



The Corruption and Crime
Commission's functions
under the *Criminal Property
Confiscation Act 2000*

Guidelines for the public

May 2021

Scope

1. These guidelines apply when the Corruption and Crime Commission (the Commission) exercises its unexplained wealth functions under [Corruption, Crime and Misconduct Act 2003](#) (CCM Act) s 21AD and the [Criminal Property Confiscation Act 2000](#) (CPC Act).

The unexplained wealth functions

2. One of the Commission's main purposes under the CCM Act is to exercise the unexplained wealth functions. These functions include investigating unexplained wealth and criminal benefits, as well as conducting civil proceedings under the CPC Act.
3. The Commission works to identify and target persons who have acquired unexplained wealth or criminal benefits through unlawful means, including those who are suspected of involvement in organised crime.
4. The Commission's objective is to disrupt crime, corruption, and associated illicit activity by removing the financial motivation for it and thereby reducing harm to the Western Australian community.

Sources of information to advance matters under the CPC Act

5. The Commission may decide to exercise unexplained wealth functions on the basis of consultations, investigations and other actions (taken by itself or in cooperation with others), or from other information provided to it.
6. In exercising unexplained wealth functions, the Commission may make such use as it thinks fit of information obtained by it under the CCM Act.
7. The Commission works with other agencies, including the WA Police Force, the Australian Taxation Office, and other law enforcement agencies and confiscation authorities to achieve its objectives.
8. The Commission's unexplained wealth functions complements actions taken by other law enforcement agencies and confiscation authorities to disrupt and deter serious and organised crime.
9. The Commission investigates and conducts civil proceedings under the CPC Act. In addition to powers under the CPC Act, the Commission may utilise most of the coercive powers under the CCM Act to advance investigations into unexplained wealth and criminal benefits.

CPC Act declarations and the basis for confiscating property

10. The Commission's unexplained wealth functions are primarily directed to non-conviction or pre-conviction based confiscation of property/assets where it establishes that a person has unexplained wealth or acquired a criminal benefit.
11. The Commission also has the authority to pursue a criminal benefits declaration against a person who has been convicted of a confiscation offence.
12. In order to establish that a person has unexplained wealth, or has acquired a criminal benefit, it is not necessary to prove a criminal offence to the criminal standard. In the case of unexplained wealth it is not necessary for there to be a link to criminal offending, rather there is a reverse onus on the respondent to prove that their wealth was lawfully acquired.
13. The confiscation of property/assets occurs to satisfy liabilities arising from unexplained wealth and criminal benefit declarations made by a court.
14. The Commission will commence civil proceedings under the CPC Act as soon as practicable. It is authorised to continue civil proceedings under the CPC Act despite the commencement and/or continuation of criminal proceedings.
15. In many instances, the Commission will move to resolve civil proceedings under the CPC Act prior to the conclusion of the criminal proceedings unless it impacts on the administration of justice.

The decision to commence proceedings under the CPC Act

16. In deciding whether to commence or continue civil proceedings under the CPC Act, the matters the Commission has regard to includes:
 - a. the need to freeze property to prevent asset dissipation whilst it undertakes an investigation;
 - b. the strength of the evidence and the extent of any further investigation that may be required;
 - c. the likelihood of successful claims by an interested party in relation to property that the Commission seeks to freeze or confiscate;
 - d. the ability for a respondent to satisfy a liability arising from an anticipated unexplained wealth or criminal benefits declaration; and
 - e. the likely realisable value of property that may be available to confiscate.

17. The following questions are relevant to the Commission determining whether to commence or continue civil proceedings under the CPC Act:
 - a. Is it likely to disrupt crime, corruption, and associated illicit activity?
 - b. Are there reasonable prospects that civil proceedings under the CPC Act will result in the recovery of ill-gotten gains or the confiscation of property?
 - c. Are the costs of pursuing substantive confiscation orders likely to exceed the return?
 - d. Has the person been charged with or convicted of a confiscation offence?
 - e. Are there other mechanisms available to recover the suspected unexplained wealth or criminal benefits (i.e. civil claims, reparation orders under the *Sentencing Act 1995*)?

18. Where commencing or continuing civil proceedings under the CPC Act will deprive a public authority, that is a victim of a confiscation offence, of restitution or compensation, it will not ordinarily be in the public interest for the Commission to proceed.

19. If a public authority has the capacity to act to enforce their legal or equitable claim over property, the Commission will generally not take action to commence or continue investigation or proceedings, unless:
 - a. the Commission is in a superior position to the government department or public authority to achieve a successful outcome;
 - b. the Commission has consulted with the public authority; and
 - c. it is in the public interest to do so.

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

21. Where commencing or continuing civil proceedings under the CPC Act will deprive the victim of a confiscation offence of restitution or compensation, it will not ordinarily be in the public interest for the Commission to proceed.

Examinations

22. The CPC Act was amended in 2018 to authorise the Commission to conduct examinations in the exercise of its unexplained wealth functions. Previously the use of such powers under the CPC Act was within the exclusive remit of a court.

23. Examinations are just one of a number of mechanisms utilised by the Commission to advance investigations and litigation under the CPC Act.
24. The Commission may order a person to submit to an examination under CPC Act s 58. An examination order may require attendance before the Commission for examination or the provision of documents or information (including by way of an affidavit).
25. A copy of the order setting out the requirements will be personally served on the person to be examined.
26. It is an offence to make a disclosure to anyone about the contents of an examination order (CPC Act s 70). This includes disclosing anything about the existence or operation of an examination order or information from which a person could reasonably infer anything about the existence of an examination order. There are limited exceptions under the CPC Act.
27. Examinations are held in private. The person to be examined may be represented by his or her legal representative subject to the Commissioner's statutory right to refuse representation in confined circumstances.
28. It is an offence to contravene an examination order. A person contravenes an examination order by failing to disclose material information or giving false information or a false document, in compliance with the order (CPC Acts 61(4)).
29. The Commission may issue an arrest warrant for a person who fails to attend before the Commission as required under the examination order (CCM Act s 148(1A)).
30. A statement or disclosure made by a witness in response to an examination order is admissible in evidence against the person making the statement or disclosure in any proceedings under the CPC Act and in any civil proceeding. It is not, however, admissible in any criminal proceedings (CPC Act s 61(8) and CCM Act s 145).
31. Various provisions in the CCM Act apply to CPC Act examinations conducted by the Commission including:
 - a. The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it thinks fit (s 135).
 - b. The Commission may regulate the conduct of examinations as the Commission thinks fit (s 138(3)).
 - c. The Commission may require a witness to take an oath or to make an affirmation (s 141).

- d. A witness may be legally represented. However, the Commission may refuse to allow a witness to be legally represented by a person who is already involved in an examination or is involved or suspected to be involved in a matter being investigated (s 142).
 - e. The lawyer appointed by the Commission may, so far as the Commission thinks proper, examine the witness on any matter that the Commission considers relevant. Likewise, a person representing a witness before the Commission may, so far as the Commission thinks proper, examine the witness on any matter that the Commission considers relevant (s 143).
32. A person served with an examination order will be in contempt of the Commission if the person:
- a. fails, without reasonable excuse, to attend before the Commission as required under the examination order;
 - b. fails to produce any document or other thing as required under the examination order;
 - c. refuses or fails to be sworn or make an affirmation;
 - d. fails to answer any question relevant to the examination that the Commission requires the person to answer;
 - e. insults the Commission while it is conducting an examination; or
 - f. deliberately interrupts an examination.
33. The Commission will generally not examine a person who has pending criminal charges where it is likely to interfere with the administration of justice. The ultimate determination of whether compulsory questioning will interfere with the administration of justice is a matter determined by the Courts.

Negotiation and Settlement

34. The Commission recognises the benefits of the timely resolution of proceedings under the CPC Act through negotiation where possible and when appropriate.
35. In deciding whether to resolve civil proceedings under the CPC Act, the Commission will have regard to the:
- a. stage of the investigation and CPC Act litigation;
 - b. likelihood of the Commission obtaining an unexplained wealth or criminal benefits declaration;

- c. likely amount of the unexplained wealth or criminal benefits declaration if the Commission were successful in litigation;
 - d. likely return if the Commission obtains an unexplained wealth or criminal benefits declaration;
 - e. likelihood of an interested party successfully claiming an interest in property that may otherwise satisfy the liability arising from an unexplained wealth or criminal benefits declaration;
 - f. particulars of any previous CPC Act proceedings taken by the Commission, Director of Public Prosecutions, or WA Police Force against the respondent;
 - g. cost of continuing to litigate the matter under the CPC Act rather than resolution through negotiation; and
 - h. any other relevant public interest factors.
36. If the Commission enters into out of court negotiations in an attempt to resolve the CPC Act proceedings, it does so on the following basis:
- a. Negotiations are voluntary. There is no requirement on any party to attend, participate, or disclose any information. Any party may withdraw from negotiations at any time.
 - b. Except as otherwise agreed, all information disclosed during the negotiations is disclosed in confidence, and is not to be disclosed to any third party.
 - c. Negotiations are undertaken on a without prejudice basis. If any information or offer is provided on any other basis (for example, without prejudice save as to costs), that basis must be explicitly stated.
 - d. No offer made by, or agreement reached, with a Commission officer is binding unless and until it is formalised in writing and signed by or with the authority of the Commission.
 - e. Though information disclosed during the negotiations is provided in confidence and on a without prejudice basis, that does not prevent the parties from using that information to further their investigation and preparation for trial, subject to the CCM Act and CPC Act disclosure and secrecy provisions.

Living and legal expenses

37. Under the CPC Act, Courts have the discretion to provide for the reasonable living and business expenses of the owner of frozen property. The owner of property that is frozen may also apply to the Court for a variation to the freezing order to allow for their reasonable living and business expenses to be met.

38. The Court has an implied power when making a freezing order to exempt property from the freezing order to meet reasonable legal expenses.¹
39. The Commission recognises that releasing frozen property for reasonable legal expenses is not only for the benefit of the individual but also assists in the effective exercise of the Court's jurisdiction under the CPC Act, which in turn benefits the State and the public.²
40. In determining the exemption for legal expenses, the Court and the parties must ensure, to the maximum practical extent, that exempted property is not misused, whether by over servicing and overcharging or by other abuse.³
41. A balance must be struck between the interest of the individual in having recourse to assets for legal representation and the interest of the community in preserving those assets to satisfy any confiscation order that might be made under the CPC Act.⁴ In some circumstances, the public interest may demand that property remain frozen and the individual be confined to utilising Legal Aid's services.⁵
42. The Commission is open to negotiating with parties as to the provision to be made for legal expenses.
43. The Commission takes the following matters into account in determining whether it will support a court order that exempts some frozen property for reasonable legal expenses:
 - a. whether the freezing order covers specified property only or all property that the individual owns, effectively controls, or has given away;
 - b. whether the party has made a genuine application for Legal Aid assistance;
 - c. whether the individual will be able to obtain or retain legal representation without recourse to frozen property;
 - d. the extent of the frozen property available to satisfy a CPC Act declaration, and the risk of depletion of frozen property by future legal fees;
 - e. the reasonableness of the legal expenses having regard to both the public interest and the individual's point of view in the context of the possibility of CPC Act declarations; and

¹ *Mansfield v DPP (WA)* (2006) 226 CLR 486 [48]-[54]; *DPP (WA) v Chapman* (2009) 196 A Crim R 156 [45]; *Franchina v State of WA* [2014] WASC 463 [4], [32].

² *Mansfield v DPP (WA)* (2006) 226 CLR 486 [50].

³ *Mansfield v DPP (WA)* (2006) 226 CLR 486 [54].

⁴ *Hoddy v DPP (WA)* [2007] WASC 7 [39]-[42].

⁵ *Franchina v State of WA* [2014] WASC 463 [35].

- f. the competing factors between an accused's choice of counsel and what constitutes reasonable legal expenses.⁶
44. The *Legal Services Directions 2017* (Cth) are informative as they guide the reasonableness of legal fees in relation to matters under the *Proceeds of Crime Act 2002* (Cth) which are akin to CPC Act matters.⁷
45. The *Legal Aid Commission Act 1976* s 14 and *Legal Aid Commission (Costs) Rules 1990* provide the applicable legal aid rates.
46. Costs determinations made under the *Legal Profession Act 2008* also provide guidance as to the reasonableness of legal fees and establish maximum rates for the remuneration of legal practitioners in Western Australian superior courts.⁸

Recovery of the Commission's Costs in CPC Act proceedings

47. CPC Act proceedings involving the Commission are conducted or managed by its Legal Services Directorate, which comprises qualified appointed Commission lawyers.
48. The Commission may also brief external solicitors or independent barristers to act for the Commission.
49. CPC Act proceedings can be complex and non-conviction and pre-conviction based investigations and litigation are more resource intensive than post-conviction based confiscation.
50. The public interest is generally served by the Commission seeking recovery of its legal costs in CPC Act proceedings.
51. If successful in CPC Act proceedings, the Commission will generally seek costs on a party-party basis in line with the applicable and most up to date *Legal Profession Act 2008* Determination and Scale.
52. The Commission will generally apply to recover costs at the rates reflected in Figure 1.

⁶ *DPP (WA) v Mansfield* (2006) 170 A Crim R 521 [22]-[25], [45], [47]; *Franchina v State of WA* [2014] WASC 463 [26]-[29], [35].

⁷ *Judiciary Act 1903* (Cth) s 55ZF; *Legal Services Directions 2017* (Cth) app D cl 5.

⁸ *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2020*; *Legal Profession (Supreme and District Courts) (Criminal) Determination 2020*.

Figure 1*

Commission Lawyer Level	Hourly Rate	Maximum Daily Rate
Director Legal Services	\$495	\$4,950
Principal Legal Officer 7	\$470	\$4,700
Principal Legal Officer 6	\$445	\$4,450
Senior Lawyer 5	\$420	\$4,200
Senior Lawyer 4	\$395	\$3,950
Lawyer 3	\$352	\$3,520
Lawyer 2	\$297	\$2,970
Para-Legal	\$231	\$2,310
Legal Support	\$150	\$1,500
Counsel	\$451	\$4,510
Senior Counsel	\$682	\$6,820

* These rates align with or are otherwise below that provided for in the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2020*.

Contact the Corruption and Crime Commission

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