applied Psychology*, Vol 19, Issue 6, p393-410.
- 156 Goldsmith A. Gray, D. Smith, R. 2014, Criminal Asset Recovery in Australia in *Dirty Assets*, Eds. King, C and Walker, C. Ashgate Publishing Co, Surrey, England
- 157 Goodrich, P. 2005, Three Theses on the Unbearable Lightness of Legal Critique, *Law and Literature*, Vol 17, No 3 pp 293-319
- 158 Gray A. 2012, Forfeiture Provisions and the Criminal/Civil Divide, *New Criminal Law Review*, 32-6.
- 159 Gray A. 2012, The Compatibility of Unexplained Wealth Provisions and ‘Civil’ Forfeiture Regimes with Kable, *QUT Law and Justice Journal*, Vol 12 Number 2.
- 160 Green, Mitchell, 2015, Speech Acts, *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2015/entries/speech-acts/>.
- 161 Haack, S. 2002, Law and Truth: Pre-Modernism, Modernism and Post-Modernism, Address at Federalist Society Conference on Law and Truth at Yale Law School, *Journal of Law & Public Policy*, 26 Harvard.
- 162 Habermas J. 1992, *Fakitztdt und Geltung: Betridge zur Diskurstheorie des Rechts und des Demonkratschers Rechtsstaats* (Frankfurt: Subrkamp, 1992)
- 163 Habermas, J. 1984, [1981]. *Theory of Communicative Action Volume One: Reason and the Rationalization of Society*. Translated by Thomas A. McCarthy. Boston, Mass.: Beacon Press
- 164 Habermas, J. 1987, [1981]. *Theory of Communicative Action Volume Two: Liveworld and System: A Critique of Functionalist Reason*. Translated by Thomas A. McCarthy. Boston, Mass.: Beacon Press
- 165 Habermas, J. 1996 *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg, The MIT Press, Cambridge Mass.
- 166 Hale, I. 1778, *History of the Pleas of the Crown*, 419; I. Blackstone, Commentaries, 290 in Doyle, C. *Crime and Forfeiture*, Congressional Research Service, 2013
- 167 Hale, S. 2004, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* John Benjamins Publishing, Amsterdam, Netherlands
- 168 Hampel, G. Brimer, E. and Kune, R. 1991, *The Australian Advocacy Institute Advocacy*

- Manual, Australian Advocacy Institute, Lane Cove, Australia*
- 169 Hand, L. 1901, Historical and Practical Considerations Regarding Expert Testimony 15  
*Harvard Law Review* 40
- 170 Hayden T. and Boyd D 1992, The Legal Control of Accounting Standards: A Critical view  
in Bromwich M. and Hopwood A. 1992, (eds) *Accounting and the Law* Prentice Hall  
Hertfordshire, UK.
- 171 Held, D. 1980. *Introduction to critical theory: Horkheimer to Habermas*. University of  
California Press.
- 172 Hines, R. 1988, 'Financial Accounting: In Communicating Reality, We Construct Reality',  
*Accounting, Organizations and Society*, Vol. 13, No. 3, 1988 p 251-261
- 173 Hood, C. 1995, The 'New Public Management' in the 1980s: Variations on a Theme,  
*Accounting Organisations and Society*, Vol 20 No 2/3 pp 93-109
- 174 Hooper, K. & Low, M. 2000, Representations in accounting: The metaphor effect,  
*Department of Accounting Working Paper Series, Number 65*, Hamilton, New Zealand:  
University of Waikato.
- 175 Hopwood, A. G. 1990, Ambiguity, Knowledge and Territorial Claims: Some Observations  
on the Doctrine of Substance Over Form, *British Accounting Review* pp. 79-87
- 176 *House of Commons Journal*, Vol 125, 1870; <https://publications.parliament.uk>
- 177 Hunt-Sharman, J. and Burgess, M, 2013, submission to the Senate Legal and Constitutional  
Affairs Committee on behalf of the Australian Federal Police Association and the Police  
Federation of Australia
- 178 Husserl, E. 1936, *The Crisis of European Sciences and Transcendental Phenomenology: An  
introduction to phenomenological philosophy*, 1970 translation by Carr, D. Northwestern  
University Press
- 179 Hussey, S.S. 1988, The Spirit of the Court: Selected proceedings of the fourth congress of  
the international courtly literature society, *The Modern Language Review* 83(2):400-402
- 180 Hutcheson, J. 2002, The Natural Law and the Right to Property, *Natural Law Institute  
Proceedings*. file:///C:/Users/TEMP/Downloads/07\_4NatLInstProc43(1951).pdf
- 181 Institute of Chartered Accountants of Scotland, 2012, *A Professional Judgement Framework  
for Financial Reporting*, <https://icas.com/>
- 182 John Locke, 1689, [1689], *Second Treatise of Government in Laslett, Peter*.  
"Introduction." *Two Treatises of Government*. Cambridge: Cambridge University Press
- 183 Joint Committee on the Australian Crime Commission, 2008, *Legislative arrangements to  
outlaw serious and organised crime groups*. Hansard, 6 Nov 2008  
[http://www.aph.gov.au/senate/Committee/acc\\_ctte/laoscg/index.htm](http://www.aph.gov.au/senate/Committee/acc_ctte/laoscg/index.htm)
- 184 Jones, C. 1994, *Expert Witnesses: Science, Medicine and the Practice of Law*, Oxford  
University Press.
- 185 Jorgensen, M. and Phillips, L. 2002, *Discourse Analysis as Theory and Method*, Sage  
Publications, London, U.K.
- 186 Joyce, P. and Wain, N. 2010, *A Dictionary of Criminal Justice*, Routledge USA and Canada.
- 187 Jucker, A. and Yael, Z. 1996, *Discourse Markers: Descriptions and Theory*, John  
Benjamins Publishing, Amsterdam
- 188 Judicial Commission of New South Wales, 1995, *Civil Trials Bench Book*,  
<https://www.judcom.nsw.gov.au/publications/benchbks/civil.html>
- 189 Kalberg, S. 2014, Max Weber's Sociology of Civilisations: *Five Major Themes*. Max Weber  
Studies, Vol14, Issue 2, p205-232
- 190 Kant, Immanuel, 1991, *The Metaphysics of Morals* [1797], Mary Gregor (trans.)  
Cambridge: Cambridge University Press.
- 191 Keat, R. and Urry, J. 1975, *Social Theory as a Science*, R.K.P. London

- 192 Keeney, R. (1992), *Value-focused Thinking: A Path to Creative Decision Making*, Harvard University Press, Cambridge, MA.
- 193 Kilcullen, R. 1996, *Robert Nozick: Against Distributive Justice*, Macquarie University Press
- 194 King, C. 2012, Using civil processes in pursuit of criminal law objectives: a case study of non -conviction based asset forfeiture, *International Journal of Evidence and Proof* 16 (4) p337
- 195 Kirby, M. 2011, *Forensic Accounting – New Rules and Opportunities, Chartered Accountants – Business Valuations and Forensic Accounting Special Interest Groups*, Sydney
- 196 Knott, M. 2104, Australia’s new security laws explained, *Sydney Morning Herald* 26 September Fairfax Press.
- 197 Koff, N.A., & DeFriese, A.M. 1994, Loosely coupled systems as a conceptual framework for interdisciplinary training. *Educational Gerontology*, 20(1), 1–13.
- 198 Korsgaard, C. 1985. Kant's formula of universal law. *Pacific Philosophical Quarterly*, 66, no. 1-2: 24-47.
- 199 Kranacher, M. Riley, R. Wells, J. 2010, *Forensic Accounting and Fraud Examination*, 1st Edition, Wiley, New Jersey.
- 200 Kruisbergen, E. Kleemans, E. Kouwenberg, 2016, Explaining attrition in confiscating the proceeds of crime. *European Journal of Criminology*, Vol 13, Issue 6
- 201 Ladd, M. 1952, Expert Testimony, *Vanderbit Law Review*, 5, 414
- 202 Lakoff, G. and Johnson, M. 1980, *Metaphors We Live By*, University of Chicago Press, Chicago
- 203 Lander J. 1961, Attainder and Forfeiture, 1453 To 1509. *The Historical Journal*, 4, pp 119-151
- 204 Langfield-Smith, K. 1992, Exploring the need for a shared cognitive map, *Journal of Management Studies*, 29 (3), 349-68.
- 205 Lapsley, I. 1998, Reforming the public sector: demon accountants at work?, *Irish Accounting Review*, Vol. 5, pp. 115-31
- 206 Latour, B. 1987, *Science in Action*, Open University Press
- 207 Latour, B. 1988a, The Politics of Explanation, in Woolgar, S. (ed). *Knowledge and Reflexivity*, Sage, London.
- 208 Laughlin R. and Broadbent J. 1993, Accounting and Law: Partners in the Juridification of the public Sector in the UK? *Critical perspectives on Accounting*, Vol 4 iss 4, pp 337-368
- 209 Laughlin, R. 1987, Accounting systems in organizational contexts: a case for critical theory. *Accounting, Organizations and Society*, 12(5): 479-502
- 210 Law Council of Australia (LCA), 2013, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, 31 January 2013, pp. 4–8, accessed 7 March 2014.
- 211 Law Council of Australia, 2007, *Model Rules of Professional Conduct*. <https://www.lawcouncil.asn.au/tags/regulation-of-the-profession-and-ethics>
- 212 Law Council of Australia, 2009, *Response to the Proposed amendments to the Proceeds of Crime Act 2002*,
- 213 Law Council of Australia, 2014, Expansion of unexplained wealth legislation causes concerns, *News from the Law Council of Australia*, <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news> 10 April 2014
- 214 Law Society of South Australia, 2012, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill* 2012, 8 February 2013, accessed 11 March 2014
- 215 Lehman, G. 2006, Perspectives on language, accountability and critical accounting: An interpretative perspective, *Critical Perspectives on Accounting*. 2006 17(6):755-779

- 216 Lehmann, M. 1978, The Bill of Attainder Doctrine: A Survey of the Decisional Law, *Hastings Law Quarterly*, Vol 5, Summer.
- 217 Leiter, B. 2002, Law and Objectivity, in *The Oxford Handbook of Law* 969, 970-71
- 218 Levi, M. and Maguire, M. 2004, Reducing and preventing Organised Crime: An evidence based critique, *Crime Law and Social Change*, 41: 397-469
- 219 Levine, D. 1981, Rationality and Freedom: Weber and Beyond, *Sociological Inquiry*. Vol 51, Issue 1, p5-25
- 220 Lexisnexis.com, <https://www.lexisnexis.com.au/>
- 221 Liberty Victoria, 2012, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, 5 February 2013, accessed 11 March 2014.
- 222 Ligertwood, A. 2004, *Australian Evidence 4th Ed.*, LexisNexis Butterworths, Austr
- 223 Lingard, L. McDougall, A. Levstik, M. Chandok, N. Spafford, M. Schryer C. 2014, Using Loose Coupling theory to Understand Interprofessional Collaborative Practice on a Transplantation Team, *Journal of Research in Interprofessional Practice and Education*, Vol 3, No 3
- 224 Littleton, 1933. *Accounting evolution to 1900*. University of Alabama Press.
- 225 Llewellyn K. 1945, Remarks on the theory of appellate decision and the rules or canons about how statutes are to be constructed, *Vanderbit Law Review*, Vol 3
- 226 Lubet, Steven; *Modern Trial Advocacy*, NITA, New York, NY 2004 pp. 83 et. seq. ISBN 1556818866
- 227 Lusty, D. 2002, Civil forfeiture of proceeds of crime in Australia. *Journal of Money Laundering Control* 5: 345–359
- 228 Lusty, D. 2003, Taxing the untouchables who profit from organised crime, *Journal of Financial Crime*, Vol. 10 Iss 3 pp. 209 – 228
- 229 Lyas, C. 1984, Philosophers and Accountants, *Philosophy*, 99-110
- 230 Mackenzie, S. and Hamilton-Smith, N. 2011, Measuring police impact on organised crime: Performance management and harm reduction, *Policing: An International Journal of Police Strategies & Management*, Vol. 34 Iss: 1, pp.7
- 231 Maiden, P. SC. 2010, Cross examination of Expert Witness, *Bar Practice Course*, New South Wales Bar Association, [https://www.nswbar.asn.au/docs/professional/prof\\_dev/BPC/course\\_files/Cross\\_Examination\\_of\\_Expert\\_Witness\\_-\\_Maiden\\_SC\\_updated.pdf](https://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Cross_Examination_of_Expert_Witness_-_Maiden_SC_updated.pdf)
- 232 Maines L. and Wahlen J. 2003 The Nature of Accounting Information Reliability: Inferences from Archival and Experimental Research, *AAA/FASB Financial Reporting Issues Conference*.
- 233 Manning, P.K. 1982, Producing drama: symbolic communication and the police. *Symbolic Interaction*, 5, 223–241.25
- 234 Mattessich, R. 1962, *Accounting and Analytical Methods*, Irin, Illinois
- 235 Maxwell, J. 2011, The role of Courts under Asset Confiscation Legislation, *OPP Proceeds of Crime Conference*, Victoria.
- 236 McCarthy, T. 1984, Translators Introduction, in Habermas, J. *Theory of Communicative Action Volume One: Reason and the Rationalization of Society*, Boston, Mass.: Beacon Press, pp. v–xxxvii.
- 237 McClellan, P, CJ, 2009, Admissibility of Expert Evidence under the Uniform Evidence Act. Emerging issues in Expert Evidence Workshop *Judicial College of Victoria*.
- 238 McCloskey H. 1976, Rights - Some Conceptual Issues, *Australasian Journal of Philosophy* 54
- 239 McHenry, C. Biffel, W. Chapman, W. and Spain, D. 2005, Expert Witness Testimony: The

- Problem and Recommendations for Oversight and Reform 137(3) *Surgery* 274. 9
- 240 McKenna, J. and Egan, K. 2009, Ireland: a multi-disciplinary approach to the proceeds of crime, in Young, S. *Civil Forfeiture of Criminal Property – Legal Measures of Targeting the Proceeds of Crime*, Edward Elgar Publishing, Cheltenham, U.K.
- 241 McNeeley, I. 1976, *The Emancipation of Writing*, Berkeley: Univ. of California Press
- 242 McNicol, S. 1999, Credit, Credibility and Character under the Evidence Acts 1995 (NSW) and (Cth) 23 *Criminal Law Journal* 339.
- 243 Meade J. 2000, The Disguise of Civility, *Hiberian Law Journal*, 1, 1.
- 244 Meinhof, U. and Richardson, K. 1994, Text, Discourse and Context: Representations of Poverty in Britain, Longman, London UK K. 1994, *Text, Discourse and Context: Representations of Poverty in Britain*, Longman, London UK
- 245 Merton, R. 1976, *Sociological ambivalence and other essays*, New York, The Free Press.
- 246 Michels, K. 2010, Internal Corporate Investigations and the Truth, *Seton hall Law Review*, Vol 40
- 247 Mill, J. 1864, *On Liberty* (3 ed.). London: Longman, Green, Longman Roberts & Green
- 248 Miller, P. and Rose, N. 1990, Governing Economic Life, *Economy and Society*, 19:1 1-31
- 249 Mingus, M. 2006, Bounded Rationality and Organizational Influence: Herbert Simon and the Behavioural Revolution, *Handbook of Decision Making*, CRC Press, p61-80
- 250 Moonitz, M. 1961, The Basic Postulates of Accounting, *AICPA*, New York
- 251 Moore D. 1991, Accounting on Trial: The Critical Legal Studies Movement and its Lessons for Radical Accounting, *Accounting , Organisations and Society*, 16 763-791
- 252 Moore, M. 2002, Law and Truth: Pre-Modernism, Modernism and Post-Modernism, Address at Federalist Society Conference on Law and Truth at Yale Law School (Mar. 1- 2, 2002). *Harvard Journal of Law and Public Policy*, 26.
- 253 Morgan G. 1988, Accounting as Reality Construction: Towards a New Epistemology for Accounting Practice, *Accounting Organisations and Society* pp 477-485
- 254 Morri, M. Cruels cuts aid underworld, NSW Crime Commissioner, Peter Hasting, *Daily Telegraph*, 31 October 2017
- 255 Murphy, F. and Galvin, B. 1999, Targeting the financial wealth of criminals in Ireland: the law and practice, in McCutcheon J.P. and Walsh D. (eds) *The Confiscation of Criminal Assets: Law and Procedure*, Round Hall Sweet and Maxwell, Dublin
- 256 Napier C. and Noke C. 1992, Accounting and the Law: An Historical Overview of an Uneasy Relationship in Michael Bromwich and Anthony Hopwood (eds) *Accounting and the Law*, Prentice Hall International (UK) Ltd, Hertfordshire.
- 257 Nigrini, M. 2011, *Forensic Analytics: Methods and Techniques for Forensic Accounting Investigations*, Hoboken, NJ: John Wiley & Sons Inc.
- 258 Nolan, S. 2013, Civil Forfeiture – an attack on the presumption of innocence, *Criminal Assets Bureau Project*, [http://www.academia.edu/6787137/Civil\\_Forfeiture\\_an\\_Attack\\_on\\_the\\_Presumption\\_of\\_Innocence](http://www.academia.edu/6787137/Civil_Forfeiture_an_Attack_on_the_Presumption_of_Innocence)
- 259 Nozick, R. 1974, *Anarchy, State, and Utopia*. New York: Basic Books
- 260 Nurse, D. 2002, Silent Sleuths. *American Institute of Certified Practicing Accountants*, [www.aicpa.org/](http://www.aicpa.org/)
- 261 Nyland, K. and Pettersen, I. 2006, Management control of public hospitals - the use of performance measures in Norwegian hospitals. *International Journal of Health Planning and Management*, Vol 21, Issue 2, p133-149
- 262 Odgers S. 2007, Proceeds of Crime: Instrument of Injustice? *Criminal Law Review*, 31, 330
- 263 Odgers, S. 2012, *Uniform Evidence Law*, 11th Edition, Thomson Reuters
- 264 Orton, J., and Weick, K. 1990, Loosely coupled systems: a reconceptualization. *Academy of*

- Management Review*, 15, 203–223.
- 265 Parliament of NSW, NSW PD 19 May 2010, <https://www.parliament.nsw.gov.au/hansard/Pages/home.aspx>
- 266 Parliamentary Joint Committee on Law Enforcement, 2009, *Inquiry into the Australian Crime Commission*, Commonwealth of Australia, Canberra
- 267 Parliamentary Joint Committee on Law Enforcement, 2012, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements*, Commonwealth of Australia, Canberra
- 268 Perelman, C. and Olbrechts-Tyteca, L. 1969, *The new rhetoric: A treatise on argumentation*. Translation by John Wilkinson and Purcell Weaver, Notre Dame: University of Notre Dame Press.
- 269 Perry, M. G. & Hampel, G. 2005, *Hampel on Advocacy: A Practical Guide to Basics*, Leo Cussen Institute, revised ed., 51.
- 270 Phillips, N. and Hardy, C. 2002, *Discourse Analysis: Investigating Processes of Social Construction*, Sage Publications, Thousand Oaks, CA
- 271 Phipson, S. 1992, *Phipson on Evidence*, Sweet and Maxwell, Thompson Reuters, London, United Kingdom.
- 272 Phipson, S. 1922, *Best on Evidence* (12<sup>th</sup> ed), Sweet & Maxwell Ltd, Thompson Reuters, London, United Kingdom.
- 273 Pickering, A. 1995, *The Mangle of Practice: Time, Agency and Science*, Chicago: University of Chicago Press
- 274 Pierce, C. 1931, *Collected Papers of Charles Sanders Peirce*, 8 vols., ed. by Charles Hartshorne, Paul Weiss and A.W. Burks, Cambridge, MA: Harvard University Press.
- 275 Plato, *The Republic of Plato*, transl. Cornford, F. 1941, Oxford University Press, Oxford.
- 276 Poluha, E. 2004, *The Power of Continuity*, Nordiska Afrika Institutet
- 277 Potter, B. 2005, Accounting as a Social and Institutional Practice: Perspectives to Enrich our Understanding of Accounting Change, *Abacus*, Vol 41 No 3
- 278 Power, M. 2013, Theory and theorization: a comment on Laughlin and Habermas, *Critical Perspectives on Accounting*, 24(3):225-227
- 279 Power, M. and Laughlin R. 1996, Habermas, Law and Accounting, *Accounting, Organisations and Society*, Vol 21, No 5, pp 441-465
- 280 Power, M. and Laughlin, R. 1992, Critical Theory and Accounting in Alveson, N. & Willmott, H. (eds), *Critical Management Studies*, pp. 115-135 London: Sage
- 281 Puxty, A. Chua, W. 1989, *Critical perspectives in management control*, Blackstone, Macmillan
- 282 Qld Gov't Press Release, 2015, <http://www.statements.qld.gov.au/home>
- 283 Queensland Council for Civil Liberties, 2012, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, 5 February 2013, accessed 11 March 2014
- 284 Rann, M. 2009, New laws target bikie's hip pocket. *Media release 16 SA* July. <http://www.ministers.sa.gov.au/news.php?id=5095>
- 285 Rares, S. 2013, Using the “hot tub”: How concurrent Expert Evidence Aids Understanding Issues, *Federal Court of Australia* <http://www.fedcourt.gov.au/publications/judges-speeches/justice-rares/rares-j-20131012> Accessed 26/2/2016
- 286 Rawls, J. 1971, *A Theory of Justice* (Original ed.). Cambridge, Mass.: Belknap Press of Harvard University Press
- 287 Rehg W. 1998, Translator's Introduction, Habermas, J. 1996, *Between Facts and Norms* MIT Press, Cambridge, Massachusetts
- 288 Rehg, W. 2011. Discourse ethics, in B. Fultner (ed.), *Jürgen Habermas: Key Concepts*, Durham: Acument, 115–139.

- 289 Remeikis A, 2013, Bleijie stands firm on unexplained wealth bill despite criticism, *Brisbane Times*
- 290 Rieh, S. 2002, Judgment of Information Quality and Cognitive Authority in the Web, *Journal of the American Society for Information Science and Technology*, 53(2):145–161.
- 291 Rieh, S. 2010 Credibility and cognitive Authority of Information, *Encyclopedia of Library and Information Sciences, Third Edition*. Taylor & Francis London
- 292 Ritzer, G. 2001, *Explorations in Social Theory: From Metatheorizing to Rationalization*, Sage Publications, London
- 293 Robb, F. 1991, Accounting - A virtual autopoietic system? *Systems Practice*, Vol 4, Issue 3, p215-235
- 294 Robbins, S. and Coulter, M. 2010, *Management, 10th Ed*. Pearson Education Prentice Hall, New Jersey
- 295 Roberts, P. and Aitken, C. 2010, The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science Guidance for Judges, Lawyers, Forensic Scientists and Expert Witnesses, *Communicating and Interpreting Statistical Evidence in the Administration of Criminal Justice*, Royal Statistical Society, <http://www.rss.org.uk/Images/PDF/influencing-change/rss-inferential-reasoning-criminal-evidence-forensic-science.pdf>
- 296 Robson, K. 1991, On the arenas of accounting change: The process of translation, *Accounting, Organizations and Society*, Vol. 16 No. 5-6, pp. 547-570.
- 297 Robson, K. 1992, Accounting Numbers as ‘Inscription’: Action at a Distance and the Development of *Accounting, Accounting, Organisations and Society*, Vol 17, No 7, pp 685-708
- 298 Romesin, H. 2002, Autopoiesis, structural coupling and cognition: A history of these and other notions in the biology of cognition, *Cybernetics and Human Knowledge*, Vol 9, No 3-4, pp 5-34
- 299 Rose, G. 1984, *Dialectic of Nihilism: Post-Structuralism and Law*, Wiley, New Jersey
- 300 RTE Archives, 1996, *International Recognition for Veronica Guerin*, <http://www.rte.ie/archives/2016/0624/797956-death-of-veronica-guerin-shocks-journalists/>
- 301 Sartore, J. and Van Doren, R. 2006, Daubert opinion requires judges to screen scientific evidence. *Pediatrics*, 118:2192–2194
- 302 Savolainen, R, 2007, Media credibility and cognitive authority. The case of seeking orienting information, *Information Research*, Vol 12 No 3
- 303 Savona, E. Lewis, C. and Vettori, B. (2004), EUSTOC: Developing an EU Statistical Apparatus for Measuring Organised Crime, Assessing its Risk and Evaluating Organised Crime Policies, *EU Directorate General of Justice and Home Affairs*, Brussels
- 304 Schall, J. 2006, The Consistency of Felon Disenfranchisement with Citizenship Theory, *Harvard Blackletter Law Journal* 53.
- 305 Schoop, M. 2001, An introduction to the language-action perspective. *ACM SIGGROUP Bulletin* 22(2), 3-8.
- 306 Schwarcz S. and Rothman A. 1993, Civil Forfeiture: a higher Form of Commercial Law? *Fordham Law Review*, 287
- 307 Selby, I. and Freckleton, H. 2009, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4<sup>th</sup> Ed) Lawbook Co, Sydney
- 308 Selenger, E. and Crease, R. 2006, *The Philosophy of Expertise*, Columbia University Press, NY
- 309 Senate Legal and Constitutional Affairs Committee (SLCAC), 2009, *Legislation Amendment (Serious and Organised Crime) Bill*, 2009, [Provisions]. Canberra: SLCAC
- 310 Senate Legal and Constitutional Affairs Committee (SLCAC), 2009. *Report on the Crimes*, Canberra: SLCAC



- 311 Sentelle, J. 1989, RICO: The Monster that Ate Jurisprudence, Speech delivered at RICO, Rights and the Constitution, *CATO Institute Conference*, Washington DC.
- 312 Sevic, Z. 2002, Accounting Aspects of ‘New Public Management’: Accrual Accounting in the Public Sector, *Journal of Finance and Management in Public Services*, Vol 4 Number 1 51-66
- 313 Shelly, R. 2007, The discourse concept of the rule of law and democracy, *SCU Law Review*, Vol11, pp 59-80
- 314 Sherman, T. 2006. *Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*. Canberra: Commonwealth of Australia
- 315 Sides, M. Q.C. 2005, Acting Senior Public Defender, [http://www.aic.gov.au/media\\_library/conferences/medicine/sides.pdf](http://www.aic.gov.au/media_library/conferences/medicine/sides.pdf)
- 316 Simser, J. 2009, Perspectives on Civil Forfeiture, in Young, S. *Civil Forfeiture of Criminal Property – Legal Measures of Targeting the Proceeds of Crime*, Edward Elgar Publishing Cheltenham, U.K.
- 317 Skalak, S. Golden, T. Clayton, M. and Pill, J. 2011, *A Guide to forensic Accounting Investigation*, 2nd Ed. John Wiley & Sons, Hoboken, N.J.
- 318 Skead, N. 2016, Crime-used property confiscation in Western Australia and the Northern Territory: Laws befitting Draco’s Axones? [http://www.law.uwa.edu.au/\\_\\_data/assets/pdf\\_file/0007/2958847/03-Skead.pdf](http://www.law.uwa.edu.au/__data/assets/pdf_file/0007/2958847/03-Skead.pdf)
- 319 Skead, N. Murray, S. 2015, The Politics of Proceeds of Crime Legislation *UNSW Law Journal* 16; (2015) 38
- 320 Smith H. 1967, From Deodand to Dependency, *The American Journal of Legal History*, Vol. 11, No. 4 (Oct., 1967), pp. 389-403
- 321 Smith, M. and Smith, R. 2016, Exploring the procedural barriers to securing unexplained wealth orders in Australia, *Trends and Issues in Criminal Justice*, Issue 523 Dec 2016 1-9 <http://crg.aic.gov.au/reports/1617/unexplained-wealth.pdf>; Sept 2017.
- 322 Standing Committee of Attorneys General 2009. Communique 16–17 April. [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_meetingoutcomes](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes)
- 323 *Stanford Encyclopaedia of Philosophy*, 2004, Stanford University Publications, <http://plato.stanford.edu>
- 324 Stark, J. 2002, *Prohibited Government Acts: A Reference Guide to the United State Constitution*, Westport, Connecticut.
- 325 Sterling, R. 1975, Toward a Science of Accounting, *Financial Analysts Journal*, Vol 31, No.5, P 28-36
- 326 Stowe H, 2006, Preparing Expert Witnesses: A Search for Ethical Boundaries, *Bar News* 44
- 327 Strauss, A. 1978, *Negotiations: Varieties, Processes, Contexts, and Social Order*. San Francisco Transaction Books Rutgers University.
- 328 Street L. 1992, Expert Evidence in Arbitrations and References, *Australian Law Journal*, 861
- 329 Stuesser, L. 2009, A comparison of the law of evidence. *Journal of the Australasian Law Teachers Association*, 2 (1&2), p73-84
- 330 Talve, M. What Is an Expert Witness? *The Expert Institute*. Retrieved 14 January 2013.
- 331 Teubner G. 1998, Juridification: Concepts, Aspects, Limits, Solutions in *A Reader on Regulation* Eds Baldwin R. Scott C. and Hood C. Oxford Scholarship Online
- 332 Teubner, G. 1987 Juridification. Concepts, Aspects, Limits, Solutions in Teubner, G. (ed), *Juridification of Social Spheres*, Berlin/New York: Walter de Gruyter.
- 333 *The Oxford English Dictionary*, 2014, Oxford University Press
- 334 Thompson, C. 2009, Evidentiary Issues in the Cross Examination of Expert and Lay Witnesses, Francis Burt Chambers. <http://www.mrlegal.com.au/legaldb.nsf/d985abc25bff996648257b3100181f17/8ec4f837434>

- 325bac825751b00042459/\$FILE/Evidentiary%20issues%20in%20the%20cross%20examination%20of%20expert%20and%20lay%20witnesses.pdf Accessed 2015.
- 335 Tinker, A. Merino and Neimark, 1982, *Ethics, Equity and Regulation*, Emerald Publishing Group, Bingley, United Kingdom.
- 336 Tiozek, E, 2013, New Laws allow Government to seize ‘unexplained wealth’, *ABC News*, 2 May 2013
- 337 Turner, S. 2001, What is the problem with experts? *Social Studies of Science*, Vol 31 Issue 1, p123-150.
- 338 United Kingdom Cabinet Office, 2000, *Recovering the Proceeds of Crime*, London Performance and Innovation Unit
- 339 United Kingdom Home Office, 1998, *Working Group on Confiscation Third Report: Criminal Assets* London U.K. Organised and International Crime Directorate.
- 340 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988,  
<https://web.archive.org/web/20050518085810/http://www.incb.org/e/conv/1988/>
- 341 United Nations Convention, 2003, The Convention Against Organised Crime,  
[https://search.un.org/results.php?query=The Convention Against Organised Crime](https://search.un.org/results.php?query=The+Convention+Against+Organised+Crime)
- 342 United Nations Convention, 2004, *The Convention Against Transnational Organised Crime and the Protocols Thereto*, [https://search.un.org/results.php?query=The Convention Against Organised Crime](https://search.un.org/results.php?query=The+Convention+Against+Organised+Crime)
- 343 United Nations Economic and Social Council, 1988, *The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*,  
[https://search.un.org/results.php?query=conventions Illicit Traffic in Narcotic Drugs](https://search.un.org/results.php?query=conventions+Illicit+Traffic+in+Narcotic+Drugs)
- 344 US Department of Justice, 2013, Types of federal forfeiture, United States Department of Justice in *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, U.S. Department of Justice,  
<https://books.google.com.au/books?id=foBuJMsjloQC>
- 345 Vallentyne, P. 2007, Distributive Justice, in *A Companion to Contemporary Political Philosophy* (editors R. Goodin, P. Pettit, and T. Pogge), Oxford, Blackwell, 548-562.
- 346 Vevaek, J. and Kennedy, J. 2004, *Conceptual Metaphor and Abstract Thought*, *Metaphor and Symbol*, 19:3, 213-231.
- 347 Waldren, J. 1994, *Vagueness in Law and Language: Some Philosophical Issues* 82 108
- 348 Walters-York, M. 1996, Metaphor in accounting discourse, *Accounting, Auditing & Accountability Journal*, Vol. 9 Iss: 5, pp.45 – 70
- 349 Watts, R. and Zimmerman J.1986, *Positive Accounting Theory*, Edgewood Cliffs, NJ: Prentice Hall
- 350 Weber, D. 2004, DPP set to confiscate elderly criminals’ home. ABC–PM 18 June.  
<http://www.abc.net.au/pm/content/2004/s1135431.htm>
- 351 Weber, M. 1948, [1919] *Science as a Vocation, Wissenschaft als Beruf*] *Duncker & Humblodt, Munich*
- 352 *Webster's Third New International Dictionary 11th Ed*, 2003, Merriam-Webster, Springfield, Massachusetts
- 353 Weick, K. and Quinn, 1999, Organisational Change and Development, *Annual Review* 50: 361-386
- 354 Weick, K.E. 1976, Educational organizations as loosely coupled systems. *Administrative Science Quarterly*, 21, 1–19
- 355 Welch, D. & Jacobson, G. 2010, Law targets cashed-up criminals. *The Sydney Morning Herald* 19 May. <http://www.smh.com.au/national/law-targets-cashedup-criminals-20100518-vca2.html>
- 356 Wellman, C. 2002, Justice, in Simon, R. Ed. *The Blackwell Guide to Social and Political*

- Philosophy*, Oxford: Blackwell.
- 357 Wendel, B. 2005, *Professionalism as Interpretation*, 99 *Northwestern University Law Review* 1167, 1191
- 358 West, R. and Turner, L. 2004, *Introduction to Communication Theory*, McGraw Hill, NY.
- 359 West's Encyclopedia of American Law, 2008, edition 2. The Gale Group, Inc. West group Publishing, Egan, Minnesota.
- 360 Wex Legal dictionary, 2015, [www.law.cornell.edu/wex/probative](http://www.law.cornell.edu/wex/probative) accessed March 2015
- 361 White, S. 1995, *The Cambridge Companion to Habermas*, Cambridge University Press, Cambridge, UK.
- 362 Williams, D. 1999, Proceeds of Crime: the government responds, *Australian Law Reform Journal* 51, ALRCrefJI 29
- 363 Wilson, R. 1999, <http://www.findlaw.com.au/articles/76/the-general-principle-of-criminal-law.aspx> accessed 28/7/2015 Sides (date), Barrister Wentworth Chambers.
- 364 Wilson, C. 1966, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, *California Law Review*, Vol 54 Issue 1
- 365 Wilson, P. 1983, *Second-Hand Knowledge. An Inquiry into Cognitive Authority*. Westport, Conn. Greenwood
- 366 Wilson, R. 1999, *Evidence*, Lawbook Company, Sydney: LBC (1st ed).
- 367 Wittgenstein, L. 1974, *Philosophical Investigations* (GEM Anscombe Translation)
- 368 Women's Museum of Ireland, accessed 2014, <http://womensmuseumofireland.ie/articles/veronica-guerin>
- 369 Wood, L. 2007, Experts In The Hot Tub, 21 *Anti-Trust* 95
- 370 Yarnall, M. 2009, Duelling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary? 88 *Oregon Law Review*, 311
- 371 Young R.M. 2001, Human Field Image Metaphor Scale (HFIMS) in Alligood, M. and Tomey, A. 2013, *Nursing Theorists and Their Work* 7th Ed, Mosby Elsevier, Missouri.
- 372 Young, S. 2009, *Civil Forfeiture of Criminal Property – Legal Measures of Targeting the Proceeds of Crime*, Edward Elgar Publishing, Cheltenham, U.K.
- 373 Zuckerman, A. and Roberts, P 2010, *Criminal Evidence*, OUP Oxford University Press, Oxford.
- 374 Zurn, C. 2007, *Deliberative Democracy and Institutionalization of Judicial Review*, New York, Cambridge University Press