Overview Report: Reports Related to Asset Forfeiture and Unexplained Wealth Legislation in Jurisdictions outside of Canada

I. Scope of Overview Report

1. This overview report attaches reports from various sources related to asset forfeiture and unexplained wealth legislation in jurisdictions outside of Canada.

II. Appendices

a. Appendix A:

   Canada, Public Safety Canada, *Civil Forfeiture Regimes in Canada and Internationally* (Ottawa: Canada, 2013).

b. Appendix B:

   Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders* (2011): prepared for the US Department of Justice, National Institute of Justice.

c. Appendix C:

   Helena Wood, *Reaching the Unreachable: Attacking the Assets of Serious and Organized Criminality in the UK in the Absence of a Conviction* (London: Royal United Services Institute for Defence and Security Studies, 2019).

d. Appendix D:

   Florence Keen, *Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation* (London: Royal United Services Institute for Defence and Security Studies, 2017).

e. Appendix E:

   Helena Wood, *The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape* (London: Royal United Services Institute for Defence and Security Studies, 2016).

f. Appendix F:

   Natalie Skead *et al*, *Pocketing the Proceeds of Crime: Recommendations for Legislative Reform* (Canberra: Australian Institute of Criminology, 2020).

g. Appendix G:

Marcus Smith & Russell G Smith, *Exploring the Procedural Barriers to Security Unexplained Wealth Orders in Australia* (Canberra: Australian Institute of Criminology, 2016).

Appendix A

Canada, Public Safety Canada, *Civil Forfeiture Regimes in Canada and Internationally* (Ottawa: Canada, 2013).

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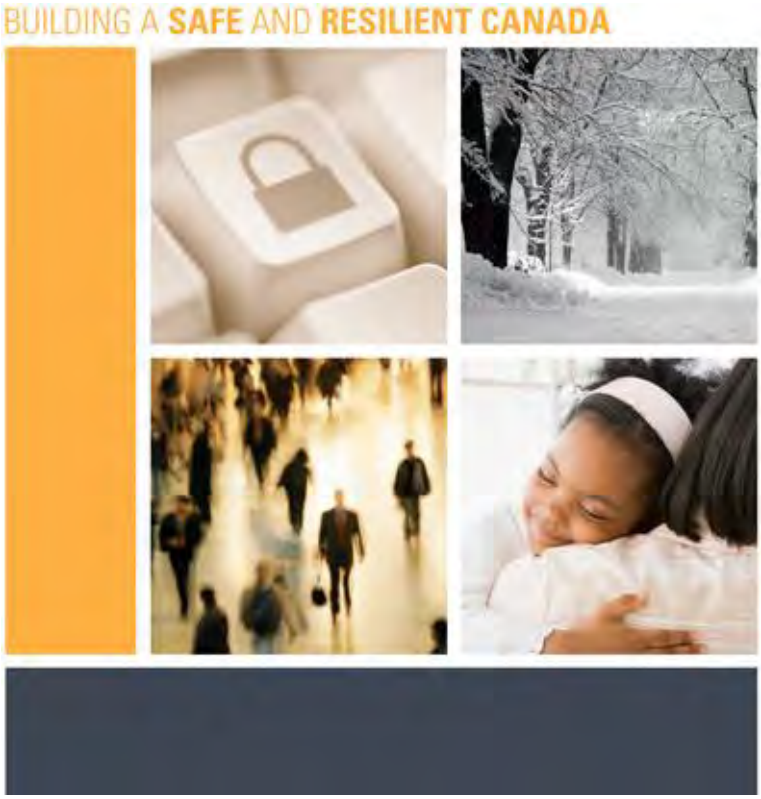

Civil Forfeiture Regimes in Canada and Internationally

Literature Review

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RDIMS # 745292

Canada

The views expressed herein are those of the authors and do not necessarily reflect those of the Department of Public Safety Canada.

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Executive Summary

Civil forfeiture is designed to recover the proceeds of crime or unlawful activity, as well as any property used to facilitate that activity (Simser 2009, 13). Supporters of civil forfeiture argue that it is an essential tool for fighting crime by removing the assets gained from crime. It also removes assets that facilitated the unlawful activity, reducing the profitability of crime. "Forfeiture is important, proponents claim, for reducing the rewards of financially motivated crimes such as drug trafficking and sales, gambling and vice, and organized crime."[1] Supporters also assert that forfeiture protects the public's interests and can promote the social good by funding victim compensation funds.[2]

A common criticism of civil forfeiture is that it is really 'criminal forfeiture dressed up in sheep's clothing.' This underscores the fact that "civil forfeiture achieves the same objectives as criminal forfeiture but without the procedural safeguards and human rights protections that apply to criminal proceedings."[3] Critics cite excessive use of civil, in lieu of criminal, forfeiture due to the lower evidentiary standard of proof for civil forfeiture.[4] Critics also oppose the practice in the UK, as well as in the US federal and state governments, of sharing civil forfeiture net proceeds among law enforcement agencies that have a role in the seizure of the property.[5]

This paper describes the civil forfeiture regimes in Australia, Canada, the UK and the US. They are all common law countries having well-established democracies and an effective and impartial law enforcement and judiciary. The paper explored the role of constitutionally-entrenched property rights in the development of civil forfeiture regimes in these four countries. While the civil forfeiture regimes of Australia, Canada, the UK and the US vary in their application and detail, they all share the *in rem* feature at all stages of the process from implementation to enforcement. The most significant difference is that Canada's constitutional division of powers does not permit the Canadian federal government to undertake civil forfeiture proceedings, which is not the case in Australia, the UK or the US.

Australia and five of its six states, as well as both territories, have established civil forfeiture regimes. There is no single Australian civil forfeiture model. To improve the effectiveness of the civil forfeiture regime, the Commonwealth and select sub-national governments (Northern Territory, New South Wales and Western Australia) of Australia adopted legislation allowing for unexplained wealth orders (UWOs). The main features of the UWO provisions of the Commonwealth *Proceeds of Crime Act of 2002* are the reversal of the burden of proof to the respondent to justify that the wealth was acquired by lawful means, and the lack of a requirement for the state to show a linkage between the offence and the property. The reverse onus provisions in forfeiture statutes have been challenged but upheld in Australian courts as being necessary.

Like Australia, the UK has a comprehensive confiscation and civil forfeiture regime established in its *Proceeds of Crime Act of 2002*. The Act created three mechanisms of civil recovery orders, forfeiture, and the taxation of unlawful earnings. Initially, the UK civil forfeiture regime provided fewer results than anticipated. In part, this was due to legal challenges that led to delays in civil recovery cases in the High Court. The UK High Court held that civil recovery was not a criminal, but a civil, proceeding intended to recover property obtained by unlawful

conduct. In a change in tactics, the UK placed its emphasis on civil recovery orders and improved its effectiveness.

Unlike Australia and the UK, the US does not have a comprehensive forfeiture statute providing for all types of offences. There are three procedural options under US federal law administrative forfeiture, civil forfeiture and criminal forfeiture. Civil forfeiture is an *in rem* proceeding, where the property is the defendant in the case. An owner's innocence is irrelevant since the property was involved in an unlawful activity to which forfeiture attaches. To improve effectiveness, the US Congress often allows administrative forfeiture in uncontested civil confiscation cases. Criminal forfeiture is an *in personam* proceeding, and seizure is only possible upon conviction of the property's owner.

As seen in the other jurisdictions, US case law has defined the parameters for civil forfeiture. The US Supreme Court held that "authorities may seize moveable property without prior notice or an opportunity for a hearing."[6] In certain cases, civil forfeiture may be considered punitive for purposes of the Eighth Amendment's excessive fines clause, and civil forfeitures do not implicate the Fifth Amendment's double jeopardy clause unless they are so punitive as to preclude any chance of remedial action. US statutes also authorize intergovernmental transfers of sale proceeds to other US law enforcement agencies.

In Canada, pursuing criminal assets using civil proceedings favours the civil model of crime control in provincial jurisdictions in which there are eight provincial civil forfeiture models. The Canadian federal jurisdiction usually undertakes criminal forfeiture subject to the higher evidentiary standard of proof 'beyond all reasonable doubt.'

Although "there has been little by way of academic commentary on civil asset forfeiture in Canada,"[7] and limited published case law, a number of principles have emerged from case law echoing that seen in international jurisdictions. The courts have intervened in Canadian civil forfeiture case law to use their authority to refuse the order of forfeiture if it was not in the 'interests of justice.'[8] The courts have also had to provide guidance to ensure that the *Charter of Rights and Freedoms* and common law principles are being followed.

Key Findings

- With governments facing budgetary restraint globally, civil forfeiture has become a growth industry. Canada is no exception. Influenced by the US, the UK and Australian experiences, eight provinces, led by Ontario, have enacted civil forfeiture legislation. In turn, Ontario's *Civil Remedies Act* has influenced the other Canadian jurisdictions.

- Proponents see civil forfeiture as a remedial statutory device designed to recover the proceeds of unlawful activity and any property used to facilitate it. This is intended to reduce criminal activity by removing the property acquired from an 'unlawful activity' or that was used to facilitate an 'unlawful activity,' thereby denying offenders the profits of their crimes. Supporters also argue that civil forfeiture protects the public's interest and can promote social good by funding victim compensation funds. Proponents state that civil forfeiture is

an essential tool for fighting crime, both by removing the assets required to facilitate additional criminal activity, and reducing the rewards of financially motivated crimes such as drug trafficking.

- Opponents of civil forfeiture charge that law enforcement agencies, particularly in the US and the UK, face major financial incentives to 'police for profit.' US researchers have found evidence that police departments are taking advantage of lenient forfeiture statutes to 'pad their budgets.'[9] Critics contend that there is excessive use of civil, in lieu of criminal, forfeiture, due to the lower evidentiary standard of proof for civil forfeiture. Critics also assert that there is lack of proportionality,[10] presumption of innocence,[11] and the double jeopardy rule[12] protections associated with criminal forfeiture.

- Similar to the three reviewed jurisdictions, Canadian courts have intervened in Canadian civil forfeiture cases to use their authority to refuse the order of forfeiture if it was not in the 'interests of justice,'[13] and ensure that the *Charter of Rights and Freedoms,* as well as common law principles, are being followed. Rulings from four Supreme Court of Canada cases originating from forfeiture cases provide future legal policy and legislative guidance in this area.

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1.0 Introduction

Civil forfeiture goes beyond the forfeiture of property used to finance criminal activities. It includes proceeds of crime, items used to facilitate crime and any profits from those activities. All jurisdictions reviewed in this paper (i.e., Australia, Canada, the United Kingdom (UK), and the United States (US)) have set up asset forfeiture regimes (i.e., may consist of administrative, cash, civil and/or criminal forfeitures). These countries were selected because they are common law countries, with well-established democracies that have an effective and impartial law enforcement and judiciary. Their asset forfeiture regimes were initially established in response to domestic and international organized crime, and target the proceeds or profits of serious and organized criminal activities. These are key preconditions for a comparative analysis with the Canadian situation.

Recent forfeiture legislation focuses on "achieving specific criminal justice objectives,"[14] including seizing proceeds of crime to disable the financial centre of criminal organizations. This form of legislation is in response to the increasing complexity of profit-motivated crime that goes beyond borders, and makes use of every technological mechanism to obscure the trail of criminal income.

During the 1970s and 1980s, the modern version of civil forfeiture began in the US. Since then, it has proliferated in common law jurisdictions (Young 2009, 2). A key feature of civil forfeiture is the *in rem* character throughout the process, from application to enforcement (Young 2009, 2), where the proceeding is brought against a property not its owners. Cassella (2009, 23-51) notes that about 85% of the US forfeiture cases in drug matters are uncontested and resolved by administrative forfeiture. The UK, Australia and Canada adopted their modern civil forfeiture regimes following a careful review of domestic laws and procedures taking into account experiences in other jurisdictions (Young 2009, 3). Since the 1990s, an international regime of laws, rules and regulations for money laundering and terrorist financing has been established within a complex network of governmental, nongovernmental and intergovernmental surveillance efforts globally.

2.0 Methodology

The Internet was used to search for open source, academic and grey literature that touched on issues associated with civil forfeiture regimes in Canada and internationally. The paper identified and reviewed opinions relating to the effectiveness or describing why a regime is considered effective in Australia, the UK and the US. This also included a review of existing Canadian provincial civil forfeiture regimes, and organizations such Financial Transactions Reports Analysis Centre of Canada (FINTRAC), as well as the Organisation for Economic Cooperation and Development (OECD). The federal role, differences with the 'unexplained wealth' laws, the legislative basis for that regime, as well as the relationship with other levels of government were identified. Review of trends and issues found in other countries and

comparing them to those in Canada, the research may identify issues for future policy consideration.

The research included a systematic review of empirical and narrative studies of the types of asset forfeiture regimes, specifically the civil forfeiture regimes. This permitted a current and comprehensive assessment of the present state of the literature on the features of civil forfeiture regimes that could be considered in the Canadian experience. This paper predominantly relied on publicly available data.

In the discussion section, there is a comparative analysis of the effectiveness of the reviewed civil and administrative forfeiture regimes. Effectiveness was measured in terms of assets seized, the rate of successful seizures compared with those later overturned in the courts and other similar metrics. The discussion section includes potential implications of adopting unexplained wealth orders (UWOs) in Canada based on lessons learned from the use of UWOs in Australia.

2.1 Research Questions

The main research questions are:

- What is used as evidence of the effectiveness of civil forfeiture and administrative forfeiture?
- What options could Canada consider to improve the effectiveness of its forfeiture regime at the federal level?
- Would the notion of unexplained wealth orders (UWO) be transferrable to Canada?

Findings from these questions may have possible applications once related legal policy and other issues have been considered.

2.2 Data Collection and Defining Terms

Fifteen English language databases and one French language database were searched using the keywords in Boolean abstract search (see Appendix 1). The set of keywords chosen reflects the wider definition of forfeiture given the purpose of the paper. Civil forfeiture is defined as the surrender or loss of property or rights without compensation.[15]

In a civil forfeiture case, the aim is to recover the proceeds of a crime and the property used to facilitate it using a different procedure than that used in criminal forfeiture. Here the action is brought against the property (*in rem*). In a civil case in which the government is the plaintiff, the property is the defendant, and the persons objecting to the forfeiture are interveners called 'claimants.' This explains why civil forfeiture cases may have unusual names in the United States, such as *United States v. $160,000 in US Currency*. In Canada, more examples include *British Columbia (Director of Civil Forfeiture) v. Wolff*, which was an action pursuant to the BC statute *in Rem Against: 2003 Dodge Ram (VIN:3D7LU38C33G783337)*.

In a criminal forfeiture case, the aim is to recover proceeds of the crime following conviction of the property owner(s) involved. The action is brought against the property owner(s) instead of

the property (i.e., using the process of *in personam* forfeiture). After finding a guilty verdict, the jury is asked to consider, by special verdict, which of the property identified in the indictment is subject to forfeiture according to the rules of criminal procedure. The criminal prosecutor must prove beyond a reasonable doubt that there is a causal link between the particular offence and the derived benefit.

3.0 Civil Forfeiture Regimes

Confiscating proceeds of crime has been recognized as an effective tool in disrupting the activities of organized crime. The basic reason is that profit or financial gain is a primary motive for criminal activities, which can be used to fund future criminal activities and lifestyles. Removal of the profit motive may act as a preventive measure and a deterrent to criminals by reducing their ability to make future investments in criminal activities (Booz, Allen, Hamilton 2011, 9).

Some countries have laws that allow the government to confiscate assets without a conviction. The non-conviction-based confiscation (hereinafter civil forfeiture) in the US and Canada is brought as an action against the property itself, or *in rem*. US civil forfeiture laws have been around since the 1790s[16] but their use has greatly increased during the 1980s as part of their drug enforcement process.

Civil forfeiture requires the state to prove that the property is the instrumentality or proceed of a crime, typically by using the civil burden of proof 'a preponderance of the evidence', and is the standard used in the US, UK, Ireland, and Italy.[17] In some countries this standard is different. For example, in Canada there have been developments in certain Canadian provinces to follow the US model (Nelson 2009, 85). "Unlike the closed system employed in the United States, Canadian courts often rely on international precedent, primarily from Britain and the United States, as well as international treaties."[18] In Australia, the evidentiary standard of proof is based "on the balance of probabilities" which is similar to the US use of a preponderance of evidence.

The role of international governmental organizations, such as the Financial Action Task Force (FATF), is highlighted in targeting of the proceeds of crime as a way to reduce and deter crime.

3.1 International Governmental Organizations

Since the 1990s, a large number of international conventions and instruments have been designed to combat organized crime, money laundering and corruption. These include the *United Nations Convention Against Transnational Organized Crime*[19] and the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.[20] These conventions contain provisions encouraging states to include civil forfeiture in their legal frameworks, which placed the burden of proof on the property owner to prove the legitimacy of that ownership. The *United Nations Convention Against Corruption*[21] also encourages state parties, subject to their constitutional and legal bases, to introduce illicit enrichment as a criminal offence. Appendix 2 lists select treaties and agreements put in place to address organized crime and money laundering.

Building on the concepts behind confiscation, some states such as Australia and Ireland have adopted unexplained wealth orders (UWOs) to strengthen their fight against organized crime by making it easier for the state to identify, seize and subsequently confiscate assets of those engaged in criminal activities.

Financial Action Task Force

The Financial Action Task Force (FATF) has been influential in convincing the international community of the need for national confiscation laws to combat money laundering, organized crime and terrorism financing.[22] Its secretariat service is provided by the Organisation of Economic Cooperation and Development (OECD) in Paris. The FATF sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF realizes that most countries that have a legal system based on common law have already established confiscation laws placing the onus of proof on the defendant in relation to the lawful origin of their property, either in the form of specific provisions or through rebuttable presumptions.[23]

3.2 Civil Forfeiture Regimes in Australia

Australia's federal government (the Commonwealth (Cth)) and five of its six states, as well as both territories, have passed legislation providing for the forfeiture of assets and seizure of property. They also have imposed pecuniary penalties to address criminal conduct that has not been proven to the criminal standard (i.e., beyond all reasonable doubt) in a criminal court.[24] There is no single Australian civil forfeiture model. Appendix 3 provides a comprehensive listing of the Australian Commonwealth and State forfeiture legislation.

Australia's forfeiture legislation

Despite not having a *Bill of Rights*, common law has recognized certain basic rights. "The Australian Courts do not construe statutory provisions as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect."[25]

The legal basis for Australian confiscation laws was founded on the principles of common law known as *deodant* and *attainder*. This permitted the forfeiture of property if a person committed a serious offence of treason or any other felony. Currently, the Commonwealth Director of Public Prosecutions (CDPP) relies on the provisions in the *Proceeds of Crime Act*, *2002* (POCA 2002) for recovering the proceeds of crime.

Lusty (2002, 345) identified six reasons for support of Australia's assets confiscation regime as:

- deterring crime by reducing actual and expected profitability;
- preventing crime by diminishing the capacity of offenders to finance further criminal activity;
- redressing the unjust enrichment of those who profit at society's expense;
- compensating society for the harm, suffering and human misery caused by crime;
- reimbursing the state for the ever-increasing cost of fighting crime; and

- engendering public confidence in the administration of justice by demonstrating to the community that crime does not pay.

Forfeiture takes place in a number of areas, such as fraud, corruption, money laundering and drug trafficking. There are two means by which proceeds of crime; can be recovered: conviction-based recovery (hereinafter criminal forfeiture), which allows the recovery of assets associated with a crime after securing a conviction for that crime and non-conviction based recovery (hereinafter civil forfeiture), which permits the restraint and recovery of assets alleged to have criminal origins without having a criminal conviction. The burden of proof required for civil forfeiture is on the balance of probabilities. All Australian states and territories except for Tasmania have legislation allowing for both criminal and civil forfeiture.

Four types of confiscation orders can be made under the POCA 2002, including 1) Forfeiture Orders, 2) Pecuniary Penalty Orders, 3) Unexplained Wealth Orders, and 4) Literary Proceeds Orders. Under certain circumstances, statutory or automatic forfeiture (i.e., forfeiture of restrained property without express order of the court) is available. This occurs where a person has been convicted of a 'serious offence' under the POCA 2002.[26]

To preserve property pending the outcome of forfeiture proceedings, the POCA 2002 permits restraining orders to be made over property early on during an investigation. These orders can be made either in the proposed charging of a person, or on a civil forfeiture basis.

The POCA 2002 has a wide range of provisions protecting the rights of owners of restrained property and third parties. These provisions facilitate access to restrained property by paying a reasonable living or business expense, excluding the property from restraint or from forfeiture in appropriate circumstances, and paying of compensation or hardship amounts out of the proceeds of forfeited property. A court can require the CDPP to provide funding regarding costs and damages as a condition of making a restraining order.

In February 2010, the *Crimes Legislation Amendment (Serious and Organized Crime) Act, 2010* (Cth) was passed, which added unexplained wealth orders (UWOs) provisions in the POCA 2002. Since the introduction of UWOs almost AUD$ 61 million (m) has been recovered under the *Act*, with the amount recovered increasing annually.[27] The confiscated money and money derived from other types of confiscated assets are paid into the Confiscated Assets Account pursuant to Part 4(3) of the POCA 2002. Figure 1 outlines key features of the unexplained wealth order legislation in different jurisdictions of Australia.

Figure 1: Key features of Unexplained Wealth Orders in different parts of Australia[28]

Commonwealth	***New South Wales***	***Western Australia***	***Northern Territory***
• Enacted in 2010 • *in Personam* – action brought against the person • The burden of proof shifts to the property owner	• Enacted in 2010 • *in Personam* – action brought against the person • The burden of proof shifts to the respondent and	• Enacted in 2000 • *in Personam* – action brought against the person • The burden of proof shifts to the property owner	• Enacted in 2002 • *in Personam* – action brought against the person • The burden of proof shifts to the property owner

Figure 1: Key features of Unexplained Wealth Orders in different parts of Australia[28]			
Commonwealth	***New South Wales***	***Western Australia***	***Northern Territory***
• The Crown has to show a nexus between an offence and the property • Court has broad discretion when making an order	property owner • The Crown has to show a nexus between an offence and the property • Court has broad discretion when making an order	• No requirement to show a nexus between an offence and property • No court discretion	• No requirement to show a nexus between an offence and property • Court has discretion to decide if making of an order is done on 'just terms'

Effectiveness of Australia's UWOs

Significant changes were made to the UWO Cth law to make its provisions more effective, and to bring it in line with the principles of common law and basic human rights following receipt of an evaluation report on the POCA 2002. Critics contended that the absence of a written *Bill of Rights* entrenched in the *Constitution of Australia*, made it easier to introduce and implement UWO provisions in Australia. "The courts have been reluctant to interpret provisions to abrogate important common law rights, privileges, and immunities in the absence of clear words or a necessary implication to that effect."[29]

A key provision of the POCA 2002 is the reverse onus of proof requiring all interveners to demonstrate that their property was lawfully acquired to avoid forfeiture. The courts in Australia have accepted the reverse onus provisions in forfeiture statutes "as being necessary.

During 2011-2012, the total estimated value of confiscation orders obtained was AUD$ 45.645 m, and the total amount recovered due to litigation was AUD$ 45.620 m.[30] This figure is up from AUD$ 13.81 m recovered in 2010-2011 and AUD$ 18.31 m in 2009-2010, the largest amount recovered since the establishment of the POCA 2002.

The Cth UWO provisions have higher standard requirements than state UWO provisions. For example, they do not hold the presumption that the respondent's property is unlawful unless the respondent is unable to establish the contrary. There is a requirement to show a linkage between the property and the offence. The POCA 2002 sets out a three step process: 1) freezing order (not mandatory); 2) preliminary UWO and 3) unexplained wealth declaration. Other differences in state legislation allow the respondent to be eligible for reasonable living and legal expenses, and the court has discretionary power to determine whether making an order will be in the interests of justice.

3.3 Civil Forfeiture Regimes in the United Kingdom

Like Australia, the UK also has a comprehensive confiscation and asset recovery regime established in its *Proceeds of Crime Act of 2002* (POCA of 2002 (UK)). Appendix 4 lists current British criminal and civil forfeiture legislation.

The UK *Act* created three new devices: civil recovery orders; forfeiture and the taxation of unlawful earnings. The first two are related to civil powers, whereas the third, taxation is different. The Serious Organised Crime Agency (SOCA) manages these powers and coordinates

different aspects of the asset recovery strategy (Gallant 2005, 110). The UK asset recovery strategy "involves the deterrence of crime and terrorism, detection of the criminal or terrorist, and the disruption of criminal and terrorist activity."[31] It removes criminals from their resources (i.e., funds and property) to prevent crime and to compensate its victims.

The *Act* has four mechanisms for seizure, forfeiture, and confiscation of the proceeds of crime including 1) criminal confiscation proceedings (hereinafter criminal forfeiture) following conviction of the defendant, 2) non-conviction based asset forfeiture (hereinafter civil forfeiture) powers also known in the UK as civil recovery, 3) cash seizure and forfeiture, and 4) taxation of suspected assets being the proceeds of crime. A civil evidentiary standard (i.e., a balance of probabilities) governs all proceedings under the *Act*. Moreover, the *Act* removed all distinction between drug and non-drug predicate offences (Home Office 2006, 39), and criminalized actual possession of criminal property by the predicate offender (HM Treasury *et al*., 2007, 18).

Criminal forfeiture

Criminal forfeiture or confiscation occurs following a criminal conviction. At that time, the offender is ordered to pay the value of the benefit or proceeds from that crime.[32] The Crown is not required to link a particular crime to a particular benefit, and has a right to assume that all of the defendant's properties held over the six previous years are proceeds of crime. Prior to initiating the confiscation procedure, the court must determine if the defendant has a criminal lifestyle.

For 'criminal lifestyle' confiscation to stand, certain conditions must be met, including that:

1) the offence was committed over a period of at least 6 months, and the proceeds of crime, from the offence exceeds £5,000;
2) the defendant's conduct is part of a criminal activity and he or she has benefited from that conduct; and
3) if the defendant was convicted for offences unlikely to be committed once (e.g., human trafficking, money laundering, drugs and arms trafficking).

If the court decides that the criminal lifestyle criteria have been met, then a 'general criminal lifestyle confiscation' takes place.[33] If not met, the court will continue to determine whether the defendant has benefited financially or otherwise from his/her criminal conduct. If the court determines that the defendant has benefited from his or her conduct, it will calculate the profit gained from that offence. The Crown prosecutor must prove beyond a reasonable doubt that there is a causal link between the particular offence and the derived benefit.

If the court has determined that the defendant has a criminal lifestyle, a civil evidentiary standard is applied throughout the proceedings. Under section 17 of the *Act*, the court is authorized to request that the defendant submit a statement accepting the allegation that his/her assets were proceeds of crime, or offer additional information to legitimize the source of his/her assets. Figure 2 lists the recovered assets from the proceeds of crime from FY 2008-2009 to 2011-2012.

Civil forfeiture

Civil forfeiture falls under Part 5 of POCA of 2002 (UK).[34] Part 5 authorizes SOCA to apply for recovery of property obtained through 'unlawful conduct' before the High Court for offences

committed in England, Northern Ireland, Scotland and Wales. SOCA receives these cases when: a) insufficient evidence exists to pursue criminal charges; b) criminal charges are not made due to public interest; c) confiscation proceedings have failed; or d) the defendant is beyond reach since that person is dead, or abroad, and there is no reasonable prospect of securing his or her extradition.

Prior to initiating an investigation, certain criteria must be met: 1) the case must be referred by a law enforcement agency or the Crown prosecution authority; 2) the recoverable property must be identified and have an estimated value of at least £10,000; 3) the recoverable property must be obtained within the last 12 years; 4) there must be significant local impact on communities; and 5) there must be evidence of the criminal conduct supported on the civil evidentiary standard.

Figure 2: UK Recovered Assets Receipts from 2008-2009 to 2011-2012.

Recovered assets receipts	***2008-2009***[35]	***2009-2010***[36]	***2010-2011***[37]	***2011-2012***[38]
	£'000	£'000	£'000	£'000
Civil	14,482	5,818	6,220	3,901
Criminal	3,331	639	2,639	3,236
Tax	2,362	317	1,050	1,178
Recovered asset receipts	***20,175***	***6,774***	***9,909***	***8,315***
Asset recoveries applied against receivers' fees	(4,498)	(1,984)	(822)	(280)
Net recovered receipts	***15,677***	***4,790***	***9,087***	***8,035***
Receipts paid to the Home Office	(2,810)	(2,412)	(2,185)	(5,327)
Recovered asset proceeds	***12,867***	***2,378***	***6,902***	***2,708***

Under civil procedure rules, SOCA may apply for freezing injunctions to preserve the assets to meet a recovery order if there is a risk of their dissipation. An interim receiving order may be granted by a court if the case meets two conditions: 1) if there is an arguable probable cause that the property is recoverable, and that if part of the property, which is not recoverable is an associated property; and 2) the identity of the person who holds the associated property could not be established.[39] If the court determines that the property is deemed recoverable, a recovery order is issued entrusting the property to its SOCA appointed trustee who will undertake the civil recovery.

Cash forfeiture

Provisions under the POCA of 2002 (UK) went beyond the original scope provided under the *Drug Trafficking Act*, 1994 by permitting cash forfeiture to cover the proceeds of crime from all offences. The POCA of 2002 (UK) allows for search, seizure, and forfeiture of cash[40] suspected of being the proceeds of crime, or is intended for commission of a crime, where the amount to be forfeited is not less than £1,000.[41] If these conditions are met, the law enforcement officers can detain the person to carry out search and seizure.[42]

Taxation powers under Proceeds of Crime Act, 2002

Taxation, the fourth part of the assets recovery regime under the POCA of 2002 (UK), gives the taxation power as an alternative to civil recovery proceedings. It may be used when there are reasonable grounds to suspect that an individual has received income or profit from criminal conduct. The POCA of 2002 (UK) authorizes the SOCA director to assess a company's chargeable profits due to the company's or another individual's criminal conduct.[43] There is no requirement for SOCA to provide evidence that the profit was derived from a specific crime, and it does not matter if the source of income cannot be identified.[44]

Taxation was introduced since criminal organization revenues have been estimated to be somewhere between £6.5 m and £11 billion (b) in 1996 alone.[45] The range is extreme due to the lack of hard metrics in this area. UK Inland Revenue does not have the power to collect tax where the source of income (including criminal activity) cannot be identified. However, Part 6 of POCA of 2002 (UK) empowers the director of SOCA to have functions of the Inland Revenue in relation to income, profits or gains due to criminal conduct and collect the taxes of criminal organizations.[46]

Effectiveness of the UK's civil forfeiture regime

Leong noted that initially the UK civil forfeiture regime has provided fewer results than anticipated. This was due in part to lengthy civil forfeiture procedures that faced many legal challenges. These contributed to delays in civil recovery cases in the High Court. This led to a change in tactics, whereby the UK would focus on civil recovery orders instead of civil forfeiture proceedings. Similar to the Australian and the Canadian regimes, the UK regime also allows for the civil recovery of property obtained from 'unlawful conduct.'

In legal challenges, concerns were raised about the civil recovery proceedings, making reference to issues, such as lack of proportionality,[47] the lack of presumption of innocence,[48] and the double jeopardy rule.[49] As seen in Canada, opponents of the UK civil recovery procedure argued that the procedure was criminal rather than civil. If deemed a criminal procedure, the safeguards guaranteed by Articles 6[50] and 8[51] of the *European Convention on Human Rights* (ECHR) would be triggered. However, the UK High Court dismissed these concerns. The Court held that civil recovery was not a criminal but a civil proceeding intended to recover property obtained from unlawful conduct.

Another feature of the UK asset recovery regime that may stimulate interest in civil forfeiture is the "Recovered Assets Incentivisation Fund" (RAIF). The RAIF is similar to the US federal government approach of equitable sharing, which distributes half of the recovered assets to the agencies involved. This is to improve asset recovery and influence local crime fighting priorities.[52] In 2007, UK police forces received £ 17 m from the recoveries made.[53]

3.4 Civil Forfeiture Regimes in the United States

Unlike Australia and the UK, the US does not have a comprehensive forfeiture statute providing for all types of offences. This is seen in Appendix 5, which lists current US federal and state statutes on asset forfeiture .

Under US federal law, there are three procedural options of administrative forfeiture, civil forfeiture and criminal forfeiture. The first applies to uncontested cases, which can be carried out by a federal law enforcement agency as an administrative or 'non-judicial' matter without the involvement of either a prosecutor or a court. Civil and criminal forfeiture are judicial matters involving the US federal court. If the government is successful, a court order will direct the transfer of the property title to the US government, where the government must establish a linkage between the seized property and a specific offence. Figure 3 identifies the key steps the US federal government follows in the civil forfeiture process.

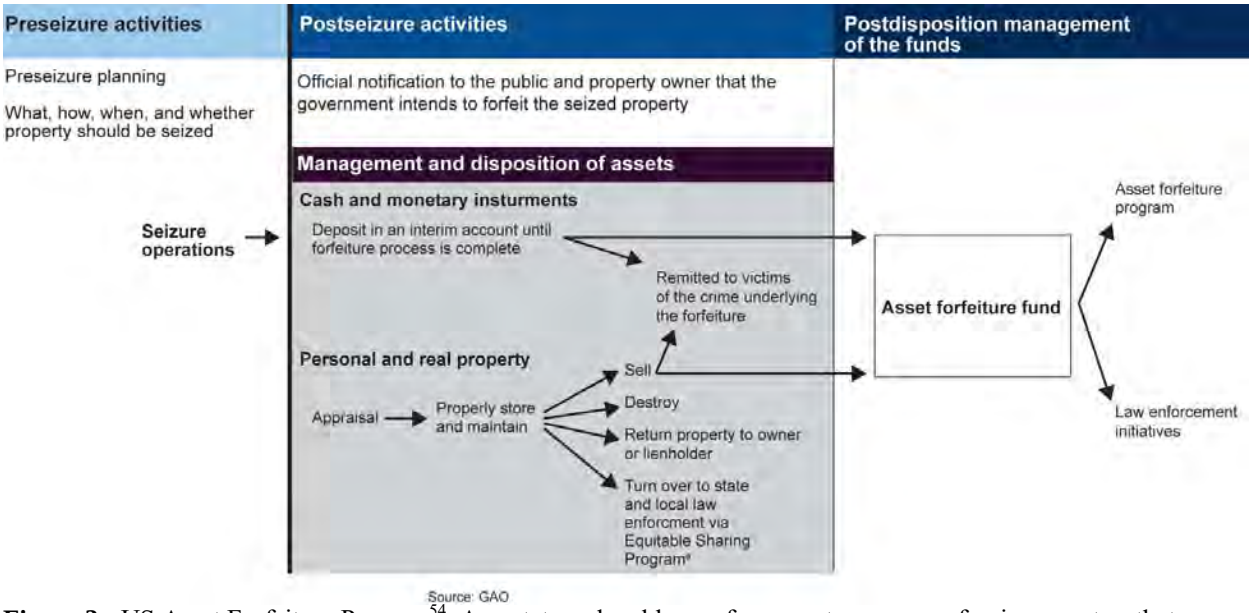

Figure 3: US Asset Forfeiture Process.[54] Any state or local law enforcement agency, or foreign country, that directly participates in an investigation or prosecution that results in a federal forfeiture by a Justice or Treasury participating agency may request an equitable share of the net proceeds of the forfeiture.

Administrative forfeiture

Administrative forfeiture authorizes law enforcement to seize a property during an investigation if there is probable cause to believe that the property is subject to forfeiture. US Congress authorizes administrative forfeiture as a first step after seizure in uncontested cases.[55] These forfeitures constitute most of the federal forfeitures because about 85 percent of narcotic drug cases are uncontested.[56]

Forfeiture begins when a federal law enforcement agency with statutory authority in a given area, such as (e.g., the Drug Enforcement Administration [DEA] in a drug case, the Federal Bureau of Investigation [FBI] in a fraud case, the Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF] in a firearms case) seizes property found during the course of an investigation. Notices are sent to anyone having an interest in the property, and who may be interested in contesting forfeiture within a prescribed period of time.

If the forfeiture is uncontested by that prescribed date, the law enforcement agency can make a declaration of forfeiture, having the same force and effect of a judicial order. Under the *Civil Asset Forfeiture Reform Act* (CAFRA), the forfeiture agency must begin the proceeding within

60 days, and give the owner enough time to file a claim. If a claim is filed, law enforcement refers the case to prosecution to begin a forfeiture proceeding. Most types of property may be seized and forfeited administratively. The key exceptions are real property and personal property. Any personal property (besides cash or monetary instruments) having a value in excess of USD$ 500,000 must be forfeited judicially.[57]

Criminal forfeiture

Criminal forfeiture is pursued when judicial proceedings are required.[58] CAFRA expanded the list of federal crimes punishable by criminal forfeiture, which includes offences involving unlawful money transmission, counterfeiting, identity fraud, credit card fraud, computer fraud, theft related to motor vehicles, health care fraud, telemarketing fraud, bank fraud, and immigration-related offences.

Criminal forfeiture is an *in personam* action against the defendant, instead of an *in rem* action against the property used in the offence.[59] If the property subject to confiscation is unavailable following the defendant's conviction, the court may order the confiscation of other property belonging to the defendant to substitute assets of same value. The indictment following conviction must list the property that the government will subject to forfeiture.[60]

Civil forfeiture

In a civil forfeiture case, the US government files a separate civil action *in rem* against the property itself. It then needs to demonstrate by using the civil burden of proof, 'preponderance of the evidence' that the property was derived from, or was used to commit a crime. Civil forfeiture does not depend on a criminal conviction. This action may be filed at any time.[61]

> "The *in rem* structure of civil forfeiture is simply a procedural convenience. It is a way for the government to identify the thing that is subject to forfeiture and the grounds [sic] therefore, and to give anyone and everyone with an interest in that property the opportunity to come into court at one time and contest the forfeiture action. The alternative, being a separate civil action against every person or entity with a potential legal interest in the property, would be administratively impossible."[62]

The US government uses civil judicial proceedings to initiate forfeiture against real estate (i.e., immovable property). It institutes *in rem* proceedings against the property by filing a complaint, or a libel against the property.[63] Property owners have 30 days to submit a claim[64] following the filing, and 20 days to provide their answer.[65]

Civil Asset Reform Forfeiture Act

The *Civil Asset Reform Forfeiture Act of 2000*[66] (CAFRA) is the US federal statute providing a uniform procedure for federal civil forfeiture. Other US federal statutes, such as the *Drug Abuse Prevention and Control Act*,[67] and its amendments, the *Patriot Act*,[68] and the *Customs Act*,[69] operate in parallel and have provisions for the seizure of property constituting proceeds of a crime. CAFRA makes the proceeds from any of the crimes upon which money laundering or *Racketeer Influenced and Corrupt Organizations Act* (RICO)[70] prosecution might be based forfeitable.

The *Act* provides for seizure and forfeiture of all proceeds of federal offences, including fraud, bribery, theft, and embezzlement. It also authorizes the federal government to seize and declare forfeited proceeds and instruments of state offences including murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking. However, CAFRA does not apply to forfeitures addressed by the Customs Service or to forfeiture statutes enforced by the Internal Revenue Service.[71]

CAFRA contains provisions to allow the respondent to file a petition for the release of property pending trial to avoid hardship. Among other things, the property owner will have to show that the property may be destroyed, damaged or lost if not returned to the owner. CAFRA introduced concepts for the 'innocent owner,' as well as procedures for when and how property owners could challenge forfeiture action. It expanded the ability to civilly and criminally forfeit the proceeds of many more US criminal offences. Certain reforms in CAFRA increased the evidentiary standard for obtaining forfeitures under US law. This included deletion of reverse onus of burden for civil forfeitures, the imposition of time limits on the government, and the requirement of having proof of a substantial linkage between the forfeited property and the underlying crime.

Equitable sharing

The US federal law enforcement practice known as "equitable sharing" enables state and local police and prosecutors to circumvent the civil forfeiture laws of their states for financial gain. Appendix 6 lists the evidentiary standard of proof required under state civil forfeiture laws, which varies considerably. Through equitable sharing, state and local law enforcement can take property under the federal civil forfeiture law instead of their state laws. The federal law makes the process both relatively easy and rewarding, since up to 80 percent of proceeds are returned to the seizing agency. Equitable sharing agreements are used to process and divide the proceeds of the seized property during joint operations involving multiple law enforcement agencies. The federal government takes over the property, handles the forfeiture case, and then distributes the proceeds to each agency according to their role in the joint operation. As of April 2009, "the US Department of Justice has shared over USD$ 4.5 billion in forfeited assets with more than 8,000 state and local law enforcement agencies."[72]

Effectiveness of the US civil forfeiture regimes

Both the federal Department of Justice (Justice) and the federal Department of the Treasury (Treasury) operate asset forfeiture programs designed to prevent and reduce crime with the seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate, federal crimes.[73] Participating agencies within Justice and the Treasury seize millions of dollars in assets annually from their law enforcement activities. Seized assets include cash and financial instruments, as well as non-currency items such as real estate, vehicles, businesses, jewellery, art, antiques, collectibles, vessels, and aircraft. In the fiscal year (FY) of 2011, the combined value of assets in these two programs was about US$ 9.4 billion (b). Estimates of US$ 6.9 b and US$ 2.5 b were the amounts of the seized assets under the management of Justice and the Treasury respectively.

US researchers[74] find the use of civil forfeiture is extensive at all levels of government and is growing. They allege that "civil forfeiture encourages policing for profit."[75] US national data

indicates that when state laws make forfeiture more difficult and less rewarding, law enforcement tends to take advantage of easier and more generous US federal forfeiture laws through equitable sharing. Although proponents of forfeiture activities highlight that the use of forfeiture funds are used to promote social goods, such as restitution to crime victims, critics contend that forfeiture creates powerful incentives for state and local law enforcement agencies with limited resources to realign their operations to activities that tend to lead to forfeiture.

Other US researchers contend that statutory and legal doctrine "has removed forfeiture not only from its historical origins but also from the realities of commercial dealings"[76] by denying fair treatment of creditors, tends to undermine the principles underlying commercial transactions. Other critics allege that there is a trend among "some law enforcement agencies [to] now use contracts and waivers to obtain property, a practice that permits them to avoid forfeiture proceedings"[77] where owners waive their interest in the property in exchange for the agency's promise not to pursue criminal charges.

3.5 Civil Forfeiture Regimes in Canada

Canada has both criminal and civil or *in rem* forfeiture. Criminal forfeiture is governed by the *Criminal Code* while civil forfeiture is governed by the provincial civil forfeiture laws. The *Constitution Act, 1867* empowers the federal government to legislate criminal law and procedures, except the constitution of the criminal courts, under section 91(27), and the provincial governments to legislate civil law, particularly property and civil rights under section 92(13).[78]

Canada has two federal statutes governing the punishment of criminal offences, the *Criminal Code* and the *Controlled Drugs and Substances Act.* Pursuant to these statutes, there is a process for criminal asset forfeiture, involving four procedures, which are explained in Appendix 7.

To date, eight Canadian provinces have established civil forfeiture laws. Ontario and Alberta were the first provincial jurisdictions to introduce civil forfeiture in Canada in the fall of 2001.[79] This was followed with similar legislation by Manitoba,[80] Saskatchewan,[81] British Columbia,[82] Nova Scotia,[83] Quebec[84] and New Brunswick.[85]

> "There is a movement for uniformity in Canadian civil law, and Ontario has typically served as the focal point for legal change within Canada. Ontario, in turn, tends to look for guidance from and conformity with the outside world."[86]

Simser acknowledged that Canadian civil forfeiture law benefited from the US experience, as well as from the Australian, Irish and South African experiences, "all of which influenced portions of Ontario's statute."[87] Nelson noted that "the *Charter of Rights and Freedoms* (hereinafter *Charter*) contains similarities with the *US Bill of Rights* amendments."[88] The *Charter* identifies guaranteed freedoms, including "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," Section 7 of the *Charter* is similar to the *Fifth Amendment's Due Process Clause*.[89] Krane noted that since the "Charter does not include a property right (or even an excessive fines clause), the courts are not obliged to subject the provincial forfeiture models to a proportionality analysis."[90]

While provincial legislatures were passing civil forfeiture legislation, they were also passing parallel legislation pertaining to the forfeiture of proceeds from the recounting of crimes.[91,92] This legislation has been described by provincial governments as compensatory for victims. The Crown can also petition the courts for forfeiture of proceeds that are placed in the relevant provincial consolidated revenue fund,[93] which may never be spent on the victims of crime.

A list of current Canadian criminal and civil forfeiture statutes is found in Appendix 8. Canadian law permits forfeiture orders to be made in three broad classes of property: proceeds of crime; instruments of crime; and property owned or controlled by terrorist groups.

Civil forfeiture defined

Differences in provincial civil forfeiture legislation indicate how each legislature defines the terms 'property', what constitutes 'proceeds' of 'an unlawful activity'. The process begins by reviewing the type of property being considered for forfeiture and the nature of the unlawful acts leading to forfeiture. It also involves determining whether forfeiture pertains only to profits, or extends to gross revenues and capital goods.

> "Each civil forfeiture statute, except the Quebec statute, defines the term 'property' in similar terms. Property generally includes all real property, such as buildings and land, and personal property, such as boats and vehicles. It also includes any 'interest' in that property, meaning that the property need not be vested in the person's patrimony or estate for it to be subject to forfeiture. The Quebec statute does not define the term at all. The definition in the Alberta statute expressly includes contingent and future interests in property, as well as causes of action. More importantly, the provision leaves open the possibility that intellectual property could constitute forfeitable property for the purposes of the *Act*."[94]

Intellectual property is not considered in the definition of property by provincial legislatures, which may exclude a source of criminal income from forfeiture (Krane 2010, 24). Instead, provincial statutes focus on pecuniary goods (currency, real estate, and other tangible property), and not on the dismantling of criminal enterprises that use intellectual property for criminal purposes. For example, should criminal enterprises or other associated organizations engage in criminal conduct, acquire or develop intellectual property (such as a trademark, a copyright, or a patent) with proceeds of crime, or through an unlawful activity, that capital and intellectual property would not be forfeitable under these provincial regimes.[95]

The absence of Aboriginal property, particularly real property situated on reserve land is not in the definition of property by the provincial legislatures (Krane 2010, 24). This may be due to the complex issues associated with "restrictions on alienability and issues of collective ownership characteristic of Aboriginal title."[96] The Supreme Court of Canada held in *Derrickson v. Derrickson* that

> "…the right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the

> *Constitution Act, 1867.* It follows that provincial legislation cannot apply to extinguish the right of possession of Indian reserve lands."[97]

The term 'unlawful activity' is defined as an act or omission that constitutes an offence under either federal, provincial, or territorial legislation in Canada. It also is defined as "an offence under an *Act* or jurisdiction outside Canada, if a similar act or omission would be an offence under an *Act* of Canada or Ontario if it were committed in Ontario."[98] Saskatchewan, Manitoba, New Brunswick and Nova Scotia have the same provision in their legislation. However, there is a lack of clarity regarding the degree of similarity required to explain any difference between foreign conduct and the Canadian offence referenced as 'unlawful activity.' British Columbia legislation limits the scope of its application for 'unlawful activity' by including a provision excluding certain laws that are expressly prescribed under the *Act*.[99]

Differences between criminal and civil forfeiture law

Krane described provincial civil forfeiture legislation within a larger legislative context, stating that the provincial legislatures "appear to be moving toward using civil procedures to achieve traditional criminal law ends, such as prevention, deterrence, punishment and incapacitation."[100] Since Confederation, forfeiture rules have been used "to nominate criminal or quasi-criminal legislature instruments, such as the *Criminal Code*,[101] narcotics[102] and customs legislation."[103,104]

Gallant stated that provincial civil forfeiture regimes regulate property since they can. These "either respect or divest property rights depending on the strength of the link to criminal activity."[105] Concurrently, provincial laws related to civil forfeiture focus on the proceeds of unlawful conduct, which is "understood as the proceeds of crime and properly a matter of federal jurisdiction."[106] Canadian provincial laws also have an authority to the court to refuse the order of forfeiture if it was not in the 'interests of justice.'[107] The courts have also had to provide guidance to ensure that the *Charter* and common law principles are being followed. Four Supreme Court of Canada cases originating from forfeiture cases of *Martineau v. M.N.R.*,[108] *F.H. v. McDougall*,[109] *Chatterjee v. Ontario (Attorney General)*,[110] and *R. v. Grant*[111] have had rulings that will provide future legal policy and legislative guidance.

Consequently, provincial civil forfeiture regimes "reflect a dual constitutional character: on the one hand, property and civil rights, and on the other, criminal law."[112] This led to some overlap between the use of civil law by the provinces to seize criminal proceeds, and the federal use of the criminal law to obtain the proceeds of crime.[113] In 2009, amendments to the *Competition Act* enhanced the Commissioner of Competition's civil enforcement powers.[114]

> "The amendments continued an ongoing process of converting formerly criminal offences, such as price maintenance, into civil offences, which do not require proof of mens rea or fault…The maximum penalties for breaches of the civil provisions from CDN$50,000 to CDN$750,000 for individuals and from CDN$100,000 to CDN$10 m for corporations for first-time offences, but unlike the *Criminal Code* provisions on sentencing, the *Competition Act* does not provide any guidance as to how these penalties are to be administered."[115]

Krane (2010, 35) noted that this increase of administrative powers and penalties has not been restricted to competition law. The Ontario legislature also increased its penalty for contravention of the *Securities Act* from CDN$ 1 m to CDN$ 5 m in addition to increasing the maximum imprisonment terms from two to five years.[116] Breaches of the *Investment Canada Act* are being enforced using civil penalties.[117]

It is important to note that although all provincial civil forfeiture laws are *in rem*, they contain a requirement to identify a person who was in possession or ownership of the targeted property. This may be reflective of the dual constitutional nature of provincial law.[118] Appendix 10 compares different aspects of the criminal and civil regimes as set out by the *Criminal Code* and the Ontario *Civil Remedies Act*, 2001 to show how provincial laws were tailored to avoid the constraints imposed under criminal law.[119]

Effectiveness of Canada's civil forfeiture regimes

The appeal of pursuing criminal assets using civil proceedings appears to favour the civil model of crime control. Canadian civil forfeiture regimes began to arrive in 2001 in the provinces of Ontario and Alberta. Since then, other provincial jurisdictions followed. However, Gallant notes that "as a federal state, most civil approaches to criminal finance have been implemented under provincial, as opposed to federal, law."[120]

A federal forfeiture model was adopted after September 11, 2001 (post-9/11).[121] Canada has yet to incorporate any reliance on taxation in either the civil or criminal forfeiture regimes (Gallant 2013, 7). It should be noted that "Canadian income tax law applies to particular sources of income, notably employment, property or business income. A criminal enterprise would qualify as a business, its illegal character irrelevant to its taxability as a source of business profits."[122]

In 2010, legislative amendments to the *Criminal Code* include all of the offences under the *Income Tax Act* as predicate offences for money laundering.[123] Taxation is used to address money laundering and reduce its profitability.

> "Provincial law, with the exception of Alberta, relies specifically on forfeiture. Alberta law contemplates the restraint of property that subsequently may be the subject of a property disposal order. Other regimes afford the seizure, restraint and subsequent forfeiture, as opposed to disposal, to the state. There is no obviously significant way in which Alberta's disposal process differs from a forfeiture process."[124]

The provincial civil forfeiture regimes follow the US approach of allocating the initial burden of proof to the state, and then discharged that burden upon proof to the evidentiary standard of probabilities. Under the provincial models, the proceeds of crime subject to forfeiture include any property derived from any criminal offence acknowledged under Canadian federal or provincial law.[125]

Although the Ontario and Alberta civil regimes have similar strengths, they also have unique deficiencies (Gallant 2004, 18). For example, these civil forfeiture models "replicate the legal structure of a conventional civil trial."[126] Their laws followed the US approach of allocating the initial burden of proof to the state, and then discharged that burden upon proof using the

evidentiary standard of probabilities (a lower standard than that of criminal law). Other provincial civil money-centred models have also reflected this framework. Researchers, such as Davis (2003) and Gallant (2004), have noted that the provincial civil forfeiture regimes protect the interests of innocent property owners, particularly given the "breadth of a civil model of crime control."[127]

Provincial law permits the forfeiture of property that is deemed proceeds of crime, or as an instrument of the crime. These provisions allow taking assets that facilitate or are linked to crime rather than proceeds of crime.[128] A related aspect of civil forfeiture regimes include statutes allowing the forfeiture of property for failure to comply with the declaratory export and import laws. This emerged post-9/11, forming an integral part of anti-money laundering regulation (Gallant 2013, 9).

Federal law requires reporting of any importation or exportation of any currency or financial instruments exceeding CDN$ 10,000 to the Canada Border Service Agency (CBSA) Border Services Officer (BSO).[129] Individuals or entities failing to file such a declaration will result in immediate seizure of the financial instruments. This property may be returned upon payment of a penalty, or unless the CBSA BSO "has reasonable grounds to believe that the property constitutes the proceeds of crime or funds for use in terrorism"[130] then, the entire property is immediately forfeit.[131]

Seven of the eight provinces having civil forfeiture regimes signed an interprovincial agreement to share information on civil forfeiture cases to strengthen their ability to successfully pursue the proceeds and instruments of crime.[132] The effectiveness of these regimes is described in terms of assets seized, successful seizures compared with those later overturned in the courts and other similar metrics are found in Appendix 9.

4.0 Discussion

Most nation states have civil forfeiture regimes that were initially established in response to the activities of domestic and international organized criminal groups. Post-9/11 there has been a change in perspective of balancing individual property rights with the public interest in crime control and public security. Both international organizations and nation states have targeted terrorist property and terrorist financing. That has broadened so that now the financial part of terrorism has merged with money laundering, dealing in prohibited arms, human smuggling and trafficking, and drug trafficking.

Forfeiture laws target select criminal justice objectives, such as removal of "the ill-gotten gains, disabling the financial capacity of criminal organizations, and compensating victims of crime."[133] Changes in legislation continue to respond to the increasing sophistication of transnational organized crime groups which make use of advanced technology to obfuscate their criminal income (Young 2009, 2) and are often seen as impenetrable to law enforcement agencies (Campbell 2010, 16). Lack of universality in civil forfeiture regimes may be, in part, attributed to the ambivalence of international treaties on drug trafficking, organized crime and corruption in mandating civil forfeiture of criminal property. These treaties impose obligations on state parties to establish laws to allow for the restraint and confiscation of proceeds of crime

and other criminal property. However, state parties to international treaties have discretion to identify whether they wish to implement these requirements within their existing criminal justice system or by other means, such as adopting a civil forfeiture regime.

Each of the civil forfeiture regimes of Australia, Canada, the UK and the US share the *in rem* feature at all stages of the process from implementation to enforcement. These regimes vary from jurisdiction to jurisdiction, as shown in Appendix 12. Some researchers contend that the *in rem* feature of civil forfeiture makes it 'awkward,' since only a person may be a party to a judicial proceeding leading to a more common *in personam* style. A non-person would then require a guardian or intervener to be appointed to represent its interests, or the interests of the unknown owner (Gallant 2005, 118). Other researchers argue that civil forfeiture encourages 'policing for profit'[134] and may lead to abuse. They have found evidence indicating that some of the police departments are taking advantage of lenient forfeiture statutes to 'pad their budgets.'[135]

First Research Question: What is used as evidence of the effectiveness of civil forfeiture and of administrative forfeiture?

Civil and administrative forfeiture regimes of Australia, the UK and the US measure the effectiveness of their models based on assets seized, rate of successful seizures compared with those later overturned in the courts, and other similar metrics. Each civil forfeiture model has similar and different elements including performance measures (if they exist).

Australia

The effectiveness of the federal Australian civil forfeiture regime is measured annually using the statistics reported by the Commonwealth Director of Public Prosecutions (CDPP). For example, in 2011-2012, the total amount relating to proceeds of crime obtained was AUD$ 45.645 m, of which all but AUD$ 25,000 was recovered.[136] Effectiveness is also measured against select CDPP performance indicators. For the year 2011-2012, the CDPP met or exceeded its targets. The outcomes of Australian court case reports are also used as measures of effectiveness of its civil and administrative forfeiture regimes. These particular case reports demonstrated the Constitutional validity of Part 2-4 of the POCA 2002, which provides for the making of pecuniary penalty orders.[137]

United Kingdom

The UK has made civil recovery orders its focal point.[138] This allows customizing cases to the benefit of unlawful activity actually recovered and the underlying criminal conduct. Three factors initially hindered the effectiveness of the UK civil forfeiture regime. These were: "litigation arising in several court challenges, lack of understanding and experience among law enforcement agencies and interim receivers, and the lack of international powers."[139] Civil forfeiture and taxation powers under Parts 5 and 6 of the POCA of 2002 (UK), respectively, allow SOCA to have extensive reach beyond criminal investigative approaches (i.e., foreign assets) to bring forward civil recovery proceedings against questionable assets overseas associated with convicted criminals. This includes freezing and seizing of such assets.

Like Australia, the UK measures the effectiveness of its civil forfeiture regime on its ability to recover funds and has demonstrated increasing effectiveness. Between 2003 and 2008, the UK government seized about £ 360 m.[140] Assets recovered during 2010-2011 were more than

£108.5 m. A further £219.1 m was denied by UK partners domestically (£44.8 m) and internationally (£174.3 m) as a result of SOCA support or referrals.[141] During 2011-2012, more than £100 m was recovered by SOCA. A further £299.7 m was denied by UK partners domestically (£115.1 m) and internationally (£184.6 m) as a result of SOCA support or referrals.[142]

United States

US Congress authorizes administrative forfeiture as a first step after seizure in uncontested cases. Such forfeitures constitute the majority of federal forfeitures because about 85 percent of narcotic drug cases are uncontested (Cassella 2004, 354). When administrative forfeiture options are not available, US law enforcement undertakes asset forfeiture.

Asset forfeiture is an integral part of the US law enforcement process at both the federal and local levels. The federal Departments of Justice (Justice) and of the Treasury (Treasury) operate asset forfeiture programs designed to seize and forfeit assets that represent the proceeds of, or were used to facilitate, federal crimes.[143] In 2010-2011, the combined value of assets was about USD$ 9.4 billion (b). Estimates of USD$ 6.9 b and USD$ 2.5 b were the amounts of the seized assets under the management of Justice and the Treasury respectively.[144]

Since there is no 'best way' to evaluate asset forfeiture success, certain issues have emerged for consideration. Forfeiture offsets the costs associated with targeting certain crimes. If forfeiture proceeds exceed or significantly lighten enforcement costs, forfeiture can be seen as cost-effective.

Canada

In Canada, pursuing criminal assets using civil proceedings favours the civil model of crime control. Unlike the jurisdictions of Australia, the UK and the US, Canada faces a division-of-powers argument regarding civil law, which is largely based in provincial jurisdiction. Currently, there are eight provincial civil forfeiture regimes. Canadian federal jurisdiction usually undertakes criminal forfeiture subject to the higher evidentiary standard of proof, 'beyond all reasonable doubt.'

Although "there has been little by way of academic commentary on civil asset forfeiture in Canada,"[145] and limited published case law, a number of principles have emerged from case law echoing that seen in international jurisdictions. The courts have intervened in civil forfeiture cases to use their authority to refuse the order of forfeiture if not in the 'interests of justice.'

Four Supreme Court of Canada (Court) cases originating from forfeiture cases re-affirmed four common law principles[146] to guide future civil forfeiture jurisprudence. First of all, in *R. v. Grant, 2009* SCC 32, [2009] 2 SCR 353, the Court upheld the application of the *Charter* relating to provisions of section 24(2) to apply to civil matters with the same force as in criminal matters. Second, in *F.H. v. McDougall, 2008* SCC 53, [2008] 3 SCR 41, the Court decided that the standard of proof required in civil proceedings of the balance of probabilities. Third, in *Martineau v. M.N.R., 2004* SCC 81 [2004] 3 SCR 737, the Court upheld the validity of the *Customs Act*. Finally, in *Chatterjee v. Ontario (Attorney-General), 2009* SCC 19, [2009] 1 SCR 624, the Court upheld the constitutionality of the Ontario statute, *Civil Remedies Act*.

Second Research Question: What options could Canada consider to improve the effectiveness of its forfeiture regime at the federal level?
Possible options are as follows.

1. Possible sources of income excluded from the definition of property by provincial legislatures, such as intellectual property and Aboriginal property as noted by Krane (2010, 24) could be considered. The items, intellectual property (s. 91(22)), copyrights (s. 91(23)) and Aboriginal lands (s. 91(24)), are of federal jurisdiction pursuant to *The Constitution Act, 1867*. Potential implications of any proposed action relating to s. 91(24) must also be balanced with the requirement of s. 35, 'Rights of the Aboriginal Peoples of Canada' of the *Charter* pursuant to *The Constitution Act, 1982*.

2. The *Criminal Code* could introduce the concept of a 'criminal lifestyle' confiscation along the lines of the *UK Proceeds of Crime Act 2002*. Confiscation or criminal forfeiture could be subject to meeting certain conditions and subject to the criminal evidentiary standard of proof. In effect, the Crown prosecutor would have to prove beyond a reasonable doubt that there is a causal link between the particular offence and the derived benefit to the accused.

3. Canadian income tax law applies to particular sources of income, notably employment, property or business income. Introduction of taxation as another tool in the federal assets recovery regime under the *Criminal Code* and the *Controlled Drugs and Substances Act*, could empower the Canada Revenue Agency (CRA) or the Public Prosecution Service of Canada (PPSC) to assess the assets of a suspected company or individual that may have received income or profit from criminal activity. These powers could also be applied to such companies or individuals offshore or outside of Canada that have offence-related properties.

4. Introduction of legal amendments to the *Criminal Code* to include all of the offences under the *Income Tax Act* as predicate offences for fraud and corruption, among others, could facilitate the reduction of organized crime. This could assist in matters of jurisdiction, particularly if the predicate offence is committed offshore and the proceeds of crime are brought to Canada.

5. Expansion of the number of federal statutes having civil enforcement powers, including the *Competition Act* (s. 45(2)), the *Investment Canada Act* (s.40 (1-2.1), the *Customs Act* (s.110), and the *Cross-border Currency and Monetary Instruments Reporting Regulations* (s.18 (2)).

6. Provincial jurisdictions' use of the term 'unlawful activity' lacks clarity as to how these governments would be able to take action to respond to 'an offence under an *Act* or jurisdiction outside Canada.' Since extra-jurisdictional matters are of federal jurisdiction regarding foreign relations, international law, and international trade, it would be reasonable to have the federal government take the lead on such matters. The federal government would be able to seize the assets and divide them[147] with the relevant provincial jurisdiction in accordance with their role in the operation.

7. Introduce the concept of 'equitable sharing', which is practiced in the UK and the US, with other Canadian jurisdictions. This may provide incentives for new and additional cooperation in federal forfeiture initiatives.

Third Research Question: Would the notion of unexplained wealth orders (UWO) be transferrable to Canada?

Canada has both *in personam* and *in rem* forfeiture statutes, both of which continue to evolve over time. In some cases their application has been broadened to cover proceeds, assets used to facilitate or were instruments of crime, and administrative forfeiture over a range of offences. However, Canadian civil forfeiture statutes differ from UWOs as used in Australia as they do not have many of the key UWO features such as (1) reversal of the burden of proof to the respondent to justify lawful origin of the property, and (2) there is no requirement to show a causal linkage between an offence and property subject to forfeiture.

There are two key issues Canada would be required to consider if it were to adopt this type of law.

- *Reverse Burden of Proof*

This would be a new concept in Canadian legislation and within civil forfeiture statutes. The reverse onus concept is contrary to established common law principles. The constitutionality of this provision would likely be challenged on the grounds that will likely breach the *Charter* pursuant to *The Constitution Act, 1982*. Also, the protections afforded by criminal law (i.e., proportionality, presumption of innocence and the double jeopardy rule) would not apply.

- *Linkage between the Offence and the Property*

As noted earlier, UWOs in Australia do not have a requirement to show a connection between the property subject to forfeiture and an offence. Conversely, under Canadian statutes there is a requirement to make a substantial connection between the specific offence and the property. Therefore, application of UWOs to Canada would require a significant change of existing legal doctrine, shifting the proceedings such that the government is no longer required to show that the respondent has been involved in the commission of a specific offence or show that the property subject to forfeiture is connected to the offence. It would be important that the effectiveness and use of the UWO be monitored by Canada to assess its application and use at the Commonwealth level. Successes or failures of application of UWOs and their successful completion rate will indicate their effectiveness.

5.0 Conclusion

This paper examined the civil forfeiture regimes established in the jurisdictions of Australia, the UK and the US and compared them with the Canadian situation taking into account trends and related issues. As noted earlier, all jurisdictions share the *in rem* feature at all stages of the process from implementation to enforcement, there are variations as shown in Appendix 11.

Some researchers[148,149,150] see civil forfeiture as a possible remedial tool that creates an option to remove from an individual or entity wrongful proprietary gains whose provenance lies in unlawful activity. This is in addition to the unlawful activity itself being addressed by traditional

criminal justice methods. Other researchers[151,152,153] criticize civil forfeiture on common law grounds alleging that forfeiture involves double jeopardy, lacks proportionality, and puts in question the presumption of innocence. Critics claim that civil forfeiture violates, among other US constitutional provisions, the Fifth Amendment's double jeopardy clause,[154] the due process clauses of the Fifth and Fourteenth Amendments,[155] and the Eighth Amendment's excessive fines and punishments clauses.[156] Similar reservations are expressed by critics in other jurisdictions but to date the Australian and UK courts have asserted that the civil procedure does not penalize any person and that therefore it does not trigger the protections built into the criminal proceedings, such as the presumption of innocence or the double jeopardy rule.

Certain examples of dependence on forfeiture in law enforcement circles were identified by researchers.[157,158] In their view, this may result in neglect of other crimes that do not include forfeiture. For example, "law enforcement agencies in jurisdictions where state law requires at least a portion of the proceeds from asset forfeitures to be used for law enforcement purposes had significantly higher levels of equitable sharing payments than agencies in jurisdictions where law enforcement could keep all such proceeds."[159] Equitable sharing emerges as an important tool for many US state and local law enforcement agencies that would be otherwise limited by their state forfeiture laws. Other emerging trends include the rise of contracts or waivers used by law enforcement to avoid forfeiture proceedings.[160] With due diligence and appropriate attention given to codes of professional conduct, law enforcement officials can implement forfeiture programs that meet all legal and ethical requirements to protect the property owners' rights while targeting unlawful activity.[161]

The paper also reviewed the provincial civil forfeiture regimes in Canada looking at the scope of their application, case law and related issues. In BC case law, in *Director of Civil Forfeiture v. Wolff – 2012* BCCA 473,[162] the BCCA held that 'it would be contrary to the interests of justice to order the forfeiture of all or part of the value of the truck.' By focusing on the individual circumstance of the case, the BC Court of Appeal narrowed the scope of its precedent, which provides a strong template for the 'interests of justice' defence in the circumstances of a one-time offender. Another BC case law finding in the *Director of Civil Forfeiture v. Huynh, 2012* BCSC 740[163] demonstrated that some of BC's Supreme Court Justices are willing to give serious consideration of *Charter* issues in cases under the *Civil Forfeiture Act*, and that the BC Civil Forfeiture Office should anticipate challenges on constitutional issues in the future.

In the case of *Alberta (Justice) v. Wong, 2012* ABQB 498[164], the defendant was facing both criminal and civil actions and argued that his Charter rights were ignored, which brought the administration of justice into disrepute. The Supreme Court's decision in *Grant* shows that exclusion of evidence in any context will be an uphill battle. The case, *Alberta v. Wong* provides a useful precedent for defendants who are successful in having evidence excluded from a criminal trial, and are concurrently facing civil forfeiture action. In *Alberta (Justice and Attorney General) v. Chan, 2009*, ABQB 311[165] demonstrated the ease with which the provincial Crown can proceed with obtaining a forfeiture order, particularly when the defendant is not available to participate in the hearing. It also shows the prejudice that can be caused to an accused person by the 'double jeopardy' of both criminal and civil proceedings against them for the same alleged offence.

The outcome of the case of *Director under the Seizure of Criminal Property Act, 2009 v. Speiler, 2012* SKQB 77[166] provides a reminder of the difference between criminal and civil standards of proof, and a clear example of how provincial governments are increasingly seizing property in lieu of criminal charges when proof of guilt beyond a reasonable doubt is not possible. *Ontario (Attorney General) v. 1140 Aubin Road, Windsor, 2008* CanLII 67887[167] (ONSC) and *Ontario (Attorney General) v. Nock, 2008* CanLII 4256[168] (ON SC) illustrate that the Court declined to order forfeiture of the home in each case due to the specifics that led to the ruling that such an order was not in the 'interests of justice'.

Unlike the other jurisdictions reviewed, Canadian provincial jurisdictions do not appear to have instituted performance measures relating to the effectiveness of their civil forfeiture regimes. Although the Canadian civil forfeiture regime is newer than the other reviewed jurisdictions, the development of provincial statutes benefited from other jurisdictions' experiences. This also relates to the availability of Canadian provincial civil forfeiture published case law. The Supreme Court of Canada has intervened in four cases originating from provincial forfeiture cases and re-affirmed key principles, such as the burden of proof for civil forfeiture, the *Charter* applies to civil forfeiture, the constitutionality of provincial forfeiture and the *Customs Act*, and these principles will guide future Canadian civil forfeiture jurisprudence.

Finally, the paper considered possible options to improve the effectiveness of the Canadian federal forfeiture regime. Options were identified based on information uncovered. However, any future consideration of these options should be subject to review by the Department of Justice with the view to assess their viability in relation to the federal legal doctrine.

6.0 Acronyms

Australia

ACC	Australian Crime Commission
ACT	Australian Capital Territory
CDPP	Commonwealth Director of Public Prosecutions
Cth	Commonwealth
NSW	New South Wales
NT	Northern Territory
Qld	Queensland
SA	South Australia
Tas	Tasmania
UWO	Unexplained Wealth Orders
Vic	Victoria
WA	Western Australia

Canada

AB	Alberta
ABCA	Alberta Court of Appeal
ABQB	Alberta Queen's Bench
BC	British Columbia
BCCA	British Columbia Court of Appeal
BCSC	British Columbia Superior Court
BSO	Border Services Officer
CanLII	Canadian Legal Information Institute
CBSA	Canada Border Service Agency
FINTRAC	Financial Transactions Reports Analysis Centre of Canada
MB	Manitoba
NB	New Brunswick
NL	Newfoundland and Labrador
NS	Nova Scotia
NWT	Northwest Territories
NT	Nunavut Territory
ON	Ontario
ONCA	Ontario Court of Appeal
ONSC	Ontario Superior Court
PEI	Prince Edward Island
QC	Québec
SCC	Supreme Court of Canada
SK	Saskatchewan
SKCA	Saskatchewan Court of Appeal
SKQB	Saskatchewan Queen's Bench
YT	Yukon Territory
MLAT	Mutual Legal Assistance Treaty

United Kingdom

AFU	Asset Freezing Unit
EC	European Community
ECHR	European Convention on Human Rights
EU	European Union
RAIF	Recovered Assets Incentivisation Fund
SAR	Suspicious Activity Reports
SOCA	Serious Organised Crime Agency

United States

AFMLS	Asset Forfeiture and Money Laundering Section
ATF	US Bureau of Alcohol, Tobacco, Firearms and Explosives
CBP	US Customs and Border Protection
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
TFF	Treasury Forfeiture Fund
USAO	United States Attorney's Offices

International Governmental Organizations

FATF	Financial Action Task Force
G-8	Group of Eight countries (Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom, United States)
OECD	Organisation of Economic Cooperation and Development

7.0 Glossary and Explanatory Terms

Attainder is "forfeiture of both real and personal property. Under the doctrine of 'corruption of blood,' on conviction of a person for a felony or treason, his or her property was confiscated to the King or Feudal Lord."[1]

Contraband refers to "property for which ownership by itself constitutes a crime, including smuggled goods, narcotics, and automatic weapons. The government's mandate in protecting the public forms the justification for seizure in this case."[2]

Deodant involves the "confiscation of instruments or objects used in the commission of an offence."[3]

Designated offence (Canada) refers to "(a) any offence that may be prosecuted as an indictable offence under this [*Criminal Code*] or any other Act of Parliament, other than an indictable offence prescribed by regulation, or (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a)."[4]

Equitable sharing (United States) as authorized in "the *Comprehensive Crime Control Act of 1984*, state and local law enforcement agencies may work together to initiate federal forfeiture actions as long as the 'conduct giving rise to the seizure is in violation of federal law,' such as when a guest at a motel is arrested for certain drug crimes."[5]

Financial Action Task Force (FATF) is an intergovernmental body, whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. FATF is comprised of 34 member jurisdictions and two regional organizations, representing most major financial centres globally. Canada has been a member of this international organization since its creation by the Group of Seven Countries (G7) in 1990. In 2007, FATF completed an assessment of the implementation of anti-money laundering and

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[1]Booz, Allen, Hamilton. (2011). *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, October 31, 2011:845:67, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf.

[2]Legal Information Institute. (2013). *LII Background on Forfeiture*, [accessed 2013-01-31] from: http://www.law.cornell.edu/background/forfeiture/

[3]Booz, Allen, Hamilton. (2011). *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, October 31, 2011:845:67, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf .

[4]*Criminal Code*, R.S.C., 1985, c. C-46 s. 462.3, [accessed 2012-12-21] from: http://laws-lois.justice.gc.ca/PDF/C-46.pdf.

[5]Carpenter, D.M., Salzman, L. and Knepper, L. (2011). *How Federal 'Equitable Sharing' Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, Institute for Justice, October 2011:14:5, [accessed 2013-02-05] from: http://walker-foundation.org/Files/walker/2012/inequitable_justice-mass-forfeiture.pdf

counterterrorist financing standards in Canada, some of these standards were directly connected to the proceeds of crime.[6]

Forfeiture is the "loss of property or rights as a consequence of an offence or of the breach of an undertaking. Forfeiture has also been described as 'a comprehensive term which means a divesture of specific property without compensation: it imposes a loss by the taking away of some pre-existing valid right without compensation."[7]

Forfeiture Orders (Australia) under the "*Proceeds of Crime Act* 2002, when the court orders that property which is the proceeds or an instrument of crime is to be forfeited to the Commonwealth."[8]

***In personam* forfeiture** action "follows a criminal conviction of the property owner. After a finding of guilt, the jury is asked to consider, by special verdict, which of the property identified in the indictment is subject to forfeiture according to rules of criminal procedure."[9]

***In rem* forfeiture** is "a proceeding that takes no notice of the owner of the property but determines rights in the property that are conclusive. The term '*in rem*' is taken from the Latin "against or about a thing," referring to a lawsuit or other legal action directed toward property, rather than toward a particular person. Thus, if title to property is the issue, the action is "*in rem*." The term is important since the location of the property determines which court has jurisdiction, and enforcement of a judgment must be upon the property and does not follow a person."[10]

Literary Proceeds Orders (Australia) "under the *Proceeds of Crime Act* 2002, when the court orders an offender to pay an amount calculated by reference to benefits the person has derived

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[6]Financial Action Task Force. (2008). *Canada's Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism*, 28 February 2008:311:1, [accessed 2013-02-22] from: http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Canada%20full.pdf.

[7]Oxford Dictionary of Law, 4th Edition (1997), Oxford: Oxford University Press, p. 195, Black's Law Dictionary, 6th Edition (1990), Minnesota: West Publishing Co., p.650.

[8]Commonwealth Director of Public Prosecutions. (2012). *Annual Report 2011-2012* ,Commonwealth of Australia, 10 October 2012:284:133, [accessed 2013-01-07] from: http://www.cdpp.gov.au/Publications/Annual-Reports/CDPP-Annual-Report-2011-2012.pdf.

[9]Pimentel, D. (2012). *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, From the Selected Works of David Pimentel, January 2012:73:6, [accessed 2013-01-02] from: http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=david_pimentel&sei-redir=1&referer=http%3A%2F%2Fwww.google.ca%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Dforfeitures%2520revisited%253A%2520bringing%2520principle%2520to%2520practice%2520in%2520federal%2520court%26source%3Dweb%26cd%3D2%26sqi%3D2%26ved%3D0CDYQFjAB%26url%3Dhttp%253A%252F%252Fworks.bepress.com%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1011%2526context%253Ddavid_pimentel%26ei%3Dp73lUNTvDNG_qQGS1oGYAQ%26usg%3DAFQjCNH_NMJJstxQ1aEttKp3NEt1TAbNxg%26bvm%3Dbv.1355534169%2Cd.aWc#search=%22forfeitures%20revisited%3A%20bringing%20principle%20practice%20federal%20court%22.

[10]Farlex. (2013).The Free Dictionary, [accessed 2013-01-02] from: http://legal-dictionary.thefreedictionary.com/In+rem.

through commercial exploitation of his or her notoriety resulting from the commission of an offence."[11]

Offence-related property (Canada) "is any property, within or outside Canada, by means or in respect of which an indictable offence under the *Criminal Code* is committed, that is used in any manner in connection with the commission of an indictable offence under the *Criminal Code*, or that is intended for use for the purpose of committing an indictable offence."[12]

Pecuniary Penalty Orders (Australia) "under the *Proceeds of Crime Act* 2002, when the court orders an offender to pay an amount equal to the benefit derived by the person from the commission of the offence."[13]

Proceeds of crime (Canada) refers to "any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence, or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence."[14]

Proceeds of an illegal activity (United States) is "any property directly resulting from, or that can be traced to, an illegal activity. Once a crime is identified, the government may seize any property flowing from the activity. In some cases, the government may seize property in lieu of provable criminal proceeds. Statutory innocent owner defenses provide a check on the seizure power, although this burden lies with the owner, not the government."[15]

Tools or Instrumentalities Used in Commission of a Crime (United States) refers to "any property used in the commission of a crime, including vehicles and real estate. By being associated with the crime, the property is "guilty" of the offence, and subject to seizure. In some cases, the innocence of the owner may not be a defence, although Constitution limitations, such as the Eighth Amendment's Excessive Fines Clause, may apply."
[16]

Unexplained wealth orders (Australia) target "the proceeds of criminal activities without a predicate offence. They are designed to further strengthen the fight against organized crime, by

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[11]Commonwealth Director of Public Prosecutions. (2012). *Annual Report 2011-2012* ,Commonwealth of Australia, 10 October 2012:284:133, [accessed 2013-01-07] from: http://www.cdpp.gov.au/Publications/Annual-Reports/CDPP-Annual-Report-2011-2012.pdf.
[12]McKeachie, J. and Simser, J. (2009). "Civil asset forfeiture in Canada," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., 2009:361:157-186:164.
[13]Commonwealth Director of Public Prosecutions. (2012). *Annual Report 2011-2012* ,Commonwealth of Australia, 10 October 2012:284:133, [accessed 2013-01-07] from: http://www.cdpp.gov.au/Publications/Annual-Reports/CDPP-Annual-Report-2011-2012.pdf.
[14]*Criminal Code*, R.S.C., 1985, c. C-46 s. 462.3, [accessed 2012-12-21] from: http://laws-lois.justice.gc.ca/PDF/C-46.pdf.
[15]Legal Information Institute. (2013). *LII Background on Forfeiture*, [accessed 2013-01-31] from: http://www.law.cornell.edu/background/forfeiture/
[16] Ibid.

enhancing the powers of the state in depriving criminal enterprises of their illicitly acquired property, particularly those individuals for whom insufficient evidence exists for criminal conviction."[17]

Unlawful conduct (UK) is defined under s.241 of the Proceeds of Crime Act, 2002 as: "1) conduct occurring in any part of the UK is unlawful conduct under the criminal law of that part. 2) Conduct which a) occurs in a country outside the UK and is unlawful under the criminal law of that country, and b) if it occurred in a part of the UK, would be unlawful under the criminal law of that part is also unlawful conduct. 3) The court or sheriff must decide on a balance of probabilities whether it is proved – a) that any matters alleged to constitute unlawful conduct have occurred, or b) that any person intended to use any cash in unlawful conduct."[18]

[17]Booz, Allen, Hamilton. (2011). *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, October 31, 2011:845:9, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf.
[18]*Proceeds of Crime Act,* 2002 (UK). c.29, Part 5, Chapter 1, Section 241, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/241.

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Anthony Kaytor (Re), 2012, SKQB 79, [accessed 2013-02-21] from: http://www.civilforfeiture.ca/anthony-kaytor-re-2012-skqb-79/.

Director under the Seizure of Criminal Property Act, 2009 v. Speiler, 2012 SKQB 77, [accessed 2013-02-21] from: http://www.civilforfeiture.ca/director-under-the seizure-criminal-property-act-2009-v-speiler-2012-skqb-77/

Supreme Court of Canada Civil Forfeiture Case Law

Chatterjee v. Ontario (Attorney General), 2009 SCC 19, [2009] 1 S.C.R. 624, paragraph 54, [accessed 2013-01-11] from: http://www.canlii.org/eliisa/highlight.do?text=chatterjee&language=en&searchTitle=Canada+%28Federal%29+-+Supreme+Court+of+Canada&path=/en/ca/scc/doc/2009/2009scc19/2009scc19.html.

F.H. v. McDougall, 2008 SCC 53, [2008] 3 SCR 41, paragraph 49, [accessed 2013-01-11] from: http://www.canlii.org/eliisa/highlight.do?text=F.H.+v.+McDougall%2C+2008+SCC+53%2C+%5B2008%5D+3+SCR+41&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/sc

c/doc/2008/2008scc53/2008scc53.html&searchUrlHash=AAAAAQAvRi5ILiB2LiBNY0RvdWdhbGwsIDIwMDggU0NDIDUzLCBbMjAwOF0gMyBTQ1IgNDEAAAAAAAAB.

Martineau v. M.N.R., 2004 SCC 81, [2004] 3 SCR 737, paragraph 30 , [accessed 2013-01-11] from: http://www.canlii.org/eliisa/highlight.do?text=Martineau+v.+M.N.R.%2C+2004+SCC+81%2C+%5B2004%5D+3+SCR+737++&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2004/2004scc81/2004scc81.html&searchUrlHash=AAAAAQA0TWFydGluZWF1IHYuIE0uTi5SLiwgMjAwNCBTQ0MgODEsIFsyMDA0XSAzIFNDUiA3MzcgIAAAAAAAAAE.

R. v. Grant, 2009 SCC 32, [2009] 2 SCR 353, paragraph 3, [accessed 2013-01-11] from: http://www.canlii.org/eliisa/highlight.do?text=R.+v.+Grant%2C+2009+SCC+32%2C+%5B2009%5D+2+SCR+353&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/2009/2009scc32/2009scc32.html&searchUrlHash=AAAAAQAqUi4gdi4gR3JhbnQsIDIwMDkgU0NDIDMyLCBbMjAwOV0gMiBTQ1IgMzUzAAAAAAAAAQ.

9.0 Appendices

Appendix 1: Proposed Databases and Keywords for Literature Review

English databases

1. Academic Search Primer
2. Canadian Public Policy Collection
3. Criminal Justice Gray Literature Database
4. Criminology: a SAGE Full-text Collection
5. EBSCO databases
6. Emerald Management Xtra
7. Education Resources Information Center (ERIC)
8. IngentaConnect
9. Journal Storage (JSTOR)
10. National Criminal Justice Reference Service (NCJRS)
11. Psychology & Behavioural Sciences Collection
12. Social Science Research Network (SSRN)
13. Social Sciences Citation Index (SocINDEX)
14. Theses Canada
15. Hein Online

French databases

- Cairn

English keywords

Search 1: (civil forfeiture* OR criminal forfeiture*) AND (Canada)

Search 2: (civil law* OR unlawful activit* OR forfeiture of property* OR proceeds of crime*) AND (confiscat*)

Search 3: (civil forfeiture*) OR (criminal forfeiture*) AND (Australia OR United States OR US OR USA OR United Kingdom OR UK OR Commonwealth model OR Great Britain OR Britain)

French keywords

Recherche 1: (la confiscation civile* OU la confiscation pénal*) ET (Canada)

Recherche 2: (droit civil* OU l'activité illégale* OU la confiscation des biens* OU produits de la criminalité) ET (*la confiscation)

Recherche 3 : (confiscations au civil*) ET (Australie OU les États-Unis OU US OU Royaume Uni OU le modèle du Commonwealth OU grande Bretagne OU GB)

Appendix 2: Treaties and Agreements re: Organized Crime and Money Laundering[19]

Year	*Treaties or Agreements relating to Organized Crime and Money Laundering from 1874 to 2004*
1874	Extradition Treaty between Belgium and Switzerland
1900	Extradition Treaty between the United States of America and Switzerland
1912	International Opium Convention
1931	UN Convention Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs
1939	UN Convention for the Suppression of the Illicit Traffic in Dangerous Drugs
1944	Bretton Woods Agreement
1950	European Convention on the Protection of Human Rights and Fundamental Freedoms
1952	First Protocol to the Convention on the Protection of Human Rights and Fundamental Freedoms
1957	Treaty of Rome (European Economic Community)
1959	European Convention on Mutual Assistance in Criminal Matters
1961	UN Single Convention on Narcotic Drugs
1966	International Covenant on Civil and Political Rights
1968	Benelux Treaty on the Enforcement of Foreign Judicial Decisions
1970	European Convention on the International Validity of Criminal Judgments
1971	UN Convention on Psychotropic Substances
1972	European Convention on the Transfer of Proceedings in Criminal Matters
1973	Treaty on Mutual Assistance in Criminal Matters between the United States and Switzerland
1977	European Convention on the Suppression of Terrorism
1978	Second Additional Protocol to the European Extradition Convention
1980	Recommendation No. R(80)10 'Measures against the transfer and safeguarding of the funds of criminal origin'
1982	Treaty between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters
1984	Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms
	Treaty between the United States of America and the Italian Republic on Mutual Assistance in Criminal Matters
	Exchange of Letters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States Concerning the Cayman Islands and Matters Concerned with, Arising from, Related to or Resulting from any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961 as Amended by the Protocol Amending the Single Convention on Narcotic Drugs
1985	Canada-United States Treaty on Mutual Legal Assistance in Criminal Matters
1986	Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth
	Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters

[19]Stessens, G. (2002). *Money Laundering: A New International Law Enforcement Model*, Cambridge University Press, Cambridge, United Kingdom, 2002:460:xviii.

Year	*Treaties or Agreements relating to Organized Crime and Money Laundering from 1874 to 2004*
	Continued
1987 1987	Switzerland-United States Memorandum of Understanding on Mutual Assistance in Criminal Matters and Ancillary Administrative Proceedings
	Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance
1988	UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
	Basle Statement of Principles
	Convention for Mutual Administrative Assistance in Tax Matters
	Treaty between the United States of America and the Commonwealth of Bahamas on Mutual Assistance in Criminal Matters
	Memorandum of Understanding between the Attorney-General of the United States of America and the Solicitor General of Canada
1989	EC Second Banking Directive
	EC Insider Dealing Directive
1990	Schengen Convention
	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
	UN Model Treaty on Mutual Assistance in Criminal Matters
	Optional Protocol to the UN Model Treaty on Mutual Assistance in Criminal Matters concerning the Proceeds of Crime
	FATF Recommendations
1991	EC Council Directive No. 91/308 of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering
1992	CICAD Model Regulations Concerning Money Laundering Offences Connected to Illicit Drug Trafficking, Related and Other Serious Offences
1994	Agreement between the United States and Mexico
1995	Europol Convention
	Model Memorandum of Understanding of the Egmont Group
	UN Model Law on Money Laundering, Confiscation and International Cooperation in Relation to Drugs
	UN Convention on the use of information technology for customs purposes
1996	Inter-American Convention against Corruption
	EU Extradition Convention
1997	Treaty of Amsterdam
	Basle Core Principles for Effective Banking Supervision
	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
	Second Protocol to the Convention on the protection of the European Communities' financial interests
1998	EU Joint Action 0f 3 December 1998 concerning arrangements for cooperation between Member States in respect of identification, tracing, freezing or seizing and confiscation of instrumentalities and the proceeds from crime
1999	Criminal Law Convention on Corruption
	Council of Europe Civil Law Corruption Convention
	UN Convention for the Suppression of the Financing of Terrorism
2000	EU Convention on Mutual Legal Assistance
	European Convention on Human Rights (ECHR)
	First Protocol – the Right to Property
	Protocol 7 – Double Jeopardy Protocol
	UN Convention against Transnational Organized Crime

Year	*Treaties or Agreements relating to Organized Crime and Money Laundering from 1874 to 2004*
	Continued
2002	The London Scheme for Extradition within the Commonwealth
2003	Protocol to the Criminal Law Convention on Corruption
	UN Convention Against Corruption
2004	G8 Declaration on Recovering Proceeds of Corruption

Appendix 3: Australian Forfeiture Legislation

Anti-Money Laundering and Counter-Terrorism Financing Act, 2006 (Cth)
Australian Crime Commission Act, 2002 (Cth)
Australian Federal Police Act, 1979 (Cth)
Confiscation Act, 1997 (Vic)
Confiscation of Criminal Assets Act, 2003 (ACT)
Confiscation of Proceeds of Crime Act, 1989 (NSW)
Crimes (Confiscation of Profits) Act, 1993 (Tas)
Criminal Assets Confiscation Act, 2005 (SA)
Criminal Assets Recovery Act, 1990 (NSW)
Criminal Proceeds Confiscation Act, 2002 (Qld)
Criminal Property Confiscation Act, 2000 (WA)
Criminal Property Forfeiture Act, 2002 (NT)
Customs Act, 1901 (Cth)
Director of Public Prosecutions Act, 1983 (Cth)
Drug Misuse and Trafficking Act, 1985 (NSW)
Proceeds of Crime Act, 1987 (Cth)
Proceeds of Crime Act, 2002 (Cth)

Appendix 4: British Legislation relating to Criminal and Civil Forfeiture

Misuse of Drugs Act 1971
Powers of Criminal Courts Act 1973
Customs and Excise Management Act 1979
Drug Trafficking Offences Act 1986
Criminal Justice (Scotland) Act 1987
Criminal Justice Act 1988
Criminal Justice (International Cooperation) Act 1990
Criminal Justice Act 1993
Drug Trafficking Act 1994
Criminal Justice and Public Order Act 1994
Proceeds of Crime Act 1995
Proceeds of Crime (Scotland) Act 1995
Proceeds of Crime (Northern Ireland) Order 1996
Crime and Disorder Act 1998
Proceeds of Crime Act 2002

Appendix 5: American Legislation relating to Asset Forfeiture (including both Criminal and Civil Forfeiture)[20]

US Federal Asset Forfeiture Statutes	
Title 7	7 USC Sections 2024(e) and (f). Forfeiture of property involved in illegal food stamp transactions, criminal forfeiture.
Title 8	8 USC Section 1324(b). Seizure and forfeiture of conveyances, gross proceeds, and property traceable to such conveyances or proceeds.
Title 13	13 USC Section 305. Penalties for unlawful export information activities.
Title 15	15 USC Section 715f. Forfeiture of contraband oil shipped in violation of law; procedure 15 USC Section 1177. Civil forfeiture of coins and currency in confiscated gambling devices.
Title 16	16 USC Sections 470 gg(b) and (c). Forfeitures; disposition of penalties collected and items forfeited in cases involving archaeological resources excavated or removed from Indian lands. (*Archaeological Resources Protection Act*). 16 USC Section 916f. Violations, fines and penalties. (*Whaling Convention Act*). 16 USC Section 957. Violation, fines and forfeitures; application of related laws. (*Tuna Convention*). 16 USC Section 972f. Prohibited acts. (Eastern Pacific tuna fishing). 16 USC Section 1171. Seizure and forfeiture of vessels. (North Pacific fur seals). 16 USC Section 1376. Seizure and forfeiture of cargo. (*Marine Mammal Protection Act*). 16 USC Section 1377. Enforcement. (*Marine Mammal Protection Act*). 16 USC Section 1540. Penalties and enforcement. (Endangered species). 16 USC Section 1860. Civil forfeitures. (National Fishery Management Program). 16 USC Section 3374. Forfeiture (*Lacey Act*). 16 USC Section 3606. Violations and penalties. (North Atlantic salmon fishing). 16 USC Section 3637. Prohibited acts and penalties. (Pacific salmon fishing). 16 USC Section 5010. Penalties. (*North Pacific Anadromous Stocks Convention*). 16 USC Section 5106. Secretarial action (Atlantic coastal fisheries). 16 USC Section 5154. Moratorium. (Atlantic striped bass conservation). 16 USC Section 5509. Forfeitures. (High seas fishing). 16 USC Section 5606. Prohibited acts and penalties. (*Northwest Atlantic Fisheries Convention*).
Title 17	17 USC Section 506(b). Criminal offences. (Copyright infringements).
Title 18	18 USC Section 38. Fraud involving aircraft or space vehicle parts in interstate or foreign commerce. 18 USC Section 492. Forfeiture of counterfeit paraphernalia. 18 USC Section 512. Forfeiture of certain motor vehicles and motor vehicle parts. 18 USC Section 545. Smuggling goods into the United States. 18 USC Section 550. False claim for refund of duties. 18 USC Section 793. Gathering, transmitting, or losing defence information. 18 USC Section 794. Gathering or delivering defence information to aid foreign government. 18 USC Section 844(c). Penalties. (Explosive materials).
Title 18	18 USC Section 924(d). Penalties. (Firearms/ammunition). 18 USC Section 981. Civil forfeiture.

[20]United States Department of Justice. (2011). *Asset Forfeiture & Money Laundering Statutes*, Criminal Division, Asset Forfeiture and Money Laundering Section, Washington, DC, 2011:333:iii-vii, [accessed 2013-02-04] from: http://www.justice.gov/criminal/afmls/pubs/pdf/statutes11.pdf.

US Federal Asset Forfeiture Statutes	
	18 USC Section 982. Criminal forfeiture. 18 USC Section 983. General rules for civil forfeiture proceedings. 18 USC Section 984. Civil forfeiture of fungible property. 18 USC Section 985. Civil forfeiture of real property. 18 USC Section 986. Subpoenas for bank records. 18 USC Section 987. Anti-terrorist forfeiture protection. 18 USC Section 1028. Fraud and related activity in connection with identification documents, authentication features, and information. 18 USC Section 1029. Fraud and related activity in connection with access devices. 18 USC Section 1030. Fraud and related activity in connection with computers. 18 USC Section 1037. Fraud and related activity in connection with electronic mail. 18 USC Section 1467. Criminal forfeiture. (Obscenity). 18 USC Section 1594. General provisions. (Trafficking in persons). 18 USC Section 1762. Marking packages. 18 USC Section 1834. Criminal forfeiture. (Protection of trade secrets). 18 USC Section 1955. Prohibition of illegal gambling businesses. 18 USC Section 1956 (c)(7). Specified unlawful activity. 18 USC Section 1960. Prohibition of unlicensed money transmitting businesses. 18 USC Section 1961(1). Definitions. 18 USC Section 1963. Criminal penalties. (*Racketeer Influenced and Corrupt Organization Act*) (RICO) 18 USC Section 2232. Destruction or removal of property to prevent seizure. 18 USC Section 2233. Rescue of seized property. 18 USC Section 2253. Criminal forfeiture. (For child pornography). 18 USC Section 2254. Civil forfeiture. (For child pornography). 18 USC Section 2318(d). Trafficking in counterfeit labels for phono-records, copies of computer programs or computer program documentation or packaging, and copies of motion pictures or other audio visual works, and trafficking in counterfeit computer program documentation or packaging. 18 USC Section 2319A. Unauthorized fixation of and trafficking in sound recordings and music videos of live performances. 18 USC Section 2319B. Unauthorized recording of Motion pictures exhibition facility. 18 USC Section 2320. Trafficking in counterfeit goods or services. 18 USC Section 2323. Forfeiture, destruction, and restitution. 18 USC Section 2331. Definitions (Terrorism). 18 USC Section 2332b(g)(5). Definition. (Federal crime of terrorism). 18 USC Section 2344. Penalties. (Trafficking in contraband cigarettes). 18 USC Section 2428. Forfeitures. (Transportation for illegal sexual activity and related crimes). 18 USC Section 2513. Confiscation of wire, oral, or electronic communication intercepting devices. 18 USC Section 3051. Powers of special agents of Bureau of Alcohol, Tobacco, Firearms, and Explosives. 18 USC Section 3322. Use of grand jury information in forfeiture proceedings. 18 USC Section 3486. Administrative subpoenas. 18 USC Section 3552(d). Disclosure of presentence reports. 18 USC Section 3554. Order of criminal forfeiture. 18 USC Section 3665. Firearms possessed by convicted felons.
Title 19	19 USC Section 1466. Equipment and repairs of vessels. 19 USC Section 1497. Penalties for failure to declare. 19 USC Section 1592. Penalties for fraud, gross negligence, and negligence.
Title 19	19 USC Section 1594. Seizure of conveyances. 19 USC Section 1595a. Importation offences.

US Federal Asset Forfeiture Statutes	
	19 USC Section 1602. Seizure, report to customs officer. 19 USC Section 1603. Seizure, warrants and reports. 19 USC Section 1604. Seizure, prosecution. 19 USC Section 1605. Seizure, custody, storage. 19 USC Section 1606. Seizure, appraisement. 19 USC Section 1607. Seizure, value USD$ 500,000 or less, prohibited articles, transporting conveyances. 19 USC Section 1608. Seizure, claims, judicial condemnation. 19 USC Section 1609. Seizure, summary forfeiture and sale. 19 USC Section 1610. Seizure, judicial forfeiture proceedings. 19 USC Section 1611. Seizure, sale unlawful. 19 USC Section 1612. Seizure, summary sale. 19 USC Section 1613. Disposition of proceeds of forfeited property. 19 USC Section 1613b. Customs Forfeiture Fund. 19 USC Section 1614. Release of seized property. 19 USC Section 1615. Burden of proof in forfeiture proceedings. 19 USC Section 1616a. Disposition of forfeited property. 19 USC Section1617. Compromise of Government claims by Secretary of the Treasury. 19 USC Section 1618. Remission or mitigation of penalties. 19 USC Section 1619. Award of compensation to informers. 19 USC Section 1620. Acceptance of money by United States officers. 19 USC Section 1621. Limitation of actions. 19 USC Section 1703. Seizure and forfeiture of vessels. 19 USC Section 2609. Seizure and forfeiture. (Cultural property).
Title 21	21 USC Section 334. Seizure. (*Federal Food, Drug and Cosmetic Act*). 21 USC Section 853. Criminal forfeitures. 21 USC Section 881. Forfeitures (Civil). 21 USC Section 1049. Seizure and condemnation proceedings (Egg products).
Title 22	22 USC Section 401. Illegal exportation of war materials. (Exportation offences). 22 USC Section 1978. Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs.
Title 26	26 USC Section 5872. Forfeitures. (Machine guns, destructive devices, and certain other firearms). 26 USC Section 7302. Property used in violation of internal revenue laws. 26 USC Section 7303. Other property subject to forfeiture.
Title 28	28 USC Section 524(c). Availability of Appropriations. (Department of Justice Assets Forfeiture Fund). 28 USC Section 1355. Fine, penalty, or forfeiture. (Subject matter jurisdiction, *in rem* jurisdiction). 28 USC Section 1395. Fine, penalty, or forfeiture. (Venue). 28 USC Section 1651. All Writs Act. 28 USC Section 2001. Sale of realty generally. 28 USC Section 2002. Notice of sale of realty. 28 USC Section 2003. Marshal's incapacity after levy on or sale of realty. 28 USC Section 2004. Sale of personal property, generally. 28 USC Section 2005. Appraisal of goods taken on execution. 28 USC Section 2006. Execution against revenue officer. 28 USC Section 2007. Imprisonment for debt.
Title 28	28 USC Section 2461. Mode of recovery. 28 USC Section 2462. Time for commencing proceedings.

US Federal Asset Forfeiture Statutes	
	28 USC Section 2465. Return of property to claimant, liability for wrongful seizure, attorney fees, costs and interests. 28 USC Section 2466. Fugitive disentitlement. 28 USC Section 2467. Enforcement of foreign judgment. 28 USC Section 2680. Exceptions. (Federal Tort Claims Act). 28 USC Section 3304(b). Transfer fraudulent as to a debt to the United States. 28 USC Section 3306(a). Remedies of the United States.
Title 31	31 USC Section 5317. Search and forfeiture of monetary instruments. 31 USC Section 5318(k). Compliance, exemptions, and summons authority. (Bank records related to anti-money laundering programs). 31 USC Section 5324. Structuring transactions to evade reporting requirement prohibited. (Involving financial institutions). 31 USC Section 5331. Reports relating to coins and currency received in nonfinancial trade or business. 31 USC Section 5332. Bulk cash smuggling into or out of the United States. 31 USC Section 9703. Department of the Treasury Forfeiture Fund.
Title 42	42 USC Section 1786 (p). Criminal forfeiture. (Supplemental nutrition program for women, infants, and children).
Title 46	46 USC Section 12118. Owners engaged primarily in manufacturing or mineral industry. 46 USC Section 31327. Forfeiture of mortgagee interest. 46 USC Section 55102. Transportation of merchandise. 46 USC Section 55105. Transportation of hazardous waste. 46 USC Section 70507. Forfeitures.
Title 49	49 USC Section 80301. Definitions. 49 USC Section 80302. Prohibitions. 49 USC Section 80303. Seizure and forfeiture. 49 USC Section 80304. Administrative. 49 USC Section 80305. Availability of certain appropriations. 49 USC Section 80306. Relationship to other laws.
Title 50	50 USC Appendix Section 16. Offences, punishment, forfeitures of property. (*Trading with the Enemy Act*) 50 USC Section 1702. Presidential authorities (*International Emergency Economic Powers Act*) 50 USC Appendix Section 2410(g). Violations. (*Export Administration Act*).
28 Code of Federal Regulations Governing the Remission or Mitigation of Civil and Criminal Forfeitures.	28 CFR Section 9.1. Authority, purpose, and scope. 28 CFR Section 9.2. Definitions. 28 CFR Section 9.3. Petitions in administrative forfeiture cases. 28 CFR Section 9.4. Petitions in judicial forfeiture cases. 28 CFR Section 9.5. Criteria governing administrative and judicial remission and mitigation. 28 CFR Section 9.6. Special rules for specific petitioners. 28 CFR Section 9.7. Terms and conditions of remission and mitigation. 28 CFR Section 9.8. Provisions applicable to victims. 28 CFR Section 9.9. Miscellaneous Provisions.
P.L. 106-185, Statute 202	*Civil Asset Forfeiture Reform Act* (CAFRA)
Federal Rules of Civil Procedure	Rule 26. Duty to Disclose, General Provisions Governing Discovery

US Federal Asset Forfeiture Statutes	
Federal Rules of Criminal Procedure	Rule 1. Scope, definitions. Rule 11. Pleas. Rule 32.2. Criminal Forfeiture. Rule 41. Search and Seizure.
Supplemental Rules for Certain Admiralty and Maritime Claims	Rule C. *In rem* actions: special provisions. Rule E. Actions *in rem* and quasi *in rem*: general provisions. Rule G. Forfeiture actions *in rem*.

State and US Territory Asset Forfeiture Legislation[21]	
State	***Disposition Statutes***
Alabama	Alabama Code: Section 20-2-93 (2010) & Section 13A-12-200.8
Alaska	Alaska Statutes: Sections 11.41.468 (2010) & 11.46.487, Ch.12.35
Arizona	Arizona Revised Statute Annotated: Sections 13-3557 & 13-4304
Arkansas	Arkansas Code Annotated: Section 5-64-505 (2009)
California	California Health & Safety Code: Section 11471 (2010) California Penal Code: Section 502.01 (2010)
Colorado	Colorado Revised Statutes: Section 16-13-504 (2009)
Connecticut	Connecticut General Statutes: Sections 54-36h (2010)
Delaware	Delaware Code Annotated: Title 16, Section 4784 (2010)
District of Columbia	DC Code Annotated: Sections 22-2723 & 48-905.02
Florida	Florida Statute Annotated: Sections 932-701 (2009) & 932.703 (2009)
Georgia	Georgia Code Annotated: Sections 16-12-100 (2009) &16-13-49
Hawaii	Hawaii Revised Statutes: Section 712A-5 (2009)
Idaho	Idaho Code Annotated: Sections 37-2744A (2009) & 37-2802 (2009)
Illinois	720 Illinois Comprehensive Statutes 550/12
Indiana	Indiana Code Annotated: Section 34-24-1-1 (2009) (as amended by P.L.1-2009 and P.L. 143-2009)
Iowa	Iowa Code Annotated: Section 809A.4 (2008)
Kansas	Kansas Statute Annotated: Sections 60-4105 (2008) & 60-4106 (2008)
Kentucky	Kentucky Revised Statutes Annotated: Section 218A.410 (2010)
Louisiana	Louisiana Revised Statutes Annotated: Sections 14:54.4 (2010) & 40.2604 (2010)
Maine	Maine Revised Statutes Annotated: Title 15, Section 5821 (2009)
Maryland	Maryland Annotated Code Articles: Sections 12-102 (2010) & 12-103 (2010)
Massachusetts	Massachusetts Annotated Laws: Chapter 94C, Section 47 (2010)
Michigan	Michigan Comprehensive Laws: Section 333.7521 (2010)

[21]National District Attorneys Association. (2010). *Forfeiture*, updated March 2010:209:1-4, [accessed 2013-02-01] from: http://www.ndaa.org/pdf/Forfeiture_3_2010.pdf.

State and US Territory Asset Forfeiture Legislation[21]	
State	***Disposition Statutes***
Minnesota	Minnesota Statute Annotated: Section 609.5311 (2009) & 609.5312 (2009)
Mississippi	Mississippi Code Annotated: Section 41-29-153 (2010)
Missouri	Missouri Annotated Statutes: Section 513.607 (2009)
Montana	Montana Code Annotated: Section 44-12-102 (2009)
Nebraska	Nebraska Revised Statutes: Section 28-431 (2010)
Nevada	Nevada Revised Statutes: Section 453.301 (2009)
New Hampshire	New Hampshire Revised Statutes Annotated: Sections 318-B:17-B (2010), 453.301 (2009), 633:8
New Jersey	New Jersey Statutes Annotated: Section 2C:64-1 (2010)
New Mexico	New Mexico Code Annotated: Section 30-45-7 (2009)
New York	New York Civil Practice Law & Rules: Sections 480.05 (Consol. 2010), 1310 (Consol. 2010), 1311 (Consol. 2010)
North Carolina	North Carolina General Statutes Annotated: Section 90-112 (2010)
North Dakota	North Dakota Centennial Code Annotated: Section 19-03.1-36
Ohio	Ohio Revised Code Annotated: Section 2981.02 (2010)
Oklahoma	Oklahoma Statutes Annotated: Title 21,Section 1738 (2009), Title 63, Section 2-503 (2009)
Oregon	Oregon Revised Statutes: Section131.558 (2007)
Pennsylvania	Pennsylvania Consolidated Statute Annotated: Title 18, Section3004 (2009), Title 42, Section 6801 (2009)
Rhode Island	Rhode Island General Laws: Sections 21-28-5.04 (2010) & 21-28-5.05 (2010)
South Carolina	South Carolina Code Annotated: Section 44-53-520 (2009)
South Dakota	South Dakota Codified Laws Annotated: Section 34-20B-70 (2009)
Tennessee	Tennessee Code Annotated: Section 53-11-451 (2010)
Texas	Texas Code Criminal Procedure: Articles 59.01 (2010) & 59.02 (2010)
Utah	Utah Code Annotated: Section 58-37-13 (2009)
Vermont	Vermont Statute Annotated: Title 18, Section 4241 (2010)
Virginia	Virginia Code Annotated: Sections 19.2-386.8 (2010) & 19.2-386.22 (2010)
Washington	Washington Revised Code Annotated: Sections 9.68A.120 (2010), 10.105.010 (2010), 69.50.505 (2010)
West Virginia	West Virginia Code: Section 60A-7-703 (2009)
Wisconsin	Wisconsin Statute Annotated: Section 961.55 (2009)
Wyoming	Wyoming Statute: Section 35-7-1049 (2010)
Guam	Guam Code Annotated: Title 9, Section 67.502.1 (2009)
Puerto Rico	Puerto Rico Laws Annotated: Title 24, Section 2512 (2009)
Virgin Islands	Virgin Islands Code Annotated: Title 19, Section 623 (2010)

Appendix 6: Standard of Proof Required for State Civil Forfeiture Laws[22,*]

Difficulty in forfeiting assets	***Standard of Proof***	***States***
Easy	Prima Facie/Probable Cause	Alabama, Alaska, Delaware, Illinois, Massachusetts, Missouri, Montana, Rhode Island, South Carolina, Wyoming
Less easy	Probable Cause and Preponderance of the Evidence	Georgia, North Dakota, South Dakota, Washington
Moderate	Preponderance of the Evidence	Arizona, Arkansas, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia
More specific	Preponderance of the Evidence, and Clear and Convincing	Kentucky, New York, Oregon
Difficult	Clear and Convincing	Colorado, Connecticut, Florida, Minnesota, Nevada, New Mexico, Ohio, Utah, Vermont
More difficult	Clear and Convincing and Beyond a Reasonable Doubt	California
Most difficult (uses criminal standard)	Beyond a Reasonable Doubt	Nebraska, North Carolina,** Wisconsin

*Most commonly, in states with two forfeiture standards, the higher one is for the forfeiture of real property.
**State law effectively does not civil forfeiture.

[22]Carpenter, Dick M., Salzman, Larry and Knepper, Lisa. (2011). *How Federal 'Equitable Sharing' Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, Institute for Justice, October 2011:14:5, [accessed 2013-02-05] from: http://walker-foundation.org/Files/walker/2012/inequitable_justice-mass-forfeiture.pdf.

Appendix 7: Canadian Criminal Asset Forfeiture[23]

Criminal Law background

There are four methods for exercising criminal asset forfeiture.

First, under section 462.37 of the *Criminal Code* a person who has been convicted of a 'designated offence'[24] or is found guilty but receives an absolute or conditional discharge is subject to criminal asset forfeiture as part of their sentence. Criminal asset forfeiture is not available for offences that are strict summary offences or that are hybrid offences prosecuted summarily.

Criminal asset forfeiture is made only upon application by the Crown prosecutor, where the court is satisfied upon a balance of probabilities that the property is the 'proceeds of crime'[25] and that the offence was committed in relation to the property. Where the Crown prosecutor does not satisfy the court that the property was in relation to the proven offence, then where the Crown prosecutor proves beyond a reasonable doubt that the property is proceeds of crime then the court may forfeit the property. The offence for which forfeiture may be ordered can be one committed inside or outside of Canada. Where a court cannot make an order of forfeiture of the property because of some defect with respect to the property a 'fine in lieu of forfeiture' may be ordered.[26] If the fine is not paid then a consecutive jail term, determined by statute, shall be ordered.

Secondly, under section 462.38 of the *Criminal Code* there is a stand-alone application for forfeiture of property for the situation where a proceeding for a designated offence has been commenced but that the accused person has either absconded from the jurisdiction or died. The court must be satisfied beyond reasonable doubt, *inter alia*, that the property is proceeds of crime.

Thirdly, under section 490.1 of the *Criminal Code* forfeiture of property may also be made upon application after conviction of a person for an indictable offence where the court is satisfied that the property is 'offence-related property.' 'Offence-related property' is any property, within or outside Canada, by means or in respect of which an indictable offence under the *Criminal Code* is committed, that is used in any manner in connection with the commission of an indictable offence under the *Criminal*

[23]McKeachie, J. and Simser, J. (2009). "Civil asset forfeiture in Canada," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., 2009:361:157-186:163-165.

[24]See Criminal Code, s. 462.3: a 'designated offence' to be "(a) any offence that may be prosecuted by indictment under this (Criminal Code) or any other Act of Parliament, other than an indictable offence prescribed by regulation, or (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a)."

[25]See Criminal Code, s. 462.3: 'proceeds of crime' means "any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence, or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence."

[26]See Criminal Code, s.462.37(3):the defects are that the property "(a) cannot, on the exercise of due diligence, be located; (b) has been transferred to a third party; (c) is located outside Canada; (d) has been substantially diminished in value or rendered worthless; or (e) has been commingled with other property that cannot be divided without difficulty."

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Code, or that is intended for use for the purpose of committing an indictable offence. Similar 'offence-related property' has been limited to the property that is specific to the offence proven.[27]
Fourthly, under section 490(9) of the *Criminal Code*, where property has been seized by the police and is not required for proceedings the court is required to either return the property to the person from whom it was taken, if they had the property lawfully, or forfeit it where the person did not have it lawfully. This is in the essence a section that is meant to deal with property that has been seized but that has not been dealt with in a proceeding or there has been no proceeding brought. Courts have held that section 490(9) is an independent basis for forfeiture. The burden of proof is on the Crown prosecutor to establish that the property is unlawfully in the possession of the party from whom it was seized on a beyond a reasonable doubt standard.[28] Originally, this section dealt merely with the disposition of property that was not dealt with during criminal proceedings or for which criminal proceedings have not been commenced. It was seen as a shorter route to forfeiture; however the courts have decided that the proceedings are to be conducted as if they were a criminal trial.[29] This has significantly reduced the use of section 490(9) as a means of criminal asset forfeiture. While this procedure does not put a person at risk of a criminal conviction, the Public Prosecution Service of Canada has conceded that the *Charter of Rights and Freedoms* (hereinafter *Charter*) applies.[30] Although the *Charter* is to be applied, the force upon which it is applied is blunted.[31]

[27]A narrow approach has been adopted by the courts to mean property related to the specific offence under the CDSA not any offence-related property. See *R. v. Hape 2005* CanLII 26591 (ON CA) at paragraphs 31-42.
[28]Refer to *R. v. West 2005* CanLII 30052 (ON CA), paragraphs 22 and 23.
[29]See *West*, paragraph 27.
[30]See *R. v. Raponi 2004 SCC* 50, paragraph 50, on the basis of *R. v. Daley 2001 ABCA 155.*
[31]See *West*, paragraph 46.

Appendix 8: Canadian Legislation relating to Criminal and Civil Forfeiture

Criminal Forfeiture

Controlled Drugs and Substances Act, 1996 (Canada)
Criminal Code, 1985 (Canada)
Proceeds of Crime and Terrorist Financing Act, 2012 (Canada)
Seized Property Management Act, 1993 (Canada)

Civil Forfeiture

Victims Restitution and Compensation Payment Act, S.A. 2001, c.V-3.5 2001 (AB)
Criminal Notoriety Act, S.A. 2005, c.C-32.5 (AB)
The Civil Forfeiture Act, S.B.C. 2005, c.29, 2005 (BC)
Criminal Asset Management Act, 2012, (BC)
Criminal Injury Compensation Act, 1996 (BC)
The Criminal Property Forfeiture Act, C.C.S.M., 2004, c.C306 (MB)
The Profits of Criminal Notoriety Act, C.C.S.M., 2005, c.P141 (MB)
The Civil Forfeiture Act, S.N.B. c.C-4.5, 2010 (NB)
The Civil Forfeiture Act, S.N.S. 2007, c.27 (NS)
Criminal Notoriety Act, S.N.S. 2006, c.14 (NS)
The Civil Remedies Act, *S.O. 2001* c.28 (ON)
Prohibiting Profiting from Recounting Crimes Act, 2002, S.O. 2002, c.2 (ON)
Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity Act, R.S.Q. c.C-52.2, 2007 (QC)
Seizure of Criminal Property Act, S.S. 2009, c.S-46.002 2005(SK)

Appendix 9: Effectiveness of Canadian Civil Forfeiture

Effectiveness of civil forfeiture in British Columbia

- British Columbia established a civil forfeiture program targeting the instruments and proceeds of unlawful activity in 2006.
- Since 2006, BC's civil forfeiture office has recovered almost CDN$ 28 m[32] in proceeds from criminal activity, including cars, helicopters, houses and cash.
- On July 1, 2010, the new BC Supreme Court Civil Rules came into effect. Its main initiatives include a revised system of pleadings, a case planning conference in each case leading to a case planning order designed to implement case specific procedures and deadlines, modified rules for expert witnesses to ensure their independence and accountability, time limits on examinations for discovery, modifications on the requirements to produce documents and a mandatory trial management conference to streamline the ultimate trial process.
- In May 2011, the Province amended *The Civil Forfeiture Act*, S.B.C. 2005, c.29, 2005 adding the provisions establishing 'administrative forfeiture' – a more streamlined, cost-effective process that would apply to cases where the property is worth CDN$ 75,000 or less and the Province's claim goes undisputed.
- Funds may be used for cost recovery to the Crown.

Effectiveness of civil forfeiture in Alberta

- Alberta established a civil forfeiture program targeting the instruments and proceeds of unlawful activity in 2001.
- Since 2001, Alberta's civil forfeiture office has recovered almost CDN$ 21 m[33] in property and cash tied to criminal activity. This includes over 173 drug dealer cars, 49 drug houses and over 100 cases of bulk cash being restrained.
- On November 1, 2010, the new Alberta Rules of Court came into force. The Rules provide for major structural changes in the manner in which litigation proceeds in Alberta. They expressly set out how they are to be interpreted. The goal is to make all precedent from the former Rule irrelevant and non-binding. An important number of changes are made to the litigation process including use of electronic service, service *ex juris* without court order, standardization of timing requirements, mandatory ADR, renaming of Examinations for Discovery as "Questioning" and expressly including undertakings arising from "Questioning" in the Rules.
- Funds may be used for cost recovery to the Crown.

[32]Shaw, R. (2012). "B.C.'s bent for secrecy over civil forfeiture office not shared by other provinces," *Times Colonist*, (2012-11-11), Victoria, BC, [accessed 2013-02-20] from: http://www.timescolonist.com/news/local/b-c-s-bent-for-secrecy-over-civil-forfeiture-office-not-shared-by-other-provinces-1.13846.

[33]Government of Alberta. (2011). "Provinces work together to seize illegal proceeds of crime: New agreement sees provinces sharing information to fight crime," *News Release* (May 13, 2011), [accessed 2013-02-20] from: http://www.alberta.ca/acn/201105/30419EA29267F-AF00-4480-70C5A90727D6B860.html.

Effectiveness of civil forfeiture in Saskatchewan

- Saskatchewan established a civil forfeiture program targeting the instruments and proceeds of unlawful activity in 2009.
- Since 2009, Saskatchewan's civil forfeiture office has recovered almost CDN$ 0.75 m[34,35] in property and cash tied to criminal activity.
- Since 2009, pursuant to section 186 of *The Traffic Safety Act 2004* (as amended), vehicles are forfeited to the Crown, and sold raising CDN$3,741.00.
- Funds may be used for cost recovery to the Crown.

Effectiveness of civil forfeiture in Manitoba

- Manitoba established a civil forfeiture program targeting the instruments and proceeds of unlawful activity in 2009.
- Since 2009, Manitoba's civil forfeiture office has recovered almost CDN$ 0.75 m[36,37,38] in property and cash tied to criminal activity.
- In 2012, amendments were made to *The Criminal Property Forfeiture Act* to allow for administrative forfeiture against personal property valued at CDN$ 75,000 or less. This process is not available against real property, nor do these proceedings take place in court.
- As of April 2012,[39]more than CDN$ 2.5 m in assets has been successfully forfeited to Manitoba through the civil court process.
- Funds may be used for cost recovery to the Crown.

Effectiveness of civil forfeiture in Ontario

- Ontario established a civil forfeiture program targeting the instruments and proceeds of unlawful activity in 2001.
- Since 2003, Ontario's civil forfeiture office (Civil Remedies Illicit Activities (CRIA)) has recovered almost CDN$ 14.4 m[40] in property and cash tied to criminal activity.

[34]Saskatchewan Ministry of Justice and Attorney General. (2012). Annual Report 11-12, Regina, SK, 2012:53:51, [accessed 2013-02-21] from: http://www.finance.gov.sk.ca/PlanningAndReporting/2011-12/201112JusticeAnnualReport.pdf.
[35]Saskatchewan Ministry of Justice and Attorney General. (2011). Annual Report 10-11, Regina, SK, 2011:53:50, [accessed 2013-02-21] from: http://www.finance.gov.sk.ca/PlanningAndReporting/2010-11/201011JusticeAnnualReport.pdf.
[36]Manitoba Ministry of Justice and Attorney General. (2012). Manitoba Justice (including Justice Initiatives Fund) Annual Report 2011-2012, Winnipeg, MB, 2012:80:24-25, [accessed 2013-02-21] from: http://www.gov.mb.ca/justice/publications/annualreports/pdf/annualreport1112.pdf.
[37]Manitoba Ministry of Justice and Attorney General. (2011). Manitoba Justice (including Justice Initiatives Fund) Annual Report 2010-2011, Winnipeg, MB, 2011:85:25-26, [accessed 2013-02-21] from: http://www.gov.mb.ca/justice/publications/annualreports/pdf/annualreport1011.pdf.
[38]Manitoba Ministry of Justice and Attorney General. (2010). Manitoba Justice (including Justice Initiatives Fund) Annual Report 2009-2010, Winnipeg, MB, 2010:84:25-26, [accessed 2013-02-21] from: http://www.gov.mb.ca/justice/publications/annualreports/pdf/annualreport0910.pdf.
[39]Government of Manitoba. (2012). "Province Proposes Changes to Legislation Targeting Profits of Crime," *News Release* (2012-04-25), [accessed 2013-02-21] from: http://www.news.gov.mb.ca/news/index.html?item=13873.

- Three types of civil cases can be brought forward under *The Civil Remedies Act* (CRA) proceeds, instruments, and conspiracy cases.
- In 2007, amendments were made to CRA to allow civil courts to impound and order the forfeiture, as instruments of unlawful activity, vehicles used or likely to be used by people who have two or more previous licence suspensions relating to drinking and driving offences or who have continued to drive while their licence is suspended for drinking and driving.
- Funds may be used for cost recovery to the Crown.
- About three quarters of CRIA's cases are drug related.

[40]Government of Ontario. (2011). "Seizing Profits from Unlawful Activity Across Provinces," *News Release*, Toronto, ON, [accessed 2013-02-21] from: http://www.news.ontario.ca/mag/en/2011/05/seizing-profits-from-unlawful-activity-across-provinces/.

Appendix 10: Comparison of the Federal and Provincial Forfeiture Rules (Ontario)[41]

Rule	*Criminal Code & Case Law*	*Civil Remedies Act, 2001 (ON)*
Property subject to forfeiture	Any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of the commission in Canada or elsewhere of an indictable offence (**s. 462.3(1)**) Any property, within or outside Canada, that is used or intended to be used that is used in any manner in connection with the commission of an indictable offence (**s. 2**)	Real or personal property, and includes any interest in property acquired, directly or indirectly, in whole or in part, as a result of an offence under an Act of Canada, Ontario or another province or territory of Canada, or elsewhere (**s. 2**)
Standard of proof for forfeiture	If convicted, then it is proof on a balance of probabilities that property is proceeds of crime, otherwise it is proof beyond a reasonable doubt (**s. 462.37(1)-(2)**)	The balance of probabilities applies to all proceedings (**s. 16**)
Applicable Rules of Evidence	The criminal law rules of evidence apply to all proceedings. (*R. v. Mac*)	The rules of the civil court apply to all proceedings. (**s. 15.6**)
When forfeiture can occur	A court must order forfeiture if it finds that the property is proceeds or instruments of crime (**s. 462.37**). A court may decline forfeiture if it is in the interests of justice (**s. 462.37(2.07)**).	A court must order forfeiture if it finds that the property is proceeds or instruments of crime (**ss. 3, 8**), unless it would clearly not be in the interests of justice.
Nature of the Unlawful Conduct	An offence means an indictable offence or inchoate indictable offences such as conspiracy or attempt (**s. 462(3)**).	An offence is an offence under an Act of Canada, Ontario or another province or territory or an offence elsewhere if a similar act were committed in Ontario (**s. 2**).
Presiding Court	Jurisdiction over forfeiture matters is shared by the Provincial and Superior Court. However, warrants issued in one jurisdiction for the seizure of property must be endorsed by a justice in another jurisdiction if executed in the latter jurisdiction (**s. 487(2)**).	The Superior Court presides over matters under the statute (**s. 4**). Therefore, any limitations on the jurisdiction arise only from international law.
Limitation Period	No limitation periods are imposed. The Attorney General, however, is bound by procedural requirements when pursuing forfeiture either post-trial or in the absence of a trial.	For proceeds, the limitation period is fifteen years after the property was first acquired (**s. 3(5)**). There is no limitation period for instruments of crime (**s.8 (5)**).

[41]Krane, J.A. *Forfeited: Civil Forfeiture and the Canadian Constitution*, Master of Laws thesis, Faculty of Law, University of Toronto, Toronto, (2010):139:35, [accessed 2012-12-21] from: https://tspace.library.utoronto.ca/bitstream/1807/25734/3/Krane_Joshua_A_201011_LLM_thesis.pdf.

Appendix 11: Comparative Evaluation of Civil Forfeiture[42,43]

Australia	*Canada*	*United Kingdom*	*United States*
Treaties			
Australia has signed and ratified the following international treaties in relation to bribery and corruption: 1.) OECD Convention on Combating Bribery of Foreign Public Officials in International business Transactions 2.) United Nations Convention against Corruption 3.) United Nations Convention against Transnational Organised Crime.	Canada has signed and ratified the following international treaties in relation to bribery and corruption: 1.) OECD Convention on Combating Bribery of Foreign Public Officials in International business Transactions 2.) United Nations Convention against Corruption 3.) United Nations Convention against Transnational Organised Crime.	The UK has signed and ratified the following international treaties in relation to bribery and corruption: 1.) OECD Convention on Combating Bribery of Foreign Public Officials in International business Transactions 2.) United Nations Convention against Corruption 3.) United Nations Convention against Transnational Organised Crime.	The US has signed and ratified the following international treaties in relation to bribery and corruption: 1.) OECD Convention on Combating Bribery of Foreign Public Officials in International business Transactions 2.) United Nations Convention against Corruption 3.) United Nations Convention against Transnational Organised Crime.
Legislation			
Independent legislation enacted in Western Australia (WA) 2000, Northern Territory (NT) and Commonwealth. New South Wales recently enacted unexplained wealth provisions in 2010.	Civil forfeiture laws are found in Ontario, Alberta, Manitoba, Saskatchewan, British Columbia, New Brunswick, Nova Scotia and Quebec. *Proceeds of Crime and Terrorist Financing Act* (2012)	Civil forfeiture – non-conviction based 1998, *Proceeds of Crime Act* 2002.	*Racketeer Influenced and Corrupt Organization Act* (RICO) where 18 USC Section 981 (1994) involves criminal penalties and 18 USC Sections 982 to 985 (1994) involves civil penalties. Prior to the enactment of RICO, the majority of US federal forfeiture statutes were civil in nature. *Criminal Money Laundering Control Act* 1986 (CMLCA) (18 USC 981) where the CMLCA is the principal civil forfeiture statute in the US. *Civil Asset Forfeiture Reform Act* (CAFRA) (2000)

[42]Booz, Allen, Hamilton. (2011). *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, October 31, 2011:845:Appendix A, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf.

[43]Deloitte. (2012). *Summary of Bribery and Corruption Legislation*, Deloitte, 2012:1, [accessed 2012-12-21] from: https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Forensic/Deloitte_Summary_Bribery_and_Corruption_Legislation_2012.pdf.

Australia	*Canada*	*United Kingdom*	*United States*
Main Characteristics			
*Prosecutor applies to the court for an order *Courts have minimal discretion when deciding on orders (WT, NT) while Commonwealth legislation and NSW give courts more discretion to refuse making the orders *Settlement required *WA and NT statutes do not require showing that any offence was committed, while the Cth and NSW require the prosecution to show on balance of probabilities that an offence was committed. *The burden of proof is on the respondent to justify legitimacy of his property *Unexplained wealth is defined to be the difference between the total value of the wealth of a person and the value of his lawfully acquired wealth *Provisions apply retroactively *Coercive powers use is provided by law such as examination, production and monitoring orders. Persons subject of these orders are prohibited in sharing with anyone that they have been examined or asked to produce such orders. *Legal and professional obligations to confidentiality are not applicable under these Acts.	*Provides for forfeiture of assets by reversing the burden of proof on the respondent *The prosecution (Public Prosecution Service of Canada/Attorney General) or another entity established by law for this purpose can apply to a court for a forfeiture, or freezing/ restraining order of proceeds and instruments of unlawful activities *The standard of evidence is on civil standard of proof. Court will make the order if it is satisfied that there are reasonable grounds to believe property is proceeds or an instrument * The statutes contain a presumption that the property that is subject of an order is an instrument or derived from, unless the contrary is established. *The Crown bears the initial burden of proof to show that a person was engaged frequently in unlawful activities, was associated with criminal organization, or charged but acquitted of an offence.	*Asset Freezing Unit (AFU) applies to the court for a forfeiture order. Standard of proof, balance of probabilities *Assets obtained up to 7 yrs. ago can be object of forfeiture *Criminal confiscation procedure can be initiated following conviction of the defendant. Two types of confiscation: 1) criminal lifestyle is established – all assets obtained over 6 yrs. can be confiscated and civil standard of proof applies. 2) if the criminal lifestyle is not established – only assets derived from a specific crime can be taken; standard of proof-beyond reasonable doubt *Civil recovery: a non-conviction based forfeiture, in which proceedings can be initiated against any person suspected to have in ownership proceeds resulting from unlawful conduct. *Assets Recovery Agency (ARA) (Serious Organised Crime Agency (SOCA)) has to prove on the civil standard balance of probabilities that the respondent has benefited from unlawful conduct. *The burden then shifts on the defendant to prove the legal origin of his assets. Statute of limitation is 12 yrs. for civil forfeiture proceedings. *Court can issue interim freezing and restraining order	*Criminal confiscation only the property of the convicted defendant may be forfeited, not the property of third parties used to facilitate the crime. *No criminal forfeiture is possible if the Government cannot or chooses not to prosecute, for whatever reason, including when criminal evidence is inadmissible, when the defendant cannot be found, or when the defendant is deceased. *Since the focus of criminal proceedings is on punishing the defendant, it is possible to forfeit substitute assets, if the forfeitable property cannot be located or identified, or if it is no longer in the possession of the defendant. *Criminal forfeitures are slower since the US Government has no formal deadline to file an indictment after seizing the assets, and because disposal of the property must be delayed while the rest of the criminal process, including trial and any appeal, is pending.[44] *Forfeiture follows one of three procedural routes: 1) civil forfeiture, 2) criminal forfeiture, and 3) administrative forfeiture. *Administrative forfeiture has been used by US Congress in the interests of expediency and judicial economy. It is used as the first step after seizure in uncontested cases.[45] If there are

[44]Cassella, S. (2007). *Asset Forfeiture Law in the United States*, 2007:25-26 (In a criminal forfeiture, the property cannot be disposed of until the criminal process is complete, and third parties have had a chance to litigate their claims; in a civil forfeiture administrative forfeitures can be done in summary fashion if no one files a claim to the property).

[45]"Under the *Civil Asset Forfeiture Reform Act*, Public Law 106-185, 114 Statute 202 (2000) and the customs laws, administrative forfeiture may be used if the property to be forfeited is cash; or if the property is worth less than USD$500,000; or is a boat, plane or car used to carry or store drugs, 19 US Code 1607; 21 US Code 881(d); 18 US

Australia	*Canada*	*United Kingdom*	*United States*
*Property can be seized or restrained ex-officio for 48 hours. Search warrants can be obtained for so-called emergency cases via means of electronic communications.		to prevent the respondent from dissipating or transferring the property. *Cash recovery – seizure and forfeiture of cash intercepted anywhere which is suspected to derive from crime. *Taxation – SOCA (ARA) can initiate assessment of taxable income of those suspected to have benefited from unlawful conduct. Enhanced cooperation and information sharing between the Agency and Internal Revenue.	no properly filed claims, the property if forfeited. *Civil forfeiture is usually the result of a civil, *in rem* proceeding in which the property is treated as the offender. *When administrative forfeiture is unavailable, or the government has elected not to proceed administratively, the government may seek to secure a declaration of forfeiture by initiating civil judicial proceedings filing either a complaint or a libel against the property. *Money laundering and other civil forfeitures are governed by the CAFRA, where the government must establish that the property is subject to confiscation by a preponderance of evidence.[46] *Cases arising prior to CAFRA amendments, the government must establish probable cause to believe the property is subject to forfeiture.[47]

Code 981(d). Under the tax laws, the procedure is available with respect to personal property valued at USD$100,000 or less, 26 US Code 7325. It has been estimated that each year administrative forfeitures account for 80 to 85 percent of the 30,000 federal forfeitures." Cited in Doyle, C. (2007). *Crime and Forfeiture*, US Congressional Research Service Report for Congress, R97-139A, May 9, 2007:74:8, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.

[46]18 US Code 983(c); *United States v. 5208 Los Franciscos Way*, 385 F.3rd 1187, 1191 (9th Circuit 2004); *United States v. $124, 700 in US Currency (Gomez)*, 458 F.3rd 822, 825 (8th Circuit 2006); *United States v. 6 Fox Street*, 480 F.3rd 38, 42 (1st Circuit 2007); *United States v. 3234 Washington Avenue North*, 480 F.3rd 841, 843 (8th Circuit 2007).

[47]19 US Code 1615; *United States v. 3234 Washington Avenue North*,480 F.3rd 841, 843 (8th Circuit 2007); *United States v. One Harrington and Richardson Rifle, Model M-14, 7.62Caliber*, 378 F.3rd 533, 534 (6th Circuit 2004); *United States v. Collado*, 348 F.3rd 323, 326-327 (2nd Circuit 2003); *United States v. One "Piper" Aztec "F" DeLuxe Model 250 PA 23 Aircraft*, 321 F.3rd 355, 359-60 (3rd Circuit 2003); *Kadonsky v. United States*, 216 F.3rd 499, 503 (5th Circuit 2000); *United States v. United States Currency Deposited for Active Trade Co.*, 176 F.3rd 941, 944 (7th Circuit 1999); *United States v. 22249 Dolorosa St.*, 167 F.3rd 509, 513 (9th Circuit1999); *United States v. $141,770 (Moreno-Pena)*, 157 F.3rd 600, 603 (8th Circuit 1998).
"The standard for probable cause in forfeiture proceedings resembles that required to support a search warrant. The determination of probable cause is based upon a totality of the circumstances test, and the government's evidence must be more than that which gives rise to a mere suspicion, although it need not rise to the level of prima facie proof," *United States v. One 1978 Piper Cherokee Aircraft*, 91 F.3rd 1204, 1207 (9th Circuit 1996); *United States v. $39,873 (Armfield)*, 80 F.3rd 317, 318 (8th Circuit 1996); *United States v. United States Currency Deposited for Active Trade Co.*, 176 F.3rd 941, 944 (7th Circuit 1999); *United States v. $9,041,598.68 (Massieu)*, 163 F.3rd 238,

Australia	*Canada*	*United Kingdom*	*United States*
Evidence of Effectiveness			
*WA from 2000-09, 27 declarations of UWO, of which 18 led to forfeiture decisions. The NT statute is considered as more effective. Common-wealth of Australia amended its civil asset forfeiture Act POCA 2002 to include UWO in 2010. No cases have been filed to date under this Act.	*Civil forfeiture statutes have been considered effective in reducing crime. From the case law, a vast majority of cases fall in the category of cash seizure and growing narcotics.	*Civil recovery is considered to have had some impact on crime reduction, mainly due to lengthy proceedings.	*Since 1993 the US Supreme Court handed down a series of decisions that incrementally began to define the constitutional borders of the government's broad forfeiture authority.[48,49] *CAFRA resolved any due process conflicts by establishing a timetable within which the government must restart the forfeiture proceedings following a claimant's successful motion setting aside an earlier confiscation declaration. *If confiscation involves material entitled to the First Amendment protection, more demanding standards must be met.[50]

246 (5th Circuit 1999); *United States v. $141,770 (Moreno-Pena)*, 157 F.3rd 600, 603 (8th Circuit 1998). Cited in Doyle, C. (2007). *Crime and Forfeiture*, US Congressional Research Service Report for Congress, R97-139A, May 9, 2007:74:11, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.

[48] *Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993)(holding eighth amendment excessive fines standards applicable to civil and criminal forfeitures respectively); *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993)(a seemingly tortured statutory construction that could be read as driven by due process concerns for the property rights of innocent owners); *Republic National Bank v. United States*, 506 U.S. 80 (1992)(a case in which all nine members of the Court rejected application of the strict *in rem* legal fiction that the government sought to employ and in which one justice went so far as to observe that "I am surprised that the Government would make such a transparently fallacious argument in support of its unconscionable position in this case," 506 U.S. at 99 (Stevens, J., concurring in part and concurring in the judgment)). Cited in Doyle, C. (2007). *Crime and Forfeiture*, US Congressional Research Service Report for Congress, R97-139A, May 9, 2007:74:30, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.

[49] *United States v. Ursery*, 518 U.S. 267 (1996) (rejecting the suggestion that the double jeopardy clause preclude, consecutive forfeiture proceedings and criminal prosecutions); *Bennis v. Michigan*, 516 U.S. 442 (1996)(refusing, at least under the facts before it, to find that due process bars the confiscation of the property of an innocent owner); *Libretti v. United States*, 516 U.S. 29 (1995)(holding that neither the promise of a jury trial found in the Sixth Amendment nor that in the Federal Rules of Criminal Procedure extended to questions of fact in criminal forfeiture proceedings). Cited in Doyle, C. (2007). *Crime and Forfeiture*, US Congressional Research Service Report for Congress, R97-139A, May 9, 2007:74:30, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.

[50] *Fort Wayne Books, Inc. v. Indiana*, 489 US 46 (1989), "the Court held while a single book or film might be seized upon an ex parte probable cause showing, books or films could not be taken completely out of circulation until after an adversary hearing on their obscenity. The First Amendment stands as no bar to the use of criminal forfeiture to punish those convicted of engaging in commercial exploitation of obscenity. *Alexander v. United States*, 509 US 544, 552 (1993). Cited in Doyle, C. (2007). *Crime and Forfeiture*, US Congressional Research Service Report for Congress, R97-139A, May 9, 2007:74:40, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.

Australia	***Canada***	***United Kingdom***	***United States***
Differences			
Constitutional Powers			
*The main constitutional documents are *Commonwealth of Australia Constitution Act of 1900*, as amended; the *Statute of Westminster Adoption Act 1942*, as amended; and the *Australia Act 1986*. *Section 128 provides that constitutional amendments must be approved by referendum. *Explicit Commonwealth (Cth) powers in section 51, including property rights. *Implicit or extension of Cth legislative powers in section 96. If a state receives a Cth grant, this provides an option for the Cth to have a role in that area being subsidized.	*Main constitutional documents often referred to are the *Constitution Act, 1867* and the *Constitution Act, 1982*, in which Part I contains the *Canadian Charter of Rights and Freedoms* and Part II addresses the rights of Canada's Aboriginal people. * Post patriation, five methods of constitutional entrenchment[51] evolved. *All amendments to the constitution must be done pursuant to Part V of the *Constitution Act, 1982*, which provides for five different amending formulae. *Explicit federal powers are authorized under section 91 of the *Constitution Act, 1867*, and without a provision giving authority over property rights. *Explicit provincial powers are provided under section 92 of the *Constitution Act, 1867* with authority over property rights.	*UK has an uncodified constitution, and its constitution is based on four principle sources: *The English Declaration of Rights 1689* and the *Scottish Claim of Right Act 1689*, statute law, common law, conventions & works of authority, such as those of Walter Bagehot and A.V. Dicey. *The latter is the idea that all laws and government actions conform to principles. These include equal application of the law, everyone is equal before the law and no person is above the law, persons are free to do anything, unless the law says otherwise; thus, no punishment without a clear breach of the law. * Explicit powers include property rights based on statute law.	**Constitution of the United States, 1787* can be revised through an amendment process. * Its first ten amendments, which were ratified by three-fourths of the states in 1791, are known as the '*Bill of Rights'*. *Article V[52] provides that constitutional amendments must be ratified by two-thirds of the states when ratified by the legislatures of three-fourths of those states. *Explicit federal powers in Article 1, section 8. *Explicit additional federal powers in the *Fourth Amendment*,[53] which provides federal powers over property rights, as well as *Sixteenth Amendment*[54] provides for federal authority over taxation.
Bill of Rights associated with Constitution			
*None.	*Part I of the *Constitution Act, 1982* contains the *Canadian Charter of Rights and Freedoms*.	* *The English Declaration of Rights, 1689* and adoption of the *Human Rights Act, 1998* to implement the *European Convention on Human Rights* (ECHR).	*The first ten amendments of the *US Constitution Act, 1787* are known as the '*Bill of Rights'*.

[51]The five methods include (1) specific mention as a constitutional document in section 52(2) of the Constitution Act, 1982; (2) amendments to constitutional documents using the amending formula in Part V of the Constitution Act, 1982; (3) constitutional entrenchment of a statutory document because its subject matter concerns a topic that can only be changed by the amending formula in Part V of the Constitution Act, 1982; (4) reference by an entrenched document; or (5) ruling by a court that a practice is part of Canada's unwritten constitution.
[52]Article V of the US Constitution, [accessed 2013-03-13] from: http://www.law.cornell.edu/constitution/articlev.
[53]Fourth Amendment to the US Constitution, [accessed 2013-03-13] from: http://www.law.cornell.edu/constitution/fourth_amendment.
[54]Sixteenth Amendment to the US Constitution, [accessed 2013-03-13] from: http://www.law.cornell.edu/constitution/amendmentxvi.

Australia	*Canada*	*United Kingdom*	*United States*
Governance			
*Federation of Australia consisting of six states[55] and two territories,[56] and a Constitutional Monarchy. *Federalism[57] and is decentralized in accordance with constitutional law.	*Canada has a federal system of governance consisting of the federal government and the government of ten individual provinces and three territories, and is a Constitutional Monarchy. *Canada has a decentralized government pursuant to its constitutional legal framework.	*The UK government is the central[58] government of the United Kingdom of Great Britain and Northern Ireland, and is a Constitutional Monarchy. *Since 1997, devolution to Scotland, Wales and Northern Ireland. *England does not have its own legislature, and is directly ruled from Westminster.	*The US has a federal system of governance consisting of the federal government and the government of fifty individual states, and is a Republic.
Unexplained Wealth Orders			
* The Commonwealth of Australia, (Cth) and five of its six states and both territories have adopted unexplained wealth orders (UWOs).[59]	*Not adopted in Canada.	*Not adopted in the UK.	*Not adopted in the US.
Burden of Proof			
*On the respondent for UWOs.[60]	*Except for the Ontario statute, all others contain the statutory presumption favouring forfeiture.	*The Crown prosecution establishes illegal origin of assets, then the burden of proof shifts to the defendant.[61]	*The government introduces forfeiture proceedings against the property itself and bears the burden of proof to establish the civil standard of proof.
Comprehensive Proceeds of Crime Legislation			
*Comprehensive, the *Proceeds of Crime Act, 2002*, as amended at the federal or	*Patchwork, eight of the ten provinces have civil forfeiture legislation. Each mirrors some	*Comprehensive, the *Proceeds of Crime Act, 2002*, as amended.	*Patchwork, at the federal and state levels of government. Refer to Appendix 5 for details.

[55]New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia.
[56]Australian Capital Territory and Northern Territory.
[57]Federalism is a system of government in which the same territory is controlled by two levels of government. Generally, an overarching national government governs issues that affect the entire country, and smaller subdivisions govern issues of local concern. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other.
[58]A centralized government is one in which power or legal authority is exerted or coordinated by a de facto political executive to which federal states, local authorities, and smaller units are considered subject.
[59]Bartels, L. "A review of confiscation schemes in Australia," *AIC Reports: Technical and Background Paper 36*, Criminology Research Council, Australian Institute of Criminology, (2010):32:7, [accessed 2013-01-02] from: http://www.aic.gov.au/documents/1/6/E/%7B16E448C6-C50B-487A-A68E-A1E89A7EB28F%7Dtbp036.pdf.
[60]The representative of the Law Council of Australia also, held that the central problem of UWOs is the lack of the need to show any evidence related to any offense, pleading to include reasonable suspicion that some offense was committed. The laws of the Northern Territory and Western Australia do not require showing that an offense was committed. Cited in Booz, Allen, Hamilton. (2011). *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, October 31, 2011:845:108, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf.
[61]For offences related to drug trafficking.

Australia	*Canada*	*United Kingdom*	*United States*
Commonwealth level and state and territorial legislation.[62] *There is no single Australian civil forfeiture model.	elements of the Ontario *Civil Remedies Act, 2001*; however they do contain elements that set them apart. *No federal legislation due to constitutional restrictions.	*Devolution has led to the establishment of	*There is no single American civil forfeiture model.
Equitable Sharing			
*None.	*Anecdotal information indicates this may be a practice in British Columbia.	*Recovered Assets Incentivisation Fund" (RAIF). The RAIF distributes half of the recovered assets to the agencies involved.	*Equitable sharing enables state and local police and prosecutors to circumvent the civil forfeiture laws of their states for financial gain. Through equitable sharing, state and local law enforcement can take property under the federal civil forfeiture law instead of their state laws, which can be up to 80 percent of the proceeds, are returned to the seizing agency.
Shared Elements			
Type of legal system			
Common law.	Common law.	Common law.	Common law.
Type of political system			
Democracy.	Democracy.	Democracy.	Democracy.
Type of judicial system			
Independent and impartial judiciary.	Independent and impartial judiciary.	Independent and impartial judiciary.	Independent and impartial judiciary.
Civil standard of proof			
Balance of probabilities.	Balance of probabilities.	Balance of probabilities.	Preponderance of evidence.
Case law impact			
*Upheld statutes and scoped out issues associated with civil forfeiture, particularly UWOs.	*The Supreme Court of Canada upheld the constitutionality of provincial statutes, and scoped out principles of common law associated with civil forfeiture.	*The High Court upheld the constitutionality of federal legislation and procedures, while scoping out the principles of common law associated with civil procedure.	*The US Supreme Court upheld the constitutionality of federal laws and scoped out implications of the asset forfeiture in relation to its interpretation of Constitutional Amendments.
Primary Target of Legislation (Organized Crime, Public Officials and/or Politically Exposed Persons)			
Organized crime, but covers all types of offences.	Civil asset forfeiture directed at 'unlawful activity' including organized crime.	Organized crime, drug & human trafficking.	Organized crime, drug & human trafficking.

[62]Refer to *Proceeds of Crime Act, 2002* (Cth) (hereinafter POCA 2002); *Criminal Assets Recovery Act, 1990* (NSW); *Criminal Property Confiscation Act, 2000* (WA); *Criminal Proceeds Confiscation Act, 2002* (Qld); *Criminal Property Forfeiture Act, 2002* (NT); *Confiscation of Criminal Proceeds Act, 2003* (ACT); *Criminal Assets Confiscation Act, 2005* (SA). Tasmania has not passed civil forfeiture legislation; it has legislation providing for forfeiture of the proceeds of crime but it is solely conviction based: *Crime (Confiscation of Profits) Act, 1993* (Tas).

10.0 Endnotes

[1]Cassella, S.D. "An overview of asset forfeiture in the United States," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., (2009):361:23-51:38. In recent years the US federal government has prevailed in several major financial criminal cases that resulted in forfeitures totalling over USD$ 1 billion (United States Department of Justice. *Asset forfeiture fund and seized asset deposit fund annual financial statement: Fiscal Year 2007*, Washington, DC, (2008):81:3, [accessed 2013-02-25] from: http://www.justice.gov/jmd/afp/01programaudit/fy2007/fy2007_afs_report.pdf.
[2]Cassella, S.D. "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin*, 55(6), (November 2007):8-21:9, [accessed 2013-02-25] from: http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf.
[3]Young, S.N.M. *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Limited, Northampton, Massachusetts, (2009):361:4.
[4]Gallant, M. "Alberta and Ontario: Civilizing the Money-Centered Model of Crime Control," 4 *Asper Review*, *International Business and Trade Law*, (2004):21:18, [accessed 2013-01-15] from: http://law.umanitoba.ca/bryanschwartz/images/stories/Asper_Chair/Conferences/2003_Dirty_Money/Papers/2_Alberta_and_Ontario_Civilizing_the_Money-Centered_Model_of_Crime_Control.pdf.
[5]Williams, M.R., Holcomb, J.E., Kovandzic, T.V. and Bullock, S. *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice, Arlington, Virginia, (March 2010):121:7, [accessed 2013-02-05] from: http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
[6]Doyle, C. *Crime and Forfeiture,* US Congressional Research Service Report for Congress, R97-139A, (May 9, 2007):74: i, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.
[7]McKeachie, J. and Simser, J. "Civil asset forfeiture in Canada," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., (2009):361:157-186:184-185.
[8]Refer to the laws for Ontario, Nova Scotia, Manitoba, Saskatchewan and British Columbia. Refer to Appendix 9 for review of the provincial statutes and available case law.
[9]Blumenson and Nilsen, (1998); Worrall, J. (2004). "The Civil Asset Forfeiture Reform Act of 2000: A sheep in wolf's clothing?" *Policing: An International Journal of Police Strategies and Management*, 27, 2004:220-240. Cited in: Williams, M.R., Holcomb, J.E., Kovandzic, T.V. and Bullock, S. *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice, Arlington, Virginia, (March 2010):121:116, [accessed 2013-02-05] from: http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
[10]See *McIntosh v. Lord Advocate* [2001] 2, all ER 638; *R. (The Director of the ARA) v. He & Cheng* [2004] EWHC 3021(Admin). The issue of proportionality must be considered on an individual basis. However, both the High Court and the Court of Appeal in England and Wales, and Northern Ireland ruled that civil recovery proceedings is generally regarded as a proportional response, and breaches to Articles 1 and 8 of Protocol of the *European Convention on Human Rights* (ECHR) were justified and proportionate to the harmful activities against which the proceedings were aimed, and in the public interest.
[11]*Keogh v. R.*[2007] EWCA Crim 528, cited in: Weisfelt, Romy. *UK Court of Appeal considers Presumption of Innocence and Principle that Legislation be Interpreted Consistently with Human Rights*,(2008), [accessed 2013-02-18] from: http://hrlrc.org.au/files/TKDA5KJK9P/Keogh%20v%20R.pdf.
[12]The double jeopardy rule states that a person should not be prosecuted twice for the same offence, and that conviction shall be a bar to all further criminal proceedings. However, if that can be circumvented, there is no independent rule in English law against double punishment. In fact, the UK has not signed or ratified the double jeopardy protocol to ECHR. See *Connolly v. Director of Public Prosecutions* [1964] AC 1254; see also *R. v. W* [1988] STC 550 (CA (Criminal Division)); see also *R. v. Smith* [2001] UKHL 68.
[13]Refer to the laws for Ontario, Nova Scotia, Manitoba, Saskatchewan and British Columbia. Refer to Appendix 9 reviewing the provincial statutes and available case law.
[14]Young, S.N.M. *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Limited, Northampton, Massachusetts, (2009):361:1.
[15]Gallant, M. M. *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*, Edward Elgar Publishing Limited, Cheltenham, UK, (2005):153:54.

[16]The first statute authorizing civil forfeiture was enacted by US Congress in 1789 as a sanction for the use of ships in customs violations, *Act* of July 31, 1789, Sections 12,36; 1 Statute 39, 47.
[17]The United Nations Convention against Corruption 2003, Article 54(1) (c), recommends use of the preponderance of the evidence standard.
[18]Refer to e.g., *R v. Oakes*, [1986] 1 SCR 103, at paragraph 50, 54 (Canada) "relying on American due process and presumption of innocence and on the European Convention on Human Rights on the presumption of innocence, respectively." Cited in Nelson, M.M. "Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads," *University of Miami Inter-American Law Review*, 41(1) (2009-2010):43-104:85.
[19]See Article 7(1a) of the Palermo Convention 2000, "Each State Party shall Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money -laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions."
[20]Refer to Article 7 of the Vienna Convention, 1998, "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."
[21]See Article 20 of the *UN Convention Against Corruption, 2003*, establishing illicit enrichment as a criminal offence when committed intentionally. Illicit enrichment is a significant increase in the assets of a public official that he/she cannot reasonably explain in relation to his or her lawful income.
[22]Refer to the 9 FATF recommendations.
[23]Financial Action Task Force on Money Laundering. "Review of FATF Anti-Money Laundering Systems and Mutual Evaluation Procedures 1992-1999," FATF Secretariat, OECD, Paris, France, (16 February 2001): 64:7-8, [accessed 2013-01-29] from: http://lpvist.free.fr/IE/Mafia/%E9valuation%20lutte%20anti-blanchiment.pdf.
[24]Refer to *Proceeds of Crime Act, 2002* (Cth) (hereinafter POCA 2002); *Criminal Assets Recovery Act, 1990* (NSW); *Criminal Property Confiscation Act, 2000* (WA); *Criminal Proceeds Confiscation Act, 2002* (Qld); *Criminal Property Forfeiture Act, 2002* (NT); *Confiscation of Criminal Proceeds Act, 2003* (ACT); *Criminal Assets Confiscation Act, 2005* (SA). Tasmania has not passed civil forfeiture legislation; it has legislation providing for forfeiture of the proceeds of crime but it is solely conviction based: *Crime (Confiscation of Profits) Act, 1993* (Tas).
[25]Grono, S. "Civil forfeiture – the Australian experience," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., (2009):361:125-157:125.
[26]The POCA 2002 provides for restraining orders over property to be made early on in an investigation. Restraining orders can be made in reliance on the charging (or proposed charging) of a person, or on a civil forfeiture basis.
[27]Bartels, L. "A review of confiscation schemes in Australia," *AIC Reports: Technical and Background Paper 36*, Criminology Research Council, Australian Institute of Criminology, (2010):32:7, [accessed 2013-01-02] from: http://www.aic.gov.au/documents/1/6/E/%7B16E448C6-C50B-487A-A68E-A1E89A7EB28F%7Dtbp036.pdf.
[28]Booz, Allen, Hamilton. *Comparative Evaluation of Unexplained Wealth Orders*, prepared for the US Department of Justice, National Institute of Justice, Final Report, (October 31, 2011):845:105, [accessed 2012-12-21] from: https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf.
[29]Ibid.
[30]Commonwealth Director of Public Prosecutions. *Annual Report 2011-2012*, Commonwealth of Australia, (10 October 2012):284:135, [accessed 2013-01-07] from: http://www.cdpp.gov.au/Publications/Annual-Reports/CDPP-Annual-Report-2011-2012.pdf.
[31]International Centre for Asset Recovery. *Asset Recovery Knowledge Centre*, Online profiles, (2007), [accessed 2013-02-01] from: http://www.assetrecovery.org/kc/node/0876cba2-a34b-11dc-bf1b-335d0754ba85.0;jsessionid=D9BC52CC6C6025EB55E89F2B4D7D3C76.
[32]*Proceeds of Crime Assets*, 2002, section 6, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/6.
[33]*Proceeds of Crime Assets*, 2002, section 6 and 10, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/10.

[34]The UK civil recovery regime was influenced by the *Racketeer Influenced and Corrupt Organization Act* (RICO) experience in the US, *Criminal Asset Recovery* of New South Wales (Australia), and *Proceeds of Crime Act*, 1996 (Ireland).
[35]Serious Organised Crime Agency. *Serious Organised Crime Agency Annual Report and Accounts 2009-2010*, SOCA, London, UK, (20 July 2010):96:81, [accessed 2013-01-18] from: www.soca.gov.uk/about-soca/.../203-annual-report-2009-2010.pdf.
[36]Serious Organised Crime Agency. *Serious Organised Crime Agency Annual Report and Accounts 2009-2010*, SOCA, London, UK, (20 July 2010):96:81, [accessed 2013-01-18] from: www.soca.gov.uk/about-soca/.../203-annual-report-2009-2010.pdf.
[37]Serious Organised Crime Agency. *Serious Organised Crime Agency Annual Report and Accounts 2010-2011*, (13 July 2011):97:81, [accessed 2013-01-18] from: www.soca.gov.uk/about-soca/.../301-annual-report-2010-11.pdf.
[38]Serious Organised Crime Agency. (2012). *Serious Organised Crime Agency Annual Report and Accounts 2011-2012*, SOCA, London, UK, (4 July 2012):108:97, [accessed 2013-01-18] from: www.soca.gov.uk/.../392-soca-annual-report-and-accounts-201112.p....
[39]*Proceeds of Crime Assets*, 2002, section 246(5) (a) (b), [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/246.
[40]Cash is broadly defined as including notes or coins in any currency, postal orders, and cheques of any kind including traveller's cheques, banker's drafts, bearer bonds and bearer shares (*Proceeds of Crime Act*, 2002, s.289(6)), [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/289.
[41]The ceiling for cash forfeiture initially was set not exceed £10,000; this amount was later reduced to £5,000, and in 2006, it was reduced to £1,000.
[42]Any cash seized can be retained for up to 48 hours, and can be extended with a decision from the Magistrate Court or Justice of the Peace. When the cash is seized, the Commissioner of Customs submits an application to the Magistrate Court for forfeiture of the seized cash in whole, or in part.
[43]*Proceeds of Crime Assets*, 2002, section 317, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/317.
[44]*Proceeds of Crime Assets*, 2002, section 319, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/319.
[45]Leong, A.V.M. "Asset recovery under the Proceeds of Crime Act 2002: the UK experience," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., (2009):361:187-227:214.
[46]*Proceeds of Crime Assets*, 2002, section 326, [accessed 2013-01-17] from: http://www.legislation.gov.uk/ukpga/2002/29/section/326.
[47]See *McIntosh v. Lord Advocate* [2001] 2, all ER 638; *R. (The Director of the ARA) v. He & Cheng* [2004] EWHC 3021 (Admin). The issue of proportionality must be considered on an individual basis. However, both the High Court and the Court of Appeal in England and Wales, and Northern Ireland ruled that civil recovery proceedings is generally regarded as a proportional response, and breaches to Articles 1 and 8 of Protocol of the *European Convention on Human Rights* (ECHR) were justified and proportionate to the harmful activities against which the proceedings were aimed, and in the public interest.
[48]*Keogh v. R.*[2007] EWCA Crim 528, cited in: Weisfelt, Romy. *UK Court of Appeal considers Presumption of Innocence and Principle that Legislation be Interpreted Consistently with Human Rights*, (2008),[accessed 2013-02-18] from: http://hrlrc.org.au/files/TKDA5KJK9P/Keogh%20v%20R.pdf.
[49]The double jeopardy rule states that a person should not be prosecuted twice for the same offence, and that conviction shall be a bar to all further criminal proceedings. However, if that can be circumvented, there is no independent rule in English law against double punishment. In fact, the UK has not signed or ratified the double jeopardy protocol to ECHR. See *Connolly v. Director of Public Prosecutions* [1964] AC 1254; see also *R. v. W* [1988] STC 550 (CA (Criminal Division)); see also *R. v. Smith* [2001] UKHL 68.
[50]*European Convention on Human Rights*, 1950 as amended by provisions of Protocol No. 14 (2010), Article 6 guarantees the right to a fair trial, [accessed 2013-01-17] from: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf.

[51]*European Convention on Human Rights*, 1950 as amended by provisions of Protocol No. 14 (2010), Article 8 guarantees the right to respect for private and family life, [accessed 2013-01-17] from: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf.
[52]Assets Recovery Agency. *Assets Recovery Agency Annual Report and Resource Accounts 2007-2008 (for the year ended 31March 2008)*, London, UK, (August 2008):48:47, [accessed 2013-01-18] from: http://www.official-documents.gov.uk/document/hc0708/hc06/0661/0661.pdf.
[53]Home Office. "£ 17 Million Cash Back to Fight Crime," (press release 17 April 2008), Home Office Press Releases, [accessed 2013-01-18] from: http://www.press.homeoffice.gov.uk.
[54]United States Government Accountability Office. *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, Report to the Ranking Member, Committee on the Judiciary, US Senate, GAO-12-972, Washington, DC, (September 2012):27:7, [accessed 2013-01-31] from: http://www.gao.gov/assets/650/648098.pdf.
[55]"Under CAFRA and the customs laws, administrative forfeiture may be used if the property to be forfeited is cash; of if the property is worth less than USD$500,000; or is a boat, plane or car used to carry or store drugs, 19 US Code Section 1607; 21 US Code 881(d); 18 US Code 981(d). Under the tax laws, the procedure is available with respect to personal property valued at USD$100,000 or less, 26 US Code 7325." Cited in Doyle, C. *Crime and Forfeiture,* US Congressional Research Service Report for Congress, R97-139A, (May 9, 2007):74:8, [accessed 2013-01-03] from: http://www.fas.org/sgp/crs/misc/97-139.pdf.
[56]"Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. CAFRA made it easier to contest a forfeiture action this led to an 80 percent drop in uncontested DEA cases. Other seizing agencies report similar figures." Cited by Cassella, S.D. *Overview of Asset Forfeiture Law in the United States*, (January 2004):347-367:354, [accessed 2013-01-29] from: http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=stefan_cassella.
[57]See 19 US Code Section 1607 "setting a maximum dollar value on administrative forfeiture of personal property"; also refer to 18 US Code Section 985(a) "real property may never be forfeited administratively." Cited by Cassella, S.D. "An overview of asset forfeiture in the United States," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., (2009):361:23-51:38.
[58]US Justice Department statistics indicate that criminal forfeiture judgments have surpassed civil forfeiture judgments every year since 1995 to a point where there are now about twice as many criminal forfeitures as civil forfeitures. Cited in: United States Department of Justice. (2008).*United States Attorneys Annual Statistical Report: Fiscal Year 2008*, Executive Office for United States Attorneys, Washington, DC, 2008:132:5, [accessed 2013-01-03] from: http://www.justice.gov/usao/reading_room/reports/asr2008/08statrpt.pdf.
[59]Refer to 21 US Code, Section 853(n)(6); *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) "a criminal forfeiture order is a judgment *in personam* against the defendant; this distinguishes the forfeiture judgment in a criminal case from the *in rem* judgment in a civil forfeiture case." [accessed 2013-01-30] from: http://www.ca3.uscourts.gov/opinarch/051715p.pdf.
[60]*Federal Rules of Criminal Procedure* 7(c), 32.2(a).
[61]Refer to *United States v. One-Sixth Share*, 326 F.3d 36, (1st Cir. 2003) "Since civil forfeiture is an *in rem* proceeding, the property subject to forfeiture is the defendant. The defences against the forfeiture can be brought only by third parties, who must intervene." See also *$734,578.82 in US Currency*, Civil forfeiture is an *in rem* action against the property itself; the forfeiture is 'not conditioned on the culpability of the owner of the defendant property.'
[62]See *United States v. Ursery*, 116 Supreme Court 2135 (1996), Cited by: Cassella, S.D. (2009). "Asset forfeiture in the United States," in *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, Simon N.M. Young (Ed.), Edward Elgar Publishing Ltd., 2009:361:23-51:42.
[63]18 US Code, Section 983(a)(3); 19 US Code Section 1608.
[64]18 US Code 983 (a)(4)(A); 20 days in customs cases, Federal Rules of Civil Procedure Supplemental Rule C(6).
[65]18 US Code 983(a)(4)(B); Federal Rules of Civil Procedure Supplemental Rule C(6).
[66]*Civil Asset Forfeiture Reform Act* (Public Law 106-185) [114 Statute 202 (2000)].

[67]See *Drug Abuse Prevention and Control Act* 21 US Code 881: provides for forfeiture of controlled substances, materials and equipment, containers, conveyances, and records involved in unlawful drug related activity. Section 21 US Code 881 (a)(6) 1978 provides for forfeiture of the proceeds of illegal drug transaction if a traceable connection between the property and the illegal activity exists; 21 US Code 881(a)(7) 1984 provides for forfeiture of real property used or intended to be used to commit or to facilitate the commission of a drug offence.
[68]18 US Code, Section 981(a)(1)(G).
[69]19 US Code.
[70]18 US Code 1963(a).
[71]Other exemptions include the *Tariff Act of 1930*, *Federal Food, Drug and Cosmetic Act*, and *Trading with the Enemy Act* (18 US Code Section 983(1)).
[72]United States Department of Justice. *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, Criminal Division, Asset Forfeiture and Money Laundering Section, Washington, DC, (April 2009):47:0, [accessed 2013-02-05] from: http://www.justice.gov/criminal/afmls/pubs/pdf/04-2009guide-equit.pdf.
[73]"Within the context of the Justice and Treasury asset forfeiture programs, asset forfeiture is the transfer of title in property to the federal government by execution of a legal process that can be administrative, civil judicial or criminal forfeiture. In a broader context, forfeiture means the involuntary relinquishment of money or property without compensation as a consequence of a breach or non-performance of some legal obligation or the commission of a crime." Cited in United States Government Accountability Office. *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, Report to the Ranking Member, Committee on the Judiciary, US Senate, GAO-12-972, Washington, DC, (September 2012):27:1, [accessed 2013-01-31] from: http://www.gao.gov/assets/650/648098.pdf.
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[78]*Constitution Act, 1867*, 30 &31 Victoria, c. 3 (UK), [accessed 2013-01-09] from: http://laws-lois.justice.gc.ca/eng/Const/FullText.html.
[79]The *Victims Restitution and Compensation Payment Act,* S.A. 2001, c.V-3.5 came into force on Nov. 29, 2001, while the *Civil Remedies Act*, 2001, S.O. 2001, c.28 [formerly, *Remedies for Organized Crime and other Unlawful Activities Act*] came into force on Dec. 14, 2001. Since the days of prohibition, some provinces had appended forfeiture provisions to the liquor control statutes to empower magistrates to order forfeiture upon contravention of these statutes or when the liquor went unclaimed.
[80]*The Criminal Property Forfeiture Act*, C.C.S.M., 2004, c.C306.
[81]*Seizure of Criminal Property Act*, 2009, S.S. 2009, c.S-46.002 [formerly, *Seizure of Criminal Property Act*, S.S. 2005, c. S-46.001].
[82]*Civil Forfeiture Act*, S.B.C. 2005, c.29.
[83]*The Civil Forfeiture Act*, S.N.S. 2007, c.27.
[84]*Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments ofUnlawful Activity Act*, R.S.Q. c.C-52.2, 2007.
[85]*The Civil Forfeiture Act*, S.N.B. c.C-4.5, 2010.
[86]Nelson, M.M. "Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and the Canadian Crossroads," *University of Miami Inter-American Law Review*, 41(1) (2009-2010):43-104:85.

[87]Simser, J. *Perspectives on Civil Forfeiture*, University of Hong Kong, (2008):9:6, [accessed 2013-02-18] from: http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1089943634036/475256-1201245199159/2008Mar-asset_recovery-civil-forfeiture.pdf.
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[89]*Constitution Act, 1982*. *Charter of Rights and Freedoms*, Section 7, Part I of the Act, Schedule B to the Canada Act 1982, Chapter 11 (UK), [accessed 2013-01-30] from: http://www.canlii.org/eliisa/highlight.do?text=Constitution+Act%2C+1982.+Charter+of+Rights+and+Freedoms%2C+Section+7&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html.
[90]Krane, J.A. "Property, Proportionality and Instruments of Crime," *National Journal of Constitutional Law*, Vol. 29, (2010):159-187:179, [accessed 2013-02-06] from: http://www.blakesfiles.com/pdf/JOK/Property_Proportionality_and_Instruments_of_Crime.pdf.
[91]Refer to *Prohibiting Profiting from Recounting Crimes Act*, 2002, S.O. 2002, c.2; *The Profits of Criminal Notoriety Act*, C.C.S.M., 2005, c.P141; *Criminal Notoriety Act*, S.A. 2005, c.C-32.5; *Criminal Notoriety Act*, S.N.S. 2006, c.14 and *Profits of Criminal Notoriety Act*, S.S. 2009, c. P-28.1.
[92]A 'contract for recounting crime' includes, for example, a contract to pay a person convicted of a designated crime for the use of recollections of the convicted person that relate to the crime. Payments would not occur if the Attorney General commences a proceeding under the *Act* and pays the money into court in the proceeding pursuant to section 7 of the *Act*.
[93]See for example, *Prohibiting Profiting from Recounting Crimes Act*, 2002, S.O. 2002, c.2, s.9.
[94]Krane, J.A. *Forfeited: Civil Forfeiture and the Canadian Constitution*, Master of Laws thesis, Faculty of Law, University of Toronto, Toronto (2010):139:23, [accessed 2012-12-21] from: https://tspace.library.utoronto.ca/bitstream/1807/25734/3/Krane_Joshua_A_201011_LLM_thesis.pdf.
[95]As noted by Krane, "this provision also may be *ultra vires* the provincial legislature due to its interference with s. 91(2), s. 91(22) and s. 91(23) of *The Constitution Act,* 1867 (*The British North America Act*, 1867), 30 &31 Victoria c.3 (UK)."
[96]*The Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).
[97]*Derrickson v. Derrickson*, [1986] 1 SCR 285, paragraph 41, [accessed 2013-01-14] from: http://www.canlii.org/eliisa/highlight.do?text=derrickson&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/scc/doc/1986/1986canlii56/1986canlii56.html.
[98]*Civil Remedies Act*, S.O. 2001 (ON), c.28.
[99]*Civil Forfeiture Act*, S.B.C. 2005, c.29, s.1.
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[101]*Criminal Code*, R.S.C. 1985, c. C-46.
[102]*Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
[103]*Customs Act*, R.S.C. 1985, c.1.
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[106]Ibid.
[107]Refer to the laws for Ontario, Nova Scotia, Manitoba, Saskatchewan and British Columbia. Also refer to Appendix 9 reviewing the provincial statutes and available case law.
[108]*Martineau v. M.N.R., 2004 SCC 81*, [2004] 3 SCR 737.
[109]*F.H. v. McDougall, 2008 SCC 53*, [2008] 3 SCR 41, paragraph 49.
[110]*Chatterjee v. Ontario (Attorney General), 2009 SCC 19*, [2009] 1 SCR 624, paragraph 54.

[111]*R. v. Grant*, 2009 SCC 32, [2009] 2 SCR 353, paragraph 3.
[112]Gallant, M. "Alberta and Ontario: Civilizing the Money-Centered Model of Crime Control," 4 *Asper Review, International Business and Trade Law*, (2004):21:14, [accessed 2013-01-15] from: http://law.umanitoba.ca/bryanschwartz/images/stories/Asper_Chair/Conferences/2003_Dirty_Money/Papers/2_Alberta_and_Ontario_Civilizing_the_Money-Centered_Model_of_Crime_Control.pdf.
[113]*Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, sections 2 and 3.
[114]*Competition Act*, R.S.C. 1985, c. C-34.
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[116]*Keeping the Promise for a Strong Economy Act (Budget Measures)*, 2002, S.O. 2002, c.22, s.181(1) amending the *Securities Act*, R.S.O. 1990, c. S.5, s. 122.
[117]See *Canada (Attorney General) v. United States Steel Corporation*, 2010 Federal Court 642.
[118]Gallant, M. "Alberta and Ontario: Civilizing the Money-Centered Model of Crime Control," 4 *Asper Review, International Business and Trade Law*, (2004):21:14, [accessed 2013-01-15] from: http://law.umanitoba.ca/bryanschwartz/images/stories/Asper_Chair/Conferences/2003_Dirty_Money/Papers/2_Alberta_and_Ontario_Civilizing_the_Money-Centered_Model_of_Crime_Control.pdf.
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[121]Proceeds of Crime (Money Laundering) and Terrorist Financing Act S.C. 2001.
[122]*R v. Poyton* [1972] CTC 411, Cited in: Gallant, M.M. "Retreating into Doubt: Tainted Finance, Civil Devices and the Rule of Law," Paper in the International Conference *Interdisciplinary Insights on Fraud and Corruption*, Working Papers #20, Observatório de Economia e Gestão de Fraude, (January 2013):19:18, [accessed 2013-02-19] from: http://www.fep.up.pt/repec/por/obegef/files/wp020.pdf.
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[127]Ibid.
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[131]*Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2001-412 s.18(2).
[132]British Columbia Ministry of Public Safety and Solicitor General. *Provinces band together to strengthen civil forfeiture*, News Release (13 May 2011): 2, [accessed 2013-02-19] from: http://www2.news.gov.bc.ca/news_releases_2009-2013/2011PSSG0064-000534.htm#.

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[143]"Within the context of the Justice and Treasury asset forfeiture programs, asset forfeiture is the transfer of title in property to the federal government by execution of a legal process that can be administrative, civil judicial or criminal forfeiture. In a broader context, forfeiture means the involuntary relinquishment of money or property without compensation as a consequence of a breach or non-performance of some legal obligation or the commission of a crime." Cited in United States Government Accountability Office. *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, Report to the Ranking Member, Committee on the Judiciary, US Senate, GAO-12-972, Washington, DC, (September 2012):27:1, [accessed 2013-01-31] from: http://www.gao.gov/assets/650/648098.pdf.
[144]These agencies also seize and hold illegal drugs, firearms, and counterfeit items that have no resale value to the government. These are held by the agencies until they are approved for destruction. In accordance with their legislation, each department (i.e., Justice and the Treasury) maintains a separate fund for the deposit of forfeitures pursuant to the *Comprehensive Crime Control Act of 1984* in which the Department of Justice Assets Forfeiture Fund (AFF) was established. Funds deposited into the AFF pay for the costs of operating the Justice Forfeiture Program. Similarly, the *Treasury Forfeiture Fund Act of 1992* established the Treasury Forfeiture Fund (TFF). Funds deposited in the TFF pay for the costs of the Treasury Forfeiture Program. Cited in United States Government Accountability Office. *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, Report to the Ranking Member, Committee on the Judiciary, US Senate, GAO-12-972, Washington, DC, (September 2012):27:1, [accessed 2013-01-31] from: http://www.gao.gov/assets/650/648098.pdf.
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[146]In *R. v. Grant, 2009* SCC 32, [2009] 2 SCR 353, the Court upheld the application of the *Charter* relating to the remedial provisions of section 24(2) apply to civil matters with the same force as in criminal matters (paragraphs 185, 195, 198, 202, 223-226). In *F.H. v. McDougall, 2008* SCC 53,[2008] 3 SCR 41, the Court decided that there will only be one standard of proof required in civil proceedings whether or not the allegations are of a criminal

nature (paragraphs 30, 40, 44-46, 49, 53-54). In *Martineau v. M.N.R., 2004* SCC 81, [2004] 3 SCR 737, the Court upheld the validity of the *Customs Act* based on three reasons. First, the forfeiture mechanism is designed to ensure compliance with the *Customs Act*, not to punish; second, while ascertained forfeiture has a deterrent effect, that in and of itself does not make the proceeding criminal; third, the forfeiture provisions are not meant to redress a wrong done to society and do not factor in the principles of criminal liability or sentencing (paragraphs 35-39). In Chatterjee v. Ontario (Attorney General), 2009 SCC 19, [2009] 1 SCR 624, the Court upheld the constitutionality of the Ontario statute, *Civil Remedies Act* (CRA) (paragraphs 4, 30, 41, 46-47). The Court also held that if the provisions of the CRA introduced an interference with the administration of the *Criminal Code* forfeiture provisions, the doctrine of federal paramountcy would render the CRA inoperative to the extent of the conflict or interference (paragraphs 42, 49-53).

[147]Any federal-provincial-territorial agreement will identify the net proceeds will be distributed based on the amount awarded.

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[154]*United States v. Ursery*, 518 US 267 (1996), cited in: Worrall, J.L. "Asset Forfeiture," *Problem-Oriented Guides for Police Response Guides Series No.7*, Center for Problem-Oriented Policing, Washington, DC, (November 2008):62:15-19, [accessed 2013-02-05] from: http://www.cops.usdoj.gov/files/RIC/Publications/e1108-Asset-Forfeiture.pdf.

[155]*United States v. James Daniel Good Real Property*, 510 US 43 (1993), cited in: Worrall, J.L. "Asset Forfeiture," *Problem-Oriented Guides for Police Response Guides Series No.7*, Center for Problem-Oriented Policing, Washington, DC, (November 2008):62:15-19, [accessed 2013-02-05] from: http://www.cops.usdoj.gov/files/RIC/Publications/e1108-Asset-Forfeiture.pdf.

[156]*United States v. 6625 Zumirez Drive,* 845 F. Supp. 725, 732, (C.D. Cal. 1994), cited in: Skorup, B. "Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases," *Civil Rights Law Journal*, Volume 22:3, (2012):427-458:451-458.

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[158]Holcomb, J.E., Kovandzic, T.V. and Williams, M.R. "Civil asset forfeiture, equitable sharing, and policing for profit in the United States," *Journal of Criminal Justice*, Vol. 39, (May/June 2011): 273-285:275-276.

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[162]Director of Civil Forfeiture v. Wolff – Court of Appeal Affirms "Interests of Justice" Defence, 2012 BCCA 473, [accessed 2013-02-20] from: http://www.civilforfeiture.ca/director-of-civil-forfeiture-v-wolff-court-of-appeal-affirms-in.
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Appendix B

Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders* (2011): prepared for the US Department of Justice, National Institute of Justice.

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COMPARATIVE EVALUATION OF UNEXPLAINED WEALTH ORDERS

PREPARED FOR THE
U.S. DEPARTMENT OF JUSTICE
NATIONAL INSTITUTE OF JUSTICE

FINAL REPORT
October 31, 2011

Order Number: 2010F_10078

Booz | Allen | Hamilton

Contents

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I. EXECUTIVE SUMMARY

Unexplained Wealth Order (UWO) laws, a relatively recent development in confiscation and forfeiture jurisprudence, target the proceeds derived from criminal activities. Like traditional *in personam* and *in rem* forfeiture, their primary objective is to deprive criminals from acquiring or benefiting from unlawful activities. However by using UWOs the state does not have to first prove a criminal charge, as is the case with conviction based forfeiture. Likewise, the state does not have to first prove that the property in question is the instrument or proceed of a crime, as is generally the case in *in rem* asset forfeiture. UWO laws differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner who must prove a legitimate source for his wealth and the forfeiture proceeding is instituted against a person rather than against the property. These seemingly radical features of UWO laws (no proof of the property being connected to a crime and a reversed burden of proof) have, in practice, been tempered by courts, prosecutors and police, but still are a powerful, and controversial, tool for seizing assets where traditional methods likely would have been ineffective.

Several countries have debated the possibility of introducing UWOs into their legal systems, but most have decided to maintain traditional confiscation regime, *in personam* following conviction, and *in rem* proceedings targeting property. Few have ventured into the area of UWOs, and some of those that have done so have faced constitutional and legal challenges. For example, in Italy the Constitutional Court declared law *12 quinquies* to be unconstitutional after two years of use determining that shifting the burden of proof violates the Italian constitution. Other countries have adopted only some aspects of UWO laws, e.g., United Kingdom, South Africa, some states in Canada, and New Zealand, have a presumption in favor of forfeiture for unlawful activities or specific offenses, but not full UWOs. Other countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offenses targeting the proceeds of corruption where the reversed burden of proof is part of the offense but yet apply only to political officials and not to all crimes and individuals as do UWO laws. A similar approach was followed by France with an amendment to its criminal code which introduced reversed burden of proof forfeiture measures targeting certain specific criminal offenders but it is still a post-conviction method. Only three countries thus far have adopted full UWOs – no proof of the property being connected to a crime and a reversed burden of proof. These are Australia, Colombia, and Ireland.

Under the parameters of this study, two countries were selected for in-depth review. Owing to their shared traits with the U.S.: common law legal systems (the courts of both countries frequently cite U.S. decisions), long established democratic traditions, and a common language, Ireland and Australia were selected. Moreover, Australia was selected as it is the only country in the world that identified these laws explicitly as unexplained wealth.

Ireland has had the most success of any country implementing UWOs. Its Proceeds of Crime Act (PoCA) of 1996 set forth the legislative framework for UWOs (although they are called “POCA Orders” in Ireland they are referred to as “Unexplained Wealth Orders” in this report for consistency). In addition the Irish Criminal Asset Bureau (CAB) Act of 1996 established the institutional framework to support POCA’s implementation. This legislation was the direct product of public outrage over the murder of an investigative journalist and a police detective by drug dealers. To this day there is still strong public support for the laws.

The single factor most important to the success of Ireland’s UWO (PoCA) law is the CAB. By forming an elite, well-resourced unit, with staff from not only police and prosecutors, but also tax and social welfare agencies, Ireland has been able to fully exploit the statute. Members of the CAB retain the powers and duties vested in them by their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized so, e.g., a CAB police agent also has the tax authority of a CAB revenue agent, and a CAB revenue agent has the arrest authority of a CAB police agent. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime not only from by way of UWO

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forfeitures but also by taxing these and denying social welfare payments to the respondents who own or control such property. Further, the CAB has access to a large database, Police Using Lead System Effectively (PULSE) which contains comprehensive information on all citizens' criminal, traffic, tax, property, customs, social welfare and consumer credit records. This enables the CAB to gather large and comprehensive amounts of information to compare assets to income and thereby determine whom they should target.

In addition, the Irish High Court appoints a judge, assisted by a special registrar, to work solely on forfeiture cases for a period of at least two years. This provides the CAB with direct and speedy access to the courts and a judge knowledgeable in forfeiture law. The CAB also has been very selective in the cases it pursues choosing only those of the type which garner public support.

The Irish law has had a significant impact on dismantling and disrupting criminal activities. Although anecdotal, it is widely reported by law enforcement officials and in the media[1] that during the first five years of its enactment the law has resulted in a significant setback to those engaged in criminal activities targeted. With the frequency of certain crimes dropping, it is assumed that a number of criminal enterprise leaders have relocated to other countries such as Holland.

From 1998 through 2009 (date of the most recent available data), the CAB obtained 110 forfeiture orders under the law totaling approximately US$16M. This figure understates CAB's effectiveness since it does not include cases in which the CAB decided to use tax laws to seize assets originally investigated under UWO (PoCA). The ability to tax property derived from crime is one of the CAB's most effective weapons. Since 1998 the CAB has obtained a total of US$160M through this method.

Australia adopted its first UWO law in 2000, four years after Ireland, but its UWO use has not been as widespread as in Ireland. Initiated at the state and territory level, these started in Western Australia (WA) in response to increased drug trafficking and drug-related deaths in the state. The WA UWO law was followed by the Northern Territory (NT) three years later. Victoria, Queensland, and South Australia subsequently adopted comprehensive forfeiture statutes including conviction and non-conviction processes that contain many aspects of UWOs. Only within the past year has a similar law (with some restrictions) been enacted at the federal (Commonwealth) level, and also in the state of New South Wales.

Compared to Ireland, relatively little forfeiture has been achieved via UWOs in Australia. Several factors are responsible for this, including a push-back by the Australian courts, caution on the part of prosecutors to bring actions under these new laws, disagreements between police and prosecutors over how strenuously to use the law, a lack of forensic accounting staff, and strict forfeiture laws for drug crimes that in some cases obviate the need for UWOs. Another factor is that the property owner can meet his evidentiary burden simply by stating that the funds in question were an inheritance or gambling winning. Since in Australia such income does not have to be reported to tax officials, there is no record that prosecutors can use to contradict the respondent's claim. Consequently, this shifts the burden back to the government, but there is no paper trail evidence that these funds would create in many other countries making it difficult for the government to disprove the property owner's claims. Another factor in Australia that has stemmed the progress of UWOs is the downward public support most notably as a result of case in which an elderly couple had their house seized after their son was convicted of possessing cannabis concealed in the roof of the home. Finally, and not least among the reasons for the lack of quantifiable success of UWOs in Australia and distinction from Ireland is the absence of a CAB-like agency. There is no centralized effort at the Federal level to coordinate UWO actions in Australia and there is not the cross-agency buy-in or cooperation like that observed in Ireland.

Notwithstanding, a number of forfeitures have been made under Australian UWOs. In Western Australia along there has been 27 UWO applications since enactment of the law in 2000, of which 21 led to forfeiture of assets. Still, it is evident that UWO provisions have not been used extensively in Australia,

[1] Interviews with the director of the DPP, former heads of the CAB, and barristers.

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and in cases where they have been used only a relatively small amount of funds were recovered totaling only approximately US$6.3M over a period of 10 years. In fact, no UWO applications were brought for a three-year period (2004–2007) following the controversial home seizure case described above.

As the Australian federal government only recently introduced UWOs, no cases have yet been instituted under its provisions. Cognizant of the critical role that the CAB has played in Ireland, the Australian federal government is establishing its own the Criminal Asset Confiscation Task Force, modeled after the Irish CAB. It is expected to begin operations in early 2012.

In both countries, the sweeping nature of the UWO statutes has been tempered in practice. Australian and Irish prosecutors, while only required to meet a burden of probable cause before the burden shifts to the property owner, in practice produce significantly more evidence than one would in a probable cause setting in the U.S., e.g., with a search or arrest warrant, even though the standard of proof is roughly the same. The level of proof that Australian and Irish prosecutors produce in UWO hearings corresponds more closely to our clear and convincing evidence standard. The Irish CAB for instance regularly produces multi-volume books of forensic accounting in support of even small UWO (PoCA) forfeitures.

In terms of the applicability of UWO laws to the U.S., some of the provisions of UWOs would be new to the U.S. while others are not. For instance, U.S. courts have long upheld as constitutional a reversed burden of proof in civil forfeiture proceedings, after the government makes its initial probable cause showing. In short, a reversed burden of proof UWO would likely withstand constitutional challenge in the U.S. *if* the Court were convinced that it is an *in rem* proceeding, a notable departure from the Civil Asset Forfeiture Reform Act (CAFRA).

There are two UWO concepts that would be novel to the U.S.: 1) the unexplained wealth concept and 2) the lack of a requirement to show a nexus between an offense and the property. If the U.S. were to consider enactment of a UWO statute it would have to resolve these issues to the satisfaction of reviewing courts. Regarding the first concept, one key to Ireland's UWO success has been the CAB's ability to proactively identify individuals with unexplained wealth. The use of a PULSE-like information exchange or fusion database system through which law enforcement can proactively compare citizens' assets to income would raise the concern of civil liberties advocates in the U.S. Regarding the second concept, the U.S. has always required that the forfeited property be the proceeds or instrumentality of a crime. A law that makes the mere lack of a valid explanation for the possession of property sufficient reason for government seizure would raise the concern of property rights advocates.

The new Australian federal UWO law addresses some of the concerns likely to be present in the U.S. It provides greater forfeiture protections to the respondents and innocent third party property owners, has a requirement that the government show a nexus between an offense and the property, and has a "safety valve" that gives court discretion to dismiss UWO actions if they are determined to be unjust. It might serve as the basis for U.S. laws that may be drafted in the future.

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II. INTRODUCTION

2.1 Purpose of the Report

The purpose of the report is to inform readers (practitioners and policymakers) on UWOs as an alternative to existing forfeiture and confiscation regimes, describe its key features, assess their application, and evaluate their effectiveness in two selected countries. In addition, the report identifies a number of issues policymakers should heed when contemplating introduction of UWOs in the U.S.

Recognizing that UWOs are a relatively new development in the area of forfeiture and confiscation laws, this report focuses on highlighting and describing key elements that distinguish UWOs from other confiscation laws. The report opens with a review of confiscation legislation in over 30 countries around the world with the purpose of identifying those that have enacted UWOs and those that have enacted non-conviction based legislation that have elements of UWOs, and other countries that have in place conviction based legislation with elements of UWOs. All these type of legislation have been classified in four different groups: i) countries that have true UWOs; ii) countries with non-conviction based laws that have some form of UWOs; iii) countries with conviction based laws that have some elements of UWOs; and iv) countries that have introduced illicit enrichment provisions, targeting proceeds of corruption.

Even though laws are relatively recent and at early stages of their implementation, the second section of the report makes an attempt to identify the effect these laws have had in the two selected counties (Ireland and Australia). The report addresses the background and specific circumstances that lead to introduction of UWOs and assesses the practical application of the law in the respective countries, obstacles and challenges faced during implementation, and lessons learned. To the extent possible, provided relevant and accessible data, the report also evaluates their effectiveness by comparing a predetermined set of metrics such as the size of seized assets, the rate of successful seizures versus those later overturned in the courts, and other similar metrics. Further, relying on mostly anecdotal evidence, the report attempts to assess the impact the UWOs have had in preventing and deterring crime by requesting feedback from agencies (prosecution, law enforcement, etc.) and professional experts (lawyers, civil society groups) engaged in implementing the laws. It is worth noting, however, that evaluating the impact of any law UWOs and its impact on deterring crime is a complex and difficult task. It requires precise data sets that can accurately correlate legislation to enforcement and to judgment. It also requires a prediction of crime rates, holding all other variables (other legislation, law enforcement techniques, and criminal behavior to name a few) constant for any given year in order to establish a baseline with which to measure the impact of the law. Such an endeavor is well beyond the scope of this report therefore any claims of the results or impact of UWO laws should be taken within the context in which the data were obtained, primarily through interviews with representatives of implementing agencies, law enforcement officials, other public officials, civil society groups, lawyers and media reports.

The concluding section of the report provides an overview of the forfeiture legal framework in the United States, assessing the ramifications of transferring these laws to the U.S. In this regard, key legal and policy issues are identified that policymakers should heed when contemplating introduction of UWO in the U.S.

Finally, although the report includes a description of conviction and non-conviction based laws in different countries around the world, the purpose of this report is not to conduct an evaluation of these laws, but to simply describe different laws that contain key elements unique to UWOs. Further the report does not attempt to educate readers on other conviction and non-conviction based laws as it assumes basic knowledge and understanding of these systems.

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2.2 Scope of Work and Methodology

Booz Allen Hamilton has been commissioned by the National Institute of Justice (NIJ) to conduct a comparative evaluation of UWOs worldwide, with a detailed study of two countries' UWOs. The contractual scope of work includes the following:

1. Literature review of existing legal and other studies that have examined the benefits and pitfalls associated with unexplained wealth orders.
2. A full listing of all countries that have implemented some form of unexplained wealth orders and for what offenses (e.g. corruption, money laundering, etc.). This discussion can include laws that do not exist at the national level but rather at the state or regional level as well (e.g. Swiss canton's law as opposed to Switzerland's national law).
3. A full description of the process to seize unexplained wealth, with actual or potential bottlenecks identified.
4. A discussion of reporting requirements for each country. Reporting requirements include not only statements of seizures for unexplained wealth, but requirements for government officials, private citizens or others to report the sources of their wealth in a transparent way.

The analysis section in this document compares the unexplained wealth orders of two countries and provides the following information:

1. A full description of the laws and their usage in the country (to include copies of the legal codes and a discussion of how the laws were drafted and implemented).
2. An evaluation of the effectiveness of the laws and their application in the country. Effectiveness should be measured in terms of assets seized, the rate of successful seizures versus those later overturned in the courts and other similar metrics.
3. Lessons learned from the implementation of unexplained wealth orders, including a discussion of the obstacles in implementing such laws and the public's impression of the law.
4. A transferability analysis for each country examined. Put simply, if the U.S. were to adopt that country's law, what would U.S. lawmakers have to consider given the different legal codes and criminal justice systems between the countries.

Methodology

While much has been written on the techniques of standard confiscation regimes and how criminals evade them, little has been published (in English) in the legal community on UWOs, testifying to their novelty. The Australian Institute of Criminology in July 2010 published one of the more thorough articles thus far written on the subject. More on the subject has been written in media reports, mostly focusing on Australia's UWO.

The relatively small amount of extant literature on the subject drove the methodology of this report. It is a data gathering and analysis effort based on independent research of original sources (statutes, legislative histories, case files, interviews with prosecutorial, law enforcement officials, defense attorneys, academics, etc.).

To determine the effectiveness and transferability of UWO laws, this report begins with a comprehensive review of current UWO laws (and any derivation thereof) enacted in a number of foreign nations. This is followed by a deep dive into two select countries (Ireland and Australia) that are much further ahead in the adoption, implementation and, in the case of Ireland, execution of UWOs. Finally, the report evaluates to what extent these laws have been effective and lessons learned for U.S. policymakers to determine whether it is worthwhile to propose enactment of such a law (or elements thereof) taking into account the inherent challenges in our legal system and public response. To accomplish this, Booz Allen followed a four-phased approach that focused on high quality standards of research and analysis while maximizing efficiencies to ensure budget and schedule constraints were kept in check.

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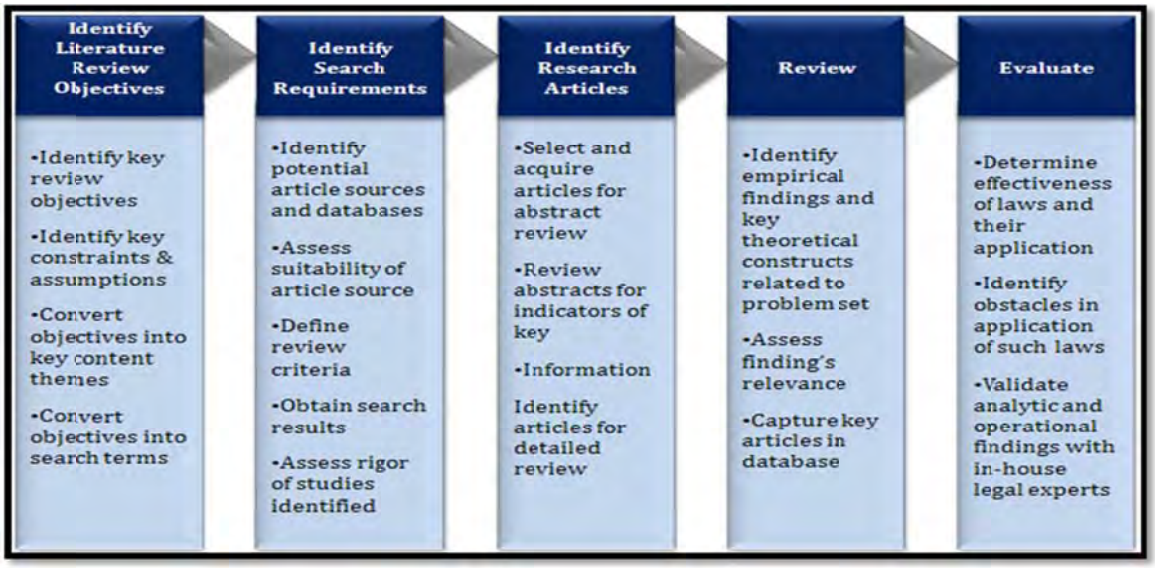
Phase 1 Desk Research and Draft Report - The first step in this phase is what we call Desk Research. The objective is to identify the study objectives, design the study approach, collect available data and literature, and put together the draft deliverable all before establishing contacts and interviews with foreign subject matter experts.

Immediately upon task initiation, the research team worked closely with NIJ to validate this strategy, scope of the research, and schedule and budget constraints. This drove the identification of types of sources that would be of suitable rigor to be included in the Desk Research and data collection effort. Where applicable, we used primary sources, refereed journals, and other open-source material that demonstrated appropriate reliability and accuracy. In addition totraditional open source data collections, through major subscription-based research respositories like Westlaw, Lexis Nexis and JSTOR we had acces to legal journals and articles written on the subject matter. In addition, the team reviewed recent international legal and foreign government studies since the majority of the information sources such as background on the law's rationale, challenges, constitutional and other issues were in these countries' publication sources and language.This initial phase of data collection was conducted locally at Booz Allen facilities using in-house expertise and subject matter experts in academia that were part of the research team.The ability to conduct this effort locally reduced travel time and allowed for a more cost-effective data collection effort.

Once the appropriate data sources were identified, the data collection effort was carried out using our case study or evidence-based approach depicted in **Error! Reference source not found.**. This approach has been successfully tested and used to guide the conduct of literature reviews, identification of data gaps, and support the development of evidence-based, social science frameworks. This method assisted in reducing risk by directing research focus and source identification, and avoiding duplication of effort.



Our research and analysis team collected and categorized results of criminal and other legal justice literature reviews. Based on the type and quality of data collected, and in view of the objective of identifying the prevalence of UWOs and their implementation, we employed the most relevant analytical approaches and tools. In addition, we incorporated a case study method for our initial review and analysis of data and sources collected.

This approach is an important and widely used methodology in socio-legal research as it has a particular relevance to complex and well-defined problem sets. Our explicit goals within this phase of the work were focused on identifying the study objectives and collect pertinent data while ascertaining the

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obstacles faced by countries that have implemented UWOs, as well as relevant public opinion. Through the implementation of our case study approach we have identified lessons learned from the implementation of UWOs throughout the world by conducting a comparative analysis of the most relevant legal cases in our selected countries. The research and analysis team compiled results of Australia's and Ireland's unexplained wealth order and conducted analyses to determine relevant patterns, trends, casual-type relationships and conforming standards that will address the objectives of the study regarding the transferability of each country's law to U.S. standards. In addition, to guide our data collection, we developed a protocol that we used for both record searches and interviews with participants.

There were two key outcomes of Phase One: 1) the identification of the two countries on which to focus our study and 2) a draft report and prelimniary findings. For the selection of the countries, the research team reviewed legislation of a number countries around the world that had implemented some form of UWOs. Of all the countries reviewed, two countries were selected based on a set of criteria[2] indetified by the research team which among others included whether the country had a full UWO (no proof of the property being connected to a crime and reversed burden of proof), the relevance of a country's legal system to the United States, and the political system of the country. Ultimately Australia and Ireland were selected as the two in-depth countries from the three countries that were found to have full-UWO laws.

For the second outcome, we presented our preliminary findings to NIJ to verify that the findings were consistent with expectation and that the countries selected were appropriate (prior to making budget commitments). Included in the presentation was a near- full description of the supervisory and technical strategies and procedures for UWO usage in each country, a preliminary evaluation of the effectiveness of those strategies and the application in the country, lessons learned from their implementation, and preliminary thoughts on the transferability of certain strategies and approaches that could be piloted in the U.S. This presentation was an in-person meeting allowing for a free and open forum of thoughts, concerns, and validation of the approach. It was an opportunity for NIJ to validate the findings, for the research team to communicate holes in the data that need to be gathered remotely, and set the parameters for the remaining pieces in the final report.

We also began drafting the final report. With much of the research complete, leaving the site visits to validate findings, our team developed the outline of the report, compiled results of the desk research, and developed a matrix and full descriptions of the laws and their usage in each country identified. This table, described in Section III of the report, is divided in four categories; 1) Countries that have implemented true UWO and apply them to all offenses and reverse the burden of proof (Australia, Colombia and Ireland); 2) Countries with non-conviction based confiscation laws that apply them to all offenses and have the presumption in favor of forfeiture; 3) Countries that have conviction based confiscation laws applicable to all offenses, reversing the burden of proof to the defendant; and 4) Countries that have illicit enrichment targeting PEP's, reversing the burden of proof to the defendant in a criminal proceeding.

Phase 2 Site Visits **-** After exhausting local research opportunities and conducting the preliminary analyses, we identified foreign nationals in the countries of interest with expertise and knowledge in the area of civil forfeiture, and if available, knowledge in unexplained wealth orders, to further refine and target or data collection. These individuals were legal practitioners, government officials, policy makers, academia, and representatives of the defense bar with the goal of obtaining a deeper understanding and local perspective of the effect of UWO laws on the countries in which we reviewed.

In addition, by utilizing NIJ resources, we were able to establish contacts with the U.S. embassies in the two selected countries (Australia and Ireland) and establish contacts with the highest U.S. government officials engaged or knowledgeable in this area. In Australia, Western Australia and Ireland, we met with

[2] For a full list of criteria's see Appendix G

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the representatives of the General Attorney's Office, the Director of Public Prosecution, law enforcement, representatives of the private bar, academics and others involved in the policy making related to UWOs[3].

Phase 3 Analysis and Conclusions **-** In this phase, all data gathered from the previous phases were rigorously evaluated to verify intermediate conclusions and to develop new results. To conduct this analysis, we began by assessing the qualitative and quantitative data to develop functions that describe the relationship between the variables we select. These variables included asset seizures, the number of successful prosecutions, amounts of money seized, and requirements for the burden of proof and the nexus between an offense and the property seized.

Phase 4 Findings Presentation **-** The objective of the final report (*this document*) is to be comprehensive while anticipating and outlining the considerations that U.S. lawmakers would have to make if adopting each foreign country's law given the different constitutional guarantees, legal codes and criminal justice systems. Consideration was given to all aspects of the legal value chain, incorporating input from all interviewees and sources of input at each decision point.

Challenges and Resolution **-** There were two major challenges to successful completion of this study. The first was gaining access to the required information. Large amounts of data were collected from disparate sources and all of them were not available for public review. It is also important to note that some data were contradictory and required time for verification and triangulation. At certain times it was difficult to obtain access to some of the data for several reasons: its sensitivity (sealed case files for example, settled cases for which there were no court records), or its currency (for ongoing court cases and investigations). Further, some data were obtained from proprietary sources. Gaining access to this information from multiple entities within several countries with varied requirements and regulations posed a unique cooperative challenge. The second challenge lied in the analysis, specifically normalizing the results from information gained from disparate sources with inherent differences to make meaningful comparisons. Key areas of difference include types of legal system, varying perspectives, amount of accessible information, and length of time in force for each law.

[3] See Appendix F. Containing contact details of people interviewed.

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III. FINDINGS

Background on Asset Forfeiture

UWOs are a relatively recent development in confiscation and forfeiture law, targeting the proceeds of criminal activities without a predicate offense. They are designed to further strengthen the fight against organized crime, by enhancing the powers of the state in depriving criminal enterprises of their illicitly acquired property, particularly those individuals for whom insufficient evidence exists for criminal conviction.

> **Unexplained wealth laws require a person who lives beyond his apparent means to justify the legitimacy of his financial circumstances.**
>
> Australian Crime Commission

The importance of confiscating proceeds of crime has long been recognized as an effective tool in disrupting the activities of organized crime. The underlying reason is that profit or financial gain is the main motive for criminals to engage in criminal activities. This profit is used to fund lavish lifestyles, as well as invest in future criminal activities. Indeed, removing the profit motive is considered to act both as a preventive and a deterrent to criminals by diminishing their capacity to invest in future criminal activities. The strategy of hitting criminals where it hurts most, "their pockets", is regarded as an effective strategy by law enforcement agencies for organized crime. While organized crime has shown resilience and a high level of adaptability to other law enforcement strategies, removal or reduction of assets is considered to have an impact on their operations. Thus, confiscation of criminal proceeds is embraced by many countries through conviction and non-conviction based confiscation mechanisms.

In an effort to combat criminal activity such as drug trafficking and other organized crime, a number of countries have laws that allow authorities to confiscate assets that are suspected to be the proceeds of illegal activity or property facilitating the crimes. In conviction based confiscation, or criminal forfeiture as it is called in the United States, the defendant is deprived of his assets based on the crimes for which he is convicted. Because it is part of the defendant's sentence in his criminal prosecution, conviction based confiscation is an action against a person, or *in personam*. In the U.S., criminal forfeiture is a bifurcated proceeding that happens after conviction and the government must show by preponderance of the evidence that the defendant's property was either used in the facilitation of, or derived from, one of the crimes for which he was convicted.[4] The criminal forfeiture authorities in the U.S. were dramatically expanded as part of the USA PATRIOT Act.

Alternatively or in parallel, some countries have laws that allow the government to confiscate the assets without a conviction. The non-conviction based confiscation, or civil forfeiture as it is known in the U.S., is brought as an action against the property itself, or *in rem*. U.S. civil forfeiture laws are nearly as old as the country[5] but their use increased greatly in the 1980's as part of enhanced drug enforcement. Civil forfeiture requires the state to prove that the property is the instrumentality or proceed of a crime, typically by the civil burden of proof or a preponderance of the evidence, which is the standard used in the U.S., U.K. Ireland, Italy, and Colombia.[6] However, in some countries, the standard is different. In

[4] There also is another form of *in personam* forfeiture, the confiscation of property that has been legislatively deemed to be contraband (e.g., drugs, certain weapons), even though there may have been no underlying criminal conviction.
[5]The first statute authorizing civil forfeiture was enacted by Congress in 1789 as a sanction for the use of ships in customs violations, Act of July 31, 1789, Sections 12, 36; 1 Stat. 39, 47. The concept dates back to Biblical times, Exodus 21:28: "If an ox gores a man or a woman, and they die: then the ox shall surely be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."
[6] The U.N. Convention against Corruption 2003 (UNCAC), Article 54(1)(c), recommends use of the preponderance of the evidence standard.

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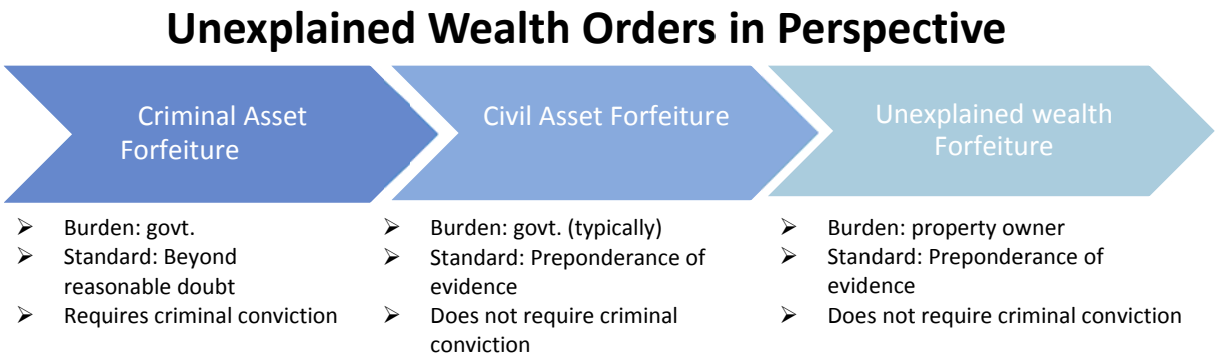
Canada, for instance, there have been recent developments in some provinces to follow the U.S. model.[7] South Africa on the other hand requires proof "on a balance of probabilities"[8], that the property is an instrumentality of an offense or the proceeds of unlawful activities" for property to be forfeited in a civil action.[9]



Over the past two decades, a large number of international conventions and instruments designed to combat organized crime, money laundering and corruption have adopted the strategy of targeting proceeds of crime as a way to reduce and deter crime. This includes United Nations Conventions against Transnational Organized Crime[10] (2000 Palermo), the United Nations Conventions against Illicit Traffics in Narcotics Drugs and Psychotropic Substances[11] (1998, Vienna). All these conventions contain non-mandatory provisions encouraging states to include non-conviction based confiscation or asset confiscation, placing the burden of proof on the property owner to show legitimacy of property. The Financial Action Task Force (FATF) has been influential in getting the international community to recognize the importance of confiscation laws to combat money laundering and terrorism financing, as well as the crimes underlying money laundering.[12] In addition, the United Nations Convention against Corruption[13] of 2003 encourages countries, subject to their constitutional and legal principles, to introduce illicit enrichment as a criminal offense, defined as a significant increase in the assets of public official that he or she cannot reasonably explain.

Building on the concepts behind confiscation, some states have adopted unexplained wealth orders to heighten the fight against organized crime in particular by making it easier for the state to identify, seize and subsequently confiscate assets of those engaged in criminal activities. Several countries have debated the possibility of introducing UWOs into their legal systems, but most have decided to maintain traditional confiscation regimes. Few have ventured into the area of UWOs, and those that have, have faced constitutional and legal challenges. For example, the Italian Constitutional Court declared law *12quinquies* to be unconstitutional, after only two years of use, when it determined that shifting the burden of proof violates the Italian constitution. Other countries (e.g., United Kingdom, some jurisdictions in Canada, and New Zealand) have a presumption in favor of forfeiture for unlawful

[7] Max M. Nelson, *Federal Forfeiture and Money Laundering: Undue Deference to Legal Fictions and Canadian Crossroads*, 41 U. Miami Inter-Am. L. Rev. 43, (Fall 2009).
[8] The civil standard of proof-balance of probability is a term used in most other countries that is the same as the U.S. civil standard –preponderance of evidence.
[9] South African Prevention of Organized Crime Act of 1998, Ch. 5, Pt. 1.
[10] See Article 7 of the Palermo Convention
[11] Article 7 of the Vienna Convention; "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".
[12] See recommendations 3 of the 40 + 9 FATF recommendations.
[13] Article 20 of UNCAC, establishing illicit enrichment as a criminal offense when committed intentionally. Illicit enrichment is a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

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activities or specific offenses as part of civil forfeiture proceedings, but not full UWOs. Some countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offenses targeting the proceeds of corruption, where the reversed burden of proof is part of the offense, but apply only to public officials, and not to all crimes. A similar approach was followed by France with an amendment to the criminal code, introducing criminal offenses in which the reversed burden of proof is a central element of the offense. For example, individuals associated with drug dealers who cannot reasonably explain their assets will be convicted and deprived of their assets. Three countries have full or pure UWOs: Australia, Colombia, and Ireland. Currently, the U.S. has no provision in its law for forfeiture based simply on unexplained wealth.

UWOs are part of non-conviction based asset confiscation because they do not require criminal convictions. However, they contain a number of features that substantially differentiate them from traditional non-conviction based asset forfeiture authorities. The first difference is that UWOs are an *in personam* forfeiture proceeding, whereby an action is brought against the person who owns or possesses the unexplained wealth or property. Secondly, the state does not have to show a predicate offense[14]. In traditional confiscation, the state must demonstrate that the property is derived from or facilitates a crime. In a UWO proceeding, the state is only required to show on civil standard of proof-preponderance of evidence (that it is more likely than not) that the respondent owns or possesses unexplained wealth, without specifically identifying the criminal activity that originated the wealth. This leads us to the third difference, reversed burden of proof. Once the state discharges its burden of proof, the burden shifts to the respondent to show that the property is lawful.

[14] As will be discussed in detail in Section 3.2.2.1 while there is no predicate offense requirement under Irish law, in practice the CAB has set a higher standard of proof for the state, showing that the respondent has been engaged in criminal behavior. The CAB does not have to show that a specific offense was committed, but it is sufficient to show that there are reasons to suspect that the person has been engaged in criminal activities. Similarly in Section 3.2.1.6 while the WA law does not have a requirement for a predicate offense, in practice the courts have imposed a higher burden on the DPP, obliging them to show some connection between the respondent and crime. The new Australian federal UNEXPLAINED WEALTHHUNEXPLAINED WEALTHHO has a requirement for a predicate offense.

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3.1. REVIEW OF ASSET FORFEITURE AND CONFISCATION SYSTEM

This section walks through the four categories of UWOs and the countries that fall within each one. It is organized accordingly:

Section 3.1.1) Countries that have implemented true UWOs and apply them to all offenses and reverse the burden of proof

- Columbia (note: Australia and Ireland are covered in more detail in Section 3.2)

Section 3.1.2) Countries with non-conviction based confiscation laws that apply them to all offenses and have the presumption in favor of forfeiture

- Antigua and Barbuda
- Canada
- New Zealand
- South Africa
- United Kingdom

Section 3.1.3) Countries that have conviction based confiscation laws applicable to all offenses, reversing the burden of proof to the defendant; and

- Austria
- France
- Italy
- Netherlands
- Switzerland

Section 3.1.4) Countries that have illicit enrichment targeting PEP's, reversing the burden of proof to the defendant in a criminal proceeding

- Hong Kong
- Singapore

3.1.1 Countries that implemented UWOs and apply them to all offenses and reverse the burden of proof

As stated earlier, three countries have full UWOs and apply them to all offenses: Australia, Colombia and Ireland. Australia and Ireland are the two countries that were selected for in-depth analysis in this study, and therefore are explored later (see Section 3.2). Colombia has not been one of the countries selected for an in-depth study, thus here we only provide an overview of the Columbian UWO law.

Colombia

Efforts by the Colombian government to dismantle drug trafficking networks, attack organized crime structures, and fight money laundering have led to numerous legislative initiatives, including the Anti-Money Laundering Law and National Drug Act of 1986 and 1996. In strengthening measures to fight organized crime, in 2002 the government adopted the Civil Asset Forfeiture Law, widely referred to as Law 793. The law was a joint initiative of the Ministry of Justice and the Ministry of Interior, supported by the National General Prosecutor's Office and the National Anti-Narcotics Office. The law codified illicit enrichment as an illegal activity for which assets can be forfeited by a court if the owner cannot justify their legitimate origin. Moreover, the law shifted the burden of proof onto the respondent to justify the legitimate origin of his or her assets and property. This law is regarded as one of the most comprehensive forfeiture laws in Latin America.[15] Although conviction based confiscation of assets has

[15]U.S. Department of State in the report of 2008. Available online at: http://www.estandardsforum.org/colombia/standards/anti-money-laundering-combating-terrorist-financing-standard, accessed January 6, 2011

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been used in Colombia since 1930, the introduction of non-conviction based assets forfeiture is a novel concept in the country's legislation.

Colombia also has in place several illicit enrichment laws that criminalize unlawful accumulation of wealth by individuals and public servants during the time they are in the office. The burden of proof is on the respondent or the public official to justify the source of wealth and the proceedings are criminal with a standard of proof beyond reasonable doubt. The illicit enrichment offense for public servants carries a sentence of 6 to 10 years and for individuals 5 to 10 years of imprisonment and payment of an equivalent amount to the value derived from the unlawful conduct.

In its fight against drug trafficking problems, Colombia has enacted several laws that target proceeds of crime, as outlined above. Due to the focus of the report on unexplained wealth orders we are focusing on the Civil Asset Forfeiture Law (Law 793) of 2002 and providing a description of the operation of the Act and key challenges faced in the course of the implementation.

Non –conviction based asset forfeiture

In 2002, the Colombian government introduced two laws to strengthen the system of civil asset forfeiture. Law 793 was designed to resolve earlier inefficiencies in the system and improve the management of asset forfeiture cases by imposing strict time limits on proceedings, reducing the time allowed to submit challenges and requesting accelerated forfeiture actions by the judiciary. The law also placed an obligation on interested third parties to demonstrate their legitimate interest in the property to protect their rights. Law 785 introduced a number of policies to strengthen the management of seized assets by establishing a fund for the administration of seized and forfeited assets, designating the National Drug Enforcement Directorate (NDED) as the agency responsible for managing seized assets.

Pursuant to law 793 the court can order the forfeiture of assets whether or not the respondent has been convicted of an offense. Forfeiture is imposed against the owner's property (*in rem*) and the prosecution is not required to establish a causal linkage between the concerned assets and a criminal offense. The court can order forfeiture if the prosecution establishes that one of the following grounds exists: illegal enrichment offense, acts against the public treasury, a corruption offense, or other specified criminal activities.[16] Property subject to inheritance is subject to forfeiture if the property is considered to have been derived from or involved in offenses listed in Article 2[17] of the law.

The court can order forfeiture of assets or property when—

- There has been an unjustified increase in personal assets, at any time, and no explanation of the origin of assets is offered, or
- The property is derived directly or indirectly from illegal activities, or
- The property was used as a means or an instrument to carry out an illegal activity, or
- The property is derived from transfer or exchange of other resources derived from illegal activities, or the property or rights involve legally obtained property used or intended to be used to conceal or mix with illegal property, or
- When the legal origin of the property sought during the trial cannot be demonstrated.

Court proceedings are initiated by the Office of the Prosecutor General (OPG), with the Comptroller General, Police and Investigation Agencies, and the National Drug Enforcement Directorate (DNE)

[16] Articles 1, 2, and 3 of Law 793 of 2002. Illegal activities referred to under these articles include: Conduct against Public Treasury such as embezzlement, illegal interest in contracts, contracts violating legal requirements, illegal monopolies, theft of national security and defense goods and equipment, offenses against public welfare, improper use of privileged information, utilization of secrets or information under seal, and activities that cause serious damage to social welfare, such as public health, social and economic order, public administration, the rule of constitutional law, kidnapping, kidnapping for extortion, extortion, and pimping.
[17] See ibid at 4.

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obliged to report to the OPG the existence of any property that may be subject to the forfeiture order. The law authorizes the NDE to be a party to the forfeiture proceedings initiated by the OPG, with full authority to present evidence, request preventive measures, and contest any decisions made. The law also provides that any person can be rewarded with up to 5 percent of the total amount forfeited to the state if he or she provides useful information to the prosecutor related to the property that may lead to the forfeiture order.

The forfeiture proceedings are independent of any criminal proceeding. Proceedings are governed by the rules of civil proceedings and the civil standard of proof is applied. In practice proceedings are lengthy and complex, and present many opportunities to appeal the evidence and the decisions. The OPG initiates the proceedings, can order preventive measures, can issue a freezing or seizure order, and can prevent anyone from disposing of or otherwise dealing with the property. If a freezing or seizure order is not issued during the investigation stage, one can be issued during the initial proceedings at the request of the prosecutor ex officio. The Solicitor General and all interested parties will be notified of such an order within five days from the day the order was issued. If parties cannot be identified, the court will consider it sufficient if a notice has been left at the address on records for the interested parties. Third parties also will be notified through an edict, posted at the Office of the Clerk as well as through national newspapers and radio. If no party has responded the court will identify a *guardian ad litem*.

After the notification periods have expired, the court will review the evidence within 30 days, the prosecution will decide whether or not to pursue the forfeiture order, and will send the case to the assigned judge. The judge, depending on the evidence, will issue a forfeiture order or will abstain from doing so. The only avenue available for appeal is the direct appeal to a superior court within 30 days. A judgment that is not appealed is required by law to undergo a consolatory judicial review.

Reversal of the burden of proof is permitted under Colombian legislation, shifting the burden onto the respondent to provide satisfactory evidence to establish the legitimate origin of his or her assets. The Colombian Constitutional Court has endorsed the reversal of the burden of proof in civil asset forfeiture, describing it as a "dynamic burden of proof" holding that "requiring the one who is better able to prove a fact, to be the one to prove it. In forfeiture cases, the owner is in a better position to prove the lawful origin of his or her property and undermines the prosecution's attempt to prove the illicit origin of the assets."[18] Further, the court held that shifting the burden of proof onto the respondent is acceptable because it is a civil proceeding and no penalty is imposed on the individual. The respondent has the right to provide new evidence to challenge decisions made within the process; usually, a person with lawful income has no trouble proving the legal origin of his or her assets. The Constitutional Court held that the law protects only the rights of those who acquire property by licit means. Those who acquire property unlawfully cannot claim the protection provided by the legal system. The main purpose of the law is to capture the results of the illegal activity.

Financial investigations are carried out by law enforcement, Financial Information and Analysis Unit (UIAF) and the General Prosecutor (Fiscalia). Their role is to gather sufficient evidence from various sources including prior judgments and court decisions, public deeds and real estate records, operation reports of buying, selling, money transfer, travels and the like and provide them to the attorney general to initiate the case.

The UIAF, established as part of the Ministry of Treasury and Public Credit in 1999, is considered one of the most sophisticated financial intelligence units in the developing world. It is an independent unit with administrative autonomy in staff administration and has administrative autonomy and legal capacity. The UIAF has developed a system of Risk Management of Asset Laundering and Terrorism Financing (SARLAFT).

[18]Constitutional Court, Sentence C-740-03, Judge Dr. Jaime Cordoba Trivino

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Cooperation between the UIAF and the financial sector is positive because the banks are not restricted by the confidentiality clause when a financial institution suspects money laundering activity. Further, under the Anti-Money Laundering Law, financial institutions are required to report cash transaction of more than 5,000 pesos and maintain records of account holders and financial transaction for a period of five years.

Effectiveness Notwithstanding the amendments introduced by Laws 793 and 785 to improve and expedite the process for resolving forfeiture cases, the general consensus is that the results have been far from satisfactory. The complexity of the legal system continues to slow the resolution of forfeiture cases, while those involved in violating the law adapt remarkably quickly to the new policies and laws introduced by the government. On the other hand, the government institutions face many challenges that slow implementation of the laws. The Fiscalia (General Prosecutor) has a large backlog of cases and lacks adequate human resources (prosecutors and judicial police) to carry out investigations and fight money laundering.[19]

The main obstacles are faced by prosecutors in small towns, provinces that are ruled either by armed groups or by local traditional landlords. When procedures are initiated to seize property, the Fiscalia faces several challenges. For example, such procedures must address issues related to many property deeds because most of the municipal records are inaccurate. Also, it is not uncommon for local staff to refuse to cooperate, either because they are corrupt or they are controlled by those whose property rights may be challenged. In addition, the records often are maintained manually, which means they can be easily manipulated or forged, and powerful landlords use their power to impede modernization of records. It is not uncommon for the records of seized property to disappear altogether; in such cases, the Fiscalia has no means of proving the existence and the ownership of property or assets.[20]

Asset management of seized assets has also been an area of great concern in Colombia. Law 785 designated the NDED as the agency responsible for managing seized assets from the time of seizure until a court makes the final decision on the forfeiture or return of assets to the owner. DNE is responsible for verifying the status of seized property, maintaining an inventory of the seized assets, identifying interim management of the property through an open solicitation process, and ensuring reasonable preservation of the economic value of the property.

Some elements of the asset management system are considered highly successful; other elements require further improvements to preserve the value of the seized assets and to reduce the maintenance costs. Assigning private real estate properties and leasing of hotels through specialized hotel operators has been highly successful, while on the other hand management problems related to maintaining inventory records has proved highly challenging, especially when it comes to motor vehicles, which are maintained in a number of different locations. Further, the law does not provide any discretion when seizing assets, which means that all assets are seized, regardless of their condition or value. It takes years for the court to make a final decision on assets; steps have not been taken to remedy the situation because it requires corresponding increases in personnel to manage the new systems. Until the end of November 2008, DNE had received 80,860 assets to manage while forfeiture was in the process. Of those assets, 12,397 (15.3%) had been returned to their owners, who had obtained favorable judicial sentences. Only 7,734 (9.6%) had been forfeited, and the remaining 60,729 (75.1%) were in the judicial process. This demonstrates the slowness of the forfeiture process and the delays in reaching final decisions.[21]

[19] Francisco E. Thoumi & Amrcela Anzola: Extra-legal Economy, Dirty Money, Illegal capital inflows and outflows and money laundering in Colombia
[20] Francisco E. Thoumi and Marcela Anzola, Extra –legal Economy, Dirty Money, Illegal capital inflows and outflow and money laundering in Colombia, Second Draft University of Texas, Austin
[21] *Clara Garrido* "Illicit Enrichment; Theory and Practice in Colombia"; Stolen Asset Recovery- A good practices Guide for Non-conviction Base Asset Forfeiture, 2009 The International Bank for Reconstruction and Development/The World Bank

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3.1.2 Countries with non-conviction based asset forfeiture laws that apply to all offenses with a presumption in favor of forfeiture

Antigua and Barbuda

Antigua and Barbuda have in place a multitude of laws targeting the proceeds and instruments of unlawful activities as well as laws on illicit enrichment. One of the first laws adopted targeting the proceeds of crime was the Proceeds of Crime Act (PoCA)[22] of 1993, which established a conviction-based confiscation and forfeiture[23] of property derived from scheduled offenses. Introduction of the Money Laundering Prevention Act (MLPA[24]) in 1996, in addition to providing for administrative seizure and forfeiture of currency (money seized at border crossings) also introduced non-conviction–based asset forfeiture without a requirement of a predicate offense. Further, in 2004, Antigua and Barbuda also adopted the Prevention of Corruption Act (PCA), introducing illicit enrichment offense primarily targeting government officials and civil servants who were suspected of committing a corruption offense. These provisions enabled the state to confiscate any property acquired by the respondent as a result of the commission of an offense. The person alleged to have committed a corruption offense bears the burden of proof and is required to adduce evidence to satisfy the court that the property in question was acquired through lawful means. In addition to these laws, the Misuse of Drugs Act (MDA) of 1998 provides for seizure and confiscation of narcotic substances, following conviction.

PoCA and MLPA are key laws in the legal framework of Antigua and Barbuda in targeting proceeds and instrumentalities derived from illegal activities. Both acts provide for conviction and non-conviction based forfeiture and confiscation, seizure, and restraint of property. Proceedings under the MLPA are civil in nature and all the facts of the case are decided on the civil standard of proof-balance of probabilities. The initial burden of proof is on the prosecution or the special entity authorized to institute proceedings under the MLPA, the Supervisory Authority. After the Supervisory Authority meets the initial burden of proof satisfying the court that the property in question is tainted property, the burden shifts to the defendant, compelling him or her to justify the legality of the property. A novel concept introduced with MLPA is the automatic forfeiture of seized property within 90 days. Proceedings under PoCA are decided based on a criminal standard of proof, beyond reasonable doubt.

Targeting proceeds of crime under PoCA and MLPA

The objectives of PoCA are multifaceted, but the main objective is to deprive persons of the proceeds, benefits, and property derived from commission of a scheduled offense[25] and of property used in commission of an offense (instrumentalities of crime). PoCA's objective is to enable law enforcement authorities to trace and confiscate property constituting proceeds of an offense. The definition of the "proceeds" of an offense is defined in the preamble of PoCA as "*any property that is derived obtained or realized, directly or indirectly by any person from the commission of a scheduled offense.*"[26] Similar definition of "proceeds" is contained in the MLPA, with the difference that it does not only cover proceeds from specific offenses, but it includes proceeds derived from any offense committed in Antigua or Barbuda or elsewhere[27].

The PoCA provides for confiscation and forfeiture of proceeds following conviction of a defendant for commission of a scheduled offense, which means that the prosecution can apply for confiscation or a

[22] Available at http://www.laws.gov.ag/acts/1993/a1993-13.pdf, accessed March 21, 2011
[23] Confiscation and forfeiture are used in the PoCA of 1993. Confiscation is used to describe in personam conviction based regime, and forfeiture is used to describe in rem conviction based regime.
[24] Available at http://www.antigua-barbuda.com/finance_investment/MoneyLaunderingPreventionAct18-9-02.pdf, accessed March 22, 2011
[25] See PoCA, 1993, p. 62
[26] Section 3(1) of the Proceeds of Crime Act of 1993 and section 2(1) of the Money Laundering Prevention Act of 1996
[27] See Section 2(ii) (b); an offense committed elsewhere includes " any foreign law, whether or not it is specified by regulation under this Act which prescribes dealings in property which is the proceeds of crime, which, if it was committed in Antigua and Barbuda, would be an offense against this Act or any other law of Antigua and Barbuda".

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forfeiture order only after the defendant's conviction. Forfeiture orders are brought against "tainted" property[28], while confiscation orders are brought against a person convicted of an offense in relation to the benefits derived from that offense. Differing from PoCA, provisions under MLPA are broader and can be applied in cases when a person has not been convicted. Moreover, the statute provides that a person is taken to be convicted of an offense, if he or she is convicted of an offense either in Antigua or Barbuda or elsewhere, or if the person has been found guilty of an offense or the court has declared that the person has absconded.

Restraining and freezing orders under PoCA and MLPA

Proceedings under PoCA generally commence with an application for a restraining or a freezing order to prevent property from being disposed of or dissipated. The court can make an order restraining property on an *ex parte* application of the Director of the Public Prosecution (DPP) supported by an affidavit. The affidavit must state whether or not the person is convicted of or charged for commission of a scheduled offense, the specified property, and reasonable grounds to believe that the person has benefited from the offense. If the court is satisfied, it will issue a restraining order, prohibiting a person from dealing with the property, and also can appoint a Public Trustee to manage or deal with the property. The court requires that all parties affected by the restraining order be notified. Similarly, in conviction based confiscation proceeding under the MLPA, the High Court will issue a freezing order on application of the Supervisory Authority, if the defendant has been convicted of or will be charged with a money laundering offense. In cases when the defendant has not been convicted of an offense it is required that the application be supported by an affidavit submitted by an authorized officer[29] stating the grounds on which he or she based suspicions that the defendant had committed an offense. In cases when the application is made relying on proposed charging of the defendant, the order will not be made unless the defendant is charged within 30 days. Any person contravening a restraining order can be fined or imprisoned.

Forfeiture and confiscation under PoCA

The PoCA of 1993 provides for a conviction-based *in rem* forfeiture to be instituted against the property and conviction-based *in personam* confiscation against the person to deprive him of benefits derived from commission of the scheduled offenses. Both proceedings are instituted by the DPP to a competent court, after the person has been convicted of a scheduled offense, but within a 12-month period from the day the person was convicted of, or charged, with an offense. For the purpose of the forfeiture and confiscation proceedings, the person is assumed to have been convicted of an offense if he or she has been convicted summarily or if there is an indictment or if a person was charged with the offense, found guilty, and discharged. Although PoCA provides for confiscation of property only following a conviction, it also contains a provision that enables the court to complete forfeiture proceedings before the defendant has been sentenced. This proceeding can be characterized as non-conviction based as no sentence has been imposed against the person or no determination of guilt has been made.

The burden of proof the prosecution has to meet in a forfeiture proceedings differs from the confiscation proceeding. In an application for a forfeiture order, the DPP must establish that the property in question is tainted property,[30] but in a confiscation proceeding, the DPP must establish that the defendant has benefited from the commission of scheduled offenses. In determining whether or not the property is tainted, the court will consider the following:

[28] See section 19(2) (a)(b)(c) of PoCA 93- Tainted property is considered property that is used in, or in connection, or has derived as a result of the commission of the offense of which offense the person was convicted of.
[29] An authorized officer is defined in Part 1, section 2 of the Act to mean a person authorized by the Supervisory Authority to perform certain acts or functions under this Act.
[30] Tainted property is defined to be "(i) property used in, or in connection with the commission of the offense; (ii) property derived, realized or obtained, directly or indirectly from the commission of the offense.

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(a) if the property was used in, or in connection with the scheduled offense, where the evidence establishes that the property was in the person's possession at the time of, or immediately after the commission of the offense;
(b) if the property was derived or obtained as a result of the offense, if evidence shows that property or money was found in person's possession, or in a building, during investigation or search; and
(c) the increased value of property will be considered to have derived from the offense, if the evidence shows that the increase resulted after the commission of the offense for which the person was convicted and evidence shows that the value of all property of the defendant exceeds the value of property prior to the offense and that the court is satisfied that persons income cannot account for the value increase.

In deciding whether or not to impose forfeiture, the court also will consider the gravity of the scheduled offense, the interests of third parties in the property, the hardship caused to any other person, and the ordinary use of the property.

In a confiscation proceeding, in determining whether or not the defendant has benefited from the offense, the court will, unless the contrary is proved, presume that all property held by the defendant when the application is made, or held at any time within a period of six years from the day the application is made, is property derived from the commission of the scheduled offenses for which the defendant is convicted. This includes all expenditures incurred by the defendant or any property received at any time. Moreover, in a confiscation proceeding, when the prosecution tenders a statement alleging that the person has benefited from an offense and determines the value of that benefit, the court will provide the defendant with an opportunity to respond to the prosecutor's statement. The defendant's failure to respond will be treated as acceptance of the allegations; similar opportunity is provided to the prosecutor on the defendant's tendered statement. In confiscation proceedings, the burden shifts to the property owner, first under section 19 (3), whereby the court will make a certain presumption unless the defendant adduced evidence to justify a legitimate source of the property. And second, sections 20 (1) and (2) provide the defendant with an opportunity to rebut the prosecutor's allegation and to present sufficient evidence proving the legitimacy of the property. The first situation is a clear example of the reversal of the burden of proof onto the defendant to present evidence and establish legitimacy of his or her property, but in the second instance it is more a rebuttal of the allegations made by the prosecution. No reversal of the burden of proof is provided under the forfeiture regime.

Another difference between the forfeiture and confiscation regimes is that under the forfeiture regime, an order can be issued to forfeit either the "tainted property," including immovable property or the defendant will be ordered to make a payment of an equal amount if the property is not available for forfeiture. In the confiscation regime, the court will order the defendant to pay a specific amount of money equivalent to the property or a sum of money realizable at the time the order is issued.

Both regimes provide for the protection of third parties, whereby the court will exclude property or an interest in a property on an application made by an innocent third party if satisfied that the person was not involved in the commission of an offense and that he or she had acquired property for sufficient consideration.

The statute also provides for variation and amendment of forfeiture and confiscation orders. Finally, if the defendant fails to make a payment or to deliver property as specified in the forfeiture or confiscation order, the court may impose a fine and imprisonment; the value of the fine or the number of years of imprisonment will depend on the value ordered to be paid. The defendant or third parties can be compensated if a forfeiture order was issued based on serious defaults in the investigation and if the defendant has suffered substantial loss. Under PoCA the court can make an order allowing for payment of reasonable living and business expenses from the frozen property, including defendant's reasonable legal expenses incurred in a proceeding under this act.

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Non-conviction based asset forfeiture under the MLPA

Seizure, detention, and forfeiture of currency Under the MPLA customs officers, custom guards, and police officers are granted the authority to seize and detain for a period of up to 7days any discovered currency of more than $10,000, if they have grounds to suspect that the currency is proceeds or an instrumentality of an offense. The detention period can be extended on the application of the Supervisory Authority,[31] until proceedings against the person from whom the money was seized have been concluded; however, the period cannot be extended for a period longer than two years from the day the money was seized. Seized money can be partially or fully released if the court is satisfied that the grounds on which the money was detained no longer exist or that continued detention could not be justified. Magistrate court may make an order forfeiting the currency if satisfied that the currency is proceeds from some form of unlawful activity[32] or an instrumentality of any offense (whether the person has been convicted or not). In determining whether or not the currency is proceeds or an instrument of an offense, the court will consider the use ordinarily made, or intended to be made, of currency and claims of any third party to an interest showing that they were not involved or aware of any unlawful use of currency. The act requires that notifications be sent to all parties with an interest in the currency. Similarly, PoCA provides for seizure of property if there are reasonable grounds to suspect that the property is tainted.

Non-conviction based forfeiture The MLPA provides for conviction and non-conviction based forfeiture. A characteristic of the MLPS forfeiture regime is the automatic forfeiture of property, whereby property can be forfeited to the Crown, 90 days after one of the following takes place, whichever is later: (a) a freezing order was issued or (b) the defendant has been convicted of an offense. Conviction-based forfeiture is governed by section 20 (a) and 20 (b(1)), whereby 90 days following conviction of the defendant of a money laundering offense the property is forfeited. Non conviction–based forfeiture is governed by section 20b (ii), which empowers the court to forfeit property subject to a freezing order issued on the grounds that the person will be charged or proposed to be charged with an offense or a related offense. The court will order forfeiture of the property 90 days after the forfeiture order is issued.

The law also empowers the respondent to exclude the whole or part of the property or an interest in the property (s. 19 b(5)) from a forfeiture order, if he or she is able to satisfy the court that the property is not proceeds or an instrument of an offense, or is in any way related to any unlawful activity. By way of this provision the burden of proof is reversed to the defendant to show that his or her property is not proceeds or an instrument of a money laundering offense.

The law provides protection for third parties with an interest in the property, empowering them to seek an exclusion order, even after a forfeiture order has been made. An application for exclusion will be permitted only if a court is satisfied that the person was not involved in the commission of an offense, his or her interest in property was not a result of a gift or under effective control of the defendant, and the applicant did not know that the property may have been an instrument of an offense, or could have not reasonably known that the property was an instrumentality of the offense.

Further, the statute allows for amendment of a forfeiture order or submission of a new application for a property related to the same offense[33]. All funds derived from released or sold property are deposited into a Forfeiture Fund established under the administration and control of the minister. The fund is used for

[31]Ministry responsible for national drug control and security, as the designated agency responsible for implementation of the MLPA, establishes a specific entity Supervisory Authority to supervise financial institutions in monitoring implementation of the Act and instituting proceedings for forfeiture and freezing orders.

[32] Unlawful activity is defined in MLPA to mean an act or omission that constitutes an offense against a law in force in Antigua and Barbuda or against a law in a foreign country, if it was committed in Antigua and Barbuda, be an offense against a law (section 2(1)). Similarly PoCA, section 3, defines it to be an act or omission that constitutes an offense against a law in force in Antigua and Barbuda or against a law of any other country.

[33] See s.5(4) new application is allowed only if the court is satisfied that the benefits or advantages were identified after the previous application was determined, or new evidence become available at a later date. S.7 provides also that an application can be amended during the proceeding.

Appendix B

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anti-money laundering activities, with the exception of 20 percent, which is set aside for administrative fees. In addition, the Act also contains provisions on the mutual legal assistance Act, on matters concerning money laundering offenses.

Finally Antigua and Barbuda enacted the Corruption Prevention Act (CPA) in 2004 to prohibit corruption and impose penalties for persons who committed corruption offenses. The Act was intended to be used against any person employed by the government or other public body who solicits or receives gifts, loans, fees, or advantage in exchange for performing or abstaining from performing, or expediting, delaying, hindering, or preventing the performance of an official duty by a public official.

The offense of illicit enrichment in Antigua is similar to the provisions incorporated in many statutes of other countries, criminalizing unexplained wealth derived as a result of an offense and shifting the burden of proof onto the defendant to defend himself and show how he was able to maintain that standard of living and how he acquired those pecuniary resources or property. If the court is not satisfied that the property and pecuniary resources were lawfully acquired, it can, in addition to the penalties, confiscate the pecuniary resources or property that the accused could not explain. The defendant has a right to appeal the court's decision. A safeguard has been included in the statute, potentially preventing malicious or false allegations by making it an offense to make false allegations or provide false information.

Monitoring, examination, and production orders Both PoCA and MLPA provide for an array of investigative powers, such as production, examination, and monitoring orders. However, limitations are imposed on these powers to limit the negative effect they may have on parties to proceedings. For example, under MLPA, a person can be examined by a court, and he or she cannot be excused from answering the questions on the grounds that the answer might incriminate him or her. However, the Act prohibits the use of information obtained during examination, or any other investigation technique, as evidence in criminal proceedings against the person, except in a proceeding for giving false testimony in the course of examination. Part IV of the Act overrides secrecy obligations or other restriction on disclosure of information. The Supervisory Authority is empowered to share information related to any suspicious transactions with any governmental agency inside or outside Antigua and Barbuda.

The police officer is authorized under PoCA to issue a production order, directing a person who has a document relevant to identifying, locating, or quantifying tainted property, to produce it or to make it available to the police officer. This does not include accounting records used in the ordinary business of a bank. The person producing the document will not bear any consequences for producing the document and it cannot be used against the person in any criminal proceedings except if the person fails to comply with the order. Further, on an application by a police officer, a judge can issue a monitoring order directing a financial institution to disclose information about transactions conducted by the account holder if there are suspicions that the person is about to or has committed a scheduled offense or has benefited from an offense. The financial institution is prohibited from disclosing to anyone the fact that such an order was issued. Finally, the PoCA enables the DPP, for the purpose of an ongoing investigation that is authorized by a judge, to request the Commissioner of Inland Revenue to disclose tax information to the DPP.

Canada

Canada has both conviction and non-conviction–based *in rem* asset forfeiture. Conviction-based asset confiscation is governed by the Criminal Code while non-conviction–based forfeiture is governed by the provincial civil asset forfeiture laws. The Canadian constitution empowers the federal parliament to legislate criminal law and the provincial legislature to legislate civil law.

Most of the Canadian states have introduced non-conviction asset forfeiture laws, joining the ranks of states that have such laws, such as Ireland, U.K., United States, Australia, and South Africa.[34] The first

[34] See generally Simmers, Jeffrey, "Perspectives on Civil Forfeiture" in Young, Simon, ed., *Civil*

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jurisdiction in Canada to introduce civil asset forfeiture was Ontario, with the Remedies for Organized Crime and Other Unlawful Activities Act in 2001, known as the Civil Remedies Act of 2001, followed by Manitoba, Saskatchewan, British Columbia, Nova Scotia, and Quebec. Canada has not yet adopted a civil forfeiture law at the federal level that would unify the non-conviction forfeiture regime across the country.

The first non-conviction based forfeiture statute enacted in Canada was in the state of Ontario. The statute is an *in rem* forfeiture proceeding, targeting the proceeds and the instruments derived or used in a commission of unlawful activity. Forfeiture proceedings are *in rem* and as such as instituted against the property attaching "guilt" to the property. The statute of Ontario is a result of a broad international and local research of confiscation and forfeiture legislation, including U.S. Australia, U.K. and Ireland. Though it is widely believed that the *in rem* forfeiture served as the main model, the Ontario statute contains a number of features that are unique and original to it, such as presumption in favor of forfeiture of instrumentalities of crime, compensation of victims who suffered from the unlawful activity to name a few.

Following enactment of the Ontario statute, other states of Canada followed and enacted similar statutes, largely mirroring provisions of Ontario however they do contain elements that set them apart. The key differentiating feature is the inclusion of presumption in favor of forfeiture. While the statute of Ontario and Alberta have included such presumption only in regards to forfeiture of instrumentalities of the crime, other statutes including British Colombia, Saskatchewan and Nova Scotia have a presumption favoring forfeiture for both proceeds and instrumentalities of the crime. The statutes generally have a requirement of a predicate offense, requiring of the state to show that an offense was committed and establish a link between the proceeds and the offense. It is important to note, that although all non-conviction civil forfeiture laws of the Canadian provinces are *in rem*, they all contain a requirement to identify the person who is in possession or ownership of the property. However, failure of the applying authority (prosecution or the chief of police) to identify the owner will not prevent forfeiture of property. Further, all statutes provide for compensation of losses incurred as a result of restraining or forfeiture order if the order is later revoked, it provides for victim's rights, and reimbursement of the respondent's legal expenses. In addition the statutes establish a fund from which payments are made to compensate victims, support activities that fight crime and provide for compensation of police and law enforcement forces for costs incurred under a proceeding under this Act.

It is important to note that while in general non-conviction asset forfeiture statutes provide for forfeiture of proceeds derived from certain offenses, usually for serious and organized crime, the statutes of Canadian provinces are construed in a broad manner to capture proceeds acquired or resulting from any unlawful activity. The definition of unlawful activity is broad and includes any offense that is considered as such under an Act of Canada, Ontario, or other provinces and territories, or an act committed outside of Canada, that is an offense in Canada.

Opponents of the law have argued that the provincial governments are trying to carry out criminal proceedings in a civil forum, but this argument was dismissed by the courts, which held that this is an *in rem* proceeding targeting property acquired from unlawful activities and is not directed toward a person. In addition, the Supreme Court of Canada upheld the constitutionality of civil forfeiture Act of Ontario in *Attorney General of Ontario v. $29,020*[35] where the respondent challenged the right of the provincial government to encroach on the right of the federal government to legislate criminal law. The Supreme Court upheld the constitutionality of the provincial legislation, contending that civil forfeiture laws fall under the jurisdiction of the provincial power.

Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13.

[35] Court case: *Attorney General of Ontario v. $29,020 in Canadian Currency et al.*

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Ontario

Ontario was the first jurisdiction in Canada to introduce non-conviction (civil) forfeiture laws, with the Remedies for Organized Crime and other Unlawful Activities Act in 2001[36] (referred to as the Civil Remedies Act). The purpose of the Act[37] is to (1) compensate those who suffered pecuniary and/or non-pecuniary losses as a result of unlawful activities, (2) deprive those benefiting from unlawful activities of their ill-derived assets, (3) to prevent re-investment of the ill-gained benefits in future unlawful activities, and (4) to prevent injury to the public that may result from conspiracies to engage in unlawful activities.[38] The Act sets forth three avenues to forfeit assets of suspects: (i) proceeds of unlawful activities, (ii) instruments of unlawful activity, and (iii) conspiracies that injure the public. Of these, the third forfeiture proceeding is a proceeding unique to the state of Ontario.

Restraining Order Parts 2 and 3 of the Act empower the Superior Court of Justice, on application by the Attorney General, to issue statutory interlocutory order for the preservation of property, including a restraining order, possession and delivery or safekeeping of property, and appointing a receiver and manager of the property. The Superior Court will issue any of the above only if it is satisfied that there are reasonable grounds to believe that the property is proceeds or an instrument of unlawful activity and if it is in the interest of justice. Any of the orders above can be issued *ex officio*.

The Act also empowers the court to cover reasonable legal expenses to persons with an interest in the property subject to an interlocutory order, if it finds that he or she has disclosed all interests in other properties and they are not sufficient to cover the legal expenses incurred as a result of the proceeding. In practice, legal expenses are covered at the legal aid rate for civil lawyers in the province.

Forfeiture Order The proceedings for the proceeds of unlawful activities and instruments of unlawful activity are commenced with an application of the Attorney General (AG) of Ontario to the Superior Court of Justice. The court issues a forfeiture order if it finds that the property is the proceeds of unlawful activity, except where to do so would not be in the interest of justice. “Proceeds of unlawful activity “is defined in part 2 of the Act to mean property acquired, directly or indirectly in whole or in part, as a result of unlawful activity. Similarly, the Superior Court will issue a forfeiture order in relation to instrumentalities of crime (part 3 of the Act) if there is proof that property was used to engage in unlawful activity that in turn resulted in the acquisition of other property or serious bodily harm to any person, in the absence of evidence to the contrary. In regard to the property alleged to be an instrument of crime, the statute provides that the respondent is required to rebut the prosecutor’s statement to avoid forfeiture of the property. It is interesting to note that no such presumption is provided for property considered to be proceeds of crime. Further unlawful activity is defined to be any offense that is considered as such under an Act of Canada, Ontario, or other provinces and territories, or an act committed outside of Canada, that is an offense in Canada. This determines that property derived or used in an offense could be subject of a forfeiture order, be it a minor or a serious offense.

The Act targets only forfeiture of property located in Ontario, and does not provide for forfeiture of property in other provinces or territories, although it allows the forfeiture of property located in Ontario when it has resulted from an offense committed outside of the province. Further, the Act is retroactive, meaning that it can be applied regardless if an offense was committed prior to or after the Act came into force.

The statute has incorporated provisions to protect the interests of legitimate and responsible owners. A legitimate owner is defined in the Act as the person who has not acquired the property as a result of unlawful activity, has acquired it for a fair value and from a lawful owner. A responsible owner is defined

[36] Available at: http://www.e-laws.gov.on.ca/html/source/statutes/english/2001/elaws_src_s01028_e.htm
[37] See Part I of the Act.
[38] Unlawful activity is defined in Part 2 of the Act to be “an act or omission that is (a) an offense under an Act of Canada, Ontario or another province or territory of Canada, or (b) is an offense under an Act of a jurisdiction of Canada, if a similar act or omission would be an offense under an Act of Canada or Ontario.”

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as the person who has an interest in the property and who has done all that could reasonably be done to prevent the property from being used to engage in unlawful activity, including the duty to notify law enforcement agencies of the activity or refuse or withdraw permission that the person has the authority to give. The law established a statute of limitations of 15 years from the first day the property was acquired, after which proceedings to forfeit proceeds of crime cannot be initiated. No limitation is set for proceedings to forfeit property considered an instrument of unlawful activity.

Part 4 of the Civil Remedies Act provides for a forfeiture regime under the "conspiracies that injure the public," whereas in a proceeding commenced by the Attorney General of Ontario, the Superior Court of Justice is authorized to issue any order that the court considers just if it finds that: "(i) two or more persons conspired to engage in unlawful activity; (ii) one or more of the parties to the conspiracy knew or ought to have known that the unlawful activity would be likely to result in injury to the public; and (iii) injury to the public has resulted from or would be likely to result from the unlawful activity" (s. 13). The "injury to the public" is defined in Part IV section12 of the Act to include "any unreasonable interference with the public's interest in the enjoyment of property, unreasonable interference with the public's interest in question of health, safety, comfort or convenience, and any expenses incurred by the public, including any expenses or increased expenses by the Crown of Ontario, a municipal corporation or a public body." The court may also issue an order requesting a person to do or refrain from doing anything specified in the order, or to pay damages to the Crown in Ontario for any injury to the public. The court will presume that the defendant was engaged, over the period of 5 years, or conspired to engage in unlawful activity on at least two occasions from which activities an injury to the public was caused, unless the defendant adduces evidence to establish the contrary. Such orders will not be issued if a person claims a right to those damages or has initiated a proceeding seeking payment. The statute establishes a statute of limitations of 15 years from the date the cause of actions arose.

Property forfeited to the Crown, under any of the regimes outlined above, is paid to the special account known as the Consolidated Revenue Fund for special purposes. The Minister of Finance is authorized to make payments out of the account for purposes stipulated in the statute: "(a) to compensate persons who suffered pecuniary and non-pecuniary losses; (b) to assist victims of or to prevent unlawful activities; and (c) to reimburse expenses incurred by the Crown of Ontario, municipal corporation, or a public body, as a result of any proceedings under this Act". There is no limit as to the extent of the costs that can be covered by this account. Claims for compensation are adjudicated administratively by independent adjudicators. Proceedings initiated under this Act are civil proceedings and findings of fact are made on the civil standard of proof, balance of probabilities. The court may find that an offense was committed, even if no person has been charged with the offense, or that the charge was made, but withdrawn, or the person was acquitted of charges.

The Attorney General is authorized to collect personal information on anyone to assist him in determining whether or not to initiate or conduct a proceeding under this Act or to enforce an order. The Attorney General will collect information by asking the person directly or in any other manner. Further, despite the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* and any confidentiality provisions, any person who has information that may be useful to the work of the Attorney General is obliged to disclose it. An exception is made in relation to personal health information of any person, unless an application by the Attorney General is made to the Superior Court of Justice in a hearing from which the public is excluded. The Attorney General enjoys immunity for any proceeding or action initiated under this Act.

Alberta

In Alberta, forfeiture is regulated by the Victims Restitution and Compensation Act[39] (VRCA), enacted in 2001. According to the Act, an illegal act is any offense under the Criminal Code or the Controlled Drug

[39] Available at: http://www.canlii.org/en/ab/laws/stat/sa-2001-c-v-3.5/latest/sa-2001-c-v-3.5.html

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and Substances Act, or any offense carried out in contravention of any act in Alberta. Illegally acquired property is defined to be any property acquired directly or indirectly from an illegal act, including an increase in value of property or a decrease of debt paid from proceeds resulting from an illegal act (s. 3). An instrument of illegal activity is defined in section 3.1 to be property used or likely to be used in carrying out an illegal act, which, in turn, would result in or was likely to or was intended to result in property or in bodily harm to any person, and is realized from the same or other disposition of property derived from an illegal act.

The minister[40]or his designee is empowered to file an application to restrain and forfeit property in the civil courts. The proceedings are commenced with an application of the minister for any of the following purposes: (i) obtain restitution or compensation for property victims and other persons; (ii) remove financial incentives to commit illegal acts; (iii) prevent use of illegal property to carry out future illegal activities; and (iv) other purposes. The minister will initiate proceedings only after a peace officer or investigator has conducted investigations and has reasonable grounds to believe that an illegal act was committed and that the concerned property was acquired as a result of that act.

Proceeds of Unlawful Activity Property is restrained *ex parte* on an application by the minister supported by an affidavit providing grounds on which the belief that the property was acquired illegally, was based, including details related to the location and description of the property, the person believed to be in control or possession of the property, and the persons who may have an interest in the property, and the illegal act alleged to have been carried out. Further, the affidavit also may include information related to the victims (s. 4(2) of the VRCA 2001). The court granting the order prohibiting any person from dealing with the property will also appoint a civil enforcement agency to manage the property. The hearing date must be set within 45 days from the day a restraining order was made, to decide on the disposition of the property. The law also enables the state to restrain property for a short period of time up to 10days by a peace officer, if there are reasonable grounds to believe that the property was acquired by illegal means. Any person failing to comply with the peace officer's direction is guilty of an offense and can be subject to a fine or imprisonment of six months or both.

Powers of the court are broad and include discretion to confirm or revoke the restraining order, return the property to the owner, provide compensation for actual loss incurred because of the restraining order, and vary any of the terms of the restraining order, release all or a portion of the restrained property and issue any ancillary order that the court considers appropriate. It is important to note that the court will grant an order to restrain concerned property even if no one has been charged with, found guilty of, or convicted of or held responsible for any illegal act in relation to the restrained property.

At the main disposal hearing, the minister bears the initial burden of proof to show that the restrained property was acquired by illegal means. The burden then shifts onto the respondent to establish the origin, nature, and the extent of his or her rights in property proving that he or she was not involved in the commission of the illegal act and, if the property was acquired after an illegal act, that he/she did not know and would not reasonably be expected to know that the property was acquired illegally (s. 13). An exception to the reversal of the burden of proof is provided when the respondent is the Crown or some other public body that incurred costs while protecting the safety or health of persons. If the minister is not able to satisfy the court that the property was acquired as a result of unlawful activity, the court may revoke the restraining order and compensate the respondent for the loss suffered (s. 14). If the minister satisfies the court, it will grant a property disposal order, ordering disposal of the property and payment to the Crown of the proceeds and payments for the purposes as defined by the statute, including payments made to the property victims or making payments of grants.

Instrument of illegal activity Similar to proceeds of illegal activity, the minister may commence an action if a peace officer has conducted an investigation and has reasonable grounds to believe that either

[40] S 1 (b) of the Act defines that the Minister, means the Minister of Justice, Attorney General and includes any person acting on behalf of the Minister.

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an illegal act was committed and that the property was used in carrying out the alleged act or that the illegal act resulted in or could likely result in acquisition of other property or in bodily harm to any person. Similarly to the proceeds proceeding, the application can be made *ex parte* on an affidavit of the minister providing sufficient details related to the description, location, and owner or possessor of the property.

Other steps in the procedure in regard to issuing the restraining order, interim actions of the peace officer and the disposal hearing, are identical to those under the proceeds of illegal activity. The standard of proof is the balance of probabilities. The Act does not require the minister to establish that anybody was charged with or convicted of an offense to satisfy the court that a property is proceeds or an instrument of unlawful activity. The minister has the burden of proof to show that it is likely that the property was derived as a result of illegal activity or was an instrument of such activity. The burden then shifts to the respondent to adduce evidence to the contrary. The respondent is given an opportunity before the main disposal hearing to adduce evidence establishing legal origin of his or her interest in the property, or can do so in the main hearing. Part two of the Act provides for restitution assistance post-conviction, ensuring that victims can be compensated and that failure to comply with these provisions can lead to fines and imprisonment.

Saskatchewan

According to the Saskatchewan Seizure of Criminal Property Act (SCPA) of 2005,[41] amended 2009, the chief of police may apply to the court for a forfeiture order if he or she is satisfied that the property is proceeds or an instrument of unlawful activity. The application identifies the property and provides sufficient details to make it easy to identify it and name the owner of the property and any other person with an interest in the property. The proceeds of unlawful activity are defined in the Act to mean property acquired directly or indirectly, in whole or in part, as a result of unlawful activity; the instrument of unlawful activity means a property likely to be used in unlawful activity to acquire other property or to cause bodily harm to a person (s. 2 of the Act). A Court of Queen's Bench may, on application by the chief of police, issue an interim order to preserve the value of the property, including a restraining order, possession and safekeeping of the property, appointing a receiver of the property, etc. An interim order can be issued *ex officio* for a period not to exceed ten days. A motion for extension of an interim order can be issued only if all parties are notified.

The court will issue an order forfeiting the property to the Crown if it finds that property is proceeds or an instrument of unlawful activity, unless it is not in the interest of justice. The standard of proof is a civil standard of proof. The burden of proof is shifted to the property owner. There is a statutory presumption that if the property is owned by a member of a criminal organization, a corporation if one of its directors or officers is a member of a criminal organization, or a person who has acquired the property for significantly less than its fair market value, is considered to be proceeds of unlawful activity, unless the contrary is established. Further, the Act defines the persons considered to be members of criminal organizations as those convicted of a criminal organization offense, if the person was found guilty, and even if the person was acquitted of an offense or if the charges were withdrawn or stayed. Similarly, the court will presume that a property is an instrument of an unlawful activity unless evidence is given to establish the contrary. This makes the respondent or the owner of the property responsible for presenting sufficient evidence at the court to establish that his or her property is not proceeds or an instrument of unlawful activity.

Protection from forfeiture is provided to legitimate owners. Forfeited property, if not in cash, shall be sold and its proceeds distributed to cover the costs of the Crown in the rights of Saskatchewan for expenses incurred selling the property, the chief of police for expenses incurred in bringing the application for forfeiture, and to any other entity for any other prescribed purpose. At the hearing, the police chief is

[41] Seizure of Criminal Property Act of Saskatchewan, 2005, available at http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S46-001.pdf

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obliged to advise the court of all registered interest in the property or any other interest known to him or her.

The Act provides for an appeal of the forfeiture order to the Court of Appeal. The decision of the Court of Appeal is final and cannot be appealed.

Manitoba

Manitoba adopted the Criminal Property Forfeiture Act in 2004,[42] introducing non-conviction asset forfeiture enabling the state to seize and forfeit assets that are considered to be proceeds or instruments of unlawful activities. The purpose of the Act is to prevent those engaged in unlawful activities from keeping property acquired as a result of unlawful activities as well as preventing them from using the property for commission of future unlawful activities.

The chief of police[43] may apply to a competent court for an interim (restraining) or a forfeiture order. In the application he must provide sufficient details on the property, name the owner(s) of the property and any other person who may have an interest in the property. On motion by the police chief, the court may make an interim order to preserve property and notices must be sent to the owner and other persons with an interest in the property. The law provides that a Court must issue a forfeiture order, unless it would not be in the interests of justice to do so, if it finds that the property is proceeds or an instrument of unlawful activity.

The burden of proof is on the respondent to establish that the property sought to be forfeited is not proceeds or the result of illegal activities. There is a statutory presumption that all of the property owned by a member of a criminal organization, a corporation if a member of a criminal organization is one of its officers or director, or a person to whom the property was transferred for significantly less than its fair market value, is proceeds of unlawful activity, unless the respondent adduces evidence to establish the contrary. The Act also includes a statutory rebuttable presumption that a person is a member of a criminal organization if he or she has been found guilty or been convicted of a criminal organization offense. It is not relevant for the purpose of forfeiting a person's property if the person was charged with and acquitted of an offense, or if those charges are withdrawn or stayed.

Similarly, statutory presumptions are established for instruments of unlawful activity. The court will presume that the property used to engage in unlawful activity resulting in acquisition of other property or in serious bodily harm to a person, is an instrument of unlawful activity, in the absence of evidence to the contrary.

The judge may issue special orders to protect people with an interest in property that is subject to forfeiture. Banks, credit unions, insurance companies, government, and some other interest holders are entitled to automatic protection, while others must prove to the judge that they did not know about the unlawful activity or did all that reasonably could be done to prevent the property from being used to engage in unlawful activity.

Forfeited property must be sold by the government after it has paid any costs the government incurred while selling the property and reimbursing the police for expenses incurred during the proceedings under this Act. The remaining funds are paid to the Victim's Assistance Fund to support victim's services or crime prevention programs and to the Legal Aid Services Society of Manitoba.

There are no limitation periods to bringing an application under this Act. The police chief or any other person acting under the authority of this Act enjoys immunity and no action can be brought against them.

[42] The Criminal Property Forfeiture Act 2004, available at http://web2.gov.mb.ca/laws/statutes/ccsm/c306e.php
[43] As defined in the Act, could be: (i) Chief of police of municipality of Manitoba; (ii) Commanding Officer of the Canadian Mounted Police in Manitoba; and (iii) special constable appointed under the Provincial Police Act in charge of police services for First Nations Communities

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British Columbia

Following the other jurisdictions in Canada, British Colombia adopted in April 2006 the Civil Forfeiture Act, introducing non-conviction based forfeiture of unlawfully acquired assets and property. The Act in general mirrors the provisions of the Ontario and Manitoba Acts[44], but differs in a number of areas (e.g., reduces the time limit for commencing a proceeding under this Act to 10 years, does not provide reimbursement of the respondent's legal expenses, and sets clear guidelines for the court to determine what constitutes an unlawful activity and if the property constitutes proceeds of crime). In addition, the definition of the proceeds of crime is expanded to include not only the property that was created as a result of unlawful activities but also the decrease in debts that occurred soon after an unlawful activity was committed. The forfeiture proceeding is a civil proceeding, with a civil standard of proof on balance of probabilities, and all the rules governing civil proceedings apply. It provides for reversal of the burden of proof, shifting the burden onto the respondent to prove the legitimacy of assets subject to the forfeiture order. The act has retroactive power, meaning that it can be applied for offenses committed before the Act came into effect.

The person responsible for originating an application for a forfeiture order is the Director of the Civil Forfeiture Office, appointed under the Public Service Act, and designated by the Minister of Public Safety. The director may delegate responsibilities to a person or to a class of persons in writing, which includes the responsibility to initiate and conduct forfeiture proceedings, collect and manage information, etc.

On application by the director, the Supreme Court, if satisfied that the property in question is proceeds or an instrument of proceeds of unlawful activity, must issue a forfeiture order. If the court finds that it is not in the interest of justice to issue such an order, it may refuse to issue it, limit its application, or include limitations. A forfeiture order may be issued concerning all or part of the property or an interest in the property that was derived as a result of unlawful activity. The application must specify the owner of the property, referred to as the registered owner, as well as any other person who controls the property but is not the registered owner. Further, the director may apply and the court may issue interim preservation orders to preserve the value of the property, if there are reasonable grounds to believe that the property is proceeds of an instrument of unlawful activity, unless doing so would not be in the interest of justice. The court may issue protection orders to address property interest in instruments held by an "uninvolved property holder in instruments case."

For a court to issue a forfeiture order it must make two determinations: (1) if an unlawful activity was committed, and (2) if the property constitutes the proceeds of crime. In determining if an unlawful activity was committed, the court will consider if the person was convicted, charged, and found guilty of an offense, although the court may find that an unlawful activity was committed even if no one was convicted, or found guilty, or if the person was charged but charges were withdrawn or stayed. A copy of the charge signed by an authorized person is sufficient admissible evidence for the court. After determining that an unlawful activity was committed, the court will proceed to determine whether or not the property is proceeds of such activity. The court will find that a property is proceeds if there is proof that a person participated in an unlawful activity that resulted in or is likely to have resulted in the person acquiring a financial benefit, unless the respondent is able to give evidence to establish the contrary. For the purpose of this Act the presumption of advancement does not apply to a transfer of property.

Money and the proceeds realized from the forfeited property are paid into a Civil Forfeiture Account and can be distributed by the director with the approval of the Minister of Finance for the following purposes: (i) compensation of victims; (ii) remedy of unlawful activities; (iii) prevention of crime; (iv) administration of this Act; and (v) any other purpose.

[44] See generally James McKeachie and Simser, Jeffrey, "Civil Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009)

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Quebec

Quebec's Act Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity, 2007,[45] introduced a non-conviction based asset forfeiture of property derived from or used to engage in unlawful activity. Note that Quebec has a civil law tradition that differs from the common law tradition of the other provinces, although it appears that the civil forfeiture regime has been modeled after common law models, such as that in Ontario[46]. Proceedings are governed by the rules of the Civil Procedure Code and rules of evidence are those applicable in civil matters. The overall responsibility for administration of the Act is vested in the Minister of Justice.

The Act has a dual purpose[47]: (i) to provide for forfeiture of property derived from or used to engage in unlawful activity so that the persons who, in whatever capacity, hold rights in such property or use such property are not allowed to keep the resulting benefit, unless they are in good faith, and (ii) to provide for the administration of forfeited, seized, or restrained property under federal laws and to allow for the disposition of such property for socially useful purposes, such as assisting victims of crime as well as the prevention, detection, and repression of crime. Unlawful activities are offenses under the Criminal Code, chapter C-46, the Controlled Drugs and Substances Act (CDSA) (chapter 19), and offenses under Schedule 1 of this Act. This Act is applicable only to property located in Quebec.

Proceedings are initiated by the Attorney General, who may apply to a court for a forfeiture order of whole or part of the property that is considered to have been derived from or used to engage in unlawful activity. The same provision provides that the Attorney General also may apply for an incidental application requesting the court to declare rights in the forfeited property unenforceable because of their fictitious or simulated nature. For the court to issue a forfeiture order, it must be convinced that the property is the proceeds or an instrument of unlawful activity; to issue an order to forfeit an instrument of unlawful activity, the court also must be convinced that the owner participated or was aware that the property was used to engage in such activity or could not reasonably have been unaware that the property was used in such activity. The statute adds another standard if unlawful activities include offenses listed in Schedule 1. In that instance, the court must be convinced that the activity resulted in substantial economic gain for the owner, possessor, or holder. Offenses listed under Schedule 1 include environmental consumer protection, labor relations, and others. This was held to be a safeguard, as designated offenses do not have the same gravity as offenses under the Criminal Code; requiring the proof of substantial economic gain will temper the use of these provisions.[48]

The statute enables law enforcement to take away property that is held, owned, or possessed by persons close to the property holder/respondent, such as blood relatives up to the second degree, spouse, and those living with the person.

The statute contains a statutory presumption that a property identified in the application derives from unlawful activity if the "defendant's legitimate income is significantly disproportionate to the defendant's patrimony or lifestyle or both."[49] Despite the resemblance to the unexplained wealth provisions of the Australian Civil Forfeiture Acts, it differs substantially from them in that its application is further conditioned with the following provisions:

[45] Available online at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2007C34A.PDF, accessed March 2, 2011
[46] See generally James McKeachie and Simser, Jeffrey, "Civil Asset Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009).
[47] Division I of the Act Purpose and Scope
[48] See James McKeachie & Simser, Jeffrey, "Civil Forfeiture in Canada" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13
[49] See s. 11. of the Act

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1) *frequently participates in unlawful activity likely to result in personal economic benefit;*
2) *participates in the unlawful activity of a criminal organization within the meaning of the Criminal Code or acts in association with such an organization; or*
3) *is a legal person one of whose directors or officers participates in the unlawful activity of a criminal organization within the meaning of the Criminal Code or a legal person in which a person who participates in such activity holds a substantial interest.*
4) *A person convicted of a criminal organization offense within the meaning of the Criminal Code is presumed to participate in the unlawful activity of or to act in association with a criminal organization.*

It is held that proving participation in criminal organization will be more challenging for the prosecution. Criminal Code defines the criminal organization to be:

- *Criminal organization means a group, however organized, that*
- *Is composed of three or more persons in or outside Canada, and*
- *Has one of its main purposes or main activities the facilitation of commission of one or more serious offenses that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.*[50]

Statutory presumptions are based on predicate offenses, meaning that presumptions will come into effect or be applied only if a person has been convicted for an offense indicated in Schedule 1 of the Penal Code or has been convicted of a criminal organization offense. The statute is silent about whether or not the burden in these cases shifts to the property owner to show the legitimacy of the property.

The statute has incorporated provisions to protect the rights of good faith owners or possessors if the nature and extent of their rights is specified in the application of the Attorney General. Further, the statute stipulates that proceeds of unlawful activity retain their nature regardless of who is their owner or possessor, unless the owner is able to establish that he or she was not or could not have reasonably been aware of unlawful origin of the property.

Seizure orders The Attorney General may apply for authorization to seize property, at any time during or even before the proceedings, if he or she has reason to believe that forfeiture of the property would otherwise be jeopardized, or that the property may be destroyed or severely damaged. The application is supported by an affidavit affirming that the property is proceeds or an instrument of unlawful activity and stating facts giving rise to the seizure.

Administration and management of property The statute contains provisions on the administration and management of proceeds and instruments of unlawful activity. Administration and management of seized and forfeited property under the statute is entrusted to the Attorney General, who in turn may designate another person to administer the property. The Forfeiture Act also grants the Attorney General legal authority to administer and deal with property that is either forfeited civilly or seized and restrained under a federal statute. Quebec and the federal government have found it necessary to pass statutes in this regard.[51] There are also provisions addressing forfeited money and its relationship to the consolidated revenue fund.

Nova Scotia

Nova Scotia passed its Civil Forfeiture Act in December 2007, largely mirroring the provisions of the Ontario and British Columbia Acts. The purpose of the Act is to prevent persons who engage in unlawful

[50] See generally James McKeachie & Simser, Jeffrey, "Perspectives on Civil Forfeiture" in Young, Simon, ed., *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Inc.: Northampton, MA, 2009) 13 at 13.
[51] See the Seized Property Management Act 1993 (federal) and the Law Enforcement and Forfeited Property Management Statute Law Amendment Act 2005 (Ontario)

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activities and others from keeping property acquired as a result of unlawful activity and preventing property from being used to engage in unlawful activity. The definition of the instrument and the proceeds of unlawful activity is similar to those in the British Columbia Act (see above). The Act empowers the Supreme Court to freeze and forfeit proceeds and instruments of unlawful activities in a civil proceeding. The Management Assets and Disposition Act of 2007 establishes an entity, the "manager of assets," who can bring civil forfeiture proceedings to a court and who can manage property that is the subject of civil or, in some cases, criminal proceedings. There is a statutory protection for uninvolved interest holders based on an interest of justice test. The court has the authority to refuse to issue a forfeiture or preservation order if it finds that it is not in the interest of justice to do so.

Public Debate in Canada

As the first jurisdiction to introduce non-conviction based asset forfeiture statutes, the debate surrounding introduction of the statute in Ontario was heated and intense. Its supporters held that the statute is necessary and crucial in dismantling serious and organized crime as well as in acting as a deterrent for future criminal activities. In contrast, its opponents, including lawyers and publicists, expressed their grave concerns in relation to the Act. One of the areas of concern was that easing the burden of proof from beyond reasonable doubt to civil burden of proof will infringe on civil rights; it enables the state to more easily seize and forfeit property; and it has an imminent potential to abuse the rights of innocent people. Opponents further contended that according to the Canadian constitution, criminal law is the responsibility of the federal government, and that, therefore, adoption of non-conviction based forfeiture laws targeting proceeds of crime is encroachment on federal law. First, it is considered that it encroached on the federal government's responsibility to legislate criminal law; second, it was a matter of criminal conduct in a civil proceeding, and third, it violated the presumption of innocence. The principle of presumption of innocence was violated on two grounds. One, by labeling the proceedings "civil," it reduced the standard of evidence to civil standards of proof thus it required convincing a judge on a civil standard of proof that it is more likely than not that a person has committed an offense, which could be major or minor, for the court to issue an order forfeiting any person's property to the state.[52] Two, the burden of proof is no longer on the state to show that a property is the proceeds or an instrument of an offense. Therefore, the statutes include a presumption of guilt requiring the defendant to prove innocence to retain his or her property.

Serious concerns were raised in regard to the broad and far-reaching powers of the Act. Specifically, the state forfeiture of property could be ordered for unlawful activities. In the Act, unlawful activities are defined to include anything that constitutes an offense under any federal or provincial law, from minor crimes to serious organized criminal activities. The individuals who drafted the Act expressed that the definition of unlawful activities in the state was purposefully left broad to enable the state to capture proceeds and instruments used for commission of an offense.

The law also was criticized for the risk it presents to possibly deprive innocent people of their assets, if they cannot in a timely manner provide sufficient evidence or if they cannot meet the high standards of evidence set by the Act. For example, according to the responsible owner clauses of the Act, an innocent property owner whose child sells drugs from his or her room of the same property, risks losing the property, if the property owner fails to do anything, such as notify the police of the activities going on his or her house. In this case, it may mean reporting one's own child. Considerable attention was paid to the potential abuse of power by law enforcement officials in issuing forfeiture orders, motivated by various incentives, increased budgets, promotions, and so on.

In a paper produced for the Law Commission of Canada in April 1999, Professors Margaret E. Beare and R.T. Naylor of York University's Nathanson Centre for the Study of Organized Crime and Corruption concluded "Although the entire notion of controlling crime by taking away the capital and the motivation

[52] Karen Slick, "*Civil Remedies Act Will Harm the Innocent and Corrupt the State*" September 3, 2009 http://www.karenselick.com/CCF090903.html accessed February 2011,

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is superficially appealing, there is no proof in logic or in practice that it actually works. There is, however, ample proof that it can pose a threat to civil liberties and civilian control over police forces"[53]

Non-conviction based forfeiture acts and Canadian case law

The Canadian constitution vests the federal government with the power to legislate and enforce criminal law, including establishment of the criminal court, while the property and civil rights are vested in the provincial governments. Critics of non-conviction forfeiture statutes often have criticized the provincial governments to legislate criminal matters, holding that they are infringing on the federal government's authority.

The constitutionality of the non-conviction based asset forfeiture statutes was challenged and upheld by the Supreme Court of Canada in *Chatterjee v. Ontario*[54]contending that Ontario's Civil Remedies Act (CRA) providing for forfeiture of property considered to be proceeds or an instrument of crime is *ultra vires* provincial jurisdiction and as such does not violate the federal government's criminal law powers. The appellant, Mr. Chatterjee, was stopped by the Ontario police for a routine traffic violation. Information revealed that he was in breach of a probation order and a search of his car incidental to the arrest, discovered cash ($29,020) and items that could be associated only with the illicit drug trade, that the car smelled of marijuana, but no drugs were found. The respondent was never charged with any offense in relation to the money, items, or with any drug-related activity. Money and equipment were seized and a forfeiture order was granted.

In the lower courts, the appellant contended that the forfeiture law was *ultra vires* provincial jurisdiction and also infringed on rights guaranteed by the Canadian Charter of Rights and Freedoms. But at the Supreme Court of Canada, the appellant focused his appeal on the grounds that the CRA forfeiture provisions were *ultra vires* the province because they encroach on the federal criminal law power. The Supreme Court upheld the constitutionality of the CRA and its power to forfeit tainted property.

The court portrayed the appellant's arguments as based on "an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation." Reference also was made to a decision in a recent case, *Canadian Western Bank v. Alberta*, 2007 SCC 22, (2007) 2 S.C.R. 3, where e federalist concept of proliferating jurisdictional enclaves is discouraged. In this case the court held that "courts should favor, where possible, the ordinary operation of statutes enacted by *both* levels of government." The court held that the CRA was enacted to deter crime and compensate victims, and that the former goal is broad enough that both levels of government can pursue it. The court further held that the effects of crime affect the federal level as well as the provincial levels of the government. In addition, the court held that CRA is an *in rem* forfeiture of proceeds and as such differs from criminal law, which in addition to a prohibition issues a penalty. CRA proceedings do not involve an allegation that a person committed an offense, are not tied to charging, convicting, or punishing an offender, and do not impose penalty, punishment, or imprisonment. The court further held that "the provincial CRA does not conflict with the Criminal Code," and that the Parliament expressly preserved such remedies in section II of the Criminal Code.

Another aspect of the Act was challenged at court when the respondent argued that a restraining order in relation to possible proceeds of crime impacted the respondent's right to a fair trial because it implies an involvement in crime. However, the court in Canada, in *R v. Trang*, held that the essence of a restraining order was to impose a temporary restraint on property while issues were determined and that an application for a restraining order was not part of the criminal trial against the defendant.

[53] See also: http://www.karenselick.com/NP001207.html
[54] *Chatterjee v. Ontario (Attorney General), 2009 SCC 19 (2009) 1 S.C.R. 624*

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In *Turner v. Manitoba*,[55] the court was asked to consider a charter challenge to the provisions of the Wildlife Act that provided for the mandatory forfeiture of items used in the commission of offenses under the Act. The court concluded that forfeiture was not cruel and unusual punishment under section 12 of the Charter, and cited the decision reached in *R v. Porter*.[56] In that case the court held that while forfeiture could be considered punishment, it was not cruel and unusual. The court noted that the thrust of cruel and unusual was directed to physical and emotional constraints of the person and not to the individual's financial or property loss.

However, the case law has defined a two-prong test in establishing that a property is an instrument of unlawful activity. In *Attorney General of Ontario v. Marijuana Growing Equipment et al.*,[57] an application was brought against real property used in an outdoor marijuana-growing operation, on the basis that the real property was an instrument of unlawful activity. One of the owners admitted during cross examination that she had been running a marijuana-growing operation, on which occasion the court established that the first test was met, that the property was an instrument of a crime. The second part of the test was the acquisition of other property, which was easily met because the owner sold marijuana for profit.

R. v. Buhay[58] is a leading Supreme Court of Canada decision on the Charter rights protecting against unreasonable search and seizure (s. 8) and the criteria for the exclusion of evidence under section 24(2). The court held that for evidence to be excluded on the Collin test, the seriousness of the breach must be determined by looking at factors such as good faith and necessity. On the facts, marijuana found in a bus station locker was excluded from evidence because the police had insufficient reason to search it without a warrant.

New Zealand

New Zealand introduced the Criminal Proceeds (Recovery) Act in 2009[59], replacing the Proceeds of Crime Act of 1990. The new law, while retaining conviction-based forfeiture of instruments of crime as provided for in the Proceeds of Crime Act of 1990, introduces non conviction–based forfeiture of other property representing the proceeds of crime. The Attorney General's office vetted the Act with the New Zealand Bill of Rights Act of 1990.

The main purpose of the Act, as stipulated in Part 1, is to establish a regime for the forfeiture of property, derived directly or indirectly from significant criminal activity, or that represents the value of a person's unlawfully derived income. The intent expressed by the legislators are multipurpose and are intended to: (i) eliminate chances for those undertaking unlawful activities to retain the acquired profit; (ii) deter significant criminal activities; (iii) reduce the chances to reinvest the profit in new criminal activities; and (iv) deal with foreign restraining and forfeiture orders.

The law clearly states that all proceedings related to restraining and forfeiture orders under this Act are civil proceedings in nature and that the civil standard of evidence applies. The Act contains detailed provisions on the restraining, forfeiture, and registration of foreign forfeiture orders.

Restraining Order Part II of the Bill (s. 24–26)—provides for restraining of property, which has the effect of prohibiting the person subject to an order from disposing of or otherwise dealing with the property. The Act differs from other Acts in that it divides the responsibility for filing an application for a restraining order between the commissioner and the prosecutor. The commissioner is authorized to apply for a restraining order when the property is considered to be tainted property and or profit derived as a

[55] *Turner v. Manitoba, 2000 MBWB 94*
[56] *R v. Porter,* (1989) 26 FTR 69
[57] *Ontario v. Marijuana Growing Equipment,*
[58] *R. Buhay,2003] 1 S.C.R. 631,2003, SCC 30*
[59] Criminal Proceeds (Recovery) Act 2009, No8 available at;
http://www.legislation.govt.nz/act/public/2009/0008/latest/DLM1451001.html

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result of unlawful activities. The prosecutor is authorized to file a restraining order for property that is considered to be an instrument of crime.

The statute empowers the Commissioner of Police to apply and the High Court (s. 24) to issue a restraining order related to specific tainted property, even if there is no respondent, if they are satisfied that there are reasonable grounds to believe that the property is tainted. Tainted property is defined in the Act to be any property that has in whole or in part been acquired as a result of significant criminal activity. Similarly, the Commissioner of Police applies for and the High Court (s. 25) issues a restraining order if they are satisfied that there are reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity. Significant criminal activity has been defined to mean (s. 6) "that if proceeded against the respondent; the offense would amount to offending that consists of one or more offenses punishable by a maximum term of imprisonment of 5 years or more and proceeds of which exceed the value of $30,000." It is presumed that a person has undertaken such activity if the person was charged and convicted of an offense in connection with the activity, or if the person has been acquitted or if his or her conviction has been quashed or set aside.

On application by the prosecutor (s. 26), the High Court, after a hearing, may issue a restraining order related to an instrument of a crime if the circumstances are that: (i) the respondent has been charged with a qualifying instrument forfeiture offense or (ii) the court is satisfied it has reasonable grounds to believe that the property referred to in the application is an instrument of crime used to facilitate the qualifying instrument forfeiture offense. It also may issue a restraining order if the court is satisfied that there are reasonable grounds to believe that: (i) the respondent will be charged with a qualifying instrument forfeiture offense within 48 hours; and (ii) the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offense. Instrument forfeiture offense is defined to be an offense punishable by a maximum term of imprisonment of five years or more and includes an attempt to commit, conspire to commit, or be an accessory to an offense if the maximum term of imprisonment for that attempt, conspiracy, or activity is five years or more.

The statute authorizes the court issuing the restraining order to issue ancillary orders, providing for reasonable living costs of the respondent or his or her defendants, reasonable business expenses, or payment of any debt out of the restrained property to be paid out of the restrained property.

Safeguards are incorporated in the statute, protecting the interest of innocent third parties if the applicant proves on the balance of probabilities his or her interest in the property, and that he or she has not benefited from unlawful activity or was not involved in the commission of the offense. In addition, the court may issue other ancillary orders as it deems fit, including orders directing the official assignee to control the restrained property, preserve its value, make mortgage payments, and so on. The restraining order lapses either at the end of 1 year from the day the order was issued or when a decision on the forfeiture order is made, whichever takes place first. The restraining time period related to property considered an instrument of crime expires at the end of the 48-hour period, if the defendant is not charged with an offense.

Forfeiture orders The commissioner may apply to the High Court for two types of forfeiture orders: (i) Asset Forfeiture order and (ii) Profit Forfeiture order. Application for a forfeiture order can be made *ex parte* if approved by the High Court, in which case the court may direct the applicant to notify the respondent as well as any person with an interest in the property as soon as practicable.

Asset Forfeiture Order The commissioner filing an application for an asset forfeiture order is required to provide sufficient details in the application on the property that is alleged to be tainted property, grounds on which the belief that the property is tainted is based, and the name of the respondent and any third party with an interest in the property. The High Court must issue an asset forfeiture order if it is satisfied on the balance of probabilities that specific property is tainted. However, the statutes provide that if there are no respondents who have claimed ownership or interest in the property, the court may not issue a forfeiture order unless the court is satisfied, on the balance of probabilities, that a restraining order was

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issued earlier in regard to the same property, that the restraining order has been in place for one year, and that the commissioner has contacted or has made reasonable efforts to notify all persons who may have had an interest in the property.

In addition, the High Court may, on an appeal from the respondent, grant an exclusion order, excluding part of the property or an interest in the property from the forfeiture order, if it believes that the respondent will suffer undue hardship if the property is included in the asset forfeiture order.

Profit Forfeiture Order. Similarly to the asset forfeiture order on an application of the commissioner the High Court must issue a profit forfeiture order if it is satisfied that the respondent has unlawfully benefited from significant criminal activity. The commissioner is required to provide sufficient details to satisfy the court on the following elements: (i) the respondent was involved in, and benefited from, significant criminal activity within 7 years from the day the application was made; (ii) specify the value of the benefit; and (iii) identify the property in which the respondent holds interest and the nature of those interests. Then the court will presume that the respondent has benefited from a significant unlawful activity, which presumption may be rebutted by the respondent on the balance of probabilities. It appears as after the commissioner discharges hid burden of proof, the burden shifts to the respondent to rebut the commissioner's claims.

The court is expected to specify the maximum recoverable amount to be forfeited, by either considering the amount specified in the application or by seeking an independent valuation of the property by a third-party expert. The statute also provides that the court will treat effective control over property as an interest in the property.

Within six months after the forfeiture order is issued, or at a later stage, any other person with an interest in the property may apply for relief for special reasons. Special reasons may include the following: the applicant had a good reason for failing to attend the hearing of the application for a non-conviction forfeiture order or if new evidence was not reasonably available at the time of the hearing. The court may issue an order for relief from non-conviction based forfeiture order on grounds of undue hardship.

Instrument Forfeiture Order On application by the prosecutor, the District Court may issue an instrument forfeiture order if it is satisfied that the property was used to commit or to facilitate the commission of a qualifying forfeiture offense, being an offense punishable by a maximum term of five years of imprisonment or more.

Until the appeal period has expired, unless a court has granted leave, the property forfeited under the instrument forfeiture order cannot be disposed of or otherwise dealt with on behalf of the Crown. Only after the appeal period expires or a final decision on the appeal has been made, can the official assignee dispose of the forfeited property.

If a court issues an instrument forfeiture order as part of the sentence imposed on a person convicted of a qualifying instrument forfeiture offense, and the conviction is subsequently quashed, the quashing of the conviction discharges the instrument forfeiture order. In that case the official assignee is required to transfer the property to the former owner or to pay the person an amount equal to the value of the person's interest in the property.

Another instrument available is the prohibition of double benefit, which means that if an application for relief is made under Sentencing Act 2002 regarding an interest in property, an amount equal to the amount must be deducted from any amount required to be paid under section 74(3)(b) to that applicant in respect of that interest. Protection safeguards are incorporated in the statute to protect the interest of the third parties.

Property management An official assignee is required to preserve the value of the restrained property under his or her custody and control. In addition, the official assignee may be a part of civil proceedings

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affecting the property, ensuring property, and realizing or otherwise dealing with securities of investments and doing anything necessary to carry on the business.

Investigative powers The Commissioner of Police is in charge of investigation and may appoint any person to conduct an investigation of the affairs, or an aspect of the affairs, or execute a search warrant.

It is relevant to note that the Commissioner of Police and the Commissioner of Inland Revenue Services are both authorized to have a written agreement on information exchange between the two entities. However, limitations are imposed as to whom the information may be disclosed to, limiting it to the authorized person, to the person for whom the information was obtained, and to any person in connection with the proceedings taken under this Act. If no proceeding is to be initiated, the Commissioner of Police is required to destroy all information obtained.

The statute authorizes the commissioner to apply to a judge for a search warrant, production and examination order[60] if the commissioner has reason to believe that a person has access to documents relevant to an investigation. Applications are made in writing, specifying the grounds on which they are based and describing the documents and the property.

The commissioner applies and the judge issues an examination order if satisfied that the commissioner has reasonable grounds to believe that a person has information that is sought through the order. A person subject to an examination order is required to appear before the commissioner, answer questions, and supply information specified in the notice. The person subject to the examination order is allowed to be accompanied by a lawyer. Any disclosure of information under this Act, if made by any of the above orders, is not considered to constitute a breach of an obligation of secrecy or non-disclosure.

The approach taken by New Zealand empowers the official assignee, as property manager, to apply to a court for a search warrant to search any place or thing if the official assignee believes that there are grounds to believe that the property proposed to be under the restraining order is in or on the place or thing, or will come into or onto the place or thing. Any person who fails to comply with a search warrant, production, or examination order commits an offense and is liable on indictment to imprisonment for a term not exceeding 1 year or a fine not exceeding $15,000, or if it is a corporate body, to a fine not exceeding $40,000.

Further, the commissioner is authorized to settle with any person related to the property subject to a forfeiture order. However, settlement agreements have a binding effect on parties only if they are approved by the High Court. The High Court must approve settlement if it is satisfied that it is consistent with the purpose of the Act and is in the interest of justice.

South Africa

Forfeiture of the proceeds of crime was introduced in South Africa for the first time in 1992 in the Drug Trafficking Act. As a conviction-based regime, it allowed forfeiture of assets derived from drug-trafficking offenses. Although the drug-trafficking offenses were tried in criminal proceedings with the criminal standard of proof, beyond reasonable doubt, proceedings in which assets were forfeited were civil with a civil standard of proof, balance of probabilities. This regime was expanded with the Proceeds of Crime Act in 1996, allowing forfeiture of the proceeds derived from any offense, after the defendant was convicted. However, it was not until 1998 that a full-fledged non-conviction based (civil) asset forfeiture provisions was introduced with the Prevention of Organized Crime Act (POCA[61]) in 1998.

The POCA retained the conviction-based forfeiture (Chapter 5) introduced by the two earlier pieces of legislation and introduced a non-conviction–based regime (Chapter 6) aimed at the proceeds of unlawful

[60] Defined supra, at s.102, 104 & 106 of the Act 2009.
[61] Prevention of Organized Crime Act (POCA), Act No.121 1998

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activities[62] and the instrumentalities of crime. To ensure implementation and to strengthen the use of POCA, the South African legislature established a specialized agency—Asset Forfeiture Unit (AFU)—under the National Prosecuting Authority (body established after 1994) headed by the National Director of Public Prosecutions (NDPP). Implementation of POCA was significantly affected by enactment of the Bill of Rights soon after. The Bill of Rights serves to protect individual rights, including the protection to private property, right to equality, and the right to freedom and security of persons. Conversely, the constitution imposes a positive duty on the state, including the AFU and NDPP, to protect, promote, and respect these rights. This created a tension between the public interests served by asset forfeiture and the private interests directly affected by it. However, despite extensive litigation, none of the provisions of the POCA 1998 have to date been declared unconstitutional.

South Africa's POCA is modeled after the U.K.'s Criminal Justice Act of 1998, and South African courts have over the years relied on the decisions and elaborations of the courts in the U.K.[63]

Criminal asset forfeiture under Chapter 5

Forfeiture of the proceeds derived from an offense, after a defendant's conviction, is governed by the provisions of Chapter 5 of POCA, commonly referred to as criminal forfeiture. The proceedings are governed by the rules of civil procedure and the civil standard of proof is applied, "preponderance of evidence."[64]According to Chapter 5 of POCA, proceeds that have derived from any offense can be subject to forfeiture, including individual "ordinary" and organized crime offenses such as racketeering and criminal gang activities (Chapter 3 of POCA). Confiscation proceedings may be conducted in parallel with the main trial or after the defendant has been sentenced, if the court is convinced that inquiries will unreasonably delay the main trail, or with the request of the public prosecutors, to delay the proceeding until after the sentence. The proceedings may be held in front of the same judge hearing the main trial against the defendant, depending on the judge's availability.

Provisions of Chapter 5 stipulate that on the prosecutor's application, the court convicting the defendant can inquire if the defendant has derived any profit from the offense for which he or she is being tried, or any other offense for which the defendant has been convicted at the same trial, or other criminal activities that the court finds to be sufficiently related to the offenses of which the defendant was convicted. The prosecutor's application to initiate inquiries of the defendant's benefits must be approved by the National Director.[65] In inquiring and determining that the proceeds are the proceeds of crime, the court will consider evidence presented at the main trial, as well as other evidence the court may consider necessary. The court also may order the prosecutor to submit to the court a statement in writing under oath on matters pertaining to determination of the value of the defendant's proceeds (Article 21.(1)(a)). A copy of the statement is required to be sent to the defendant 14 days before the statement is sent to the court. The defendant has the right to dispute allegations made in the statement and present the grounds for dispute. If the defendant does not dispute the statements, the court shall consider the statements as conclusive proof.

The court also may request the defendant to submit a statement in writing to the court under oath on any matter related to the determination of the amount that may be realized (Article 21(3) (a)). Similarly, the court will request the defendant to submit a copy of the statement to the public prosecutor 14 days before the statement is presented to the court. The court's order to the defendant to submit a statement can be considered as partial reversal of the burden of proof to the defendant, during the proceeding. The article highlights that the defendant's statement can be on any matter related to the matter involved, which is the

[62] Section 6 of Prevention of Organized Crime Act (POCA), amended in 2004, also covers "property associated with terrorist and related activities"
[63] "Phillips, whereby the court relied on the decision of *Her Majesty's Advocate v. McIntosh* (2001) All ER (D)"—Asset Forfeiture in South Africa Raylene Keightley
[64] Chapter 5 of POCA, Provisions 13 (1), (2), (3)
[65] In the text of the Statute it is stated the National Director which is further defined in the preamble to include any functionary in the National Prosecuting Authority

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defendant's property. Subsequently, the defendant's statement will present relevant facts or evidence that would establish the legitimacy of the concerned property.

Similarly, Article 22(2)(b) provides that if the court is conducting an inquiry into a defendant's property for the purpose of issuing a restraining order, has requested from the defendant to disclose facts related to any property over which he or she may have effective control and the location of such property (section 26(7)), and the defendant fails to disclose such facts or furnishes false information, the court also will accept these facts as prima facie evidence that the property represents the proceeds of unlawful activities. Therefore, if the defendant fails to disclose facts related to his or her property and is asked to do so by the court, the court will interpret this as an admission that the concerned assets were derived from an offense. If the court finds that the defendant has benefited from the offense, in addition to the imposed sanction, the court will order the defendant to pay a set amount of money to the state. For the court to determine whether or not the defendant derived any profit, and its extent, it will inquire whether the defendant has had any legitimate source of income from which he or she could have acquired assets or property (article 22(3)(a), (b)). If the court finds that the defendant has not had legitimate income over the fixed period to justify legal origin of the property, the court will accept this as prima facie evidence that the property represents the proceeds of crime. The defendant has the opportunity to rebut this presumption by presenting new evidence to the court to justify his or her sources of legitimate income.

If the court determines that the defendant has benefited from an offense, the amount to be forfeited cannot be higher than the value the defendant has acquired from the offense. Although the status determines the upper limit above which no forfeiture order can be issued, it is left to the discretion of the court to determine any appropriate amount below the upper limit. Thus, the court will seek to issue a forfeiture order that is rationally connected to the purpose sought to be achieved by that order. In this regard it has been held in *Sheikh*[66]that it is intended to ensure a defendant disgorges the fruits of his or her criminal conduct, as well as to act as a deterrent. Further, in the same case, the court held that not only direct but also indirect benefits can be subject to forfeiture, including benefits derived by a shareholder of a company that was enriched through the shareholder's criminal activity. If it is found that the defendant has benefited from an offense, section 22(3) provides that all property held by the defendant at the time of conviction or 7 years before the prosecution was initiated, all property held and all expenditures incurred during that period, was derived from, or met out of the proceeds of the defendant's unlawful activities. The burden is then placed on the defendant to rebut these presumptions. The presumptions were held to be "unobjectionable" by the High Court in *Phillips*,[67] where it was noted that although the defendant had raised constitutional objection to the presumptions in the affidavit filed at court, the matter was not pursued in argument before the court. To date, this presumption has not been challenged by either the Constitutional Court or the SCA.

If the defendant has died or absconded after conviction and the court believes there are reasonable grounds that a confiscation order would have been issued if the defendant were alive, the court will, on the application by the National Director, inquire whether or not the defendant acquired any profit from an offense. If the court finds that the defendant benefited from an offense, a confiscation order will be issued.

Pending a conviction or confiscation order, to preserve the property and its value, the court may issue a restraining order. The application for a restraining order will be made by the National Director, prohibiting any person affected by the order from dealing in any manner with the property to which it applies. A restraining order will be granted over realizable property as specified in the restraining order, or over all property transferred to the defendant, as well as any property held by any third party who may have received affected gifts from the defendant. The court also may order the defendant to disclose any other assets unknown to the court. A restraining order can be issued before the criminal proceeding against the defendant has started, if the court is satisfied that the defendant will be charged with an

[66]*Shabir Shaik and Others v. The State*, Case No. 248/06 (2006) ZASCA, 6, November 2006
[67]*NDPP v. Phillips and Others*, 2002 (4) SA 60 (W)

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offense and if there are reasonable grounds to believe that a confiscation order may be issued.[68] The restraining order may be varied or rescinded, either at the request of the defendant or by the court if it deems it is in the interest of justice. Further, if the court is satisfied that the person whose property was restrained, or that his or her family will face undue hardship, it will make such provisions to cover reasonable living expenses. Similar provisions can be made to cover reasonable legal expenses in connection with any proceeding instituted against the defendant.

To prevent any realizable property from being disposed of or removed, the court may order the seizure of such property. The seized property then will be placed under the care of the *curator bonis*, who will be responsible for its administration and management until a final decision is made by the court. The decision on seizure may be rescinded or varied on the application by the defendant or any third party with any interest in the property.

Realization of property is initiated by the court if the defendant fails to satisfy a confiscation order and which is executed against the affected property. The court, on the application by the National Director and after the proceedings against the defendant are concluded and no appeal is filed, appoints a *curator bonis* to conduct realization of the realizable property. Realizable property is any property held by the defendant as well as any property held by a third party who may have received gifts from the defendant. This has been interpreted to include properties not held by the defendant, owned by a third party, if there is evidence that the defendant has an interest in it. Broader interpretation of the provision was applied to include properties that are in reality owned by the defendant but have been transferred to a third party to avoid confiscation. The law provides that no realization of the property will be made until the claims of third parties with any interest in the property are satisfied. The court-appointed *curator bonis* will be responsible for realizing the property and making any realized payments to the state.

Non-conviction based asset forfeiture–Chapter 6

The introduction of non-conviction based (civil) forfeiture regime in South Africa pioneered civil forfeiture of property without prior conviction. The key difference between the forfeiture proceedings under Chapter 5 and those under Chapter 6 is that the provisions of the latter do not require criminal conviction or even prosecution of the person whose property is subject to forfeiture. Forfeiture is focused on the tainted property and is granted only in regard to the actual proceeds derived from unlawful activities or instrumentalities of the crime. It is imposed as a measure against the person's property and is not a penalty imposed against the person. Its general aim is to strip the respondent of the property or assets derived from his or her wrongdoings. The statute stipulates that forfeiture can be ordered for offenses included in schedule 1 of POCA.[69]

Non-conviction based asset forfeiture under Chapter 6 consists of two phases: (1) preservation phase, whereby a court grants an order to preserve the property; and (2) forfeiture phase, whereby the court grants a final order, forfeiting the property to the state.

The prosecutor may apply *ex parte* to a High Court for a preservation order, which prohibits any person from dealing in any manner with the concerned property. If there are reasonable grounds to believe that the property is either an instrumentality of an offense referred to in Schedule 1of POCA, or represents the proceeds of unlawful activities, the court will grant such an order. There are no statutory requirements for the prosecutors to show to the court that an application for a forfeiture order will be made. Based on

[68]*NDPP v. Kyriakou* – " … court held that NDPP does not have to prove as a fact that confiscation will be made, discretion of the court should be sparingly exercised and only in the clearest of cases where the consideration in favor substantially outweigh the considerations against….."
NDPP v. Rautenbach – "…court needs to only ask whether there is evidence that might reasonably support a conviction and a consequent confiscation order and whether that evidence may be reasonably believed…."
[69]Offenses under Schedule 1 of POCA include: murder, rape, kidnapping, public violence, arson, offenses dealing with gambling, offenses related to the Corruption Act, extortion, etc For a full list of Schedule 1 offenses, please see Prevention of Organized Crime Act (POCA) of 1998 at: https://www.fic.gov.za/DownloadContent/LEGISLATION/ACTS/02.POCA.pdf

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section 38 (1), the prosecutor is authorized to apply *ex parte* for a preservation order without notifying interested parties; this section was challenged in the court on the basis that it infringes on the right of access to the court. The Constitutional Court upheld the constitutionality of section 38, holding that the principle of *audi alteram partem* was not excluded, meaning that in considering applications for preservation orders, the court still can apply the principle related to the provisions orders and return days provided for in Chapter 5 (Criminal Forfeiture). In reality, the AFU is tasked to conduct assessments based on the facts of the case and to determine whether or not a notice will be served.

Although the prosecutor is allowed to make an application for forfeiture *ex parte*, section 39 requires that after the preservation order is issued, notifications must be sent by the prosecutor to all persons with an interest in the property and that the notification be published in the *Gazette*. The prosecutor also is required to give notice of a forfeiture application to all persons who made an appearance with the intention to oppose after receiving notice of the preservation order. Persons making an entrance shall submit an affidavit containing the identity of the person, nature and extent of his or her interest, and the basis for defense based on which the forfeiture order is opposed (section 39(5)). Interested parties opposing forfeiture orders usually do so at the forfeiture stage of the proceedings, either in the forum of an appeal or an application for a variation of rescission. The preservation order will be in effect for 90 days, when it will expire, unless an application for forfeiture was made, an unsatisfied forfeiture order is pending, or the order is rescinded before the expiration of the period. Further, if it is considered necessary to preserve the property from being disposed of or transferred, the court will authorize its seizure. In such instances, provisions have been made to allow for appointment of a *curator bonis*, similar to the criminal forfeiture proceedings.

When a preservation order has been issued against a property, the court can make provisions for reasonable living expenses and/or legal expenses, if it is satisfied that those expenses could not be covered from other properties that are not subject to the preservation order, and if the defendant has disclosed under oath all of his or her assets and liabilities.

The public prosecutor can apply to a High Court for an order to forfeit property to the state, giving a 14-day notice to every person who entered an appearance. The statute also allows for late entry of appearance if the person was not aware of the existence of the forfeiture order, but before the judgment is given. For the court to grant a forfeiture order it must be satisfied on a balance of probabilities that the property is either an instrumentality of a Schedule 1 offense or is the proceeds of unlawful activities. Both statutory requirements have been a subject of consideration by the courts. Regarding the definition of the proceeds of unlawful activities,[70] the SCA held that the definition is wide and should be narrowed and focus its analysis on the "connection" between the proceeds and unlawful activities, holding that "some sort of consequential relation should be required between the proceeds and unlawful activities."[71] It was held that the definition of proceeds does not refer to offenses, but to the "proceeds of unlawful activities," which means that it includes "conduct which constitutes a crime or which contravenes any law."[72] The meaning of "instrumentality of an offense" has been even more intensely deliberated, holding that the definition contained in POCA[73] is too wide. In *Cook*, SCA expressed its concerns that if the definition is interpreted literally it could lead to arbitrary deprivation of property and breach of the protections guaranteed by the Constitution (section 25). Further, the court concluded that a narrow interpretation of the definition of instrumentality was required, that the property must play a reasonable role in the commission of the

[70] The proceeds of unlawful activities are defined to include "any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'.
[71] *NDPP v. Rautenhach* 2005 (4) SA (603) SCA
[72] NDPP v. Mohunram
[73] *"An instrumentality of an offense means any property which is concerned in the commission or suspected commission of an offense at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere."* See POCA 1(1)

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offense; that is, it should in a substantial sense facilitate the offense.[74] The court held that this can be established based on the way the property has been organized, arranged, constructed, or furnished to enable or facilitate the commission of the crime. The court, in *Cook*, also held than an incidental relationship between the property and the offense is not sufficient to establish that the property is an instrumentality of the crime; however, the more incidents that can be established, the easier it is to draw a connection.

After the court has established, on balance of probability, that a property is an instrumentality of an offense, it will issue a forfeiture order. The validity of the order will not be affected either by the absence of a person with an interest in the property or by the outcome of the criminal proceeding. The prosecutor is required to notify a person with interest in the property that there are reasonable grounds to believe that the property is an instrumentality of an offense. If the court finds that the interest of third parties was acquired legally, or if the person has not known or suspected that the property is the proceeds of unlawful activity, it may exclude his or her interest from forfeiture. In such a case, the person bears the burden of proof to present evidence that he or she did not know that the property is an instrumentality of the crime or the proceeds of unlawful activity.

Courts were concerned that if forfeiture were ordered every time a property was found to be an instrumentality of a crime that it could lead to arbitrary deprivation of property. Thus, it determined that an inquiry be conducted into proportionality analysis before forfeiture of any property is ordered. The court looked at a number of factors, including: whether or not the property is integral to the commission of the offense, whether or not forfeiture would prevent further commission of the offense and the social consequences of the offense, whether or not the innocent owner defense would be available to the owner, the nature and use of the property, and the effect on the respondent of the forfeiture.[75] After this inquiry, the court further narrowed and defined cases in which forfeiture of concerned property will be granted, evaluating the impact of forfeiture on the persons affected by the decision, and evaluating thoroughly the importance the property had for the commission of the crime. It seems that the court narrowed the implementation of forfeiture only in cases when the property was essential to the commission of the offense, and also granted and expanded the rights of innocent owners. Finally, in *Mohunram*, the court held that the NDPP has the onus to establish the proportionality of forfeiture sought, not the respondent.

The statute provides further protections for rights of any person affected by the forfeiture order. Section 54 allows a person with an interest in forfeited property, to apply for an excluding order 45 days after the forfeiture order was issued. The application should be accompanied with an affidavit containing relevant information on the title of property, acquisition time and circumstances and the relief sought. The applicant is also allowed to present further facts, evidence and witnesses on his or her behalf. Witnesses and other evidence can be also presented by the prosecutor. And lastly, provisions on appeal enable any person to challenge the forfeiture order at a higher court.

PoCA and South African case law

As stated earlier, although none of the POCA provisions were declared unconstitutional, substantive case law was developed since its implementation. Many aspects of the statute were challenged and the South African courts have, until now, upheld it. Thus, it is surprising to note that although Chapter 5 holds a number of statutory presumptions, which are considered by the court as *prima facie* evidence in determining the lawfulness of property, or shifting the burden of proof onto the defendant, these have not been challenged by the respondents. Most of the cases related to non-conviction forfeiture appear to be in the area of defining the meaning of the "instrumentalities of an offense" and establishing the connection

[74] Raylene Keightley "Asset forfeiture in South Africa under the Prevention of Organized Crime Act 121 of 1998", *Civil Forfeiture of Criminal Property*, Simon N.M. Young
[75] *Prophet v. NDPP* 2006 (2) SACR 525 (CC)

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between the offense and the instrumentality of the property as well as proportionality analyses, as noted above.

An important case in civil asset forfeiture is *NDPP v. Mohamed No and Others*,[76] where the Constitutional Court held that Chapter 6 *provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offense, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted.* The court ascertains that forfeiture orders are not dependent on the institution or on successful conclusion of a criminal prosecution. The objective of civil forfeiture is to strip profits from those who have acquired them through unlawful activities. However, it is considered that Chapter 6 may lead to arbitrary deprivation or unjustifiable violation of the rights protected by the Constitution, precisely because it does not require the establishment beyond a reasonable doubt that an offense was committed. Forfeiture is focused on the "guilt' of the property rather than on the wrongdoing of the owner.

Further the courts dealt with the definition of the scope of POCA, deliberating on whether POCA was limited to organized crime offenses, such as racketeering, money laundering, or criminal gang activities. The court held that *while the ambit of asset forfeiture provisions of POCA 1998 extend beyond organized crime, it held that use of asset forfeiture outside of the ambit of organized crime would not always be appropriate and justified*. This issue also was debated by the Constitutional Court in *Mohunram v. NDPP*,[77] where the court held that it was unconvinced by the contention that Chapter 6 of POCA can reasonably be interpreted so as to apply only to so-called "organized crime" offenses. Judgments in *Mohunram* agree that fighting organized crime is a relevant factor in proportionality analysis, but that it is not necessarily a decisive factor. The court expressed concerns about disproportionate application of forfeiture, but was reluctant to interpret the purpose of POCA to target only property used as an instrumentality for commission of "organized crime" offenses.

Forfeited money is paid into the Criminal Assets Recovery Account (CARA), which is part of the National Revenue Fund. The CARA is administered by the Criminal Asset Recovery Committee, consisting of the Minister of Safety and Security, Minister of Finance, the National Director, and two other members. Its role is to make recommendations regarding allocation of moneys to institutions, organizations, or law enforcement agencies. Powers to institute an investigation to determine unlawful origin of property are vested in the Director of Public Prosecutions.

United Kingdom

The confiscation regime in the United Kingdom (U.K.) before consolidation by the Proceeds of Crime Act of 2002 was governed by various laws such as the Drug Trafficking Act of (1986), which provided for mandatory confiscation of the proceeds from drug-trafficking offenses, which was amended and consolidated in 1994. Further, part VI of the Criminal Justice Act (1988), amended by the Criminal Justice Act (1993) and further developed by the Proceeds of Crime Act (1995), governed confiscation of the proceeds from indictable and other summary offenses. By 1999, it was noticeable that the confiscation track record in the U.K. was poor, despite these confiscation powers. Few confiscation orders were issued and even fewer of what was ordered was being collected. As a result, the government ordered a study to evaluate the confiscation system in the U.K. The Performance and Innovative Unit (PIU) of the U.K. Cabinet Office conducted the evaluation and published a report in 2000 identifying key weaknesses in the national confiscation regime and making a number of recommendations to enhance it, including enactment of cohesive and comprehensive legislation. Responding to the recommendations, the U.K. legislators enacted the Proceeds of Crime Act in 2002, creating a comprehensive confiscation and asset recovery system, establishing the Asset Recovery Agency (ARA), consolidating criminal law with regard to money laundering and confiscation, introducing non conviction–based civil recovery and the use of revenue powers in relation to criminal gains, and developing ways to exchange information between the

[76] 2002 SA 843 (CC0 (12 June 2002)
[77] 2007 (2) SACR 145 (CC) (26 March 2007)

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new agency and other authorities. The new legislation was described as representing "the new era focused on depriving the organized criminals of their illicit gains, and disrupting funding for future activities, thus showing crime will not pay."[78]

The Proceeds of Crime Act of 2002 provides four procedures or regimes for seizure, forfeiture, and confiscation of the proceeds of crime: (1) in criminal proceedings following conviction of the defendant; (2) in civil proceedings in front of the High Court, also known as civil asset recovery; (3) taxation of incomes or gains suspected of being derived from crime; and (4) confiscation by police or customs and excise of cash suspected of being the proceeds of crime.

Conviction based confiscation

The aim of the conviction based confiscation proceedings is to recover profits and financial benefits derived from defenders' criminal conduct. Chapter 2 of POCA provides for confiscation of the proceeds of crime following the conviction. Confiscation procedure can be initiated by the public prosecutor or *ex officio* by the court, after the defendant has been convicted of a crime. Before initiating the confiscation procedure, the court must determine if the defendant has benefited from its criminal activity. After establishing the benefit, the court must determine if the defendant has a criminal lifestyle. For "criminal lifestyle" to stand, the following conditions must be satisfied: (i) the offense must have been committed over a period of at least 6months and the benefit derived from the offense exceeds £5,000; (ii) if the defendant's conduct forms part of a course of criminal activity and if he or she has benefited from that conduct (in the proceeding in which the defendant was convicted, he or she was convicted for three or more offenses); and (iii) if the defendant is convicted for offenses unlikely to be committed once (e.g., human trafficking, money laundering, drug and arms trafficking). To ascertain the financial benefits of the defendant, the court relies on the following assumptions: that any property transferred to the defendant over the past 6 years, from the day the proceedings against the defendant were initiated, is assumed to derive from crime, that all expenses incurred during the past six years are assumed to be covered by the profit derived from crime; and that any property transferred to or obtained by the defendant is considered to be free of any interest. The statutory assumptions aid in determining the defendant's benefit from the crime, unless the court considers this will give rise to a serious injustice, or unless the defendant can prove that the assumptions are incorrect.

If the court decides that the criminal lifestyle standard is not met, then it will continue to determine whether or not the defendant has gained any financial or other benefit from the criminal conduct. If the court affirms that the defendant has profited from his or her conduct, it must calculate the profit gained from the particular offense. In this case, the prosecutor must prove beyond reasonable doubt the causal link between the particular offense and the derived benefit.

After determination of the amount from which the defendant benefited, the court determines the recoverable amount, which can be paid to the state; however, the court also must assume when calculating benefit that the victims of the conduct have or will start a proceeding to recover the loss, injuries, or damages caused to them as a result of the conduct. In determining the final amount, the court applies the general rule that the final recoverable amount should equal the profit made from the conduct. However, if that amount is no longer available, the court will decide its reduction accordingly. In addition, to prevent dissipation or transfer of assets, the court can issue a restraining or freezing order, ordering the defendant not to deal with the assets.

The law provides that a confiscation hearing can be held before the defendant is sentenced for the offense and for a maximum of two years after the date he or she was convicted. The payment order should be enforced within a specified period of time, as ordered by the court. If the defendant fails to make the payment, the court can order imprisonment, which is ordered in addition to the primary sentence. Both the prosecutor and the defendant can apply for a variation or discharge of the confiscation order.

[78] Asset recovery under the Proceeds of Crime Act 2002: the UK experience, Angela V.M. Leong

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The standard of proof applied throughout the proceedings is the civil standard, balance of probabilities. Contrary to this conclusion held by the representatives of the Judicial Cooperation Unit of the Home Office and the Head of Asset Forfeiture,[79] GRECO[80] evaluators in the Annual Report concluded that in cases when the court establishes that the defendant has a criminal lifestyle, the burden of proof shifts onto the defendant to prove the legitimate source of his or her assets. Provision 17 of the POCA 2002 empowers the court, on receipt of the statement from the prosecutor, and the director to share the statement with the defendant, and authorizes the court to request that the defendant submit a statement accepting the allegation or offer other information on matters he or she proposes the court to consider. This does represent a reversal of burden of proof during the proceedings after the prosecution has shown that the defendant has a criminal lifestyle, whereby the defendant is offered an opportunity before the court to prove legitimacy of the concerned property.

Non-conviction based forfeiture - Civil recovery

Non-conviction based forfeiture or in English legislation knows as civil recovery proceedings were introduced in the Proceeds of Crime Act 2002, with recommendations from the Home Office Working Group on Confiscation and the PIU report in 2000 permitting forfeiture of assets derived from unlawful conduct, without prior conviction. This regime is considered more intrusive and better suited to counter increasingly well organized and sophisticated criminal activity.

Part V of POCA 2002[81] authorizes the Serious Organized Crime Agency (SOCA, of which ARA is now a part)[82] to apply for the recovery of the property obtained through unlawful conduct, before the High Court for offenses committed in the U.K., Ireland, Wales, and Scotland. Cases are referred to ARA from the law enforcement agencies when: (a) there is no sufficient evidence to pursue criminal charges; (b) no criminal charges are made due to public interest; (c) confiscation proceedings have failed; and (d) the defendant is beyond reach because that person is dead or abroad and there is no reasonable prospect of securing his or her extradition. Before an investigation is initiated by the ARA, certain criteria must be met: (1) the case must normally be referred by a law enforcement agency or prosecution authority; (2) recoverable property must be identified and have an estimated value of at least £10,000; (3) recoverable property must be obtained within last 12 years; (4) there must be significant local impact on communities; and (5) there must be evidence of the criminal conduct supported on the civil standard balance of probabilities. A significant limitation on the investigative powers is the restriction of the ARA to investigate only the cases referred from law enforcement agencies, thus restricting ARA's power to initiate investigations independently. Significant investigative powers were granted to ARA under Part 8 of POCA, such as production orders, search and seizure warrants, disclosure orders, customer information orders, and account monitoring orders. The disclosure order is one of the most important orders because it enables SOCA staff or the Director to ask any person to produce documents, provide information, or answer questions related to an investigation.

The court may order the applicant to notify the respondent and any third party with interest in the property that is subject to the recovery order. The court will grant an interim order if it is satisfied that there is a good arguable cause, that the property is recoverable property, and that any of the recoverable property is associated property.[83] The burden of proof is on the ARA to prove on the balance of probabilities that the

[79] Tough on Criminal Wealth; Exploring the Practice of Proceeds from Crime Confiscation in the EU, Barbara Vettori
[80] GRECO Second Evaluation Round–Evaluation Report on the United Kingdom, 2004
[81] Civil recovery regime influenced by the RICO experience in the U.S., Criminal Asset Recovery in New South Wales, and the Proceeds of Crime Act 1996 of Ireland
[82] Asset Recovery Agency incorporated in the Serious Crime Agency
[83] Associated property is defined by Section 245 of POCA 2002 to be "any property held by the respondent which is not in itself the recoverable property but: (a) any interest in the recoverable property; (b) any other interest in the property in which the recoverable property subsists; (c) if the recoverable property is a tenancy in common, the tenancy of the other tenant; (e) if (in Scotland) the recoverable property is owned in common, the interest of the other owner; and (e) if the recoverable property is part of a larger property, but not a separate part, the remained of that property."

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property is recoverable and was obtained through unlawful conduct. It is sufficient to prove that the property was obtained from unlawful conduct, whether or not the person received, money, goods, or services for commission of the conduct; the ARA does not have to prove that the conduct was of a particular type. Therefore, the property may be recoverable even if it is not possible to prove that the particular property derived from a particular type of crime. The respondent has the burden to prove the lawful source and to produce evidence that rebut the allegation that his or her property is recoverable.

The ARA may apply to the High Court *ex parte* to issue an interim receiving order. An interim receiving order can be an order for: (i) detention, custody, or preservation of property, and/or (ii) appointment of an interim receiver. The ARA may, per Civil Procedure Rules, apply for freezing injunctions to preserve assets for the purpose of meeting a recovery order when there is an imminent risk of dissipation of assets.

The court will grant an interim receiving order if it meets the following two standards: (1) if there is an arguable cause that the property is recoverable, and that if part of the property, which is not recoverable, is associated property, and (2) the identity of the person who holds the associated property could not be established.[84] The court appoints a receiver to manage the property with wide powers and responsibilities, including establishing the owner of the property, location and the extent of property, management of the property, including sale of perishable goods, carrying on the business or trade, as well as undertaking any other steps the court deems appropriate. The unique role of the receiver in U.K. legislation is that in addition to the roles outlined above the receiver is also responsible for taking and continuing the investigation from the ARA.

If the court decides that the property is recoverable, it must issue a recovery order vesting property in the trustee to undertake civil recovery. The trustee is appointed by the court and acts under the direction of the ARA director. The trustee is responsible for (i) securing the detention, custody, or preservation of the property vested on him, (ii) realizing the value of the property for the benefit of the ARA, and (iii) assuming any other function delegated to him.

In 2002 the decision was made to abolish the ARA and redistribute its functions to SOCA (under the Serous Crime Act 2007). The amendments of 2005 empower SOCA to sue anyone in the High Court if it suspects the person has gained or benefited in any way from unlawful conduct.

Cash forfeiture

The third regime provided for by POCA 2002 extended the scope from what was originally provided under the Drug Trafficking Act of 1994. It extends cash forfeiture to cover the proceeds from all offenses, allows for search, seizure, and forfeiture of cash intercepted anywhere in the country suspected of being the proceeds of crime or intended to be used for commission of a crime, and the amount to be forfeited is not less than £5,000, recently reduced to £1,000.[85] Cash forfeiture[86] originally was applied only to the cash intercepted at the border crossings for the proceeds suspected to derive from or intended for commission of drug-trafficking offenses.

Cash forfeiture is a civil procedure and the civil standard of proof applies; thus, conviction is not required as a prerequisite to apply for forfeiture or enforce a forfeiture order. POCA authorizes police, customs, and excise officers to search, seize, and apply for forfeiture of cash if the following conditions are met: (1) there is a reasonable ground to believe that the person is carrying, transporting, or owning cash that is suspected to be the proceeds of crime, or intended for commission of a crime; (2) the cash is a recoverable property; and (3) the amount is no less then £1,000. If these conditions are met, the police and customs officers can detain the person if necessary to carry out search and seizure; however, although the law

[84] POCA 2002, section 246 (5) (a) (b)
[85] Ceiling for cash forfeiture initially set not to exceed £10,000; this amount later reduced to £5,000, while recently, in 2006, it was decided to reduce the ceiling to £1,000
[86] Cash is broadly defined as including notes or coins in any currency, postal orders, and checks of any kind including traveler's checks, banker's drafts, bearer bonds and bearer shares. Proceeds of Crime Act, s289 (6) U.K.

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permits the search of premises, it does not allow intimate or strip search of the suspect. In most circumstances, for police or customs officers to carry out searches, approval from the Justice of Peace (in England, Wales, and Northern Ireland) and the sheriff (Scotland) is required. If it is not practicable to obtain an approval, the law provides for a senior officer, a police inspector, or equivalent to approve search and seizure[87]; in such circumstances, the officers conducting the search are required to submit a written report justifying their actions and justifying the necessity of immediate action. Cash seized during the search can be retained for no more than 48 hours; this time can be extended only with the decision of the Magistrate Court or Justice of Peace. While the cash is seized, the Commissioner of Customs can submit an application to the Magistrate Court for forfeiture of the seized cash in whole or in part.

Cash forfeiture is considered to be a successful tool in depriving criminals of the proceeds of crime, although success rates vary among different police services depending on the level of training received on the application of the cash forfeiture law. The number of seizures and forfeitures reported by the ARA indicate that expansion of the use of the cash forfeiture regime led to a peak in 2003, when there were 422 cash seizure totaling £16.7 million. In the years between 2006 and 2009, there has been a progressive increase in the amounts recovered in cash forfeitures, as seen in the table below.

Table 1: 2008/09 Proceeds of Crime Compared with Earlier Years[88]

	2006–2007	2007–2008	2008–2009	% increase from 2006 to 2009
Cash seizure	£3.3M	£8M	£9.2M	178%
Cash forfeiture	£2.3M	£2.9M	£4.5M	95%

Taxation powers under PoCA

The fourth power provided by POCA is taxation of the proceeds of crime. This measure is introduced as an alternative to civil recovery, granting revenue functions to the Director of the ARA to assess a suspect's income and taxes. The qualifying condition enabling the Director of the ARA to assess a suspect's income is that he or she should have reasonable grounds to believe that the income gained is a chargeable income or that the accrued profits are a result of a person's criminal conduct. Further, POCA authorized the director to assess a company's chargeable profits resulting from the company's or another person's criminal conduct (POCA 317). To enforce taxation there is no need for the ARA to provide evidence that the profit was derived from a specific crime and it is immaterial if the source of an income cannot be identified (POCA 319). Inland Revenue has the power to assess a person's income tax; however, it cannot act in cases when the source of income cannot be identified. Similar provisions are provided for inheritance tax, authorizing the director to assess the inheritance if there are reasonable grounds to suspect that the transfer made is attributable to criminal property. In applying internal revenue provisions the director must apply interpretations published by the Board of Inland Revenue.

The power to tax the proceeds of crime was introduced in the U.K. because it was estimated that criminal organizations have generated somewhere between £.6.5M and £11B in 1996[89] alone, and some of these revenues were untaxed and thus considered to destabilize the U.K. financial system. Inland Revenue has leant staff to SOCA to enhance the sharing of information and experience.

Effectiveness The civil recovery procedure has yielded fewer results than expected. The procedures are lengthy and encounter many legal challenges, and only a small percentage of seized assets are actually recovered and collected by the agency. For example, for years 2004–2005, out of £15 million seized, only

[87] The rules defining this authority are provided for in the Code of Practice issued by the Secretary of State (292 POCA 2002)
[88] Serous Organized Crime Agency (SOCA) Annual Report 2008/09, p.32
[89] "Asset Recovery Under the Proceeds of Crime Act 2002; the UK experience," Angela V.M. Leong

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£5.6 million was recovered. Similarly, in 2005–2006, out of £85.7 million seized, only a small portion of the total £4.6 million was recovered.[90]

The decision to establish the ARA was made based on the experience of other agencies dealing with criminal confiscation; therefore, setting too high an expectation and targets. Operational and financial costs also were estimated based on the experience of other agencies, without taking into consideration the complexity of the cases with which the ARA would be dealing, the legal challenges it would face, and the length of the civil proceedings. Another criticism was ARA's failure to cover its costs; it used £60M to cover operational costs over the three years of its existence, but it recovered only £8M. Thus, targets set for the ARA were often too high and difficult to achieve. It was noted that at the best case, between 2003 when the ARA was established and 2009 (last report) the ARA was able to achieve only three of its five targets.[91]

In addition, legal challenges caused significant delays in the civil recovery proceedings. Fundamental concerns regarding civil proceedings were raised, such as concerns related to lack of proportionality, lack of presumption of innocence, and the double jeopardy rule. Some respondents argued that the civil recovery procedure should be criminal and not civil, which would trigger the safeguards guaranteed by Articles 6 and8 of the European Convention on Human Rights (ECHR). However, the High Court dismissed these concerns, holding in *Walsh v. The Director of the ARA*; *R* (the Director of the ARA) *v. He & Cheng*, and *R v. Belton* (N. Ireland), that civil recovery is not a criminal but a civil proceeding in nature, and is intended to recover property obtained through unlawful conduct and not to penalize any person and as such it does not trigger protections built into the criminal proceedings such as presumption of innocence or the double jeopardy rule.

Further, it was noted that when considering POCA 2002, the Home Office was careful to consider and incorporate human rights safeguards in the legislation, ensuring that provisions in POCA are in agreement with the standards of the ECHR, striking the right balance between the rights of the individual to enjoy property and the right of society to reclaim illegally gained assets. Some of the safeguards incorporated are: setting the minimum threshold of £10,000, ensuring that the burden of proof remains with the state, and ensuring that all respondents have legal representation during the proceedings and, therefore, providing legal aid and incorporating provisions that provide for compensation in cases of wrongful judgments. The intention of the legislature was to make confiscation the primary tool to deprive criminals of their profits, with the civil recovery remaining an alternative, and the taxation regime to be used as a last resort. However, this was later modified with the Revised Guidance issued by the Secretary of State to the Director of ARA in February 2005, indicating that criminal investigations, civil recovery, and taxation investigations and proceedings can be instituted at the same time, thereby modifying the alternative role of the civil recovery and taxation regime, and placing them at the forefront of the forfeiture regimes.

3.1.3 Countries that have some form of unexplained wealth provisions that apply to all offenses, providing for reversal of the burden of proof in a *criminal* proceeding

Austria

Austrian legislation has recognized forfeiture and confiscation as additional penalties for committed crimes since 1987. However, these provisions were not applicable in many cases when attempting to confiscate gains derived from serious crimes. To remedy this situation and enhance confiscation of criminal proceeds, the legislature revised and re-enacted the provisions on conviction based confiscation in 1996. The amended Austrian Criminal Code provides for confiscation in both civil and criminal proceedings.

[90] Evaluation of the Civil Recovery Regime, Angela V.M. Leong
[91] See ARA and SOCA Annual Reports

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Conviction based confiscation in criminal proceeding. The rationale for introducing the new confiscation rules is that "crime must not pay" and the profit should be taken away from the offender, with the aim of deterring them from doing wrong again. These rules are applicable to all punishable offenses for which the offender has gained or received any kind of financial benefit.

These provisions are widely known as skimming-off profit rules, which is different from previous legislation where they do not provide an additional penalty but are a standalone sanction. They are non-conviction based, whereby the prosecution does not need to establish a linkage between the proceeds to be confiscated and a commission of a specific crime or offense. The procedure can be initiated in parallel with the judgment of conviction, independently, or even without instigating a conviction procedure at all.

Section 20 of the Penal Code provides for a reversal of the burden of certification of origin, avoiding full reversal of the burden of proof, and focusing on the burden of the defender to present the facts. It is sufficient for the prosecution to prove that the defendant has continuously and repeatedly committed criminal offenses and that he has obtained economic benefit from it, or has received economic benefit from committing an offense, and he will be condemned to pay an amount of money equivalent to the gained illegal profits. Similarly, members of criminal organizations who have gained pecuniary benefits during the time they were members can be stripped of their assets. The court has only to establish that the perpetrator was a member of criminal organizations during a period of time and the burden of proof shifts onto the offender. However, the implementation of the reversed burden of proof provided by section 20, paragraph 2, can be solely used in specific and restricted circumstances and, second, at least in certain cases, the provisions relative to such reversal are substantially purposeless because they are not understood and interpreted by judges.[92]

Confiscation rules in Austria are subject to limitations; for example, if gained profit is less than €21,802, the confiscation procedure will be renounced; however, the law allows the court to add up profits gained from several offenses. Similarly, it is left to judges not to apply confiscation measures in cases where the costs of the proceedings would be disproportionately higher than the amount of money to be confiscated or if confiscation would cause an undue hardship for the person. However, an interesting feature of the confiscation procedure in Austria is the application of the net principle, which targets only the net profits of the offender, excluding expenses incurred when committing the crime. However, payments made to accomplices are not taken into account.

The Council of Europe Group of States Against Corruption (GRECO) criticized the Austrian confiscation rules in its 2008 Annual Report,[93] ascertaining that payment of an equivalent sum of money does not target the actual proceeds derived from offenses, but rather imposes a financial measure that would amount to illegal benefit, and this system would face difficulties when attempting to apply it to certain types of gains (e.g., immaterial advantages such as honorary distinction, assets that have a particular value of the offender notwithstanding their real market value). Furthermore, the report found that the provisions are silent as to the kinds of assets to which they can be applied (e.g., movable, immovable property, initial or converted proceeds, assets convoluted with legal income, transferred to third persons or relatives). The Austrian authorities hold that this value confiscation system is ultimately equivalent to a system of direct confiscation.

In addition, if the assets derived from criminal activity were not seized and are not available for confiscation, an equivalent sum of money can be paid to the state by the offender to fulfill the imposed sanction. However, different from other countries, the imposition of imprisonment in case of default of payment is not allowed.

[92] *Tough on Criminal Wealth: Exploring the Confiscation of Proceeds of Crime*, Barbara Vettori, p. 43
[93] GRECO; Joint First and Second Evaluation Round; Evaluation Report on Austria available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2007)2_Austria_EN.pdf

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Non-conviction based asset forfeiture. Contrary to skimming off assets, forfeiture is stipulated as *in rem* and applies the gross principle, disregarding the expenses incurred while committing the offense, and allowing forfeiture of the total value considered to be derived from the offense. Forfeiture is applied to—

- Assets at the disposal of the criminal organizations
- Assets secured in Austria for offenses committed abroad, for offenses not under Austrian jurisdiction but being punishable under the law of the scene of the crime.

To impose the forfeiture of assets belonging to criminal organizations, two facts must be established: (i) evidence of the existence of a criminal organization; and (ii) economic power of disposal, the latter being the most important.

According to the forfeiture rules, the forfeiture is not allowed if there are legitimate third-party claims by persons who have not participated in the offense or who are not members of the criminal organization. In such instances the court will not proceed with the forfeiture. Forfeiture is ordered simultaneously with the judgment of conviction, but it also can be initiated independently of the conviction proceeding.

Investigations are carried out by the Financial Investigation Unit, which was created as part of the Ministry of Interior and has and uses common investigation techniques. Sometimes investigations are carried out during the trial phase. The prosecution, through the investigative judge, issues a provisionary injunction. As pointed out earlier, the prosecution needs only to establish sufficient facts that the person is or was a member of a criminal or terrorist organization and the burden to present facts shifts to the offender to prove the origin of the property.

Effectiveness Austria has no reliable data on confiscation. Since the reform of the national confiscation system in 1996, public prosecutors are required to complete a form on collected data on the quantity of the seized and confiscated assets. This data collection system does not work because the information provided to the Ministry of Justice is incomplete.[94]

France

France is a country with a civil legal tradition, and has recognized confiscation as an instrument to combat serious crime since 1810. The old French law had at its disposal two models of confiscation: General Confiscation, whereby all of the offender's property and assets could be forfeited to the government, and Special Confiscation, forfeiting only parts of the offender's assets. General forfeiture was applied only in rare occasions for specific crimes during World War II, such as treason, espionage, and the like. The new Criminal Code of 1994 does not differentiate between general and special confiscation, but distinguishes between obligatory (mandatory) and discretionary (optional) confiscation. Mandatory confiscation is ordered as a preventive measure for instrumentalities, hazardous or dangerous materials used or intended for use or derived from criminal offenses. Discretionary confiscation may be ordered for all serious and misdemeanor offenses punishable by imprisonment.

The Criminal Code and the national confiscation systems were subject to amendments in 1996[95], 1999, 2000, and 2005; the most recent amendments were approved in July 2010,[96] are yet to be implemented.

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[94] Tough on criminal wealth: Exploring the practice of proceeds from crime, Barbara Vettori

[95](Act no. 1998-468 of 17 June 1998 Article 5 Official Journal of 18 June 1998)
Where the law so provides, a felony or a misdemeanor may be punished by one or more additional penalties sanctioning natural persons which entail prohibition, forfeiture, incapacity or withdrawal of a right, an obligation to seek treatment or a duty to act, the impounding or confiscation of a thing, the compulsory closure of an establishment, the posting a public notice of the decision or the dissemination the decision in the press, or its communication to the public by any means of electronic communication.
ARTICLE 131-11
Where a misdemeanor is punishable by one or more of the additional penalties enumerated under article 131-10, the court may decide to impose as a main sentence one or more of the additional penalties. The court may fix the maximum period of imprisonment or monetary penalty which the penalty enforcement judge may order to be wholly or completely enforced, under the conditions set out under article 712-6 of the Code of Criminal Procedure, if the convicted person fails to respect any

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France recognizes only conviction-based confiscation, whereby confiscation of assets or property can be ordered only if the person is convicted for commission of an offense. Confiscation is characterized as an additional optional measure; that is, the judge has the option to impose confiscation as complementary or as a standalone sanction, and thus can even replace the primary issued prison sanction. Confiscation is mandatory for objects classified as dangerous or harmful, instrumentalities, and things used or intended for the commission of the offense or its proceeds, except for articles subject to restitution. The law also authorizes confiscation of equivalent value if the goods ordered for confiscation are no longer available.

For a number of offenses, including crimes against humanity, drug trafficking, money laundering, trafficking inhuman beings, prostitution, terrorism, begging, and criminal associations, the Criminal Code foresees general confiscation of part or all of the offender's property, whether private individual or legal person, whatever its nature, movable or immovable, and whether it is jointly or separately owned. In addition, Article 433-22 allows for the confiscation of unlawfully received gifts, which is related to corruption of public officials. The provision of this article focuses on confiscation of the proceeds of corruption attained by civil servants, publicly exposed people, and members of the judiciary.

France not only has introduced complete reversal of the burden of proof onto the defendant, but also has made it the central element of the criminal offense. Until 1996, the prosecution had the burden of proof in the proceeding to establish that the proceeds were of illegal origin; only one exception was permitted, under Article 222-39-2, for those convicted of carrying on a habitual relationship with a drug trafficker or user. The amendments of 2003 and 2004 of the French Criminal Code expanded the exception to cover all types of crimes, stipulating that all persons who are not able to account for the lawful origin of their income and who are associated, in close contact, or living with persons engaged in human trafficking, prostitution, begging, extortion, and persons committing misdemeanors or felonies against the properties of others, acts of terrorism, and all persons who participate in criminal associations,[97] will be charged with criminal offenses. If convicted, they can be imprisoned and ordered to pay a significant fee. In addition, for certain criminal offenses, an additional penalty of confiscation of all or part of their assets can be imposed against the defendant. This represents a radical move in French criminal law because it not only reverses the full burden of proof onto the defendant but also makes it a central element of a crime. The charged crime in such cases is the inability of the person to justify the legal origin of his or her income. Contrary to the laws in Ireland and Australia, which imposes confiscation of assets, the French criminal justice system not only imposes confiscation and payment of a fee, which are financial measures, but also imposes imprisonment, thus targeting the personal freedom of the defendant. The law does not require the existence of a predicate offense to impose these measures. It is interesting to note that when interviewed,

obligations or prohibitions arising from the penalty or penalties imposed under the provisions of this article. The president of the court gives the convicted person notice of this after pronouncing his decision. The prison sentence or the fine which the court fixes may not exceed the penalties incurred for the misdemeanor for which the judgment has been pronounced, nor those provided for by article 434-41 of the present code. Where the provisions of the first paragraph are applied, the provisions of article 434-41 are thus not applicable.

[96] Extension of the possibilities of searches to seize assets subject to confiscation under article 131-21 of the Criminal Code;
Possibility of investigation for certain offenses to order security measures on assets (movable and immovable) as a guarantee for the payment of fines and the compensation of victims;
Determination of rules applicable to seizures when these relate to all or part of the assets of a person, immovable assets, movable assets or non-physical rights on movable assets, or seizures which do not lead to dispossession.
Creation of the *Agence de gestionet de recouvrement des avoirssaisis et confisqués* (Agency for the Management and Recovery of Seized and Confiscated Assets). It will manage all assets, regardless of their nature, which have been seized, confiscated or are subject to conservatory measures during a criminal procedure, as well as with transferring or destroying such assets.
Authorizes the court to order the seizure of assets which it has confiscated and have not yet been subject to seizure. When confiscation is final the immediate sale of movables whose value may depreciate quickly may be ordered and finally the Criminal Procedure Code of provisions on international cooperation to execute decisions on confiscation.

[97] Article 222-39-1, Article 225-6, Article 225-12-5, Article 321, Article 222-39-1 and Article 450-2-1 of the French Criminal Code. English translation of the French Criminal Code available at http://195.83.177.9/code/index.phtml?lang=uk

Appendix B

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despite the radical character of these legal measures, French authorities stated that this option is used in judicial practice without causing any difficulties.[98]

French law also allows for confiscation pursuant to administrative procedures by the customs code, whereby customs officials are authorized to confiscate contraband materials, proceeds of crime, sums of money, and other items.

The law foresees seizure of all objects that could serve as evidence, instruments that have been used or intended for the commission of the offense, and objects that appear to be the proceeds. Seizure can be applied as early as during preliminary inquiries or judicial investigation with a warrant issued by the judge. Seized objects then are listed and placed under seal of proof of origin under court custody, except bank and post office accounts. The Financial Intelligence Unit TRACFIN also can block, for up to 12 hours, suspect bank transactions. The 12-hour time period can be extended only by the president of the Paris Regional Court. There is no department or body dedicated to managing seized assets; movable assets are stored in court registries, while immovable property is overseen by court-appointed receivers. When the subject of seizure is money or securities they are deposited in a bank account.

Financial investigation and confiscation of proceeds is undertaken by two different agencies operating under the auspices of two different ministries. TRACFIN[99] operates under the Ministry of Finance, Economy and Industry, and OCRGDF[100] under the Ministry of Interior. Although their areas of operation are similar and may even overlap, coordination between the two agencies is lacking because of a well-known rivalry between the police and the customs authorities. Financial investigations are carried out in almost all cases whereby the TRACFIN follows the trail of the money, tracking bank accounts through which funds were channeled and identifying holders and beneficiaries. Banking secrecy and confidentiality regulations do not represent grounds for opposing such judicial actions. To facilitate such investigations, France has established automated filing of all open bank accounts in France. Another route available to financial investigators is the use of the simplified tax procedure, which enables them to process national information on all individuals and legal persons under the jurisdiction of the tax directorate.

Because confiscation is conviction based it usually is ordered by the trial court and the prosecution does not need to submit a special application. All confiscated assets and materials become state property.

Effectiveness There are no statistical data on the seizure or confiscation of the instrumentalities and proceeds of corruption or equivalent assets to these proceeds, but bank accounts are seized in nearly all corruption cases.

Italy

Italy is one of the first countries in Europe, perhaps the world, to enforce UWO measures as a tool to attack the financial base of organized crime and go after the profit acquired from criminal enterprises. Italy adopted this approach in its attempt to fight mafia-organized groups in southern Italy originating in the late 1950s after the World War II. These measures were not officially known as UWOs, but they contain key elements constituting UWOs; for example, they shift the burden of proof to the property owner to justify the legitimacy of the property; they are non-conviction based; and all or part of the assets and/or property for which lawful origin cannot be justified can be seized and subsequently forfeited.

Confiscation and forfeiture, according to Italian legislation, can be imposed in two different procedures,[101] the first being part of the patrimonial or preventive measures, also known as "extra judicial", and is non-conviction based, and the second being the punitive or judicial measures, whereby

[98] GRECO Annual Evaluation report on France, 2006, p. 4
[99] Traitement du renseignement et action contre les circuits financiers clandestins (TRACFIN)
[100] Office Central pour la Repression de la Grande DelinquanceFinanciere (OCRGDF)
[101] Letizia Paoli, "Seizure and Confiscation Measures in Italy: An evaluation of their effectiveness and constitutionality, 1997, *European Journal of Crime, Criminal Law and Criminal Justice*

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the confiscation order is issued in the course of criminal proceedings is conviction based (Article 240 of the Italian Penal Code).

Preventive (administrative) measures-non-conviction based

Although controversial and heavily criticized for violating personal rights, such measures have been upheld by the Constitutional Court and supported by the parliament and judicial authorities. They are constituted as preventive measures and are enforceable on five categories[102] of subjects considered socially dangerous, regardless of the commission of the offense, to which five preventive measures can be applied. They are non-conviction based, administrative in nature and are enforced outside criminal proceedings by law enforcement authorities under judicial supervision and under looser rules of evidence.

These measures were introduced for the first time in 1956 as personal preventive measures or *Misure di prevenzione personale*, and were modified in 1965 (Law No. 575) and in 1982 (Law No. 646[103]) to reflect the evolution of crime. The 1965 amendment (Law No. 575) extended the law to apply to preventive measures, including special and personal supervision of those "suspected of belonging to Mafia organizations." The 1982 amendment, known also as the Rodogne-La Torre Act,[104] extended the scope to include "the suspects belonging to mafia type associations, or to the Camorra mafia type associations, known locally as pursuing goals or acting in ways that correspond to those of mafia type associations," thus extending the application to other types of criminal behavior that use the methods and ways of mafia organizations, such as drug or human trafficking, prostitution, and so on. The most important innovation introduced by the 1982 amendment was the property or financial measure, which authorized seizure and confiscation of property and assets of the suspects belonging to mafia organizations. If a suspect was unable to justify the lawful origin of his or her assets or property, the court was authorized to order confiscation in whole or in part of his or her personal assets. The mere suspicion that a person is a member of a mafia-type organization was sufficient to impose preventive measures. According to Article 2-bis of the 1965 amendment, the source of income of those suspected of belonging to a mafia organization is assessed in terms of their lifestyles, financial means, property, and economic activities. However, with later development of the legislation, these requirements have been made more stringent and the evidentiary requirements to instigate the imposition of preventive measures must be beyond the stage of mere suspicion. However, the latter has been criticized by some legal scholars who believe that preventive measures were progressively taking on a more penal and judicial character.

Before enforcing preventive measures, police and the prosecution are required to investigate the suspect. Investigation is extended to cover his or her family members, including spouse, children if they have lived with the suspect over the past five years, and any other legal entity, company, syndicate, association, or organization in which he or she could have disposed of part or all of his or her assets. Seizure and confiscation are regulated by the 2-ter of the 1965 amendment (Law No. 575). The prosecutor must make an application for preventive measures and the court has the authority to order seizure or confiscation of assets. Two conditions are required for seizure: (i) assets must be directly or indirectly at the disposal of the suspect; and (ii) there must be a discrepancy between the suspect's wealth and his or her income or there must be sufficient evidence that the assets are the proceeds of crime or the use thereof. Imposition of a confiscation order against the suspect is followed by the application of personal measures.

Although this is an extra judicial proceeding, there is a reversal of the burden of proof, which requires the suspect to present sufficient evidence and to justify that his or her assets are not the proceeds of crime. If the defendant cannot prove lawful origin of his or her assets, the court can issue a confiscation order

[102] At the time of its entry into force, the law provided for five categories of criminal behavior: vagabonds, those involved in trafficking, prostitution, drug trafficking, illegal betting and gambling.
[103] Preventive measures among others include, formal notice, return to their place of residence (repatriation) or prohibition of residence in one or more municipalities or provinces, withdrawal of licenses, concessions or applications of register, linked with the exercise of economic activities in which the person put under personal preventive measures takes part.
[104]

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depriving the suspect of the proceeds. The prosecution does not need to prove commission of an offense or link assets or proceeds to a specific crime.

Conviction based confiscation

Confiscation of assets considered to be instruments of crime and proceeds of crime is conviction based, governed by Article 240 of the Criminal Code. The first paragraph of Article 240 stipulates that "in the case of conviction the judge may order forfeiture if the things that were used or were intended to accomplish the crime or of the things that were the product or the profit." For confiscation to be ordered the first prerequisite is imposition of a conviction on the defendant for an offense. The standards of evidence are those of regular criminal proceedings "beyond reasonable doubt"; thus, the prosecutor is required to provide proof under the rigorous requirements of the rules of criminal proceedings that the defendant has committed an offense. Confiscation per Italian criminal law can be optional or mandatory. Optional confiscation is for all criminal offenses whereby the judge has the discretion to decide whether or not to impose confiscation. Mandatory confiscation, which represents a supplementary sanction, is for a number of criminal offenses enumerated under Article 416-bis, such as those associated with mafia-type extortion, kidnapping, loan sharking, and various types of money laundering as well as drug trafficking.

Per Article 321 of the Criminal Code, seizure of a part or all assets is allowed in all cases where there is a probable cause that there may be a future confiscation that may occur at the end of the trial. Further, the Article *12quinquies* enacted in 1992 (Law No. 356) stipulates that those convicted of committing offenses associated with the mafia, including drug offenses, organized crime, and money laundering, are required to demonstrate the lawful source of their income and property. If they are unable to do so, they may be imprisoned for up to five years and forfeiture of part or all of their assets is compulsory. The second paragraph of this disposition provides for the reversal of the burden of proof, shifting the burden from the prosecutor to the defendant to justify the origin of his or her assets. This paragraph was declared unconstitutional in 1994 by the Constitutional Court, on the grounds that it was contrary to the principle of the presumption of innocence of the criminal proceeding and violated Article 27 of the Italian Constitution. To cover the legal vacuum created by the striking of the law, the government enacted *12sexies* the same year. The new law retained the compulsory character of the confiscation for those convicted of crimes stipulated under 416-bis. The text makes forfeiture compulsory in the case of a conviction for crimes prescribed by Articles 416-bis (delinquent mafia-type association), 629 (extortion), 630 (kidnapping for ransom), 644, 644-bis (loan sharking), 648, 648-bis, 648-ter (various types of money laundering) of the Penal Code,[105]and foresees that if a person convicted of crimes associated with mafia cannot justify the origin of the assets and if these appear to be disproportionate to his or her income, as declared in the tax declaration. The new law carries more stringent conditions for its application: the first limit being to those convicted of mafia-type crimes; the second requiring that the property be disproportionate to the assets stated in the tax declaration and the income made from economic activities; and the third that there is no need to establish a causal link between the assets to be confiscated and a specific offense.[106]

There also are doubts about the constitutionality of the new law as well; however, the Constitutional Court has not yet challenged its application. Some legal scholars consider that this law is unconstitutional because it does not allow the judge to verify and establish whether or not the convicted person is associated with or is a member of a mafia-type organization.

Reversal of the burden of proof was introduced initially with the *12quinquies* law in 1992 and amended with law *12sexies*, which were introduced to overcome the limited impact of Article 240 of the Criminal Code, which was considered ineffective in fighting organized crime. These provisions allow for

[105]LetiziaPaoli;"Seizure and Confiscation Measures in Italy," *European Journal of Crime, Criminal law and Criminal Justice*, vol.5/3, 256–272, 1997

[106]GuilianoTurone "Legal frameworks and investigative tools for combating organized transnational crime in the Italian experience." GuilianoTurone is Judge of the Supreme Court of Italy, Rome.

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compulsory confiscation of criminal assets derived from criminal activities that are well established and for which the prosecution does not have the possibility of collecting sufficient evidence under strict rules of criminal proceedings to prove their illegal origin. After the law *12quinquies* was declared unconstitutional, the new law *12sexies* retains the inversion of the burden of proof, but under a number of stringent conditions. Because the inversion of proof is limited to certain criminal offenses, some serious crimes that endanger society cannot be covered by this law.

Effectiveness In regard to the efficiency of the application of rules ordering confiscation of illegal proceeds, there is a general consensus among scholars and practitioners that the effect is meager. According to available statistical data, which are not abundant, lack accuracy, and are duplicative, only a small number of seized assets is actually confiscated. For example, the data that exists for the years 1982–1995 show that out of 19,125 seized assets, only 5,333 were subject to confiscation orders, which is only 30% of the total seized assets. Moreover, the value of the confiscated assets is less than their value when they were seized. This is believed to be the result of a number of factors, such as depreciation in the value of the assets due to the long judicial proceedings, asset mismanagement, and inaccurate assessment of the original value of the assets. However, despite the correlating outside factors, it can be concluded with a high degree of certainty that the total value of the assets confiscated is significantly less than the value of the assets seized, based on the low number of confiscation orders issued.

The efficiency of applying confiscation measures has varied from year to year, reaching peaks between the years 1982 and 1985 and between 1992 and 1994. Legal scholars attribute this improved implementation and enforcement of confiscation orders to social developments. For example, following enactment of Law No. 646 in 1982, which introduced property measures, there was widespread use of confiscation orders, resulting in seized assets with a value of more than 300 billion lira and about 250 billion lira worth of property being removed from convicted Mafiosi or their front men.[107] After the first three years of progressive and effective application, there was a steady decline over the next years. Similarly, another peak was noted in 1992 after the murder of two judges—Falcone and Borselino—and subsequent introduction of the *12quinquies* law criminalizing "unjustified possession of values," which authorized confiscation of the assets of those convicted of mafia-type crimes. For 18 months after the law was enacted, the courts used it to confiscate considerable assets, until it was declared unconstitutional by the Constitutional Court. In 1993, the year the law was enacted, from August to the end of the year, 778 items were seized, with an estimated value of 338 billion lira, representing 42 percent of the total value of the assets seized in 1992.[108] The law *12sexies*, enacted to fill the legal vacuum created by the *12 quinquies*, was used sparingly by the courts, resulting in much smaller amounts of seized and confiscated assets, reaching only three percent of the total value of the assets seized and confiscated in 1995.

Netherlands

Conviction based confiscation of illegal proceeds has been possible in the Netherlands since 1983; however, it has been used infrequently due to a number of factors; for example, the requirement to establish a direct link between the assets to be confiscated and an offense, little time devoted to financial investigations, and the inclusion of confiscation proceedings as part of the main trial. Most of these factors were remedied with enactment of the "Strip Them" Act of 1993, which expanded offenses for which confiscation could be imposed, allowed for the separation of confiscation proceedings from the main trial, and provided for confiscation of assets without the requirement to establish a link between the proceeds and an offense in certain circumstances. In the majority of cases, however, the link between the proceeds and a particular offense is required following criminal prosecution. In cases when the causal linkage is not required, prior conviction is still a prerequisite. Furthermore, although the law does not permit in general terms a reversal of the burden of proof, an exception is provided for in Article 36e, paragraph 3, whereby the court can order the defendant to prove legal origin of his or her income. Unique

[107]Letizia Paoli, "Seizure and Confiscation in Italy," p. 259
[108]Letizia Paoli, "Seizure and Confiscation in Italy," p. 262

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to the Dutch confiscation regime is the incorporation of civil forfeiture regime features in certain circumstances, including reversal of the burden of proof and confiscation of the proceeds without the need to link them directly to an offense.

Conviction based confiscation in criminal proceedings

As stated previously, application of the confiscation regime was enhanced with the 1993 Act. The main objective of the law is "to provide an efficient way to prevent the increased number of organized and lucrative forms of international crime, such as drug trafficking, fraud and environmental offenses."[109] the legislature's intent was to deprive those involved in committing criminal offenses of the economic advantage or financial benefits, by taking away from them, all or part of the gained profits. Confiscation laws were further enhanced with amendments in 2003 and 2005, improving asset seizure and management and introducing special financial investigations.

The main provision on confiscation is Article 36e of the Dutch Criminal Code, providing for two types of confiscation: Ordinary Confiscation and Special Confiscation. Ordinary confiscation (governed by Articles 33 and 33a of the Criminal Code) stipulates that confiscation as a sanction can be imposed when a defendant has been convicted of any criminal offense, and the items derived from the offense or used for commission or preparation of the offense can be confiscated. Special confiscation (Article 36e[110]) provides that the public prosecution can request the court to impose a measure requiring the defendant to pay a sum of money to the state in relation to the illegally obtained profits acquired from: (i) the offense for which the defendant was convicted (Article 36e, paragraph 1); (ii) similar offenses other than those for which the defendant was convicted, when there is "sufficient evidence" to assume that they also were committed by the defendant (Article 36, paragraph 2); and (iii) profits from offenses for which a fifth category fine can be imposed (fifth category fine is imposed for a number of offenses and is more than €45,000). This measure also can be imposed if a criminal financial investigation suggests that it is likely that illicit profits were obtained by committing other criminal offenses.

To impose confiscation per Dutch law, a prior criminal conviction is always required. Thus both the first and the second variant referenced above require presentation of sufficient evidence to establish a direct link between the proceeds and the offense. The third variant, however, pertains to a situation where a person has been convicted of an offense punishable by a fifth category fine and against whom financial investigation has been conducted and its results suggest that he or she may have acquired illegal profits from other similar offenses. This suggests that the prosecution does not need to establish commission of another offense and prove a direct link between the profits and the offense. The question arises: How does the court assess and determine the advantage of the profits acquired by the defendant from other similar offenses? The literature[111] shows that court uses an abstract method of calculation to identify illegally

[109] "Measures Concerning Confiscation of Illegally Obtained Profit," Claire Daams and Ingrid van de Ryet, *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 5/3, 308–313, 1997

[110] Section 36e of the Criminal Code

1. At the request of the Public Prosecutions Department, the person who is sentenced for a criminal offense may, by separate decision of the court, be obliged to pay a sum of money to the State in confiscation of illegally obtained profits or advantages.
2. This obligation may be imposed on the person as referred to in subsection one who gained profits or advantages by means of or from the proceeds from the criminal offense as referred to in that subsection or from similar offenses, or from offenses that are punishable with a fine of the fifth category, and of which there is sufficient evidence that they have been committed by him.
3. At the request of the Public Prosecutions Department, a person who is sentenced for a criminal offense punishable with a fine of fifth category and against whom, as a suspect of that criminal offense, a criminal investigation is conducted, may, by separate decision of the court, be obliged to pay a sum of money to the state in confiscation of illegally obtained profits or advantages, if, in view of that investigation, it is likely that offenses or other criminal offenses have in any way resulted in the convicted person having obtained illegal profits or advantages as well.

[111] "The burden of proof in confiscation cases; A comparison between the Netherlands and the United Kingdom in the light of the European Convention of Human Rights," Tijs Kooijmans, *European Journal of Crime, Criminal law and Criminal Justice*, vol. 18 (2010) 225–236

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obtained profits, calculating the assets derived from the defendant during a certain period of time, and determining how much of the acquired profits can be justified on the basis of legal income. If the increase in property cannot be fully explained on the basis of legal sources of income, the defendant is invited to justify that the increase of assets is derived from legitimate resources. If the defendant cannot provide satisfactory evidence to prove legal origin of the assets, the court will assume that the unexplained part of the assets was derived from illegal activities. This represents a reversal of the burden of proof, shifting the responsibility to justify the origin of his or her assets onto the defendant, even though Dutch law does not in general provide for reversal of the burden of proof.

Confiscation in Dutch law is discretionary and is imposed on the request of the public prosecutor. It can be requested at the beginning of the main trial or at any time up to two years after the verdict in the main trial has been reached. A confiscation request also can be issued based on an earlier verdict. A confiscation procedure can be part of the main trial, but more often is conducted in a separate proceeding. The reason for a separate proceeding is to prevent delays in the main case by the thorough financial investigations that are necessary to carry out the confiscation proceedings. However, when financial investigations are not complex, it is possible to have a confiscation request considered during the main trial. The confiscation measure is imposed with a verdict separate from the verdict of the main trial.

If the original assets derived from the proceeds of crime are no longer available, the law allows for value confiscation, whereby the defendant can be ordered to pay a sum of money equivalent to the proceeds or objects acquired. Further, confiscation can be enforced against third parties, if they knew or should have reasonably suspected that the goods had been obtained by means of the criminal offense or represent the proceeds of crime. The value confiscation principle also can be applied to third parties.

The law grants the prosecutor the authority to reach a settlement with the defendant regarding confiscation. Settlement can be reached at any time during the investigation, during the trial, and even after the verdict in the main trial has been read. If a settlement is reached, the defendant is obliged to pay a certain amount of money to the government or to turn over certain objects considered illegally acquired. A settlement agreement does not have any legal effect on the main trial. After a settlement is reached, the criminal financial investigation is closed. A settlement can be made in regard to the whole amount or part of the profit obtained. If it becomes clear later that the profits were larger then assumed, it is not possible to start another confiscation procedure to confiscate the surplus. If, however, the settlement is reached before the final verdict acquitting the defendant is made, the defendant can request reimbursement of the sum of money paid. Such reimbursement is not automatic; the charged person must make a request to have the money or the goods returned.

Financial investigation Two types of investigations are carried out in the course of criminal investigations: a regular financial investigation and a special criminal financial investigation. A regular financial investigation is carried out in all criminal cases; a special criminal financial investigation is initiated when the results of preliminary investigations indicate a likelihood of illicitly obtained benefits that may total at least €12,000. This threshold amount was introduced by the Directives on Special Confiscation. Special investigations are authorized by a judge at the request of the prosecutor and are carried out by the Financial Support Bureaus (FSB) whose sole purpose is to apply confiscation provisions. The FSBs' role is also to coordinate the information among other institutions involved in implementing the confiscation legislation, such as tax authorities, public prosecutors, and others. The law grants application of special investigative means such as electronic surveillance, undercover operations, house searches, phone taps, and others.

Seizure and asset management Freezing and seizure of instrumentalities of crime is regulated by Articles 94–126 of the Criminal Procedure Code. The law allows for seizure and freezing of assets to secure the return of the objects or items derived from the crime or to ensure execution of a future confiscation order or payment of a fine. The seizure order is issued by a judge acting either *ex officio* or

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on the request of the public prosecutor; in the case of special financial criminal investigations, authorization of the public prosecutors is required. The seizure is carried out by the police.

Management of seized and confiscated assets is entrusted to the Prosecution Service Criminal Asset Deprivation Bureau (BOOM). The agency has the authority to make all decisions pertaining to management of seized assets: (i) to appoint an administrator; (ii) pay the seizure costs from the state coffers; or (iii) authorize delineation, destruction, abandonment, or use for a purpose other than the investigation. Assets ordered for confiscation are transferred to the state unless there are claims of damage from victims.

Effectiveness To facilitate implementation of the confiscation law, BOOM is set up to assist public prosecutors with investigations. Most courts have specialized chambers for confiscation matters and there are four specialized prosecutors at the BOOM who assist local prosecutors in the most serious criminal cases. Further, the Board of the Procurator General drafted "Directives on Special Confiscation" providing guidance to prosecutors to ensure efficient and uniform application of the confiscation provisions.

Given that confiscation is conviction based, prosecutors have no difficulties in confiscating the proceeds considered to be derived from illicit activities. The existence of the extended confiscation regime has made it possible to widen the application of confiscation to proceeds derived from other offenses, other than the one for which the defendant was convicted. Although measures are discretionary, they always are applied in organized crime cases.[112] Seizure of assets is extensively applied and has proved effective in obtaining evidence for proceedings, including confiscation and the main offense.

However, despite the progress made in applying confiscation provisions, there are considerable difficulties. One of the main issues raised is the quota of ten cases per year, which every public prosecutor must fulfill. Introducing this quota as a performance standard has enticed some prosecutors to pursue minor and less important cases rather than important and more time-intensive cases.

Switzerland

Switzerland is a federal state, made up of 26 cantons, whereby criminal law is a matter of federal law. Switzerland has a civil legal tradition and the criminal law is codified in the Penal Code and the Penal Procedure Code, which are based on the principle of legality, meaning that no one can be charged for an offense that is not classified as such in the criminal code. The principle is introduced in the Criminal Code to protect defendants from arbitrary judicial decisions. The legislative body of the country has the power to determine which actions are classified and legislated in the criminal code as criminal offenses, for commission of which any person can be accused, prosecuted, and convicted.

Swiss law provides for both conviction and non-conviction based forfeiture laws. Both proceedings are governed by the same provision in the Criminal Code and the same procedures of the Criminal Procedure Code. Both confiscation proceedings *in rem* and *in personam* are conducted in criminal proceedings. Swiss criminal law does not provide for forfeiture of criminal assets in civil proceedings.

[112] Barbara Vettori, "Tough on Criminal Wealth; Exploring the Practice of Proceeds from Crime Confiscation in the EU," Netherland, 89–94

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Conviction based confiscation

Conviction based confiscation of the proceeds of criminal law is governed by Articles 69–72 of the Swiss Criminal Code, and is mandatory. Article 69 of the Criminal Code governs conviction-based confiscation, authorizing the judge to confiscate the proceeds resulting from the commission of an offense as well as the instrumentalities of the crime, and objects used or intended to be used for the commission of the offense. Confiscation following conviction is mandatory and is deemed a supplementary measure to the prime penalty imposed by the court.

Alternatively, the Swiss Criminal Code provides for independent criminal confiscation proceedings to be initiated against the property *in rem* in cases when the defendant cannot be identified or has absconded. Article 70, paragraph 1 states "the judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender, provided that they do not have to be returned to the injured party to restore his or her rights." Forfeiture is ordered against absent defendants, because this is an *in rem* forfeiture, it is not important who the owner is as long as these assets are known to be proceeds of crime. Swiss Criminal Code has adopted a broad concept of assets to include all valuable objects, items, economic advantages, and indirect benefits. The code sets forth provisions whereby the assets will not be confiscated if they were acquired by a third party not knowing of their criminal origin and if the measure is considered excessively harsh. The right to order confiscation of assets is subject to statutory limitation of seven years, unless the offense of which the defendant is accused has a longer prescriptive period, in which case the later applies. After the confiscation order is issued, the court is obliged to officially announce it, whereby interested third parties are given an opportunity to claim their interest in the property, which rights expire five years after the official announcement is made.

The burden of proof is on the prosecution, which is required to establish the link between the offense and the proceeds, under criminal standard of proof. The prosecution must establish that an offense was committed and that the property or assets were derived from commission of a particular offense, or have resulted from or were intended for commission of an offense. Although the standard of proof is criminal, it represents a lower standard of proof, called "intimate conviction," meaning that the judge must be intimately convinced that the assets are the proceeds of an offense. For intimate conviction to exist, it is not necessary for there to be proof; rather, an "accumulation of clues" is deemed sufficient to convince the judge of the offense. However, when it concerns criminal organizations, Swiss law provides for reversal of the burden of proof; therefore, when a person is suspected to be a member of or to have supported a criminal organization, he or she will have the burden to prove the lawful origin of his or her assets (Article 260 of the Criminal Code). This legal statutory presumption comes into play and the burden of proof passes to the suspect only in cases when the person is liable for prosecution for membership in or support of a criminal organization.

To order the confiscation of assets considered to be the proceeds of crime, the criminal offense must be classified as such in the Criminal Code or other criminal laws in Switzerland (principle of legality), and must be within the jurisdiction of Swiss authorities. An exception is provided for proceeds derived from narcotics offenses, in which circumstances the Federal Law on Narcotics applies. This law provides that assets can be forfeited even in cases when the Swiss criminal justice authorities have no jurisdiction to prosecute the offenses, but the proceeds have been derived from drug-trafficking offenses.

The court also can order compensatory claims, or payment of an equivalent value assessed by the judge to have derived from the crime, if the actual proceeds are no longer available, if they have been spent, or if they have been otherwise disposed of by the defendant. The defendant is obliged to pay the amount set forth by the judge. From the amount received, the court may fulfill the claims of injured or third interested parties (Article 71 of the Criminal Code).

Article 305-bis of the Criminal Code sets forth the provisions incriminating money laundering offenses with respect to the confiscation of the proceeds of crime. The law provides that persons who obstruct the

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discovery or the confiscation of assets that they knew or should have known to be derived from an offense are liable for up to three years of imprisonment.

To prevent dissipation, loss, or transfer of assets to third parties, Swiss Criminal Procedure Code sets forth provisions governing the seizure of assets (Article 65 of the Criminal Code). The investigative judge and the federal prosecutor have the power to ask the court to issue an order to seize or freeze assets. For the court to issue a seizure order there must be serious circumstantial evidence of a direct or indirect link between the assets for seizure and an offense. Seizure can be applied to movable and immovable property or property purchased with the proceeds derived from criminal activity, even if only part of the purchase was made with the proceeds of unlawful origin. The seizure order will remain in effect until the court makes a final decision regarding the property subject to seizure.

The amount of information available to evaluate the effectiveness of the implementation of the law is insufficient on which to base relevant informed conclusions. According to the GRECO Second Round Evaluation Report,[113] there have been six court confiscation orders in the past 3 years, two of which are corruption cases.

3.1.4 Countries that have illicit enrichment targeting PEPs, reversing the burden of proof to the defendant in a criminal proceeding

A considerable number of countries worldwide have developed legislation known as illicit enrichment that targets politically exposed people including public officials of all levels that may have acquired assets as a result of corruption or abuse of official position. We have chosen to depict only a couple of countries implementing illicit enrichment law. For a more exhaustive and comprehensive review, the World Bank is conducting a study on Illicit Enrichment laws worldwide.[114]

Hong Kong

The legal system of Hong Kong, as described by the Hong Kong Department of Justice, is "one country two systems." The Basic Law of the Hong Kong Special Administrative Region (HKSAR) was enacted in 1990 and came into effect in 1997. It was enacted in accordance with the Constitution of the People's Republic of China and contains a feature whereby the socialist system and policies of China shall not be practiced in HKSAR; thus, the previous capitalist system remains unchanged for another 50 years. This provides an avenue for continuation of all previous laws and ordinances of the former system, including those related to confiscation and forfeiture regimes.

Legislation governing confiscation and forfeiture regimes in Hong Kong was enacted during the British rule and little has been done to amend or upgrade them. Provisions targeting proceeds derived from drug trafficking and other serious offenses were passed in two different legislations; in 1989 the Drug Trafficking (Recovery of Proceeds) Ordinance (DTROP) and in 1990 the Organized and Serious Crime Ordinance (OSCO). In addition, in 1997 Hong Kong enacted the Prevention of Bribery Ordinance to combat and eradicate corruption, which has a provision on the Possession of Unexplained Property. Although the Hong Kong confiscation regime is considered advanced and moderate, it has seen very little development in this area since it became a special administrative region of China, with the exception of the anti-terrorist financing legislation enacted in 2002–2004. A recent evaluation conducted by FATF concluded that Hong Kong has a good legal structure to combat money laundering and the terrorist financing system, fully meeting FATF requirements, with more work to be done in the area of terrorist financing.

Confiscation of proceeds derived from drug trafficking and serious offenses

Both DTROP and OSCO provide powers for confiscation of property following conviction for drug trafficking, serious offenses, and *inter alia* for corruption cases. Although the offenses listed in Schedules

[113] GRECO Joint First and Second Evaluation Round 2007, Evaluation Report on Switzerland
[114] World Bank is in the process of publishing a report on effectiveness of Illicit Enrichment.

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1 and 2 include many serious offenses, they do not include all indictable offenses; for example, tax evasion is not included in the specified offenses. Although it is held that the proceeds of many offenses not listed in Schedules 1 and 2 can still be captured through the money-laundering provisions, with the requisite *mensrea*, whereby one deals with the proceeds of any indictable offense, the person also commits money laundering; therefore, proceeds of an offense can come under the scope of the confiscation provisions in OSCO.[115] Both laws apply to properties in Hong Kong and are retroactive, including offenses committed before the Act came into effect.

Restraining orders Both DTROP and OSCO contain powers for the restraint and charging of property to satisfy a confiscation order. A restraining order prevents the defendant from dealing with the property; the charging order imposes a charge on the property to secure a payment of money to the government equivalent to the value of the property. Restrained property can be seized by an authorized officer to prevent the property from being disposed of or otherwise transferred from Hong Kong. The court issues a restraining order if proceedings against the defendant were commenced and if it is satisfied that there are reasonable grounds to believe that the defendant has benefited from a drug-trafficking or other serious offense. This has been recently amended to allow a restraining order to be issued earlier in the process so that there is less time for the defendant to dispose of his or her assets. A restraining order can cover all of the property owned or in possession of the defendant, including property acquired through legitimate means, to ensure that if a confiscation order is issued the property can be used to satisfy the confiscation order. After the restraining order is issued, the court appoints an interim receiver to manage and control the property.

Confiscation orders After the defendant has been convicted of a drug-trafficking or other serious offense, on the prosecutors application, the District Court or High Court must order confiscation if it is satisfied that the defendant has benefited from the committed offense of which he was convicted. If the defendant fails to pay the amount specified in the conviction order, the court will impose a term of imprisonment. The length of the term, similar to that of the Singapore confiscation regime, will vary depending on the amount specified in the confiscation order and set to be paid to the government. If the prosecution applies for an organized crime offense, the scope of the confiscation order will be wider. When filing the application for a confiscation order the prosecutor must file a statement providing the facts to support the application. This statement is considered by the court as conclusive except for the facts that the accused has not accepted. The accused also is required to submit a statement on the amount that might be realized at the time the confiscation order is issued. The rights of third parties are not taken into account when the confiscation order is issued, and there are no opportunities for them during the proceedings to make an application to protect their interests.

Confiscating proceeds of corruption

The Proceeds of Bribery Ordinance (PBO)[116] has specified that the corruption occurs when an individual abuses his or her authority for personal gain at the expense of other people. The PBO does not incriminate only the person receiving the benefit, but also the person bribing the public official. The statute also covers or is applicable to all public and private companies. Public bodies include the government, executive council, legislative council, any district council, any board, commission, committee, or other body, whether paid or unpaid appointed by or on behalf of the chief executive. The Independent Commission against Corruption(ICAC), established by the Independent Commission Against Corruption Ordinance, has the powers to investigate corruption offenses, to arrest, and to detain those suspected of being engaged in corruption offenses, and is permitted to search and seize property.

[115] *"Civil Forfeiture for Hong Kong: issues and prospect,"* Simon N.M. Young
[116] Available at: http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf, accessed March 17, 2011

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The PBO empowers the ICAC to apply *ex parte* to a First Instance Court for a restraining order. A restraining order may cover all of the property of the suspect, whether it is held by the suspect or a third party. The court can revoke or vary the restraining order on the request of the suspect or a third party. Even though the Act provides for a restraining order, once the suspect has been convicted of a corruption offense, the PBO does not provide for the forfeiture or confiscation of the property. At this stage, to enforce confiscation, the prosecution must rely on OSCO, which also applies only to a limited number of corruption offenses, including bribery, bribery for giving assistance in regard to contracts, bribery for procuring withdrawal of tenders, and corrupt transactions with agents. However, the PBO confers a confiscation power only for the purpose of confiscating assets of a government servant who has been convicted of possession of unexplained property. This provision (s.10) provides that any person who is a chief executive officer or a prescribed officer is guilty of an offense if he or she (a) maintains a standard of living above that which is commensurate with present or past emoluments or (b) is in control of pecuniary resources or property disproportionate to his or her present or past emolument, unless he or she gives a satisfactory explanation to the court as to how he or she was able to maintain such a standard or how such pecuniary resources or property came under his or her control. If the suspect is the chief executive officer, the court will evaluate the truthfulness of his or her statement by taking into account the assets that the suspect had declared to the chief justice. The court will presume, if satisfied that a third party has close relationship with the suspect, that any pecuniary resources or property held by him or her, unless the contrary is established, are in control of the suspect.

Section 10 of the statute shifts the burden of proof to the suspect/defendant to explain the legitimacy of his or her property. The court also will use prior disclosure of property documents filed by the suspect holding the public office. If a suspect is convicted of an offense under section 10, he or she will be fined up to $1,000,000 and subject to imprisonment of 10 years. Section 24 of the statute stipulates that in all proceedings against a person suspected or accused of having committed an offense under the statute, the burden is with the suspect or the accused.

On conviction of the defendant for possession of unexplained property, the court may, in addition to any penalty, order the confiscation of any pecuniary resources or property up to an amount not exceeding the amount or value of the pecuniary resources or property, the acquisition of which was not explained to the satisfaction of the court. The Secretary of Justice is authorized to make an application for confiscation within 28 days after conviction. The statute provides safeguards for property held or controlled by other persons, holding that his or her property will not be confiscated unless sufficient notice is given to the owner or if a third party was able to satisfy the court that he had acted in good faith when holding or controlling property or pecuniary resources for another person.

Section 10 of the PBO, on unexplained property, has been subject to criticism by many scholars. The main criticism is related to the way the offense is structured. It was held that unexplained wealth as it is drafted becomes an offense only if the person subject to an investigation is not able to satisfy the court of the origin of his or her property. The problem lies in that the provision does not connect unexplained wealth to a corruption offense:

> Any person who, being or having been a Crown servant – (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offense.[117]

Further, it was held that it is uncertain whether the statement "satisfactory explanation" relates to satisfying the court that the wealth is not derived from a corruption offense or does it investigate the

[117] Section 10, Proceeds of Bribery Ordinance 1980

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acquisition of the official's wealth. Two cases have examined the unexplained property section of the PBO. In *Privy Council in Mok Wei Tak and another v. The Queen*,[118] the court gave section 10 a broad meaning, stating that section 10 will be breached if an official has a standard of living or wealth disproportionate to his or her official emoluments, and that the offense consists of two ingredients: (1) control of resources or standard of living disproportionate to official income and (2) the defendant knows that he or she will be unable to give a satisfactory explanation as to the source of the funds sufficient to persuade a court at trial. It was held that the prosecution needs only to prove excess wealth for the burden to shift to the defendant. The Privy Council did not consider the impact of the reversed burden of proof on human rights, but this was later reviewed by the Hong Kong Court of Appeal in *Attorney General v. Hui Kin-hong*.[119]The court upheld section 10, stating that it has proved its effectiveness in the fight against corruption. The court concluded that section 10 is dictated by necessity and goes no further than necessary. Wilsher considers that court analysis is perfunctory and is focused on effective law enforcement with no consideration of alternative means of prosecuting corruption.[120]
Any person convicted of the corruption offense will be ordered by the court to pay a specified amount or value or any advantage benefited as a result of the offense to a public body. The order will be enforced in the same way the civil judgments of the High Court are enforced. The statute differentiates between enforcement of confiscation orders for corruption cases in the public sector and the private sector. In the private sector, law enforcement and the prosecutor's sole responsibility is to inform the principal of issuing the order, and the principal will decide whether to enforce it or not. In public sector corruption cases, law enforcement and the prosecution will be involved to enforce the civil order.

The statute permits a third party holding or having control over property or resources to appeal the decision to the Court of Appeal. The defendant has a right to appeal against the sentence as provided for in Part IV of the Criminal Procedure Ordinance.

Investigative powers The statute provides broad investigative powers to the ICAC commissioners and its investigating officers when investigating alleged corruption offenses. The statute empowers the commissioner or an investigating officer to apply *ex parte* to the Court of First Instance to issue an authorization order in writing, permitting the investigating officer to investigate any account, books, documents, or other materials related to the person who is suspected of committing an offense. The authorization also may empower the commissioner or the investigator to require any person to produce books, documents, or other articles related to the suspect. Any person failing to comply with the orders without a reasonable excuse shall be guilty of an offense and shall be fined up to $20,000 and subject to imprisonment for one year.

Further, the commissioner or investigating officer may apply, and the Court of First Instance may issue, an order requesting the Commissioner of Inland Revenue or any other officers to produce material for the commissioner or to give them access to it. Similarly, an order can be issued by the Court of First Instance authorizing the commissioner to request any person to provide information related to the suspect, if the court is satisfied that there are reasonable grounds to believe the person has information that may be relevant to the investigation. However, the statute provides for the protection of privileged information obtained in the course of conducting business, and such protections will be extended to clerks or servants employed by the legal advisor.

Finally, it is important to add that all three ordinances create a duty for all citizens to report suspicion or knowledge of any of the offenses to an authorized officer. Persons providing information to law enforcement are protected by the virtue of section 26 of the statute, based on which no witness is required to appear in court unless ordered by a court itself; their identity is protected and must not be revealed.

[118] (1990) 2 AC 333
[119] (1995) 1HKLR 227
[120] "Inexplicable wealth and illicit enrichment of public officials: A model draft that respects human rights in corruption cases," Dan Wilsher,*Crime, Law &Social Change* (2006) 45:27–53

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Singapore

Singapore's legal system is based on the English common law system. A unique characteristic of Singapore's legal system is that it has evolved into a distinctive jurisprudence, continuing to absorb practices from common law as well as best practices from other mature legal systems. These developments in Singapore law reflect an acute awareness of the need to recognize and accommodate current international business and commercial practices.

In July 1989, the Corruption (Confiscation of Benefits) Act was enacted to provide for a more effective mechanism in the confiscation and recovery of corruption benefits, especially in relation to unexplained benefits and benefits of persons who die or abscond while under investigation. The Confiscation of Benefits Act was later strengthened, and in 1999 was renamed the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA), as the primary instrument for criminalizing the laundering of benefits derived from corruption, drug trafficking, and other serious crimes, as well as allowing for the investigation and confiscation of such benefits. Before the CDSA was passed, the money-laundering regime was governed primarily by two separate acts: the Corruption (Confiscation of Benefits) Act and the Drug Trafficking (Confiscation of Benefits) Act.

The CDSA is conviction-based asset forfeiture, providing for forfeiture of proceeds of benefits derived from criminal conduct following conviction of the defendant for drug-trafficking and other serious offenses. The CDSA does not address confiscation of any property that constitutes instrumentalities used in or intended for use in commission of drug-trafficking or other serious offenses. The purpose of the CDSA is to take out the profit from the crime by depriving the criminal of ill-gotten gains. The CDSA covers two main categories of predicate offenses—"drug trafficking offense"[121] as well as foreign drug-trafficking offenses," and "serious offense"[122] and foreign serious offenses, whether committed before or after the CDSA came into force. The CDSA applies to any property, whether is located in Singapore or elsewhere, demonstrating the cross-border effects intended by the CDSA.

Restraining powers The CDSA enables the High Court to issue a restraining or charging order. A charging order imposes on any property a charge for securing the payment of money to the government. Similarly, the restraining order prohibits anyone from dealing with the property subject to the restraining order. The High Court will issue a charging or restraining order on application by the prosecutor, if it is satisfied that there are reasonable grounds to believe that the defendant has derived benefit from a drug offense or from criminal conduct, if proceedings have been instituted against him or her, and if the proceedings have not been concluded. The High Court also can issue an order restraining the property if the defendant has been officially notified that he or she is under investigation for a drug offense or criminal conduct before charges are made or the defendant has been convicted of an offense. If the defendant acquires additional property the court may increase the confiscation order by that amount. If proceedings are not instituted within three months the court will discharge the restraining order. A restraining order can be issued *ex parte*. Police are authorized to seize property if there is a risk that the property may be removed from Singapore. Seized or restrained property is entrusted to the public trustee or a receiver who manages, takes possession of the property, and realizes any realizable property.

Confiscation powers Part II of the CDSA empowers the court, on application by the public prosecutor, when a defendant has been convicted of one or more drug or serious offenses, to issue a confiscation order against the defendant in related to the benefits derived from drug trafficking or criminal conduct, if the court is satisfied that such benefits have been so derived. The court will make a determination of the amount to be recovered from the defendant and, if necessary, will consider the evidence reviewed in the main proceedings against the defendant. In cases where the court is unable to do so, the registrar will

[121]Offenses included under the First Schedule, including offenses from the Section 5,6,7,10,43,46 of the Misuse of Drug Act.
[122]Offenses included as serious offenses under the Second Schedule, including conspiracy, incitement, attempt and abetment of these offenses. Offenses from the Penal Code (Cap. 224) as well as offenses under other specific legislation relating to bribery, hijacking, kidnapping, vandalism, prostitution, etc.

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make the determination. The court will confiscate the property of a person considered to have absconded if it is satisfied on balance of probabilities that the person has absconded and that investigations for a drug-trafficking or other serious offense have been commenced against him or her.

Sections 4 and 4A shift the burden of proof to the defendant. Sections 4 and 6 provide that a court will presume that if the defendant has at any time held property or an interest disproportionate to his or her known sources of income, it was derived from drug-trafficking offenses, unless the defendant is able to adduce evidence to justify the legitimacy of his or her assets. Similarly, per sections 4A and 7, any expenditure incurred by the defendant will be presumed to have been met out of proceeds unless the defendant is able to establish the contrary. Statutory presumptions pursuant to section 4 apply to the property of a deceased defendant (s.28), and proceedings will be instituted against his or her personal representative and his or her estate may be confiscated, although no imprisonment would be imposed against the personal representative or any beneficiary. Any question of fact to be decided by a court in proceedings under the CDSA is decided on the balance of probabilities, except when the prosecution is required to prove in any proceeding the commission of an offense. When issuing the order, the court will accept conviction as conclusive unless it is subject to review, it was quashed or set aside, or the issuing of an order is not in the interest of justice or the public interest. In addition to the provisions shifting the burden to the defendant, section 9 of the CDSA provides an opportunity for the defendant to rebut the prosecutor's tendered statement. If the defendant fails to respond, the court will consider his or her silence as acceptance of the allegations. Alternatively, the defendant can accept or challenge orally or in writing the allegations made by the prosecution and the statement will be considered admissible evidence.

The CDSA empowers the court to determine the amount to be recovered from the defendant based on the court's assessment of the value of the benefits, issued in writing in a certificate. Benefits are defined in the CDSA to be any property or interest, including income accrued from such property or interest held by the person at any time before or after enactment of the CDSA, that is disproportionate to known sources of income. The amount to be recovered can be reduced or increased, either on prosecutors' or receivers' application. The defendant is required to pay the recoverable amount; if he or she fails to do so, the defendant will be liable for interest on that sum. The CDSA prioritizes fulfillment of debts and obligations from the confiscated property.

The CDSA also provides for the protection of rights of third parties. Any third party with an interest in the property may apply before or during the proceedings to protect his or her interest. The court will issue an order declaring the nature, extent, and interest in the property if satisfied that the person with an interest in the property was not involved in the defendant's illegal activities and that he or she acquired interest without knowing and in circumstances that do not arouse suspicion that the property was involved in or derived from drug trafficking or criminal conduct. Part III of the CDSA allows the court to impose imprisonment on the defendant if he or she fails to pay an amount ordered in the confiscation order; the term of imprisonment can be ordered as follows: if the amount does not exceed $20,000, imprisonment not exceeding two years; if the amount exceeds $20,000 (SGD), imprisonment up to five years; for an amount exceeding $50,000(SGD), but no more than$100,000(SGD), imprisonment of seven years; and for an amount exceeding $100,000(SGD), imprisonment of ten years.

Information-gathering powers The CDSA gives broad powers to the court to collect information and materials that may be useful for the investigation. The police officer conducting the investigation is required to apply to a court to access material evidence that may be in possession of a third party or the defendant. The court will issue an order directing a person to produce material or give access to those materials to the authorized officer only if the court is satisfied that there are reasonable grounds to believe that a specified person (defendant) had carried on or has benefited from a drug-trafficking offense or criminal conduct and that there are reasonable grounds to believe that the material subject to application are of substantial value for the investigation and do not include items subject to legal privilege. Further, the court must be satisfied that there are reasonable grounds to believe that obtaining these materials is in the public interest, will benefit the investigation, and will help in explaining the circumstances under

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which the person came into possession of these materials. Provisions under this section protect items subject to legal privilege. However, no one will be precluded from a production order under the justification that it might incriminate or make the person liable to a penalty. If a person fails to comply with a court order or provides false information, he or she will be liable to a fine not exceeding $10,000(SGD) or to imprisonment not exceeding two years or both.

In addition, the High Court may, on application by the Attorney General, issue an order directing a financial institution to produce the materials to the Attorney General or to the authorized officer. This also requires that it be satisfied that there are reasonable grounds to suspect that a person has carried out or has benefited from a drug-trafficking offense or criminal conduct and that there are reasonable grounds to believe that the materials that are the subject of the application are of substantial value for the investigation. Cooperation of the financial institution with the court order will not be considered a breach of any restrictions on information disclosure imposed by law and the institution will not face any action for material produced in good faith.

Search powers On application by an authorized officer, the court may issue a search or warrant authorizing the officer to enter and search premises if the court is satisfied that a person has committed or benefited from offenses (provided for by the CDSA) and there are reasonable grounds to believe that on the premises are materials of substantial value to the investigation. The officer conducting the search is authorized to seize and retain any material, other than items subject to legal privilege. Persons obstructing the officer are subject to a fine of up to $10,000(SGD) or imprisonment of up to two years.

The CDSA contains provisions specifying the obligations of financial institutions in retaining records and their obligations to disclose them to an authorized officer. The CDSA also imposes a responsibility on anyone who has reasonable grounds to suspect that a property represents proceeds of or was used or is intended to be used in connection with drug trafficking or criminal conduct, and the information came to his or her attention in the course of his or her profession, business, or employment, requiring him or her to disclose the knowledge to an authorized officer. Failure to do so can result in conviction and a fine not exceeding $10,000(SGD). Advocates and solicitors and their clerks and interpreters are excluded from this duty.

Finally the CDSA provides for compensation of a person against whom an investigation for drug trafficking or criminal conduct is initiated, but where the person was never convicted of or the conviction was quashed or the person is granted a pardon. The court will order compensation to be paid by the government if the person makes an application and if the court is satisfied that there was some serious default on the part of the prosecution and the applicant has suffered serious loss.

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3.2 Comprehensive Analysis of the UWO in Two Selected Countries

This section of the report describes the process of seizure and forfeiture of property under UWOs in two selected countries: Australia and Ireland. For each country, it provides a brief overview of the policy debate surrounding introduction of UWOs, assesses their effectiveness, and identifies key bottlenecks and key challenges faced in the implementation of the statutes.

After considering a large number of countries that provide for reversal of burden of proof in conviction and non-conviction based forfeiture proceedings, the study team identified three countries that met the criteria determined by the research team, key of which are; i) that it is a non-conviction based asset forfeiture proceeding; ii) there is no requirement for a predicate offense; and, iii) the burden of proof shifts to the respondent to show lawful source of property. These three countries are Australia, Colombia, and Ireland. Because the study called for a comprehensive analysis in two countries, the team has focused on Australia and Ireland, primarily because they are both common law countries and are well-established democracies with effective and impartial law enforcement and judiciary, which, based on the team's findings, are key preconditions for application and effective use of UWOs. Moreover, Australia was the first country to identify its legislation specifically as UWO. Nevertheless, with some minor nuances, each of the three countries contained all three the elements of UWOs described above. The nuances include a varying degree between different statutes regarding the predicate offense. While some statutes had no requirement to show a connection between the property and any criminal activity (e.g., Western Australia and Ireland), the Criminal Asset Bureau in Ireland, in most of the cases, established, on a lower standard of proof, reasonable suspicion that the respondent was engaged in some criminal activity. And the Australian federal UWO contains a clear provision requiring that a connection between the property and an offense is shown. Some of these differences are incorporated in the statute while others arose during the practical application of the laws. In either case, we assume these nuances still reach the threshold of a pure UWO for the purposes of this study

UWOs while widely embraced and promoted by law enforcement officials are awaited with skepticism and criticism by human rights groups, academics and private attorneys. European countries, except for Ireland and Italy, have in large part stayed away from introducing non-conviction based asset forfeitures and have been critical of Irish legislation considering it a drastic response to organized crime with a potential to erode fundamental human rights. The Supreme Courts in both Australia and Ireland have upheld the constitutionality of these laws but have characterized them as draconian. Moreover, the courts have justified them as a measured and proportionate response to the crime and the threat organized and serious crime poses to society. In contrast, some academics believe the law if not carefully and appropriately targeted can violate basic rights of the individual. Similarly, members of the defense bar believe that powers vested in the state are too far reaching and create a gross imbalance of power between the respondent and the state.

In most cases, the main concern expressed by legislators, legal professionals, and others is the possibility for abuse of power under the Act. In the study's review of a considerable amount of case law, and during the team's interviews with representatives of various agencies engaged in implementing the law, this issue was addressed by cautiously and vigilantly choosing cases. In Ireland there was not a single case that was criticized or flagged by attorneys, media or public as a case that should not have been brought under the UWO proceedings. Western Australia, on the other hand, did have one such case when the public and media negatively reacted to the application of UWO in respect of an elderly couple whose house was confiscated after their son concealed drugs on their property.[123]

[123] Clarke 2004, "Elderly drug dealers lose their appeal' *Sydney Morning Herald* 15 March 2005

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Finally, it is important to identify the areas of criminal activity in which the Act is being used. The major areas of criminal activists against which the Act has been used are drug-trafficking offenses, financial fraud, tax fraud, and corporation offenses.

Although it was stated in the beginning of this study that it is difficult to evaluate the effectiveness of the civil forfeiture regime, conclusions can be drawn on the basis of indicators that show the impact of the Act. In Ireland, both the anecdotal and statistical evidence lead us to believe that the PoCA and the CAB, with its extensive powers, have had a positive impact in reducing criminal activities in Ireland. Statistics show that the CAB has used these powers extensively. And the available data on the number of cases commenced by the CAB and the number of orders made, as well as the successful application of the cases, show that the CAB has continued to work consistently in attacking proceeds of crime and that it is doing it successfully.

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3.2.1 Australia

This section of the report reviews the history and background of the confiscation and forfeiture laws in Australia that led to the introduction of UWOs, and reviews the confiscation and forfeiture statutes of Western Australia (WA), Northern Territory (NT), and the recently enacted federal (Commonwealth) law. The final section focuses on the effectiveness and the use of such laws in WA and in the Commonwealth, challenges and obstacles faced in the course of implementation, and lessons learned.

Australia was one of the first countries to enact unexplained wealth provisions as part of its non-conviction–based forfeiture regime as a mechanism to fight serious and organized crime by depriving those who have engaged in unlawful activities of their illegally gained profits. Beginning first at the State or territory level, they have been in existence for more than ten years in WA and since 2003 in NT. Victoria, Queensland, and South Australia have comprehensive forfeiture statutes including conviction and non-conviction processes that contain many aspects of UWOs. Only within the past year have similar laws been enacted at the federal level, and also in the state of New South Wales (NSW).

The History of UWOs in Australia

The legal basis for confiscation laws in Australia was founded in ancient principles of common law known as *deodant* and *attainder*,[124] which permitted confiscation of property if a person committed a serious offense of treason or other felony. All the ancient forms of forfeiture had been abolished by the beginning of the 20th century, initially in England and later in other common law countries, including Australia. *In rem* forfeiture is a recent development, introduced in the Australian Customs Act of 1901 and in the Fisheries Management Act of 1991. In 1997, the Australian government introduced Section 229A in the Customs Act, enabling the state to require forfeiture of contraband and conveyances related to contraband, if, on the balance of probabilities, it was established that the goods were derived from dealing with prohibited narcotic imports. Because this regime did not yield the expected results, the Act was amended, introducing Division III, which empowered the state to require forfeiture of contraband and conveyances, introducing *in personam* civil forfeiture. Under these provisions, the government was able to recover pecuniary penalties, in a civil proceeding, equal to the benefit derived from dealing with narcotics. Note that this regime represented the first *in personam* forfeiture regime e in a civil proceeding without a prerequisite requirement for conviction or charge of an offense, or the need to establish that specific property derived directly or indirectly from an offense. This regime was the foundation of future forfeiture laws in Australia.

The initiative for comprehensive confiscation and forfeiture laws can be traced to the early 1980s when the Australian Police Ministers Council (APMC) extended an invitation to the Standing Committee of Attorney General (SCAG) to draft comprehensive and uniform legislation that provided for confiscation of criminally derived property and prevention of unjust enrichment. A number of Royal Commissioners and Justices advocated for enactment of non-conviction–based confiscation laws as the most appropriate response to crime. They argued that the existing approach, whereby confiscation was considered as a measure imposed against the individual for his or her wrongdoing, should be altered to a broader approach and be focused on unjust enrichment. Unjust enrichment, as a concept, is not focused on wrongdoing of the individual but on the property acquired through illegal activities.[125] As such, the

[124] *Deodant* involved the confiscation of instruments or objects used in the commission of an offense. *Attainder* is forfeiture of both real and personal property. Under the doctrine of "corruption of blood", on conviction of a person for a felony or treason, his or her entire property was confiscated to the King or Feudal Lord. Source*:* Ben Clarke "Confiscation of "unexplained wealth" Western Australia's response to organized crime gangs, " *South African Journal of Criminal Justice*, vol. 15, 2002, p. 61–87.

[125] The concept of unjust enrichment was for the first time mentioned by the Australian Law Reform Commission in the report "*Confiscation that Counts*", Knoting. That is that the development of the common law in this area is driven by a public policy recognition of the notion that persons ought not, as a matter of principle, be permitted to become unjustly enriched at the expense of others. This is seen by the Commission as a significant broadening of the common law which formerly recognized the concept of unjust enrichment (albeit not in those precise terms) in a more limited way through particular rules such as that denying a person who has unlawfully caused the death of another person from benefitting from the estate of that person".

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property should be forfeited unless the property owner is able to prove the legal origin. The concept of unjust enrichment laid the foundation for future UWOs. Accordingly, Justice Moffitt called for civil forfeiture laws to be modeled on existing tax laws. He stated that, "tax authorities can call on taxpayers to account for assets which appear to exceed their income…. It is difficult to see why in the face of serious organized crime a statute could not be drawn to provide that in prescribed circumstances."[126] However, these suggestions were not incorporated in the SCAG sponsored legislation, conviction-based confiscation model in 1985, which was enacted in 1987 as the Proceeds of Crime Act (PoCA). It has been argued by Lusty[127] that this was done partly because the government wanted to enact uniform laws across Australia and partly because the United Kingdom had previously enacted similar legislation. Following enactment of the PoCA, all of the states adopted statutes mirroring the provisions of the federal statute, enacting conviction-based confiscation laws.

The PoCA of 1987 provided for confiscation following a defendant's conviction of an offense, whereby in a civil proceeding the court would determine whether or not the defendant had benefited from the commission of an offense and the value of the benefit. However, an important feature was incorporated into the statute, the so-called statutory forfeiture, whereby *all* of the property belonging to a person convicted of a serious offense would be confiscated within six months, unless the respondent was able to show that that property or parts of it were lawfully acquired. Thus, the concept of the reversal of the burden of proof in specific circumstances can be traced to the PoCA of 1987, showing its long history in Australia and justifying its acceptability by society and the courts. Further, here we first see the presumption that all of the property is the product of unjust enrichment.

At the outset, conviction-based confiscation law was not meeting expectations of depriving criminals of illegal assets. At the time of its enactment, it was estimated that organized crime in Australia in one year would generate between AUD$1B-4.5B, with an average annual confiscated amount of at most AUD$7.5M.[128] Based on statistical data from 1995 to 1998, however, the total amount of confiscated assets under the conviction-based regime was AUD$14.39M (US$15.6M), averaging AUD$3.6M (US$3.8M) per year. In 1999, these figures decreased to AUD$2.7M (US$2.9M) in Queensland and AUD $2.4M (US$2.56M) in WA.[129] It was clear that conviction-based confiscation regimes were recovering only a minor portion of the billions derived or acquired through criminal activities. This situation sparked debate about the efficiency of the confiscation regime and the advantages of non-conviction–based confiscation regimes. Similarly, the Australian Law Reform Commission, in its report "*Confiscation that Counts; A Review of the Proceeds of Crime Act 1987*[130] (1999), found that conviction-based confiscation systems were not producing the intended results, that very little was being confiscated, and more importantly, that the existing regime was having little or no impact on deterring and fighting crime. The report recommended enacting a non-conviction–based regime. As a result of these debates, in 2000, the Criminal Property Confiscation Act was enacted in WA, the first state within the federation to introduce a non-conviction–based *in personam* forfeiture regime, providing for two forfeiture streams: UWOs and the criminal benefits declaration (CBD) (including crime-used and crime-derived property). NT followed suit and adopted a similar statute mirroring the provisions of the WA in 2003.

In 2002 the Commonwealth responded to the criticism of conviction-based regimes and enacted a non-conviction–based regime with the Proceeds of Crime (PoCA) 2002. This law was also influenced by international trends that marked a new era in fighting transnational and global crime by pursuing the proceeds of criminal activities. Specific international initiatives included the UN Convention against

[126] Cited by David Lusty in "Civil Forfeiture of Crime in Australia, "*Journal of Money Laundering Control*, 2002, vol. 5, p. 348
[127] Ibid. at 2.
[128] Includes the Australian Crime Commission Report; Confiscation that counts, and Ben Clarke, "Confiscation of 'unexplained wealth'; Western Australia's response to organized crime gangs,"*Afr. J. Crim. Just.* 15, 2002, p. 61–87
[129] David Lusty, "Civil Forfeiture of Proceeds of Crime in Australia," *J. of Money Laundering*, vol. 5, p. 345–350
[130] Australian Law Reform Commission, *Confiscation that Counts; A Review of the Proceeds of Crime Act 1987*, 1996, available at:http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc87.pdf.

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Transnational Organized Crime (2000) which is referred to also as Palermo Convention, and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) also referred to as the Vienna Convention, and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. All the above-referenced conventions contained specific provisions that targeted the proceeds[131] and instrumentalities[132] of crime.

Although the Commonwealth entertained the possibility of introducing UWOs when the PoCA of 2002 was drafted and enacted, the regime was regarded as a step too far and a decision was made to not include UWOs in the bill. However, the PoCA is still a comprehensive statute providing for both conviction and non-conviction–based asset confiscation.[133] The forfeiture provisions provide for both *in rem* and *in personam* forfeiture of property considered to have derived from criminal activities. Both schemes are non-conviction based, meaning that there is no requirement for a predicate offense to impose forfeiture of property. The *in rem* forfeiture is a proceeding instituted against the property; the *in personam* proceeding is instituted against the person if it is established that he or she owns property derived from a criminal offense. *In personam* forfeiture proceedings are applied in cases when there is insufficient evidence to convict a person for commission of an offense however, there is sufficient evidence to show, on balance of probabilities, that the person has committed an offense and has acquired benefits from it[134]. In both proceedings, the burden is on the property owner to show that the property was acquired through legitimate means to avoid forfeiture. The Act confers broad investigative powers on the state and on law enforcement to identify and trace the proceeds of crime, including examination orders (a court order summoning any person for an obligatory examination), notices to financial institutions, and production and monitoring orders. Proceedings under the PoCA are conducted as a civil hearing under the civil standard of proof—balance of probabilities—and, after the government establishes that the property has been acquired through commission of an unlawful activity, the burden of proof is shifted to the respondent to show that the property subject to any of the proceedings under the Act is lawfully acquired. The law also included a clause to assess the impact of the Act soon after its enactment and the progress made in achieving its objectives.

As a result, the Commonwealth commissioned an independent party to review the Act in 2006, four years after its enactment. The objective of the review was to assess the impact of the Act, identify factors that limited the achievement of the objectives of the Act, and make recommendations to improve the operations of the Act. The report, commonly known as the Sherman report,[135] found that, in general, the PoCA of 2002 was having a greater impact than its predecessor, the PoCA of 1987, because significantly more assets were being seized and forfeited. On the other hand, it found that it was not meeting its objectives of deterring and preventing crime, although the report noted that measuring the impact on crime deterrence was subjective. It is important to note, however, that while confiscated assets increased in 2002, the amounts seized and forfeited under the non-conviction schemes were lower. As noted in the

[131] See PoCA of 2002, s 329(1), defining proceeds of an offense to be: (a) property hole derived or realized, whether directly or indirectly from the commission of the offense; or(b) pertly derived of realized, whether directly or indirectly from the commission of the offense.
[132] See PoCA of 2002, s. 329(2), defining an instrument of an offense to be; (a) the property used in, or in connection with, the commission of an offense; or (b) the property is intended to be used in, or in connection with, the commission of an offense.
[133]Confiscation schemes under the Act provide for: restraining orders that prohibit the disposal or dealing with property; forfeiture orders that forfeit the property to the Commonwealth; pecuniary penalty orders that require a payment of a certain amount; and literary proceeds orders that also require payment of amounts based on the literary proceeds of crime.
[134] See PoCA, s.47(1)(c) and (2), stating that a "court must make a forfeiture order …. If the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting… serious offense" and under (2) further defining that" a finding of the court……need not be based on a finding as to the commission of a particular offense and can be based on the finding that some serious offense or other was committed".
[135]Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act (2002),* July 2006, available at:
http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth).

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CDPP Annual Report 2003[136] the PoCA of 2002 came into operation on 1 January 2003 and it took CDPP substantial time to recruit and train additional staff to support the implementation of forfeiture schemes (See Table below illustrating the slow uptake in recovered assets). Furthermore, although Sherman described the operation of UWOs in WA and NT, he did not make recommendations to introduce them at the federal level. He stated that "Unexplained wealth orders are no doubt effective, the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community."[137] He added that it would be inappropriate to recommend their introduction at that time, but that the issue should be kept under review. In 2008, however, the Parliamentary Joint Committee of the Australian Crime Commission (PJC-ACC) initiated an inquiry into legislative strategies to combat organized and serious crime. Based on the results of the inquiry and the lengthy debates on the effectiveness of UWOs and other strategies to combat crime, the Commonwealth amended[138] PoCA in 2010, introducing, among other additions, UWOs. Soon after, in December 2010, NSW moved ahead and introduced UWOs. Shortly before this, Queensland had adopted the Criminal Proceeds Confiscation Act and Other Acts Amendment in 2009 containing provisions similar to UWO. Although the statute does not have specific unexplained wealth provisions, its provisions are very similar. South Australia also introduced an unexplained wealth bill in 2009, which passed the Parliament, but it is not clear when it will go into effect.

Table 2: Criminal Assets Recoveries under the PoCA of 2002

POCA 2002 ($AUD)						
	Conviction PPO	**Civil PPO**	**Conviction FO's**	**Civil FO's**	**Other**	**TOTALS**
1 Jul 02 - 30 Jun 03	$0	$87,962	$59,263	$17,000	$0	$164,225
1 Jul 03 - 30 Jun 04	$0	$185,488	$758,634	$2,296,473	$220,845	$3,461,440
1 Jul 04 - 30 Jun 05	$599,431	$634,678	$3,040,891	$1,316,153	$953,308	$6,544,461
1 Jul 05 – 30 Jun 06	$1,137,846	$6,924,168	$4,971,537	$1,435,078	$25,918	$14,494,547
TOTAL						$24,664,673

Source; Sherman report, April 2006

[136] See CDPP Annual Reports 2003, at; www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual Report-2002-2003.pdf
137 Sherman report, 2006
[138] See *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth)

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3.2.1.2 Western Australia (WA)

The History of UWOs in Western Australia

After ten years of implementation of conviction-based confiscation legislation, WA moved ahead and enacted non-conviction–based legislation in 2000, and with it, unexplained wealth provisions. It was the first jurisdiction in Australia to do so. Under the unexplained wealth forfeiture stream the courts are required to grant a UWO if it is more likely than not that the property is of unlawful origin. The law contains a statutory presumption that the respondent's wealth has not been lawfully acquired unless the respondent is able to establish the contrary. The burden of proof shifts to the property owner to produce sufficient evidence to satisfy the court of the lawful origin of his property to avoid forfeiture. The Director of Public Prosecutions (DPP) need only satisfy the court, on a balance of probabilities, that it is more likely than not that the property constitutes unexplained wealth and that a person owns or controls property that is beyond his or her reasonable means of living. Provisions of the Criminal Property Confiscation Act (2000)[139] are considered far-reaching compared with other forfeiture regimes in force in Australia and elsewhere. Critics claim they encroach on the fundamental civil rights of the respondents while proponents others argue that they are a reasonable tool to use against criminals who are otherwise untouchable. The law has been heavily criticized by the defense bar on the grounds that it contravenes the principles of common law and infringes on basic human rights. However, despite the criticism the law received when introduced, its practical application has caused little public dissent. On the contrary, the WA DPP was criticized by the media inquiring as to why these laws are not being applied more frequently.

The unexplained wealth provisions in WA were introduced before the local elections of 2000 as part of the WA government's strategy to enact a tough-on-crime campaign to fight and deter serious and organized crime with a particular emphasis on drug trafficking. Introduction of the bill was propelled by an inquiry initiated by the Legislative Assembly of the Parliament of WA in 1997 in response to increased drug trafficking and an increased number of drug-caused or drug-related deaths in WA and other Australian states and territories. The Parliament established a *Select Committee into the Misuse of Drug Act 1981* to examine mechanisms to prevent and amend drug problems including effective legal sanctioning of drug dealers. . In its report "*Taking the Profit out of Drug Trafficking*",[140] the committee found that the conviction-based confiscation regime was not producing the intended results and was not having an impact on reducing and preventing crime. Consequently, the committee recommended urgent introduction of a non-conviction–based forfeiture regime. This included a rebuttable presumption that all property owned or controlled by a person reasonably suspected on the balance of probabilities by the state of having been derived by trafficking, be deemed to have been obtained from the proceeds of drug dealing. Although the committee's recommendations initially were intended solely for use against drug traffickers, lawmakers expanded its application to cover property or wealth derived from any illegal activity. The priorities of the WA government shifted from the regular notion of reactive prosecution to focusing on developing an effective legislative framework to combat, deter, and prevent crime and within that drug trafficking. Coincidentally, the Australian Law Commission advocated a similar strategy in its 1999 report, *Confiscation That Counts*, stating that confiscation schemes should aim not only to punish wrongdoings but also to prevent unjust enrichment of individuals through illicit activities.

The WA Provisions of the Criminal Property Confiscation Act (CPCA) of 2000 was a result of extensive research on national and international confiscation and forfeiture legislation conducted by the federal WA

[139]Criminal Property Confiscation Act 2000, as of 18 Oct. 2010.
[140]Select Committee into the Misuse of Drugs Act 1981: "Taking the Profit out of Drug Trafficking: An Agenda for Legal and Administrative Reforms in Western Australia to Protect the Community from Illicit Drugs," Interim Report November 1997, available at: http://parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/357E57A3B1C156B648257831003E9513/$file/InterimCover.pdf.

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Office of Attorney General in seeking to develop an effective law that would enable the state to deprive criminals of their illegal gains, without a prior conviction, and reversing the burden of proof onto them to show the legality of their property. Key model laws that inspired the development of UWOs include the NSW Criminal Asset Recovery Act (CARA) of 1990, which provides for the reversal of the burden of proof onto the respondent and confers broad investigative powers to law enforcement agencies. The U.S. RICO[141] Act inspired the authors to move toward enactment of a law that would target the proceeds of crime without a need to show or establish a nexus between the property and an offense, which is considered the largest impediment to tackling the principals of criminal organizations who organize and coordinate criminal activities but keep themselves at a safe distance from those activities. However, provisions on unexplained wealth of WA represented a new and innovative approach to attacking property that is derived from unlawful activities. The unexplained wealth law was specifically enacted by the WA parliament to target individuals who live beyond their legitimate means of support. It contain a statutory presumption in favor of forfeiture, deeming all or parts of property to have been derived from unlawful activities, and reversing the burden of proof onto the respondent to justify the source of his or her property. Further, the burden of proof on the state was eased and the prosecution does not need to show a connection between an offense and the property; it is sufficient to show that the person owns or possesses property that is beyond his or her reasonable means of living. This made it substantially easier for the WA prosecutors to forfeit property that is suspected of being derived from or used in criminal activities.

The bill received broad support in the Parliament, with only minor dissent from a few opposition members. Those opposing the law expressed reservation on the grounds that it violated the principles of common law–presumption of innocence - by reversing the burden of proof onto the property owner to establish that the property was acquired through lawful means. The bill also was criticized for its retrospective effect when applied against offenses and property acquired before the Act came into effect on the grounds that it created uncertainty for citizens, as they may be subject to a court proceeding for acts that were not against the law at the time they were committed. Although the first argument carries with it some weight because the burden of proof reverses onto the respondent during the proceeding, the second argument does not have value because the statute of WA does not require establishing a connection between any offense and the property subject to UWOs. The respondent is not charged or asked about commission of an offense.

Additional criticism came from the Law Society of WA on the grounds that the Act failed to provide sufficient protections for innocent parties and that it did not grant the court discretionary power in making a forfeiture order. The letter submitted by the Law Society to the Parliament stated "We are talking about the nature of mandatory confiscation under this legislation…application is made…the court is not given the usual discretion to decide whether to confiscate. As soon as the conditions are met, the property is confiscated and that is it; there is no discretion or jurisdiction left to the court to do otherwise".[142] Despite the dissent, the WA Criminal Property Confiscation Act (CPCA) was enacted in the proposed form with only minor changes that did not alter the substance of the law.

Criminal Property Confiscation Act (CPCA)

The main objective of the CPCA, in which WA's UWO law and two other forfeiture mechanisms are found, as stated in its preamble, is to:

> …provide for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.

[141] Racketeer Influenced And Corrupt Organizations (RICO)
[142] Introduction and First Reading, 29 June 2000, Criminal Property Confiscation Bill 2000.

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The key features distinguishing confiscation regimes provided by the Act from the earlier regime are as follows: (i) it is non-conviction based and there is no requirement on the DPP to show that an offense was committed; (ii) the burden shifts to the respondent to produce evidence to establish lawfulness of property subject to an unexplained wealth application; (iii) it provides for forfeiture of all or parts of the property belonging to the respondents, irrespective if the property was acquired before or after the commencement of the Act; (iv) it provides for automatic confiscation of property within 28 days if the respondent does not object the seizure and forfeiture; and (v) the statute does not grant the court the discretion to refuse making of a forfeiture order. These points illustrate the legislature's intent to draft a far-reaching law that enables the state to seize property merely on the suspicion on reasonable grounds of an authorized officer or prosecutor that a person possesses unexplained wealth or that a person may have been engaged in criminal activities. However, as will be detailed later, the Australian High Court has, through the few cases that have come before it, limited the effect of the Act.

In addition to the UWO, the CPCA provides for two more forfeiture streams under a CBD: crime-used property and crime-derived property, which can be either conviction or non-conviction based. In addition, the CPCA allows the state to forfeit "substitute property" in cases where the property used in the crime cannot be located. The crime-used property provision targets property that is used in commission of an offense, an instrumentality of a crime, while the crime-derived CBD deals with the profits and benefits directly or indirectly derived or acquired as a result of the commission of a criminal offense. As highlighted above, the UWO differs from the CBD in that the former does not contain a requirement to establish a nexus between an offense and the property, whereas under the CBD scheme, the property owner must either have been convicted of an offense, or the DPP has to show on balance of probabilities that the respondent committed an offense and the property derived is directly or indirectly as a result of the respondent's involvement in that offense. Another conviction-based forfeiture feature under the CPCA is that it can be applied where there has been the commission of a "confiscable offense"[143] which is defined as any offense that is punishable by two years of imprisonment. This is a very low threshold for application of forfeiture and confiscation schemes, especially because there are very few offenses in Australian legislation for which punishment is less than two years of imprisonment. The threshold set in the federal legislation for involving forfeiture proceedings against a person is three years. From this, it can be concluded that the primary objective of the legislation is to deter crime by taking away the profit and imposing radical measures as a deterrent to engagement in criminal activities.

It is also important to highlight that under the CPCA the conviction-based confiscation of property belonging to declared drug traffickers is considered one of the most radical confiscation schemes.

On declaration of a person as a drug trafficker[144], the state also automatically confiscates all of the property owned or effectively controlled or given away at any time by the defendant, whether or not it is was acquired through lawful or unlawful means. This is one of the most-used confiscation schemes[145] by the DPP in WA whereby a large proportion of confiscated property results from conviction and subsequent declaration of a person as a drug dealer. Use of this legal provision is far simpler for the government than use of UWOs or the two CBD tools.

[143]See CPCA 2000, Part 12, S142.
[144]Declared Drug trafficker means a person who is declared to be a drug trafficker under Section 32A of the *Misuse of Drugs Act 1981,* if he or she was charged and convicted with a serious drug offense and the offense that was committed, or it is more likely than not to have been committed after the commencement of this Act. Under the Misuse of Drug Act, a person is declared a drug trafficker, if he or she has been convicted of one drug-trafficking offense involving over 28 grams of heroin, or similarly prescribed quantities of other drugs, or three trafficking offenses involving any lesser quantities of any of the prescribed drugs.
[145]Se CDPP Annual Report 2009-2010, "A significant proportion of confiscated property arises from the conviction of an accused person and the subsequent declaration that the person is a drug trafficker".

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Proceedings under UWOs (Freezing Orders)

The proceedings under UWOs, pursuant to Section 11 of the CPCA, may commence either with an application for a freezing order or an application for unexplained wealth made in conjunction with an application for a freezing order. These can be made either in the proceedings for the hearing of an objection or at any other time. The DPP makes the final determination, based on the facts of the case, whether or not to initiate a proceeding with a freezing or a UWO. If there is an immediate risk that the property will be dissipated or lost (e.g., car or cash in a bank account), the proceeding will commence with a freezing order; in all other cases, the proceeding will commence with an application for UWO. The DPP receives and evaluates information from law enforcement and determines the best action for each case. The figure below describes the flow of the UWO proceeding in WA.

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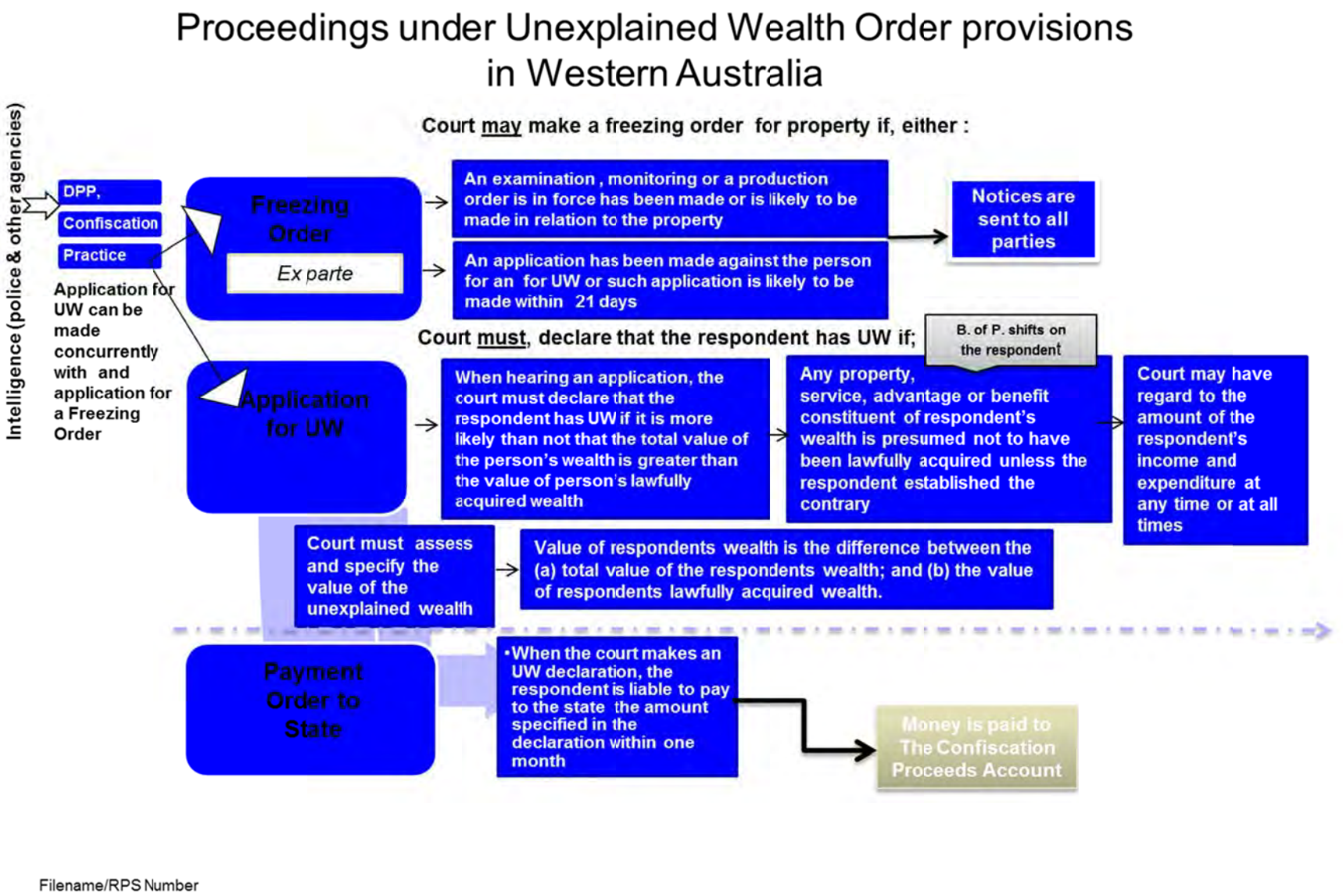

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Most of the cases are referred to the DPP by the WA state police and, to a lesser extent, by the Australian Crime Commission (ACC). However, there is no restriction as to whom might refer cases to the DPP. Cases have also been referred from the Australian Securities and Investment Commission and other agencies. Law enforcement bodies refer cases based on information they obtain when conducting criminal investigations. Police are responsible for carrying out investigations, collecting evidence, and preparing affidavits stating reasonable grounds on which they base their suspicion that the person possesses or controls unexplained wealth. Examples of such documents include, depending on the case, forensic accounting analysis, bank statements, property tracking documents, tax records, and any other document that can be obtained and would verify the origin of respondent's property.[146] After the police gather sufficient satisfactory evidence to show that a person possesses or controls unexplained wealth, the case is referred to the DPP, which then reviews the case and determines the best course of action. The police and the DPP may continue to work on the investigation, gathering additional evidence to strengthen the case before making an application to a court.

The examination order imparts to the DPP the power to require a respondent, or any other person who has knowledge or information related to the property subject to an order, to appear for examination.[147] This power is somewhat similar to, but broader in scope, than grand juries in the U.S. Under the statute, anyone summoned for examination is required to answer questions and is prohibited from disclosing to anyone that an examination was conducted or that he or she was the subject of an examination order. If the person refuses to answer questions during the examination or provides false information he or she may be held in contempt of court and/or charged with a felony. The examination order is a powerful tool available to law enforcement to further investigations and to gather sufficient evidence to satisfy the court that the person owns or effectively controls property that is considered unexplained wealth.

The state also can use examination orders when applying for a crime-derived or crime-used declaration, or for confiscation of a declared drug trafficker's property. However, the statute limits the use of information obtained during an examination process to only civil forfeiture or confiscation proceedings. It cannot be used in an on-going or subsequent criminal proceeding. Therefore, no criminal charges can be pressed against an individual based on the information obtained during examination. Legislators understand the power of examination orders and in response have imposed additional limitations on the examination powers of the state by authorizing the court to define the scope of the examination order. The scope of the questions is limited strictly to the property, its nature, and its location, subject to a UWO or any other civil forfeiture order and no other questions can be asked.

It is important to note that the ACC also has been granted similar powers; however, the examination powers of the ACC are broader and more far-reaching, with fewer limitations. The ACC is empowered to summon anyone for an examination, and relatively quickly, if required even within a workday. The scope of the examination may cover any subject that is of interest to the ACC. Concurrently, use of the information obtained is limited only to civil forfeiture proceedings, with a caveat that derivative information can be used to initiate criminal proceedings. In other words, if an examinee admits that he or he has committed a murder and discloses the location of the murder weapon, the ACC cannot disclose the person's admission but it can point the police to the location of the murder weapon. Examination orders can be an important tool for gathering evidence under unexplained wealth provisions but they are not widely used under the CPCA in WA.

Further, the WA legislators incorporated provisions in the statute to ensure the protection of innocent owners and the adverse impact that an application for a UWO can have on them. These provisions empower the court to determine if a hearing will be held in a closed court or permit only a specific class

[146]For example, police have obtained records from casinos or horse racing to show that a person has not acquired his or her funds through gambling or horse racing.
[147] CPCA 2002 – Division 2 – Examination

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of persons to be present during the proceedings. Similarly, the court also may prohibit publication of the report of the proceeding or of any information related to the proceeding.

The DPP can, and in most cases will, apply *ex parte* for a freezing order to prevent property from being dissipated. Freezing the property that is suspected of being subject to a UWO is provided for under the confiscable property provisions of the CPCA (Section 43). Upon application by the DPP, the court may make a freezing order prohibiting anyone from disposing of the property if the court is satisfied that either (i) an examination, monitoring, or suspension order has or will be made against a person in relation to the property, or (ii) an application for an unexplained wealth declaration has been or will be made within 21 days after the freezing order is made. Freezing orders obtained on the grounds that an examination order has been made usually are done to enable the DPP to determine whether or not an unexplained wealth declaration can be served.

Pursuant to the statute, when a freezing order is made *ex parte*, any person with an interest in the property must be notified of the order as soon as practicable. In addition to notifying the person that his or her property is subject to a freezing order, it must advise the person that if he or she does not file an objection to the confiscation within 28 days from the day the notice is received the property will be automatically confiscated. However, the courts have determined that the automatic confiscation is applicable only for crime-used and crime-derived streams and is not applicable for the unexplained wealth forfeiture stream. To identify any person who has an interest in property the Act requires that any person receiving a notification of a freezing order make a statutory declaration at the court and identify any other person that may have an interest in the property. The courts recognize that the statutory declaration is a mechanism to identify all persons who may be affected by the order. If the person fails to make a statutory declaration, he or she may be fined up to AUD$5,000.

The scope of a freezing order varies from case to case. It can cover all property owned or effectively controlled by the respondent at the time when the order is made as well as the property acquired after the order is made. Frozen property will be in the care of the DPP, Public Trustee, or the Commissioner of Police. Although the general idea is to retain the property pending judicial determination, the court can order that the property be sold or destroyed in certain circumstances. The order freezing real property becomes valid once it is registered in the Registrar of Titles of the State of Western Australia; for other tangible properties, the order is valid from the moment it is made by the court. Any person dealing with the property in any way while it is frozen commits a serious offense, and may be fined up to AUD$100,000 or the value of the property or subject to imprisonment for five years, or both.

A freezing order remains in effect as long as the grounds on which it was made are valid. If a freezing order is made on the grounds that an application for an unexplained wealth declaration will be made within 21 days, the order will stop being in effect if an application is not made or if the court set the freezing order aside.

Proceedings Under UWOs (Forfeiture Orders)

Section 11 of the CPCA provides that on application by the DPP to a court for an unexplained wealth declaration against a person, the court must make an order if it is more likely than not that the person owns or effectively controls unexplained wealth. The statute does not grant the court discretionary power to determine whether to make an order once it is shown on the balance of probability that a person owns unexplained wealth. The statute states that a person has unexplained wealth if the value of the person's wealth is greater than the value of the person's lawfully acquired wealth. Property bought or paid for with unlawful consideration is unlawful, even if the property itself was obtained legally.

Under the statute, the DPP bears the initial burden of proof and must establish on the civil standard of proof that it is more likely than not that the respondent owns unexplained wealth. It is not necessary to show that the property was derived or acquired as a result of a specific offense or to show that the respondent has been involved in or has committed an offense. This provision was upheld by the District

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Court of Western Australia in a recent case,[148] where the court held that "mere unexplained wealth may trigger confiscation in certain circumstances and that it is no longer a requirement to show that an offense was committed." This lack of a requirement of a predicate offense eased the burden of proof on the prosecution to institute cases under unexplained wealth provisions, merely on the grounds that there is a reasonable suspicion that a person owns unexplained wealth However, overly prescriptive provisions on assessment and valuation of unexplained wealth have raised the threshold of the burden of proof the prosecution has to meet to institute a successful UWO case. The prosecution is required to produce evidence detailing all the property that the respondent owns, or effectively controls including property that has been consumed or disposed of and its origin. Only then does the burden shift to the respondent to show lawful origin of the whole or parts of the property the prosecution suspect constitutes unexplained wealth.

CPCA Section 13 determines that "the value of the respondent's unexplained wealth is the difference between the total value of the respondent's wealth and the value of the respondent's lawfully acquired wealth". The statute specifies, in Section 144(2), that the value of a person's wealth is the amount equal to the sum of the values of all items of property, and all the services, advantages, and benefits that together constitute the person's wealth, including property the person owns or effectively controls[149] when an application is made, property that is acquired after an application is made, or property that is consumed or given away at any time. This implies that for the court to determine if the respondent owns or controls unexplained wealth it will need a full inventory of his/ her wealth, including the wealth consumed. The DPP considers these statutory requirements cumbersome, demanding, and time consuming because they impose a heavy burden to identify, trace, value, and determine the origin of each item of the property that constitutes the respondent's wealth. Thus, it is considered that the burden of proof on the prosecution in reality has a higher threshold than inferred or contemplated by the legislature, whereby it was considered that it would be sufficient to merely show that a person owns more than he or she has lawfully acquired before the burden shifts to the respondent to show the lawful origin of the property. Thus, the prosecution must conduct a thorough investigation, employ highly skilled forensic accountants, and have access to considerable resources to gather the evidence necessary to establish in front of a court that the value of a person's wealth is greater than their lawfully acquired wealth.

After the prosecution establishes that it is more likely than not that the person owns or effectively controls property that is unexplained wealth, the court will presume, pursuant to Subsection 12(2), that "any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary." The statute has a presumption in favor of forfeiture and the court will presume that the respondent owns or possesses unexplained wealth unless the respondent rebuts the claims of the prosecution. If the respondent is unable to prove the legality of the property he or she bears the risk of losing it all.

In practice, however, the threshold the respondent is expected to meet is much lower when compared with the threshold of the prosecution. The civil standard of proof applicable in civil forfeiture cases is the one applied in Briginshaw,[150] "reasonable satisfaction," which is a higher standard of proof than that implied by the civil standard of proof on the balance of probabilities. The High Court of Australia stated that for the court to be reasonably satisfied on an issue it must be convinced, depending on the gravity of the issue, "clearly," unequivocally, strictly, or with certainty". Courts have embraced the argument that it should be easier for the state with its enormous apparatus and resources to bear a higher standard of proof compared to the individual who has access to limited resources to counter the allegations made by the

[148]Unreported case of the District Court of WA (2008).

[149]The definition of effective control is provided for under the Act (Section 156), which states that a person has effective control of property if he or she does not have the legal estate in the property but the property is directly or indirectly subject to the control of the person, or is held for his or her benefit.

[150]*Briginshaw v. Briginshaw*, (1938) 60 CLR 336.

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state. In practice, this has set a higher threshold of proof for the state and lowered the standard of proof for the respondent. In reality the respondent can discharge the burden of proof if he or she gives a statement under oath simply declaring that the property is lawful and it was not acquired through unlawful means. Courts have considered it sufficient if the respondent claims that the property or money was inherited or a gift from a relative overseas, or were acquired through gambling or horse racing. This has been made possible, in particular, because the Australian revenue code does not require gifts, inheritance, or funds acquired through gambling to be reported for tax purposes. Therefore, the statements cannot be verified with the tax records and the statement must be accepted as accurate unless the prosecution is able to establish the source of the funds.

In determining whether or not the respondent owns or possesses unexplained wealth the court will, among other issues, take into account the respondent's income and expenditures at any or at all times (Section 12(4)). There is no limit as to how far back in time the court can go in evaluating the lawfulness of a respondent's property. However, as a matter of practicality, for accounting purposes law enforcement officials and the prosecution have determined that a cutoff date is necessary to facilitate financial analysis of a person's property.

The statute provides, and the courts have upheld, that hearsay evidence is admissible in court, providing that an affidavit of an authorized officer stating his or her belief that the person owns unexplained wealth is sufficient evidence to satisfy the court that an order should be made. This was confirmed by the Supreme Court of Western Australia in *Director of Public Prosecution for Western Australia v. Hafner.*[151] The statute also provides that the court may hear evidence or the opinion of people experienced in the investigation of illegal activities involving prohibited plants or drugs, such as officers of the Australian Federal Police, police officer of WA, customs officers, and DPP, to help determine the value of the property. Transcripts of other proceedings also can be used as evidence against a person in a proceeding under the Act.

After the UWO is issued, pursuant to Section 14 of the Act, the respondent whose property is subject to the order is required to pay to the state an amount equal to the amount specified in the declaration as the assessed value of the unexplained wealth . The payable amount is paid into the Confiscation Proceeds Account.[152] If the person fails to pay the amount within one month the debt will be recovered from the frozen property unless the court has granted an extension.

Successfully obtaining a UWO is resource intensive because it requires specific sets of skills such as forensic accounting and investigators, to identify respondents' wealth and determine which parts of the property cannot be justified as being unexplained wealth. The WA police recently have employed additional staff with financial qualification with the intent of increasing applications for unexplained wealth.

Proceedings under Criminal Benefits

As described in Section 3.2. (ii), in addition to UWO provisions, the Act contains two other forfeiture schemes: crime-used property and crime-derived property of a declared drug trafficker. Proceedings for crime-derived and crime-used property commence with seizure and a freezing order. A police officer is authorized to seize, retain, or guard property for 72 hours or longer if a freezing order is made after the property was seized. A justice of the peace may make a freezing order if he or she is satisfied that there are reasonable grounds to believe that the property is crime-used or crime-derived or if a person has been charged or will be charged for commission of an offense within 21 days or if the person can be declared a drug trafficker. The law requires that a freezing notice must be sent to the owner and any other third party who may have an interest in the property summarizing the effects of the notice and advising him or her that if an objection to confiscation of the property is not filed within the time prescribed by law the

[151] *Director of Public Prosecution for Western Australia v. Hafner,* [2004] WASC 32.
[152] See CPCA of 2002, s. 130

Appendix B
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property will be automatically confiscated within 28 days. Any person receiving a freezing order is obliged to give a statutory declaration to the police officer within seven days of receiving it stating the names of other persons who may have an interest in the property. A penalty is applicable for those who do not comply with the order.

Making a Declaration The DPP initiates criminal benefits proceedings by applying to a court for a criminal benefits declaration (CBD). The court must make a declaration if it is more likely than not that the respondent was involved in the commission of a confiscation offense[153] and that he or she has derived direct or indirect benefits, services, advantages, or property as a result of his or her involvement in the commission of an offense. If the person was convicted of the confiscation offense the court presumes that the respondent has derived benefits from the property. However, the court may make a CBD even if the person has not been charged or convicted of an offense if there are grounds to believe that he or she has committed an offense. The court presumes that property, services, and advantages have derived from crime unless the respondent establishes otherwise.

The court will not make a CBD if one already has been made in relation to the property, if the property has been confiscated, or is the subject of a UWO. When the court makes a CBD the respondent is required to pay to the state an amount equal to the assessed value specified in the CBD. The value of the property, services, advantages, and benefits is considered to be the value at the time it was acquired or on the day the application was made, whichever is greater.

Crime-derived property remains crime-derived even if it is disposed of, used to acquire other property, or otherwise dealt with. If crime-derived property is used to purchase lawful property, the lawful property becomes crime-derived because of the origin of the original property. The statute provides that property ceases to be crime-derived property when it is acquired by an innocent party, if the court orders its release, if forfeited money has been paid to the Public Trustee, or if the property is disposed of in accordance with the CBD.

Substitution of Crime-used property in Criminal Benefits

Substitution of crime-used property is another novelty introduced under the CPCA to ensure that when property used for the commission of crime is no longer available, then other property can be confiscated to satisfy the claim. Before a court makes a substitute of crime-used property order, the DPP is required to establish, on civil standard of proof, that it is more likely than not that the respondent has used the property in the commission of an offense. The court considers that the property is no longer available if the respondent does not own or have effective control over it, or if a freezing order has been made that was set aside in favor of the spouse or partner or a dependent.

For a court to declare property as a substitution of crime-used property, it does not need to base its finding on the commission of a specific confiscation offense, but only on whether or not a confiscation offense was committed, regardless of whether anyone was charged or convicted of the offense. A declaration may be made even if no one owns or effectively controls the identified property. The burden of proof is on the DPP, except in two situations. First, if the respondent has been convicted of the crime, the court will presume that the property was used for commission of an offense, and the respondent bears the burden to establish the contrary. Second, if the respondent is not convicted for commission of the offense, and it was established that the crime-used property was in the respondent's possession at the time the offense was committed or soon thereafter, and that the property was used in commission of the offense, the respondent bears the burden of proof to establish the contrary.

Thus, it can be concluded that the respondent bears the burden of proof in the majority of the cases because the statute places the burden on the respondent, whether the person is convicted of an offense or not convicted of an offense but there are grounds to believe that some offense was committed.

[153]In the Act, confiscation offense means an offense against a law in force, anywhere in Australia, that is punishable by imprisonment of 2 years or more.

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When the court makes a crime-used property substitution declaration, the respondent is required to pay to the state an amount equal to the amount specified in the declaration. The value of the property is assessed based on the value of the property at the time the relevant offense was committed or is likely to have been committed. A declaration also can be made against two or more respondents, in which case they are jointly liable to pay to the state the amount specified in the declaration.

Recovery and Release of Confiscable Property in Unexplained Wealth Orders and Criminal Benefits

Recovery of Confiscable Property When the court makes the declaration for unexplained wealth the respondent must pay the state the amount specified in the declaration within one month. The court may extend this period for an unrestricted period of time. However, if the respondent fails to meet his or her debt within the given time period the DPP can apply for a confiscable property declaration, asking the court to allow satisfaction of the debt from the frozen property owned or in effective control of the respondent.

Release of Confiscated Property After property has been confiscated the owner may apply for release of the confiscated property. The owner must make such an application within 28 days from the date the person became aware, or can reasonably expected to have become aware, that the property was confiscated. The person making the application for release must establish that he or she owned the property and that it is not controlled by the person benefiting from the offense and that the person was not aware or could have not been aware that the property was liable for confiscation.

Investigation and Search

Investigation and search - For the purpose of collecting relevant information the court may make examination, monitoring, and production orders. When making a decision whether or not to apply for a freezing order or a declaration order, the DPP or a police officer may conduct preliminary inquiries. During the preliminary inquiries, they may request information from a financial institution on financial transactions and other activities related to the respondent's account. The financial institution must comply with the order. If it fails to do so, a significant penalty can be imposed.

Examination, Production, and Monitoring Orders As discussed in 3.2.1.2 (iii) the District Court may order a person to submit to an examination. The court also may make a production order, ordering a person to produce property tracking documents if the court suspects that the person has the documents in his or her possession. Anyone contravening the production order is considered to have committed an offense. A person is not excused from complying with an examination or production order under the pretext that the information given might incriminate him or her or that by complying with the order, he or she would breach an obligation. This feature was held to violate well-known principles of professional privilege, posing ethical and professional dilemmas for many professionals. It especially will affect defense lawyers of those suspected of committing organized crime offense or other criminal activities.

Information disclosed during examination is admissible evidence in a proceeding under the CPCA as well as in any other civil proceedings. However, any information obtained during the examination order cannot be used in a criminal proceeding against the person. The statute grants the authority to the District Court to make an examination order on an application by the DPP. However, the court determines the type and the nature of questions that can be asked by the DPP during an examination order. The questions are limited to the property subject to an order and any other property, income, or expenditure the respondent may own or effectively control. Examinations are conducted *in camera* and the respondent or the person to be examined may be represented by a legal representative. The examination powers granted to the DPP under the CPCA are narrower than the examination powers granted to the ACC under the Act establishing the ACC. The ACC not only has broader powers, but also can exercise them independently of a court and within a much shorter period of time. Further, under the Act, if the respondent fails to answer the questions he or she is not entitled to file an objection to the confiscation of property, or, if such an objection is filed, it has no effect. If the respondent fails to answer the questions, he or she may be fined

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up to AUD$100,000 or an amount equal to the value of the property or may be subject to imprisonment for five years or both. Any other person failing to respond to an examination order or contravening such an order may be fined up to AUD$50,000 or be subject to maximum imprisonment of up to two years.

The DPP also may apply *ex parte* for monitoring and suspension orders, ordering a financial institution to monitor an account of a person suspected of having benefited or of being about to benefit from an offense. The financial institution is obliged to comply with the order and give information to the DPP or a police officer about all transactions carried out through an account held with the institution by that person. The monitoring order can be in force for up to three months. These provisions help law enforcement agencies establish the extent of a respondent's wealth and its sources.

Secrecy Requirement One of the key features of the CPCA that is not provided for in the Commonwealth's PoCA of 2002 is the secrecy requirement, whereby any person who is the subject of a preliminary inquiry, examination, monitoring, or production order should not disclose or share with anyone information about the examination, monitoring, or production order, the requirements of the order, or the information given in compliance with the order. One exception is for a corporate officer, enabling him or her to disclose restricted information to the DPP or police, an officer of the corporation, and a legal practitioner for the purposes of obtaining legal advice.

Detention, Search, and Warrant A Justice of Peace may issue a search warrant to a police officer for the search of premises if satisfied that there are reasonable grounds to suspect that there will be confiscable property or any property tracking documents at the premises within 72 hours. The search warrant may be executed at any time and will continue to be in force for 30 days. If the applicant has reasonable grounds to suspect that firearms may be used, he or she must state the grounds for that suspicion.

Management of Seized, Frozen, and Confiscated Property

The Commissioner of Police is responsible for managing seized property and the DPP is responsible for managing and controlling frozen and confiscated property until a decision is made whether to return it to the owner, to sell it, to destroy it, or to dispose of it. The DPP may appoint a Public Trustee, the Commissioner of Police, or the person who owns the property to manage the property while the freezing order is in effect. The person controlling the property while the freezing order is in effect may arrange for the property to be valued by a qualified evaluator and send a copy of the inventory to all persons who received a copy of the freezing order. The Public Trustee is entitled to receive any fees for performing its functions.

All funds forfeited or confiscated under the CPCA are transferred to the Confiscation Proceeds Account. On direction of the Attorney General funds from this account can be used to provide support services and other assistance to victims of crime, to support activities of the police against crime, and to cover the costs incurred from storing, seizing, or managing frozen or confiscated property. In 2009, the AG and DPP made a decision to allocate to the police approximately 15 percent of all funds derived as a result of confiscation or forfeiture. These funds have been used to hire new staff, provide training, and develop skills in areas critical for implementation of the CPCA. Additional resources have motivated the police to ramp up the efforts in identifying, tracing, and forfeiting proceeds acquired as a result of unlawful activities.

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3.2.1.3 Australia Commonwealth (Serious and Organized Crime Act 2010)

Background

The Commonwealth of Australia enacted the Proceeds of Crime Act in 2002. It is a comprehensive forfeiture and confiscation regime introducing non-conviction based forfeiture of proceeds and instrumentalities of crime. The Commonwealth PoCA is a complex and comprehensive legislation containing a range of conviction-based and non-conviction–based forfeiture schemes including literary proceeds, pecuniary penalties, and *in rem* forfeiture proceedings. The law was amended in 2010 to introduce UWOs with the Crimes Legislation Amendment (serious and Organized Crime) Act.

Proceeds of Crime Act 2002

As noted in the preamble of the PoCA, its principal objectives are to "deprive persons of the proceeds and instruments of the offenses including derived benefits, against the laws of Commonwealth or the governing Territories and to deprive persons of literary proceeds derived from commercial exploitation of their notoriety from having committed offenses". In 2010, the following section was added, incorporating UWOs into the PoCA "to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offenses and to punish and deter persons from breaching laws of the Commonwealth or the non-governing territories and prevent reinvestment of proceeds".[154] Inclusion of UWOs in the PoCA permitted the courts to forfeit unlawfully acquired property across the country in all states and territories if the Commonwealth laws are violated. One of the deficiencies of the adoption of UWOs at the state level was that it created the undesired consequence of those engaged in illegal activities merely moving their activities to another state. Adoption of UWO laws by the Commonwealth is aimed to remedy that situation by ensuring that there are no weak points. However, one limitation remains: application of unexplained wealth laws is limited to confiscating property derived from offenses against a federal law or a state offense with a federal aspect.

As with the WA unexplained wealth law, a key feature of the Commonwealth UWOs is that it places the burden of proof on the person whose property is the subject of the order. He or she is required to appear before a court and show evidence to satisfy the court that the property was lawfully acquired. If the person fails to satisfy the court, the court will make an order asking the person to pay an amount of money equivalent to the unexplained wealth to the Commonwealth. All proceedings are civil in nature and the civil standard of proof—balance of probabilities—applies.

PoCA is a complex law providing an array of forfeiture and confiscation schemes for indictable offenses that range from non-serious to serious and terrorism offenses. It is interesting to note that the PoCA of 2002 contained provisions reversing the burden of proof to the property owner when an application for forfeiture had been made and in this regard the unexplained wealth orders do not represent an innovation or novelty in the Act, as the PoCA of 2002 already provided for the reversal of the burden of proof to the respondent. The intention of the Australian Federal Police, who took the lead in promoting the law at the federal level, was to enact legislation similar to that in existence in WA and NT without a requirement to establish a nexus between specific assets and criminal wrongdoing and to reverse the burden of proof to the respondent. However, their efforts were thwarted during the legislative drafting process. The Office of Attorney General incorporated provisions that required the government to show a nexus between the property and an offense. Including the requirement of showing a tight link with an offense significantly weakened the powers of the UWOs because mere ownership of unexplained wealth no longer is sufficient to apply the order. The state must establish, on balance of probabilities, that a person has committed an indictable offense, whether a foreign offense, a Commonwealth offense, or a state offense with a federal aspect. However an actual conviction is not required for a UWO.

[154]PoCA 2002 Section 5, Part 1-2 Objects.

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Proceedings under Unexplained Wealth Orders

Freezing Orders Most of the proceedings under the Commonwealth PoCA commence with a freezing order or a restraining order to prevent dissipation and loss of the property. In most cases, the first phase in forfeiture and confiscation proceedings is an application for a freezing order.

Freezing orders are made on financial accounts if there are grounds to suspect that the account balance reflects proceeds or an instrument of an offense, and the magistrate is satisfied that unless the order is made the owner will not be deprived of all or parts of the proceeds or instrument of an offense. The proceeds do not have to be related to the commission of a specific offense. Authorized officers[155] are empowered to apply for a freezing order by submitting an affidavit with detailed information suggesting that the balance in the account is the proceeds of an offense or an instrument of a serious offense. With the freezing order a magistrate can order a financial institution not to allow a withdrawal from an account. For urgent cases, freezing orders also can be issued by telephone, facsimile, or other electronic means if the delay would impede the effectiveness of the order. However, this order does not prohibit the financial institution from withdrawing funds from an account that is under a freezing order to meet its liabilities. The financial institution and the authorized officer enjoy immunity and cannot be sued for requesting or complying with a freezing order. The statute also contains provisions permitting the account holder to withdraw funds to meet his or his dependent's reasonable living expenses, but not to cover legal costs to be incurred in connection with the proceedings under the Commonwealth PoCA. The law also provides for revocation of a freezing order.

Restraining and Forfeiture Orders Restraining orders can be made against property on application by the DPP on the grounds that the property may be the object of forfeiture or confiscation in relation to certain offenses. Property is forfeited to the Commonwealth if certain offenses have been committed, although conviction for an offense is not always a requirement to order forfeiture. Alternatively, penalty orders can be made, ordering payments to the Commonwealth of a specified amount of money.

Restraining, forfeiture, and pecuniary penalty orders are made by a competent court on application by the DPP.

Similar to WA unexplained wealth provisions, a proceeding for a UWO (see figure on next page) can commence with an application for a restraining order or an application for a preliminary UWO. However, differing from the WA and NT UWO laws, the Commonwealth PoCA has introduced another phase in the proceedings, the preliminary UWO, which requires a respondent to appear before a court to enable the court to determine whether or not to make a UWO. This phase is the trial of the case whereby the court hears all the evidence and submissions of the parties and determines whether or not the person owns or controls the property that is considered unexplained wealth. The final phase of the proceeding is when the court makes the order, requiring a person to pay an amount specified in the declaration to the state.

[155] Authorized officers are certain members of the Australian Federal Police (AFP), Australian Commission for Law Enforcement (ACLE), and Australian Crime Commission (ACC).

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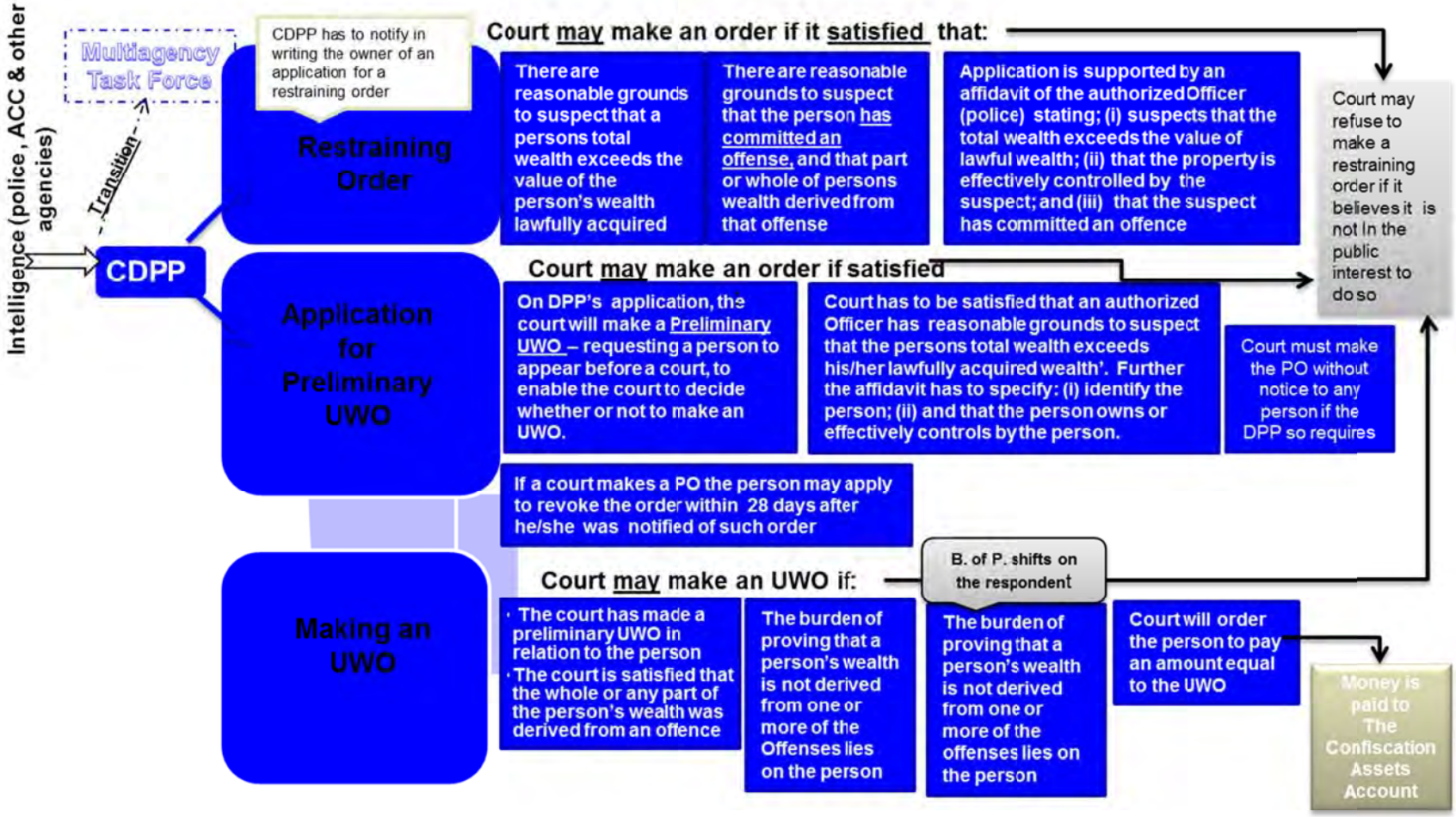
Proceedings under Unexplained Wealth Order provisions in Commonwealth



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Restraining Orders Pursuant to Commonwealth PoCA Section 20A, the court may, on application by the DPP, issue a restraining order prohibiting anyone from disposing of or otherwise dealing with the property specified in the application. Differing from the WA PoCA, the unexplained wealth provisions under the Commonwealth PoCA require the DPP to notify, in writing, the property owner and any other third person with an interest in the property of its intent to make an application for a restraining order, unless the court permits the DPP to make an application without notifying the owners if there are reasonable grounds to believe that the property may be disposed of. The DPP may make an application for a restraining order supported by an affidavit of an authorized officer stating reasonable grounds on which he or she bases the suspicion that: (i) the person owns or effectively controls the property subject to the application, (ii) the person has committed an offense,[156] or (iii) all or part of the person's wealth was derived from an offense. While the property is under a restraining order, the court may order that some of the property be used to meet the owner's reasonable legal expenses arising from application of the Commonwealth PoCA. However, before any payment is made, the court will direct a court assessor to certify that legal expenses have been properly incurred. In addition, the court may make an order allowing recovery of reasonable living and business costs of the respondent and his dependents from the restrained property. Finally, the court is granted discretion to refuse to make a restraining order if it is satisfied that it is not in the public interest to do so or if the Commonwealth refuses to make an undertaking with respect to the payment of damages or costs. If the court refuses to make a restraining order on the grounds that it is not in the interest of justice it may make an order regarding costs it considers appropriate, including costs on an indemnity basis.

restraining order related to unexplained wealth ceases to be in effect if one of the following occurs: (1) days pass from the day the order was made and an application for a UWO was not made; (2) the application is made, but the court refused to make the order; and (3) the time for an appeal has expired and the appeal has lapsed or was dismissed.

Issuance of Unexplained Wealth Order Pursuant to Section 179B, a court will, on application by the DPP, make a preliminary UWO ordering a person to appear before the court to enable the court to decide whether or not to make a UWO. The application by the DPP must be supported by an affidavit of an authorized officer stating reasonable grounds on which she bases his/her suspicion that the person's total wealth exceeds the value of the person's lawfully acquired wealth. It also must identify the person who is the owner of the property and show that the property is owned or in effective control of that person. Section 179G of the Commonwealth PoCA defines the respondent's wealth as consisting of all of the property owned or controlled by the respondent at any time, before or after law came into effect, including the property that the person has disposed of or consumed at any time. The total wealth of a person is the sum of the value of all property that constitutes the person's wealth. On DPP's request, the court may make a preliminary UWO without notifying any person. In such a case, pursuant to Section 179N, the DPP is required to notify the property owner or any third party with an interest in property within seven days from the day the order is made.

Preliminary UWOs may be revoked, pursuant to Section 179C, on application by the property owner within 28 days from the day he or she was notified of the order. This period can be extended for up to three months by the court on application by the owner. The court will revoke the order only if it is satisfied that there are no reasonable grounds on which the order could be made or if it considers that it is not in the interest of justice or the public to do so.

If the court subsequently issues a UWO (Section 179E), it directs the respondent to pay a specified amount of money to the Commonwealth that is equal to the difference between the respondent's total wealth and the value of lawfully acquired wealth. The court will make an order if a preliminary UWO was in place and if there are reasonable grounds to believe that all or part of the person's wealth derives

[156] An offense is the offense against a law of Commonwealth, a foreign indictable offense, or a state offense that has a federal aspect.

Appendix B

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from commission of an indictable offense. The provision on predicate offense, requiring the state to show that respondent's wealth is derived from a specific offense, is unique to the federal unexplained wealth laws. The burden of proof, however, is on the owner to show lawful source of the property. Section 179E(3) states: "In proceedings under this section, the burden of proving that a person's wealth is not derived from one or more of the offenses …… lies on the person".[157] The court has the discretion to make an order unless it considers it is not in the interest of justice to do so. If the government fails to give undertaking of damages the court may refuse to make a preliminary UWO.

The court has the authority to vary UWOs on application by the DPP and to increase the unexplained wealth amount if facts or evidence become available after the UWO was already made, or if it was impossible to identify the property at the time the order was made.

If making a UWO will cause undue hardship to a person's dependents, the court may order the Commonwealth to pay a sum of money to relieve the hardship, if the dependent is at least 18 years old. The court also may decide to cover legal expenses of the person who is the subject of a UWO arising from application of this Act. Legal expenses will be paid from the property declared unexplained wealth.

The Act contains a provision based on the operation of Part 20A (Unexplained Wealth Order) that is overseen by the Parliamentary Joint Committee on Law Enforcement (the Committee) and it may require the Australian Federal Police, Australian Crime Commission, the DPP, and any other federal agency receiving any material disclosed related to this part of the Act, to appear before it from time to time to give evidence.

Since the entry into force of the Act, the power to implement a UWO has rested with the DPP; however, with the Crimes Legislation Amendment Bill of 2011,[158] there have been amendments to various Acts related to the enforcement of criminal law and proceeds of crime. Specifically, the Commonwealth PoCA provides for sharing of power between the DPP and the Commissioner of the Australian Federal Police (AFP) to perform functions and duties related to orders under the Commonwealth PoCA of 2002. This means that the AFP has the power to initiate any of the proceedings for forfeiture or confiscation of the proceeds of crime provided under the Commonwealth PoCA. This has subsequently been amended to include the Commissioner of the AFP, together with the DPP, as the "responsible authority" to initiate any proceedings under the Commonwealth PoCA and to appear before a court hearing an application for a proceeding. These provisions came into effect in January 2011 but the AFP has not used these powers.[159]

However, there is tension between the AFP and the DPP regarding the role each will play and the division of responsibilities. And this tension has increased in the context of the newly proposed initiative by AFP to establish a separate independent task force that will act as a responsible authority to initiate proceedings under the Commonwealth PoCA. The initiative is under way and may come into effect as early as fall 2011. The idea is to create an independent task force similar to the Irish model, composed of the AFP, ACC, the Revenue Services, and the Customs Office. The source of contention is the role of the DPP in the task force, or if it will play any role. Although the Commonwealth DPP expressed reservations toward unexplained wealth laws, it believes it has an important role to play in terms of acting as the filter between the police conducting the investigatory work and the courts reviewing and deciding the cases. However, others consider that the role of the DPP is yet to be defined and that it potentially may not have a role. At the time of writing the report, negotiations are underway between AFP, ACC and CDPP to determine the future roles as well as the inner workings and modalities of the practical operation of the proposed task force.

[157] Re-enforcing the reversal of the burden of proof in unexplained wealth order proceedings, S.179E(5) reiterates that despite S.317 of the Act, that states that the burden of proof in any proceeding under PoCA is on the applicant (DPP or AFP), subsection 3 placing the burden on the respondent has effect.
[158] Crimes Legislation Amendment (No. 2) 2001, the Parliament of the Commonwealth of Australia.
[159] No case has been initiated by the AFP as of June 2011 but Booz Allen learned that at least one case was being considered.

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Proceedings under Convictions for Indictable Offenses[160]

Restraining Orders The proceedings for forfeiture of assets for an indictable offense[161] commences with either a freezing or a restraining order prohibiting the person convicted or charged for an offense from disposing of or dealing with the property. A court is obliged to make a restraining order on application by the DPP supported by an affidavit of an authorized officer if the person has been convicted or charged with an indictable offense or if it is proposed that he or she be charged with an indictable offense. The affidavit must include the grounds on which the authorized officer bases his or her suspicion and if the suspect has not been convicted that he or she is suspected to have committed an offense. If the application is to restrain the property of a person, other than the suspect himself, an affidavit must state the officer's suspicion that the property is under the effective control[162] of the suspect and that it is proceeds from or an instrument of the offense.[163] The competent court has the authority to refuse to make a restraining order if it is satisfied that it is not in the public interest to do so or if the Commonwealth refuses to give undertaking of damages to a court.

The court may make provisions to allow for certain expenses of the person whose property is subject to the restraining order to be met by the restrained property including reasonable living expenses of the owner or his or her dependents, reasonable business expenses, and a debt incurred in good faith. However, the Act does not permit the court to make an allowance for legal costs. Requirements for notifying the property owner of a restraining order are strict to the degree that a court will not hear an application unless it is satisfied that the respondent has been properly notified.

The PoCA provides opportunities for third parties to apply for revoking or an exclusion of property within 28 days. If the person was not notified of the restraining order he can apply at any time to exclude property from the restraining order. The restraining order will cease if one of the following events occurs: (a) charges are withdrawn, (b) the suspect is acquitted, or (c) the suspect's conviction for the offense is quashed, unless there is a confiscation order in process or an application for confiscation has been made. The restraining order ceases to be in force if, within 28 days after the order was made, the suspect is neither convicted nor charged for commission of an offense and a forfeiture order has been made. Applications for restraining orders, revocation orders, and exclusion from restraints are interlocutory proceedings.

***Forfeiture* Orders[164]** While the restraining order can be made against the property if there is reasonable ground to suspect that the person has committed an offense, forfeiture orders will be made only after the person has been convicted of an indictable offense. A property will be forfeited to the Commonwealth by a competent court on application by the DPP if the court is satisfied that (1) a person has been convicted of one or more indictable offenses not more than six months earlier and (2) the property specified in the order is proceeds or an instrument of one or more offenses. The court also has the option of making a pecuniary order that requires the person to pay a specified amount to the Commonwealth which is derived

[160] See federal PoCA of 2002 S.17 Restraining Orders – people convicted of or charged with indictable offenses

[161] Throughout the text of the Act, whenever referring to an indictable offense, it includes an indictable offense, an indictable foreign offense, and an indictable offense of the Commonwealth. Indictable offense as defined in the Chapter 6 "interpreting this Act" of PoCA" means an offense against a law of the Commonwealth or a non-governing Territory". Indictable offense of the Commonwealth "means an offense against a law of a state or a self-governing Territory that may be dealt on indictment and the proceeds of which were dealt with in contravention of the law", which may include import and export of goods into or from Australia, communication and transactions in the course of banking. Foreign indictable offense means a conduct that constitutes an offense against a law in a foreign country, or if it occurred in Australia, it would have constituted an offense against a law of Commonwealth, a state, or territory. See PoCA 337A.

[162] See PoCA 2002 (337). Property may be subject to the effective control of a person even if the person has legal interest, a right, power, or privilege in connection with the property, this includes property held in trust, and property disposed of within 6 years before or after application for a restraining or confiscation order.

[163][163] Proceeds are defined in PoCA 2002, Section 329 (1), to include property wholly or partly derived, directly or indirectly, from the commission of offenses and property indirectly derived to include property sold or disposed[163].An instrument of an offense is a property used in, or in connection with or is intended to be used in the commission of an offense.

[164] See PoCA of 2002, s.48 – Convictions for indictable offenses

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from the commission of the offense. In some cases (e.g., terrorism offenses and conviction-based forfeiture) where property is suspected to be an instrument of an offense, the court will presume that the property was used in, or in connection with, the offense, even if no evidence is submitted to show that the property was used for commission of an offense. For the court to make such an order it is sufficient to show that the property was in the possession of the person convicted of an indictable offense at the time of, or immediately after, the offense was committed. Presumption that the property is an instrument of an offense places the burden of proof on the person whose property is the subject of the forfeiture order to rebut the court's presumption and demonstrate the lawful origin of his or her property to avoid forfeiture. This shows that Australia has accepted the reversal of the burden of proof in conviction-based *and* civil forfeiture cases prior to introducing the unexplained wealth orders shifting the burden onto the property owner or a third party.

When making the order, the court considers whether the order will cause hardship on a person other than the owner of the property, the gravity of the offense, and the intended use of the property. The court will make an order to forfeit property even if the person has absconded, if it is satisfied that the person has fled and that if tried, he or she would have been charged and convicted for commission of an offense.

If the DPP applies for a forfeiture order, it is required to notify in writing the person convicted for commission of an offense whose property is subject to that forfeiture order and any third party and others whom DPP believes may have an interest. Alternatively, before making the decision to issue the order, the court may order the DPP to give or publish notice of the application. Further, the forfeiture application may be amended, either at the request of the DPP or with its consent, to include additional property. The court will amend the application only if it is satisfied that the necessary evidence became available after the application was made and it was not reasonable to identify the property at the time when the application was made. If a forfeiture order will cause undue hardship on the person's dependents and the court is satisfied that the person's dependents had no knowledge of the person's conduct and are at least 18 years old, it will order the Commonwealth to pay a specified amount to his or her dependents to relieve the hardship.

Persons claiming any interest in a property are allowed to appear before the court and present evidence at the hearing of the application. The court appoints an Official Trustee to deal with the property on the Commonwealth's behalf, dispose it, and from any amount received, cover his or her charges and costs and credit the remainder of the money to the Confiscated Assets Account established by the Commonwealth PoCA of 2002. This provides that if someone else disposes of, or otherwise deals with the property knowing that a forfeiture order has been made in relation to that property, he will be charged with an offense, for which the penalty is five years of imprisonment.

The court also may make an exclusion or compensation order, on application by a person who claims to have an interest in the property, if it is satisfied that the property or the interest of third parties in the property are not proceeds or an instrument of one or more offenses. The person making the application is required to notify the DPP of an application enabling him or her to produce further evidence in relation to the property.

If a person's conviction is quashed the forfeiture order also is quashed if, within 14 days, the DPP does not apply to the court to confirm the forfeiture order.

Civil Proceeding Forfeiture (In Rem Forfeiture)

Pursuant to Section 49 the property suspected of being the proceeds or an instrument of an indictable offense (e.g., terrorism, foreign, or offense of Commonwealth) can be restrained by a court. An application is submitted by the DPP stating reasonable grounds for its suspicion supported by an affidavit of an authorized officer. The court will make the order if it is satisfied that an authorized officer stated reasonable grounds to believe that an offense was committed. There is no requirement to establish a link between the proceeds and the commission of a specific offense. The identity of the property owner is not

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relevant for making the order; however, the DPP is obligated to notify the owner and third parties with an interest in the property of the application who then can apply for an exclusion order. If such an application is not made the court will make a restraining order. The court has the discretion to refuse to make such an order if the two following conditions are met: (i) the offense is not a serious offense, and (ii) the court is satisfied that making such an order is not in the public interest.

At least six months after a restraining order has been in force, the DPP can apply to forfeit the property to the Commonwealth. The DPP must apply to a court to establish that the property is the proceeds and/or an instrument of one or more indictable offenses. The DPP does not need to prove commission of a specific offense. Findings can be based on the belief that some type of indictable offense was committed. On application for a forfeiture order the DPP is required to notify, in writing, persons with an interest in the property.

The court may refuse to make a forfeiture order if an application has been made to exclude the property from the restraining order or if it considers that doing so would not be in the public interest.

Proceedings related to people suspected of committing Serious Offense

Restraining Orders[165] If a person is suspected of committing a serious offense[166] the court must make a restraining order prohibiting a person from dealing or disposing of the property as long as the DPP applies for an order and is able to show that there are reasonable grounds to suspect that a person has committed a serious offense. The application for a restraining order is supported by an affidavit of an authorized officer in which he lays reasonable grounds on which he /she basis the suspicions that the respondent has committed a serious offense. Reasonable grounds do not need to be based that a particular serious offense was committed. Since this is a civil proceeding the officer needs to only show on balance of probability that the person has committed some serious offense.

Forfeiture Order (s. 47) On an application of the DPP, the court must make a forfeiture or a pecuniary order if the property was subject to a restraining order for at least six months and the court is satisfied that there are reasonable grounds to suspect that the persons has been engaged in serious offenses. For the court to be satisfied that a person has been engaged in serious offenses it does not need to be based on the finding that the person committed a particular serious offense but only that some serious offense or other was committed. The order can be made before the end of six month period if it is made with parties consent. Hearsay is admissible on the application of the restraining order but is not admissible on an application for a forfeiture order unless it includes one of the exemptions in the Evidence Act, which applies to civil proceedings in the jurisdiction in which the application is brought. Moreover, the court does not have the discretion not to make the order even in cases when there is no risk of property being disposed of or otherwise dealt with.

All rights and remedies available to third parties under the section above, in relation to making an application for an exclusion or compensation order, are available to third parties with an interest in the property. For a court to make an exclusion or compensation order a third party must demonstrate to the court that his or her interests in the property are not proceeds or an instrument of unlawful activities. This does not apply to an already-forfeited property. Application for an exclusion or compensation order will not be heard until the DPP has had sufficient time to conduct a thorough examination in relation to the applications.

It is important to note that the PoCA also contains a scheme that allows forfeiture of property following conviction of a person of a serious offense, which is different from forfeiture of property of a person

[165] See PoCA of 2002, s.18 Restraining Orders
[166] Serious offense is an indictable offense for which punishment is imprisonment of 3 or more years, involving unlawful conduct related to narcotic substances, serious drug offenses, money laundering, people smuggling, offenses against the Financial Transaction Reports Act of 1988, and offenses against the Anti-Money Laundering and Counter-Terrorism Financing Act of 2006.

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whose conduct constitutes serious offense (non-conviction based). In these cases forfeiture is automatic and does not require institution of a separate proceeding.[167] In addition, the court may make a pecuniary penalty order following conviction of a person of a serious offense, after six months, from the day the person was convicted.

Proceedings under Literary Proceeds Orders

Literary proceeds are defined as a benefit that a person derives from the commercial exploitation of the person's notoriety resulting, directly or indirectly, from commission of an offense or the notoriety of another person involved in the commission of that offense. Commercial exploitation may include publishing any material in written or electronic form, use of media and visual images, words and sound, and live entertainment.

A restraining order can be made on a suspect's property if the court is satisfied that there are reasonable grounds to suspect that the person has committed an indictable offense or a foreign indictable offense and that the suspect has derived literary proceeds. There is no requirement to prove commission of a specific offense for the court to be satisfied; it is sufficient to demonstrate that the person committed an offense. The court has the discretion to decide whether or not to make a literary proceeds order.

Courts authorized to deal with forfeiture and restraining orders include all courts that have jurisdiction to deal with criminal matters (e.g., the District Court or the County Court). The Supreme Court also has jurisdiction.

On application by the DPP, the court may make an order directing a person to pay an amount to the Commonwealth, if it is satisfied that the person has committed an indictable or foreign indictable offense, regardless of whether he or she has been convicted of the offense, and that the person has derived literary proceeds related to the offense. A literary proceeds order can even include future literary proceeds if the DPP applies and the court is satisfied that the person will continue to benefit in the future.

When making an application, the DPP is required to give a written notice of the application to the person subject to the literary proceeds order, including a copy of the application.

In deciding whether or not to make a literary proceeds order the court will consider the nature and purpose of the product or activity; whether it was in the public interest and/or has social, cultural, and educational value; and the seriousness of the offense and when the offense was committed. In ascertaining whether or not the person has derived literary proceeds and determining the value of the proceeds, the court will treat any property in a person's effective control as well as any property transferred to him or her by another person, to be his or her property.

Before the literary proceeds order is enforced, the DPP will apply for a confirmation order to a court. The person whose property is subject to such an order may appear at the hearing and present additional evidence. A confirmed literary proceeds order made in relation to an offense is considered a civil debt owed by the person to the Commonwealth.

Investigation and Search

Investigation and Examination To obtain relevant information the court may make an order to examine the person whose property is restrained, his or her spouse, and any third party with an interest in the property. The examinee cannot refuse to answer questions on the basis of self-incrimination. An examinee's lawyer may be present at the examination and may participate in conducting the examination. Facts and documents disclosed by the examinee cannot be used as evidence in any civil or criminal proceeding against the defendant, except in proceedings for giving false information, proceedings in an application under the Commonwealth PoCA, or ancillary proceedings.

[167] See PoCA of 2002, Part 2-3 Forfeiture on Conviction of a Serious Offense

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Production Orders A magistrate may make a production order requiring a person to produce or make available one or more property tracking documents to an authorized officer for inspection. The magistrate can make such an order only if he or she is satisfied that there is a reasonable suspicion that the person possesses or is in control of such documents. This excludes documents used in the ordinary business of financial institutions. The authorized officer can inspect, examine, take extracts from, or make copies of the documents. The person is not excluded from producing a document on the basis of self-incrimination, breach of an obligation, or breach of legal professional privilege. If a person required to produce documents makes false statements or omits important facts, he or she will be guilty of an offense. Similar to production orders are notices to financial institutions, whereby an officer may give a written notice to a financial institution to provide information or documents to an authorized officer if the officer believes that the information would help determine whether any proceeding under this Act will be initiated against a person.

Monitoring Orders A judge may issue a Monitoring Order requiring a financial institution to provide information about transactions conducted during a specified period of not more than three months. The judge making the order must have reasonable grounds to believe that the person has committed or is about to commit a serious offense, was or will be involved in the commission of an offense, and has or will benefit from an offense. Those complying with the order enjoy immunity in regard to their actions.

Search Warrants A magistrate may issue a search warrant to an authorized officer for the search of premises if satisfied that there are reasonable grounds for suspecting that there is or will be evidentiary materials or tainted property within 72 hours. A search warrant can be obtained by telephone or other electronic means but the circumstances must be serious and urgent. If the applicant has reasonable grounds to suspect that firearms may be used, he or she must state the grounds for that suspicion. Things seized during a search will be in the custody of the head of the enforcement agency executing the search and is responsible to preserve its value and form.

Access to Tax Information The Commissioner of Taxation may disclose information acquired under the provisions of taxation law to an authorized officer of a law enforcement agency if satisfied that the information is relevant to making or proposed making of a proceeds of crime order. In addition, the DPP and the police have access to databases maintained by the Australian Transaction Reports and Analysis Centre (AUSTRAC) containing data on significant cash transactions by cash dealers in Australia, reports by travelers where more than AUD $10,000 is carried in or out of Australia, and reports of international funds transfer instructions.

Management of Seized Property

Preservation of restrained property—Official Trustee Custody and control of restrained property is given to the Official Trustee by the court. He or she is able to recover the costs incurred after forfeiture. Orders can be varied to enable property to be sold or leased, with the proceeds of sale being restrained or rent being applied to make mortgage repayments. Property losing its value can be sold.

Although the Official Trustee is protected from any damage claims related to managing the property, the Commonwealth may be liable to pay compensation pursuant to the undertaking if the property suffered a loss while under a restraining order. Net proceeds from sale of forfeited property and money paid in satisfaction of pecuniary penalties are paid into the Confiscated Assets Account. Money can be used to pay foreign governments and states in recognition of the contribution they made to a recovery in a particular case or to satisfy the Commonwealth's obligation with respect to a registered foreign property; payments also are made to the Legal Aid Commission. The Commonwealth PoCA does not contain any provision paying compensation to victims.

The Proceeds of Crime Act of 2002 is a comprehensive and complex legislation providing for a number of conviction and non-conviction based legislation, including literary proceeds, pecuniary penalties, and *in rem* forfeiture proceedings. The law was amended in 2010 with the Crimes Legislation Amendment,

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introducing unexplained wealth orders. The law came into effect in late December 2010. Inclusion of UWOs in the PoCA permitted the courts to forfeit unlawfully acquired property across the country, in all states and territories if the Commonwealth laws are violated. Although the PoCA '02 already contained provisions reversing the burden of proof to the respondent in confiscation proceedings, introduction of unexplained wealth orders authorized the government to target property solely on the grounds that it constituted unexplained wealth. Unexplained wealth orders further enhanced the powers of the state in the fight against organized crime. UWO combined with the powers of the Australian Crime Commission (broad powers to use examination orders without a court order) present a formidable tool in the hands of the government. The only deficiency or the weakness of the law is the requirement that the state has to show on preponderance of evidence that the respondent has committed a specific federal offense. Since no cases have been instituted to date under unexplained wealth laws, its efficiency and operation is yet to be assessed.

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3.2.1.4 Northern Territory –Criminal Property Confiscation Act 2003

Background

NT introduced unexplained wealth laws in 2003 under the Criminal Property Forfeiture Act (CPFA), mirroring the provisions of the CPCA of WA. However, it seems that there are differences between the two that led the Parliamentary Joint Committee for Australian Crime Commission (ACC) to evaluate the NT Act as more successful in using its unexplained wealth laws. Similar to the WA Act, the NT Act provides for conviction- and non-conviction-based forfeitures regimes, including unexplained wealth, criminal benefit, and crime-used property declarations. Criminal benefit and crime-used property can be handled under both conviction- and non –conviction based sections. If a person has been convicted of an offense a court will make an order depriving the respondent of his/her assets or property in a civil proceeding separate from the criminal proceeding in which the respondent was tried. However, such an order can be made even if the person is not convicted of an offense, but there are grounds to believe that an offense was committed. The prosecution does not have to establish a causal link between an offense and the property. Further, these forfeiture schemes can be directed against the property (*in rem*) if the owner of the property cannot be identified and against a person (*in personam*) if the owner of the property is identified. Unexplained wealth declarations are always *in persona.*

Criminal Property Forfeiture Act

The objective of the Act, as defined in the preliminary section of the statute, is to target the proceeds of crime in general and drug-related crime in particular to prevent unjust enrichment of persons involved in criminal activities.[168] For the purpose of the statute, a person is taken to be involved in criminal activities if he/she is declared a drug trafficker in accordance with the Misuse of Drug Act of 1981, or if an unexplained wealth or criminal benefit declaration is made against him or her, or if the person is or was found guilty of a forfeiture offense. However, declaration enabling the state to require forfeiture of property is made even if no one is charged with, or found guilty of, an offense. It is sufficient to establish that some offense was committed. The court will forfeit a property regardless if it is owned or effectively controlled by the person involved or considered to be involved in criminal activities. NT uses the funds from the forfeited property to cover costs of the state to fight criminal activities. The competent court to hear and make unexplained wealth orders is the Supreme Court of NT.

Proceedings under Unexplained Wealth Orders

Police and the DPP can apply to a local or a supreme court for a restraining order *ex parte*. The competent court will make a restraining order applying to all or parts of the property, prohibiting any person of disposing or otherwise dealing with the property as specified in section 55 of the Act if the respondent has been charged with an offense or is declared a drug trafficker or if an application is made or will be made within 21 days for an unexplained wealth, criminal benefit, or crime-used property declaration. In hearing the application, the court must consider each ground showed by the prosecution and specify in the order the grounds on which it bases the order. A notice will be sent to the respondent as soon as practicable notifying him/her of the restraining order. However, if the court considers that the affidavit contains information that may prejudice an ongoing investigation the information will be limited to a notice. The respondent can object within 28 days to the restraint of the property and is obliged to give a statutory declaration within seven days after receiving the notice, giving information on other known owners or people with an interest in the property. The restraining order can be in force for an unlimited period of time or as specified in the order made by a court.

The court may set aside the restraining order if the respondent is not convicted of an offense or the reasons for which the order was made cease to exist. Notice of setting aside the order is sent immediately

[168]See Section 3 of the Criminal Property Forfeiture Act 2000, Northern Territory of Australia

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to the respondent. A court may specify in a restraining order whether the property will be moved or not, appoint a public trustee to manage and control the property, as well as determine whether the living expenses of the respondent or his/her dependents will be covered by the profits derived from the restrained property.

A restraining order of immovable property takes effect when it is registered under the Land Title Act and the Registers - enters a statutory restrictions notice in the land register (section 53).

The respondent whose property is the subject of the restraining order may file an objection with a competent court within 28 days disputing the grounds on which the order was made. The court may set aside a restraining order if it is satisfied that the respondent charged with an offense or against whom an unexplained wealth , crime-derived or crime-used declaration is made does not own or control the property or he/she has given it away.

Issuance of Unexplained Wealth Declaration The DPP may apply to the Supreme Court[169] for an unexplained wealth declaration against a person (*in personam*) under section 67 of Act. Unexplained wealth is defined as the difference between the respondent's total wealth and the respondent's lawfully acquired wealth. The respondent's total wealth consists of all items, services, advantages, and benefits that a person owns or effectively controls or has given away, while the respondent's lawfully acquired wealth consists of all items, property, and services, advantages lawfully acquired.

For a court to make an unexplained wealth declaration it is sufficient to establish that it is more likely than not that the respondent's total wealth is greater that his or her lawfully acquired wealth. When deciding whether the person has unexplained wealth, the court presumes that all the property, services, benefits, and advantages are acquired unlawfully unless the respondent is able to establish the contrary. The court also considers the respondent's income and expenses at any time or at all times, assesses the difference between the respondent's total wealth and lawfully acquired wealth, and specifies its value. If a court issues a unexplained wealth order the respondent is obliged to pay to the NT the amount specified by the court or the debt will be satisfied by forfeiture of the property under restraining order.

Criminal Benefit Declaration

A police officer may seize, retain, or guard for up to 72 hours the property suspected of being crime used or crime derived or owned or controlled by a drug trafficker. A local court may make an interim restraining order prohibiting anyone from dealing with the property if it is satisfied that an application for a restraining order will be made against a person or the specified property. Application for a restraining order can be made by telephone or other electronic means. Such order is in force for only three days. Following the interim restraining order a member of the police or the DPP, depending on the court jurisdiction, can apply for a restraining order to a Local or Supreme Court. A restraining order can be made against property or against property (*in rem*) for crime-used or crime-derived property or against property owned by a specified person (*in personam*) if the person is or will be charged with commission of an offense or will be declared a drug trafficker. Hearings for the application of the restraining order can be held in closed sessions and the court may allow only certain individuals to attend the session. Proceedings for making a restraining order for crime-derived and crime-used property are the same as for unexplained wealth orders described above.

A court may, on the application of the DPP, declare that property of equivalent value owned or controlled by the respondent be substituted for the crime-used property if it is more likely than not that the respondent has made criminal use of property and the crime-used property is not available for forfeiture. Crime-used property substitutions can be made against two or more respondents in regard to the same property.

[169] The Supreme Court is the only court with jurisdiction in proceedings for an unexplained wealth declaration. The Local Court has no jurisdiction over these proceedings.

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Regardless of whether the respondent has been convicted or not for an offense, and if the prosecution is able to establish that the property is more likely than not crime-used property, it is presumed that the respondent made criminal use of the property unless the respondent is able to establish the contrary. The burden of proof lies with the respondent to present evidence and fact to satisfy the court that the property is not crime-used property. Property is considered crime used if it is used or intended to be used, by the respondent alone or with anyone else, for commission of an offense. The court making the crime-used property substitution declaration will order the respondent to pay to the NT the amount specified in the order.

Criminal benefits are considered property wholly or partly derived, directly or indirectly, from an offense and considered crime derived regardless of whether anyone has been charged or convicted of an offense or whether a person who directly or indirectly derived benefit from an offense is identified and was involved in the commission of an offense. Crime-derived property can be stolen property, property acquired lawfully but with unlawful sources, and any monetary value acquired in Australia or elsewhere from commercial exploitation of any product of public broadcast. Once property becomes crime derived, it remains crime derived even if it is disposed of unless it is acquired by an innocent person or disposed of in accordance with a court order.

The Supreme Court must declare that the respondent has acquired a criminal benefit if it is more likely than not that the respondent was involved in the commission of an offense and that the property, services, advantages, or benefits were wholly or partly derived, indirectly or directly, as a result of the respondent's involvement in the offense whether or not the property was lawfully acquired.

The court will presume that all the property is acquired as a result of the respondent's involvement in the commission of a forfeiture offense unless the respondent is able to establish the contrary. The respondent has the burden to present facts and evidence to convince the court that his/her property has been lawfully acquired. Property is lawfully acquired only if it was acquired through lawful means. When the court makes a criminal benefit declaration it specifies the value of the benefit in the order and obliges the respondent to pay an amount equal to the value to the NT.

Forfeiture If the person under any of the forfeiture schemes described above fails to pay an amount specified in the order to the NT the DPP may apply to the Supreme Court for a forfeitable property order enabling the prosecution to require forfeiture of property subject to the restraining order or property not owned by the respondent if it is more likely than not that the respondent effectively controls it and it satisfies the respondent's obligation to the NT.

If a person is declared a drug trafficker all property subject to restraining order owned or controlled by the person will be forfeited to the NT. Further, a member of the police or DPP may apply and a court may make a forfeiture order if it is more likely than not that the property is crime used or crime derived. For the court to make such an order the property must be under restraining order and the period for filing an objection of the restraining order has expired or the objection has been heard and determined. The court must make a forfeiture order even if no one has been identified as the property owner. The court may also order forfeiture to NT of property subject to a restraining order if an unexplained wealth, criminal benefits, and crime–used substituted declaration has been made against the person who owns or effectively controls the property.

After the court makes the forfeiture order in relation to property the DPP must inform the Registrar of the order and provide a copy of the declaration order and particulars of forfeiture.

Investigation and Search The process and requirement of investigation and search are unique for all forfeiture regimes provided for in the Criminal Forfeiture Act of NT. A financial institution can volunteer or can be required by the DPP or police force to provide relevant information if there are reasonable grounds to believe that information may be important to an investigation or is necessary in making a decision whether to apply for an unexplained wealth or a criminal benefit or crime-used declaration. The

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DPP can require a financial institution to provide information on a person, his/her account, and transactions of the account within seven days after the receiving the notice. If the institution fails to comply with the order or provides false or inaccurate information it is considered that the financial institution has committed an offense. Otherwise, no lawsuit can be instituted against a financial institution for information provided to the police or prosecution.

Examinations, Production, and Monitoring Orders The DPP may apply *ex parte* and the Supreme Court may order a person to submit to an examination about any of the matters related to the wealth, liabilities income, and expenditure of a person who has been convicted of a forfeiture offense or is suspected of having unexplained wealth, or is a declared drug trafficker. The examinee is required to give the court any documents including property tracking documents and information in his/her possession or control. The examinee may be represented by his/her legal representative and is not allowed to contravene the examination. A person who does not comply with the order can be imprisoned for up to five years, and corporations can be sanctioned to pay an amount that is equal to the value of the property. No one is excused from complying with the order under the pretext that doing so could lead to self-incrimination or breach of professional obligation. Statements given by the examined person can be used in a proceeding under this Act or any other civil proceeding, but not in a criminal proceeding, unless the person gives false or misleading information. Subsequently, a court must order a person to produce the property tracking documents[170] if the court suspects that the person has the documents in his/her possession or control. Anyone contravening the production order commits an offense. Further, the DPP may also apply *ex parte* for monitoring and suspension orders that order a financial institution to monitor an account of a person suspected to have benefited or is about to benefit from an offense. The financial institution is obliged to comply with the order and give information to the DPP or a police officer about all transactions carried out through an account held with the institution by a person. The monitoring order can be in force for up to three months.

Secrecy requirement The statute prohibits any person who has been the subject of a production, monitoring, or examination order to disclose to any other person the fact that a notice was served on him/her, that he/she was the subject of such order or the information given in compliance with the order. One exception is for a corporate officer enabling him/her to disclose restricted information to the DPP or police, an officer of the corporation, and a legal practitioner for the purpose of obtaining legal advice or ensuring compliance with the order.

Detention, Search, and Seizure A member of the police force is authorized to stop and detain a person who is suspected to own or control property liable for forfeiture or possesses property tracking documents. Similarly police can detain a person holding property liable for forfeiture for another. To search premises, baggage, packages, or any person, a member of the police must obtain a search warrant from the Justice of Peace. Application can be made by telephone or other electronic means stating under oath grounds on which he/she bases the suspicions that there are or will be property tracking documents or property liable for forfeiture within the next 72 hours. If the applicant has reasonable grounds to suspect that firearms may be used he/she needs to state the grounds for that suspicion. A member of police may also detain and seize documents found in the course of the search, take extracts, make copies, download or print out any documents containing relevant information, as well as require any person to give them information in their possession or control. The search warrant may be executed at any time and will continue to be in force in 30 days.

Management of Seized Property

Control and management of seized property is the responsibility of the Commissioner of Police, while for the restrained and forfeited property is the responsibility of the Public Trustee or a person appointed by the Trustee or the owner of the restrained property. The Public Trustee may manage and control the

[170] A document is a property tracking document if it helps identify or locate crime-used property or crime-derived property, determine the value of the property and identify or locate any or all of person's wealth.

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property or any funds held in an account of a financial institution which may be transferred to him/her on his/her request and take all reasonable steps to ensure that the property is appropriately stored or managed and maintained until it is returned to the owner, sold, destroyed or otherwise disposed of. The statute provides for destruction of property if it is in the public interest or its sale if the property is or will deteriorate substantially if retained. The Public Trustee is entitled to receive fees for its services and it is liable for taxes only to the extent that those can be reimbursed from rents and profits derived by the property.

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3.2.1.5 New South Wales—Criminal Asset Recovery Act 1990

Background

A conviction-based confiscation law was adopted in New South Wales in 1989 with the Confiscation of Proceeds of Crime Act (1989). Under this law, the court can make an order for the confiscation of assets from a person who has been convicted of a criminal offense. In 1990, the Criminal Asset Recovery Act (CARA) of 1990 was adopted by NSW. This was the first jurisdiction in Australia to introduce non-conviction-based civil asset forfeiture laws. In 2010, NSW followed the lead of other jurisdictions and amended CARA by adopting provisions on unexplained wealth. The amendment bill was adopted in September 2010.

The purpose of the NSW PoCA is to provide for the confiscation of interest in property of a person engaged in serious crime related activities in order to enable proceeds of serious crime related activities to be recovered as a debt to the Crown.

Criminal Asset Recovery Act 1990

The principal objectives of the NSW CARA of 1990 are to: (a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and (b) to enable the current and past wealth of a person to be recovered as a debt due to the state if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired; (c) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous six years or acquired proceeds of the illegal activities of such a person, and (c1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings; and (d) to enable law enforcement authorities effectively to identify and recover property.[171] Proceedings under Unexplained Wealth Orders in NSW

The first asset forfeiture step is an order whereby the property of a person who has engaged in serious criminal offenses can be forfeited to the state.

Restraining Orders The Supreme Court will make a restraining order on the application of the Commission[172] supported by an affidavit of an authorized officer stating grounds based on which he/she suspects that the person whose property is the subject of the order has engaged in a serious criminal activity and has derived property from it. The Commission may make an application *ex parte* to the Supreme Court which may require that the parties be notified of such order if it considers it reasonable. Interested parties, upon receiving the notification, may appear at the hearing and produce evidence with respect to the property in question. A provision permits urgent applications to be submitted by telephone or other means of communication, e.g., radio, facsimile, or email, if the application is supported by a statement of the officer that the order is required urgently because of the risk that funds may be withdrawn or it is not practical for an officer to appear in person. A restraining order cannot apply to an interest in property acquired after the order has been made unless it is specified in the order. The NSW Trustee and Guardian are responsible for management of some or all interests in the property. The court can order that reasonable living and legal expenses of any person who has an interest in property or his/her dependents be covered by the restrained property. The NSW Act provides that a maximum

[171]Criminal Asset Recovery Act 1990, last accessed February 22, 2011, available at: http://www.austlii.edu.au/au/legis/nsw/consol_act/cara1990272.txt

[172]"Commission" means the New South Wales Crime Commission constituted under the New South Wales Crime Commission Act 1985.

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allowable cost will be set by a regulation in order to limit the amount of legal expenses to be met out of the property.

The Supreme Court, on the application of the property owner within 28 days from the day the order was made, can set aside the order if the Commission has not satisfied the court that there are reasonable grounds for suspicion that the person was engaged in serious crime or has derived property from it.

In addition, when the court makes a restraining order it can also make other ancillary orders such as an order varying the interests in property, an order for the examination on oath of the property owner and any other person before the court or an officer of the court, and/or an order authorizing seizure of property or assigning a trustee or a guardian over the property. The person being examined is not exempt from answering any question or producing any document on the grounds that he/she breaches legal or professional privilege, personal obligation, or that it may lead to incrimination. However, answers given under examination cannot be used in criminal proceedings except if the person objects to answering the questions or producing documents during the examination.

Issuance of an unexplained wealth order The Commission may apply, and the Supreme Court must issue, a unexplained wealth order requiring a person to pay to the Treasurer an amount assessed by the court as the value of the unexplained wealth if the court finds that there is a reasonable suspicion that the person against whom the order is sought was involved in (a) serious crime related activity or serious crime related activities, or (b) acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities)(s. 28A). The court does not need to base its findings on the grounds that a specific offense was committed.

The court is empowered to refuse to issue a UWO, or may reduce the amount that would otherwise be payable as assessed under section 28B, if it thinks it is in the public interest to do so. Section 28B defines "unexplained wealth" to be the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied, on the balance of probabilities, is not or was not illegally acquired property or the proceeds of an illegal activity. "Current or previous health" is considered to be the sum of the values of all interest in property of the person that is under his/her effective control or that he/she has at any time expended, consumed, or disposed of and any service, advantage, or benefit provided at any time to the person or at the person's request, including property acquired or disposed of before or after the commencement of the NSW Act. Considering the far-reaching powers of this legislation, one limitation was incorporated that empowers the court to consider only the current and previous wealth of the person on which the Commission has provided evidence.

In determining the amount the person is required to pay to the state as a result of proceeds assessment or unexplained wealth order, the court will deduct any amount paid or property already forfeited under another confiscation of forfeiture order, proceeds assessment order, and pecuniary penalty orders.

The burden of proof is on the respondent to prove that the person's current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.

If conviction of a defendant is set aside or quashed, it does not affect the validity of the proceeds assessment and unexplained wealth order. Further, if any of the above referred orders is made against a person it will not prevent the making of a forfeiture order based on the serious crime related activity. The person whose property is subject of a forfeiture order will be notified of such order. However, his/her absence will not prevent the court from making the order.

The NSW Act provides that if an order will cause undue hardship to a dependent of the person subject to the order, the court will order to pay a specified amount to the dependent, if the dependent had no knowledge of the conduct that led to the order or the dependent is younger than 18 years old and in which case the former does not apply.

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The amount defined in the proceeds assessment or UWO is considered to be a debt payable to the Crown which is paid to the Treasurer and credited to the Confiscated Proceeds Account. From the Proceeds Account, the following costs are permitted to be reimbursed: the Treasurer's, NSW Trustee and Guardian costs and fee for performance of his or her duties, any other amount as required by a Supreme Court order, and to the Victims Compensation Funds. Moneys to this account will be paid after any payments resulting from a court order have been paid as well as other amounts paid to law enforcement, victims' support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation, or drug education.

The court will assign a NSW Trustee and Guardian to take care of the property or of an interest in property until forfeiture order is made. Once the court has made the forfeiture order, the court will, upon application by the NSW Trustee and Guardian, make an order directing the Trustee to sell or otherwise dispose of property or specified interest in property and execute any deed or instrument. From the proceeds the Trustee will pay fees and expenses incurred by him/her in performance of the duties.

Proceedings under a Proceeds Assessment Order

On application by the Commission the Supreme Court must make a proceeds assessment order requiring a person to pay to the Treasury an amount assessed by the courts to be the value of the proceeds derived from unlawful activities. The Supreme Court must make a proceeds assessment order if it finds that it is more probable than not that the person who is above 18 years, was engaged over the past six years in serious crime related activity involving indictable quantity or in offenses punishable by five years of imprisonment (section 27) and the person has derived proceeds from illegal activities and knew or ought reasonably to have known that the proceeds were derived from illegal activity. The court does not have to base its decision on findings that a particular offense was committed. It is sufficient to find that some sort of offense was committed.

In assessing the proceeds derived from illegal activity the court will consider the following:

- the money and value of an interest acquired by the defendant or another person as a result of illegal activity;
- the value of any service, benefit, or advantage provided for the defendant (or another person) because of the illegal activity;
- the market value of a plant or drug similar to any involved in the illegal activity, and the amounts that were ordinarily paid for an act similar to the illegal activity;
- the value of the defendant's property before and after the illegal activity; and
- the defendant's income and expenditure before and after the illegal activity.

If the evidence provided at the hearing shows that the value of defendant's property after an illegal activity exceeds the value of his/her property before the activity the court will treat the excess as having derived from illegal activities except if the court is satisfied the excess was due to causes unrelated to an illegal activity. Similarly, if evidence is provided at the hearing of the defendant's expenditure during the period of six years, the court is to treat any such amount as proceeds derived from an illegal activity except to the extent that the court is satisfied the expenditure was funded from income or money from other sources unrelated to an illegal activity. The court will not subtract expenses incurred by the defendant in relation to the illegal activities or any proceeds derived as an agent on behalf of another person from the proceeds assessment order.

From the above, although not directly stipulated, it can easily be concluded that the burden of proof is on the defendant to give evidence to the court of the legal origin of his/her property.

Investigation and Search - Search Warrants The law provides that an authorized officer may apply to an authorized official for a search warrant if he/she has reasonable grounds under suspicion that there is or will be evidentiary materials or tainted property within 72 hours. The authorized officer, if satisfied that there are reasonable grounds for doing so, may issue a search warrant to enter the premises and search for

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any or all of the property or evidence. Authorized officers conducting the search may seize anything that they may suspect is evidentiary material or tainted property and have the power to remove it from the property or guard it on those premises for seven days unless a restraining order is made.

Production Orders The Supreme Court may make a production order requiring a person to produce or make available one or more property tracking documents to an authorized officer for inspection. An authorized officer applies for a production order on oath setting the grounds based on which the officer suspects that a person has possession or control of a property-tracking document(s). This excludes banker's books, meaning any accounting records of a bank used in its ordinary business of banking. The authorized officer can inspect, examine, take extracts from, or make copies of the documents. The person is not excluded from producing a document on the basis of self-incrimination, breach of an obligation, or disclosure of legal professional privilege. The person subject to a production order has been given the right to apply to the Supreme Court for a variation order to make the document available to an authorized officer in the place where they are usually held. If a person fails to comply with the order or provides incorrect information, the person can be imprisoned for up to two years. The person is also prohibited from sharing the information that he/she was a subject of a production order.

Monitoring Orders The Supreme Court may make a monitoring order, on the application of an authorized officer, requiring a financial institution to provide information about transactions conducted during a particular period if the court is satisfied that there are reasonable grounds for suspecting that the person against whom the order is made has been or is about to commit a serious crime related activity or has acquired or is about to acquire, directly or indirectly, any serious crime-derived property or any fraudulently acquired property. The monitoring order applies to transactions conducted during the period specified in the order but not later than three months after the date of the order. Those complying with order enjoy immunity in regard to their actions taken. However, if the financial institution fails to comply with the order it will face a penalty.

NSW had in place a broad range of conviction and non-conviction forfeiture laws targeting property that has derived from, or used, in criminal activity. It was the first state in Australia to introduce a non-conviction forfeiture law in the 1990s allowing the state to target assets of a person even if he has not been convicted of an offence. However, in 2010 it introduced UWOs furthering expanding the powers of the existing regime allowing the state for the first time to target assets without a prior finding that a person has been engaged in serious crime. Distinct from other Australian states, NSW has entrusted the powers to pursue forfeiture cases not to the DPP but to a separate entity NSW Crime Commission. The NSW Crime Commission will be also authorized to pursue UWO cases. Since the law has been recently amended no cases have been yet made and its application and effectiveness is yet to be determines.

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3.2.1.6 Evaluating the Effectiveness of Australia's UWOs

Evaluating the effectiveness of any law, especially the effectiveness of unexplained wealth laws, is a complex and difficult task. UWOs were introduced as a new and powerful weapon against any form of crime, given that the expectations of their impact on fighting and deterring crime were very high. In reality, however, their practical application has proven complex, time and resource consuming, and highly unpredictable. Their controversial nature, accused of breaching civil rights and the principles of common law, brought them under public and media scrutiny. There continues to be tension between those who ask why these laws are not applied more often and those who think these laws should not be used at all because they grossly violate basic rights and are a disproportionate response to crime. The truth lies somewhere in between—these laws have the potential to affect and reduce crime, but they cannot be viewed as a cure-all for everything. It has been said that UWOs are effective in cases when progress against crime cannot be made through the normal course of criminal law, but they should be applied as a last resort.

To gain an overall perception of the impact of unexplained wealth orders on fighting and deterring crime, the study team solicited the opinions and views of agencies and individuals who were directly involved in unexplained wealth (e.g., prosecutors, police, intelligence agencies, defense bar, academics, and civil society) activities. Although this approach has limitations, in that it surveys the opinion of only a small group of people it does express an informed opinion of the impact of the law. In this regard, it must be noted that the Commonwealth of Australia has only recently enacted unexplained wealth orders (May 2010) and no cases have been brought under this scheme; a few cases are under consideration and are expected to commence soon. However, given the sensitive nature of ongoing investigations, no information was available on these. Thus, the quantitative evaluation of the effectiveness of unexplained wealth orders is focused on WA since that is the only jurisdiction with available data.[173]

Australian academics, lawyers, and civil right groups have been critical of the Criminal Confiscation Act of WA, describing it as the most far-reaching confiscation regime compared to other forfeiture regimes in the world. They contend that unexplained wealth provisions have the potential of violating civil rights and the principles of common law, including the sanctity of private property, the right to privacy, the right to secrecy, and the right to silence.

Although the NT Forfeiture Act was modeled after the WA Criminal Property Confiscation Act (CPCA), it is widely believed that it has improved and advanced it. A statement to that effect was given by the Parliamentary Joint Committee of the Australian Crime Commissions (PJC-ACC) when reviewing legislative strategies to combat crime. Representatives of the PJC-ACC believe that the NT Forfeiture Act contains a number of differences that are considered essential in mitigating the effect the Act has on people's lives and rights. Comparatively, the UWO law adopted at the Commonwealth level has fundamental differences from the WA and NT statutes, some of them heavily influenced by the Commonwealth constitution.

The differences between the WA and NT Acts result primarily from the influences from other Acts in effect in the state and in the NT Constitution. Because the NT is a territory, its constitution stipulates that property cannot be forfeited unless it is done on "just terms"; as a result, the NT statute provides that property will not be automatically forfeited after the court has made an unexplained wealth declaration until the DPP has made an application for forfeiture to a competent court. Making a forfeiture order is an additional safeguard built into the statute, requiring judicial review of the forfeiture order and providing an opportunity for amendment or revocation of an order if new evidence or facts come into existence. This provision does not exist in the WA statute whereby after the court has made an unexplained wealth declaration the property subject to an order is forfeited automatically.

[173] Two other states/territories have UWOs. However, we selected WA as the focus for our study for several reasons: limited resources; it was the first state to introduce UWOs; it is one of the largest jurisdictions that have enacted UWOs; and it is one of the states that has most frequently used UWOs.

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Similarly, the NT's Sentencing Act of 1995 allows the court reviewing the application for unexplained wealth to take into account the offender's cooperation as a mitigating factor when imposing a sentence. The respondent's cooperation is not considered by the court when imposing forfeiture in WA courts.

Finally, the NT has set a higher threshold for declaring a person convicted of a drug-trafficking offense, a declared drug trafficker. The threshold in WA is set to one offense meaning that a drug trafficker can be convicted of only one offense before he or she is declared a drug trafficker and has all of his or her property forfeited. The threshold of the amount of drugs trafficked is also very low in WA. It is sufficient that a person be found guilty of trafficking more than 24 grams of drugs to be declared a drug trafficker. This threshold is higher in NT where a person must be convicted of three related drug offenses before he or she can be declared a drug trafficker. In addition, the PJC-ACC notes that NT uses "an investigative and prosecutorial model that has a much greater level of interaction between prosecutors, police, and the Department of Justice." [174]

Unexplained wealth provisions of the Commonwealth reflect lessons learned from WA and NT, international experience as well as a rich and in-depth public debate held in Australia. As a result, the PJC-ACC decided that unexplained wealth laws are a significant and effective tool that can be used to prevent and deter crime, disrupt criminal enterprises, target the profit motive of organized criminal groups, and ensure that those benefiting from organized crime are captured. However, the UWO law introduced by the Commonwealth differs from the UWO laws of NT and WA providing for more legal remedies for the respondent and his or her dependents, limiting arbitrary application of the law and incorporating safeguards to protect civil rights and limit potential arbitrary application of the order.

First, the Commonwealth restraining order provisions are narrower than those in the NT and WA. The language of the Commonwealth statute empowers the court to consider whether a restraining order should be made or not. Second, the standard of proof the Commonwealth needs to put a restraining order in place is considerably higher than that required under the WA and NT statutes. For a court to make a restraining order under the federal statute, the Commonwealth must show that there are reasonable grounds to suspect that the respondent owns or possesses unexplained wealth and to establish a nexus between the property and a federal offense or a state offense with a federal aspect. Including the requirement to show a nexus between the property and an offense has raised the threshold of evidence the state must meet to obtain a successful application under unexplained wealth. Although this was not contemplated when the law was drafted, the federal constitution dictated that there must be a nexus between the property and an offense. The requirement for making a preliminary UWO is not as strict because it does not require a link between the property subject to the application and an offense. For a court to make an unexplained wealth declaration it is required that a preliminary forfeiture order be in place. Another key difference is the requirement for the prosecution to show that the respondent has committed an offense or that there are reasonable grounds to suspect that the person was involved in or has committed an indictable offense which can be an indictable offense violating the laws of the Commonwealth, a foreign offense, or a state offense. Such a requirement does not exist under the WA and NT laws. The federal law also does not provide for automatic forfeiture as do the two other laws, whereby property under a freezing order will be automatically forfeited, vesting it to the government if the owner does not file an objection within 28 days.

With the intent of protecting the rights of dependents and innocent third parties, the Commonwealth law also allows the forfeited or frozen property to be used to cover legal fees of the respondent if the respondent does not have any other means to cover such costs. The court also can allow reasonable living and business costs to be drawn from the property subject to a freezing order if the dependent is under age 18 and has shown that he or she could not have reasonably been aware that the property was derived or used in or in connection with an offense. Significant changes have been made to the UWO

[174] PJC – ACC " *Inquiry into the legislative arrangement to outlaw serious and organized crime groups*", August 2009, p.-116

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Commonwealth law in an effort to make its provisions more effective and to bring the law in line with the principles of the common law and respect of basic rights.

A number of academics[175]contend that it was considerably easier to introduce and implement unexplained wealth provisions in Australia in the absence of a written Bill of Rights entrenched in the constitution. It was held that the courts have been reluctant to interpret provisions to abrogate important common law rights, privileges, and immunities in the absence of clear words or a necessary implication to that effect (Grono, 2009).

Figure 2: Key features of different Unexplained Wealth Orders in Australia

Western Australia	Northern Territory	Commonwealth	New South Wales
➢ Enacted in 2000 ➢ *in Personam* – action brought against the person ➢ The burden of proof shifts is reversed to the property owner ➢ No requirement to show a nexus between an offense and property ➢ No court discretion	➢ Enacted in 2002 ➢ *in Personam* – action brought against the person ➢ The burden of proof shifts to the property owner ➢ No requirement to show a nexus between an offense and property ➢ Court has discretion to decide if making of an order is done on "just terms:	➢ Enacted in 2010 ➢ *in Personam* – action brought against the person ➢ The burden of proof shifts to the property owner ➢ The state has to show a nexus between an offense and the property ➢ Court has broad discretion when making an order	➢ 2010 ➢ *in Personam* – action brought ➢ proceeding ➢ The burden shifts to the respondent ➢ The burden of proof shifts to the property owner ➢ The state has to show a nexus between an offense and the property ➢ Court has broad discretion when making an order

Public Debate

Initiatives to introduce measures to fight organized crime by attacking profit came as early as the 1970s and 1980s when royal commissioners conducted inquiries that revealed high levels of organized crime. Each of these commissioners recommended adopting measures to attack the primary motive of criminal activities—profit.[176] However, the Australian government was reluctant to proceed and adopt non conviction based forfeiture laws fearing that they might be opposed by various political and civic groups. Ultimately, in early nineties NSW went ahead and adopted non conviction based laws and later in the decade the WA adopted a non-conviction based forfeiture law including UWO. Years later, similar, if not stronger, support came from law enforcement agencies such as the AFP, ACC, the police of most jurisdictions, and the Tax Office. Evidence of the effectiveness of UWOs also was provided to the Australian Joint Parliamentary Committee by international law enforcement agencies from Italy and the United Kingdom. The representative of the Italian National Police, talking about the importance of depriving criminal of their assets, noted that "*mafia members are prepared to spend time in prison, but to take their assets is to really harm these individuals*." In contrast, other groups, such as the Law Council of Australia and Civil Liberties of Australia expressed grave concerns over the provisions of the Commonwealth PoCA especially in regard to the impact that UWOs would have on the basic rights of individuals and the public interest. Although they in essence supported the objectives of the bill, they were concerned with the operations of the legislation.

Tom Sherman, in his report on evaluation of the PoCA of 2002, also expressed reservations regarding unexplained wealth laws. He stated that although unexplained wealth orders are undoubtedly effective

[175]Ben Clarke, David Lusty, Grono.
[176]David Lusty, "Civil Forfeiture of proceeds of crime in Australia, "*Journal of Money Laundering Control*, 5, 2002, p. 345–359.

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they should not be introduced by the Commonwealth at this stage; rather, they should continue to be reviewed.[177]

The debate about unexplained wealth laws has taken place largely in the context of two recent committee inquiries at the Commonwealth level: the PJC-ACC in August 2009 and the Senate Legal and Constitutional Affairs Committee (SLCALC) in September 2009. In 2008, the PJC-ACC initiated an inquiry into legislative initiatives to outlaw serious and organized crime including forfeiture of the proceeds of crime as one of the mechanisms to fight, prevent, and deter serious and organized crime. The PJC-ACC conducted the inquiry[178] by examining the effectiveness of legislative initiatives, internationally and in Australia and evaluating the impact and consequences of those initiatives on society, criminal groups, and their networks and law enforcement agencies.[179] Internationally, the PJC-ACC sent a delegation to the United States, Canada, Italy, Ireland, and the United Kingdom to examine international trends in dismantling and disrupting serious and organized crime and the legislative and administrative approaches. In addition, the committee solicited input from the public at larger, by holding public hearings in large cities and soliciting input from different organizations and individuals regarding effective strategies that had an impact on combating crime. Subsequently, based on the results of the inquiry, the Commonwealth of Australia adopted the Serious and Organized Crime bill in November 2009 which went into effect May 2010. Among other amendments, the bill introduced unexplained wealth, amending the PoCA of 2002.

The Australian Parliament's approach led to transparent and inclusive debate on the introduction of unexplained wealth orders. Different strata of society were able to present their views, either supporting or dissenting, about the bill. AFP President, Jon Hunt, in its submission to the PJC-ACC, stated the following:

> This has been a long time coming. It is imperative that we have strong, tailored and effective laws in place to combat serious organized crime. Our members in the AFP & ACC have been working with antiquated laws that have been grossly inadequate for dealing with sophisticated organized and transnational crime syndicates.[180]

Further, he held that this law will strengthen the existing legislation by defining new criminal offenses that target those engaged in organized crime, strengthening asset confiscation and anti-money laundering regimes, and requiring individuals suspected of owning unexplained wealth to demonstrate its legitimacy and enhance search and seizure powers and the ability to access electronic data.

The objectives of the unexplained wealth laws support and reinforce those of confiscation and forfeiture laws, as follows:

- Deter those contemplating criminal activity by reducing the possibilities to retain profit
- Reduce the capacity to reinvest the proceeds in future unlawful activities by taking away the proceeds
- Remedy the unjust enrichment.

[177]Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002,* (Cth), July 2006. Available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth), accessed January 23, 2011. Commonly referred to as The Sherman Report.

[178]Parliamentary Joint Committee of the Australian Crime Commission (PJC-ACC), "*Legislative Arrangement to outlaw serious and organized crime groups,"* available at: http://www.aph.gov.au/senate/committee/acc_ctte/laoscg/report/index.htm, accessed January 21, 2011.

[179]Terms of Reference of the PJC-ACC, available at: ttp://www.aph.gov.au/senate/committee/acc_ctte/laoscg/report/c01.htm#anc1, accessed January 21, 2011.

[180]Police Federation of Australia, "*Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Serious Organized Crime) bill 2009.*

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In addition, one of the key arguments presented by the law enforcement agencies is the power of unexplained wealth laws to deprive principals of criminal organizations, or as they were referred to,"Mr. Bigs" of their unlawful property. The main challenge law enforcement agencies and prosecution face is the ability to gather sufficient evidence to prosecute heads of criminal organizations. In most cases, lower level criminals are prosecuted and convicted of offenses but there is never sufficient evidence to prosecute those who orchestrate these activities. This was explained by the Police Federation of Australia in a note sent to the PJC-ACC:

> Do Australian police know who is involved in organized and serious crime in Australia? The answer is yes. Can we prove beyond reasonable doubts that these criminals are involved directly in those crimes? The answer is no.…Unexplained wealth is the easiest way as a crime prevention method to stop further crime.

In similar terms, the explanatory memorandum for the Commonwealth bill notes that:

> [T]he existing confiscation scheme under POCA are not always effective in relation to those who remain at arm's length from the commission of offenses, as most of the other confiscation mechanisms require a link to the commission of an offense. Senior organized crime figures who fund and support organized crime but seldom carry out the physical elements of crime, are not always able to be directly linked to specific offenses.

Therefore, unexplained wealth provisions allow the prosecution and the court to attack the profit of these highly profitable criminal networks without the need to prove a causal connection between the offenses and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offense was committed has enabled law enforcement to deprive those benefiting from criminal activities of their profits.

The Australian Tax Office also supported the law, arguing that UWOs would assist it in enforcing tax legislation. The key argument for adoption of unexplained wealth provisions was that it makes it possible to attack and take away the profit from those who have obtained it in an unlawful way by following the money trail. Through these provisions the enforcement agencies target primarily the financial incentive to become involved in the commission of criminal offenses. Many believed that if the incentive were removed many criminal organizations will cease to exist and dismantle. This strategy was proved successful in Ireland, Italy, and other jurisdictions within Australia, where local officials believe (albeit anecdotally) many criminal organizations have ceased to exist and many criminals have relocated their operations elsewhere when the civil forfeiture provisions with reversed burden of proof were adopted. Further, professor Rod Broadhurst, in his submission to the SLCAC in August 2009, observed that "tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in organized crime is usually indirect in terms of actual commission.[181]"

A representative of the Office of the Commonwealth Ombudsman supported adoption of UWOs as a means to fight and deter crime. However, given the wide reach of the powers and the nature of such orders the authorized officers making an application must have reasonable grounds to believe that an offense was committed. Further, in his statement regarding the erosion of privacy rights, he stressed that such measures should be undertaken only when they are necessary and proportional to address the immediate need and are subject to appropriate and ongoing accountability measures and review.

Although law enforcement agencies and some academics strongly supported the law, civil rights organizations, law societies, and other academics strongly opposed it calling it a draconian measure that violates basic rights such as the right to private property, freedom of citizens from unnecessary intervention from the government, and the right to privacy. Clarke holds that "seizure of assets by organs

[181] *Inquiry into the legislative arrangements to outlaw serious and organized crime groups*, Parliamentary Joint Committee on the Australian Crime Commission, August 2009

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of the state is coercive exercise of power which should not be undertaken lightly."[182] He also notes that the WA CPCA "represents the most significant encroachment upon citizen's property rights in Western Australia and possibly Australian legislative history."[183]

A key argument against unexplained wealth provisions from civil rights organization is the reversed burden of proof on the property owner and the risk that it could lead to confiscation of property of innocent people. A member of the motorcycling community told the PJC-ACC "the only problem I have with unexplained wealth law is I do not believe most people could actually explain everything they own[184]." In the same report, the Law Council of Australia called these laws obnoxious and stated that they were offenses against common law and human rights principles. The Law Council presented its arguments against the unexplained wealth provisions as follows:

- The reverse onus of proof undermines the presumption of innocence.
- Provisions infringe on the right to silence and exclude legal professional privilege. The WA and the NT provisions allow the DPP to use information obtained during examination for criminal prosecution.
- Appeal processes are inadequate.
- The potential for arbitrary application of the laws, with the use of the laws, can be politically motivated.[185]

In a hearing in front of the SLCAC, the representative of the Law Council of Australia also, held that the central problem of UWOs is the lack of the need to show any evidence related to any offense, pleading to include reasonable suspicion that some offense was committed. The laws of the NT and WA do not require showing that an offense was committed.

From the Explanatory Notes on the Criminal Proceeds Confiscation (Serious and Organized Crime Unexplained Wealth) Amendment Bill 2010, it is evident that the government seriously pondered the introduction of reversed burden of proof and its consequences, and has decided to enact them despite the fact that they do breach fundamental legislative principles as a tool to fight the increasing threat from serious and organized crime.

Some believe that the WA and NT provisions erode the right to silence and the right to privacy because they require the respondent or any person knowing anything about the respondent's affairs or property to disclose that information to the DPP.

Tim Gate of the Law Council argued that:

> …absence of requirement to present evidence that shows there are reasonable grounds to suspect that the respondent has committed an offense, or that his wealth is derived from an offense, when combined with the reversed onus of proof, puts the person in a position where the suspicion in relation to the wealth is the sole thing that has triggered forfeiture.

This relates more to the WA and NT forfeiture regimes because the Commonwealth unexplained wealth laws contain provisions that require the prosecution to show reasonable grounds that the respondent has or was involved in commission of an offense. Moreover, the law has specific provisions setting out specific requirements for the affidavit to be considered by a court.

[182]Ben Clarke, *A man's home is his castle–or is it? How to take houses from people without convicting them of anything: The Criminal Property Confiscation Act 2000 (WA),* Electronic copy available at: http://ssrn.com/abstract=1718863, accessed February 8, 2010.
[183]Ben Clarke *Confiscation of unexplained wealth; Western Australia's response to organized crime gangs,* Afr. J. Crim. Just 15 (2002) p. 61–85.
[184] Report of the Parliamentary Joint Committee –Australian Crime Committee- *Inquiry into the legislative arrangement to outlaw serious and organized crime,* August 2009 pg.121(point5.59).
[185]Ibid. at 40.

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Concerns have been raised that unexplained wealth provisions could be easily misused for political or other purposes because the requirements to commence unexplained wealth proceedings are meager and light on the prosecution. It is sufficient that it is brought to the attention of the police that a person owns wealth that could be unexplained wealth to commence a proceeding against a person, which may represent a significant infringement of the person's civil liberties.

Effectiveness of UWO - Commonwealth

As stated previously, the Commonwealth only recently introduced UWOs, and no cases have yet been instituted under these provisions. When the Commonwealth PoCA was conceived, the powers to institute UWOs were vested on the Commonwealth DPP (CDPP); however, with an initiative undertaken by the Australian Federal Police, the law was amended in 2011[186] to include the AFP. As it now stands, both the DPP and the AFP share the powers under the PoCA, including UWOs. The AFP has the same powers and responsibilities to institute any of the proceedings under the Commonwealth PoCA; the decision as to who will pursue the cases will be made by the AFP.

Following the initiative of the AFP to get involved in the forfeiture of proceeds of crime, a new initiative was originated to establish a Criminal Asset Confiscation Task Force (CACTF) modeled after the Irish Criminal Asset Bureau. The idea came about after the AFP representatives visited Ireland to familiarize themselves with Irish forfeiture system. At the time of this writing, the legislation is being drafted and negotiations are ongoing among different agencies about the modalities of the operation and the task force is expected to be established by January 2012. The concept, on which the agency is to be built, is that co-location leads to coordination with staff being shared among different agencies (e.g., AFP, ACC, customs, DPP, and tax administration). This should mitigate a tense relationship between the DPP and the AFP regarding the usage of UWOs as well as the role the DPP should play in the future CACTF. While the DPP believes it must be engaged and act as a filter between the police and the judiciary, the AFP believes that it must lead and is in a good position to deal with the courts independently of the DPP. The AFP expressed concerns that the DPP tends to take a conservative approach and set a higher threshold for evidence than required by the law, and, thus, fewer UWO applications will be brought. On the other hand the DPP is concerned about requirements on undertaking of damages, requesting the DPP to compensate the respondents if unexplained wealth application was not successful, which could lead to bankruptcy of the DPP if cases are not carefully selected and pursued. The AFP, on the other hand, does not view this as an issue and considers the DPP as being too conservative. Although there are tensions regarding their future roles, the DPP perceives a need for future involvement in the task force and the modality of their involvement has yet to be determined.

As stated, no UWO cases have yet been brought on the Commonwealth level, but there are a few cases that the AFP is working with the ACC to prepare. It is important for the United States to continue to monitor the application of UWOs by the Commonwealth of Australia, and track the progress of the application of UWO at the federal level in contemplating introduction of unexplained wealth in the U.S.

In summary, the UWOs of the Commonwealth have higher requirements. They do not have a presumption that the respondent's property is unlawful unless the respondent is able to establish the contrary and there is a requirement to show on balance of probability that an offense has been committed. Furthermore, the Commonwealth PoCA sets out a three stage process: (1) a freezing order (not mandatory); (2) preliminary UWO; and (3) unexplained wealth declaration. Other differences are that the respondent is eligible for reasonable living and legal expenses and the court has the discretionary power to determine whether making an order will cause undue hardship or injustice.

The shortcomings of the legislation, as viewed by the DPP, are the requirement that an examination order be made before the property is frozen, which may lead to disposition or loss of property. In addition, gifts,

[186] Crimes Legislation Amendment Bill, (No.2), 2011, The Parliament of the Commonwealth of Australia.

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inheritances, and proceeds from gambling cannot be verified easily and that may lead to unsuccessful applications.

Based on the analysis of the law and on earlier experience of the CDPP asset forfeiture manager, the evidentiary requirements imposed by the law make for a high threshold. The type of evidence required and expected to be provided by the CDPP may be tax records, employment records, inheritance, gifts, and the difference between the total wealth versus specific property.

The DPP considers that the law parallels money-laundering work, and that UWOs will be pursued when there are no other options or when all other options have been exhausted.

Effectiveness of UWOs – Western Australia

Statistical information on the application of UWOs is available through the DPP Annual Reports but there are a number of limitations. For example, funds paid into the Confiscation Proceeds Account from 2001 to 2009 reflect funds recovered from all forfeiture and confiscation schemes available under the Criminal Confiscation Act of 2000. These funds include UWOs, crime-used and crime-derived, as well as declared drug trafficker. Table 3 shows the total amount of funds paid into the Confiscation Proceeds Account. There is a steady increase in funds paid to the CPA, with the largest amount paid in 2007–2008 and 2009–2010. The WA DPP Annual Report 2009–2010 notes that the most significant proportion of confiscated property arises from conviction of an accused drug trafficker and the subsequent declaration that the person is a drug trafficker. The table also shows that the proportion of funds arising from declaration as a drug trafficker make up between 50 and 90 percent of the funds paid into the CPA. As of September 2009, a total of AUD$43,581,117 (US$46M) were paid into the CPA, AUD$6.1M (US$6.4M) of which came from UW unexplained wealth matters indicating that they do not appear to have been used extensively.[187]

Table 3: Amounts Paid into CPA (WA) and Portion of Funds from Drug Trafficker's

Period	Amount ($AUD)	Amount ($US)	Declared Drug Trafficker ($US)	Funds Recovered from Other Schemes($US)
2000/01	$417,074.00	$447,020	N/A	N/A
2001/02	$779,533.00	$835,503	N/A	N/A
2002/03	$1,388,500.00	$1,488,194	N/A	N/A
2003/04	$1,170,275.00	$1,254,301	N/A	N/A
2004/05	$2,091,774.00	$2,241,963	$1,964,410.05	$277,553.33
2005/06	$2,524,362.00	$2,705,611	$1,312,627.03	$1,392,984.16
2006/07	$5,070,596.00	$5,434,665	$2,903,255.40	$2,531,409.39
2007/08	$12,618,686.00	$13,524,708	$8,650,773.25	$4,873,934.40
2008/09	$7,837,418.00	$8,400,145	$6,510,863.46	$1,889,281.15
2009/10	$13,438,281.00	$14,403,150	$10,768,793.67	$3,634,355.90

Source, WA DPP Annual Report (2009/10)

Table 4: Amounts recovered from the UWO January 2001 to January 2010

No.	Type of a case	Amount ($Australian)	Amount ($US)
1	Suspected drug dealer	$2,620,000.00	$2,813,880
2	Suspected drug dealer	$1,540,000.00	$1,653,960

[187]Conversion rates from Oanda Currency Converter- July 3rd, 2011: AUD $1 - US $ 1.074

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3	Suspected drug dealer	$52,000.00	$ 55,848
4	Suspected drug dealer	$200,000.00	$214,800
5	"Bikie" - motorcycle gangs	$250,000.00	$268,500
6	Suspected drug dealer	$40,000.00	$42,960
7	Suspected drug dealer	$126,000.00	$135,324
8	Suspected drug dealer	$330,000.00	$354,420
9	Spouse of a suspected drug dealer	$200,000.00	$214,800
10	Cash seizure/case dismissed		$0
11	Cash seizure	$35,000.00	$ 37,590
12	Suspected drug dealer	Active Case	$ 0
13	Case related to corruption	$100,000.00	$ 107,400
14	Theft	$150,000.00	$161,100
15	Suspected drug dealer	Active Case	$0
16	Seized large amount of cash	$63,000.00	$67,662
17	UNEXPLAINED WEALTHHUNEXPLAINED WEALTHHO	$315,000.00	$ 338,310
	TOTAL	**$6,021,000.00**	**$6,466,554**

Source: WA DPP, July 2011

Based on the data obtained from the WA DPP, as of June 2009, 27 unexplained wealth applications were made since 2000–2001 (see Table 5), of which 21 led to forfeiture of assets. This indicates a high success rate of more than 70 percent. Of all the applications for unexplained wealth, only three were set aside by the court; three others are pending resolution. Of 24 unexplained wealth matters finalized, 22 were settled and only two were litigated (only one led to forfeiture). A high number of cases settled indicate that the WA DPP is inclined to settlement outside of the courtroom. Note that the amount recovered from settlement is generally less than the amount of unexplained wealth identified by law enforcement authorities. However, settlement is favored because it ensures successful and rapid resolution of cases avoiding lengthy and costly proceedings with an unpredictable outcome. Of the two cases litigated only one led to forfeiture. None of the cases reached the High Court of Australia (HCA); all were resolved by the Appellate Section of the Supreme Court of WA.

DPP's willingness to settle might have been influenced by unsympathetic courts. WA courts, in particular the High Court of Australia, have not looked favorably on the civil forfeiture regimes because they consider them too radical and too infringing on fundamental civil rights. Although no case under the unexplained wealth provisions reached the HCA, other cases under the CPCA were not reviewed favorably and the court has in many instances favored the respondent, thus curbing the powers of the state in forfeiture proceedings.

It is evident that unexplained wealth provisions have not been used extensively in Australia, and in cases when they have been used only a relatively small amount of funds were recovered totaling only AU$6.0M over a period of 10 years in Western Australia. As shown in Table 5, no unexplained wealth applications were brought for 3 years (2004–2007). It is believed that this is due to public criticism of the DPP over

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the application of the law to an elderly couple who were convicted of possessing cannabis after their son concealed drugs in their roof.[188]

However, over the past three years, there has been an increase in applications for UWOs which is justified with an increased allocation of resources into this area in particular into the police (WA DPP). Since 2008, it was decided that 25 percent of funds paid into the Confiscation Proceeds Account will be transferred to the police where they have used the additional funding to hire forensic accountants. In 2001, when the Act was enacted, the Proceeds of Crime Squad (division of the WA police) had one forensic accountant but since then the number of forensic accountants has risen to six. In addition, this is also attributed to the fact that the Confiscation Team of the DPP has expanded over the years, from three to 18, thus increasing the capacity of the Confiscation Team to pursue forfeiture cases.[189]

Another reason for a rather low number of applications for unexplained wealth declarations is because it is much easier to carry out a confiscation of all property under the provisions of a declared drug trafficker. In a number of cases related to declared drug traffickers, there was unexplained wealth. However because of the provision on automatic confiscation of all property, lawful and unlawful, belonging to a drug trafficker, there was no need to invoke UWO provisions.

Table 5: Wealth Declarations in Western Australia (source WA DPP)

Year	UWO Applications	UW Applications Set Aside	UWO Declaration That Led to Forfeiture	No. of Cases Pending Resolution	No. of Cases Settled	No. of Cases Litigated
2000/01	8	1	7		8	
2001/02	4		4		4	
2002/03	3	1	2		3	
2003/04	2		2		2	
2004/05						
2005/06						
2006/07						2
2007/08	2	1	1			
2008/09	5		3	2	3	
2009/10	3		2	1	2	
Total	**27**	**3**	**21**	**3**	**22**	**2**

As noted previously, the CPCA of WA, providing a broad range of conviction and non-conviction based forfeiture regimes, is far-reaching legislation that empowers the state to attack the proceeds of crime as well as the property belonging to a criminal/drug trafficker. Given the broad range of forfeiture regimes and the ease of forfeiture of property under the drug trafficker confiscation provisions, UWOs were more time consuming and unpredictable.

Although we have heard repeatedly that unexplained wealth laws are an effective tool in fighting and deterring crime, we found little quantifiable evidence to substantiate those claims in Australia. These laws were introduced with great enthusiasm by legislators as an effective tool in the war against organized and serious crime, raising the expectations that they will be a cure for all problems in the community. It also

[188] Lorana Bartels, "Unexplained Wealth laws in Australia," *Trend and Issues in Crime and Criminal Justice*, No.395, July 2010, Published by the Australian Institute of Criminology.
[189] Ian Jones, Confiscation Practice Manager, WA DPP.

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seems that the support required to enforce and apply these laws have been downplayed, resulting with a low application of this law. The biggest criticism of the WA unexplained wealth regime was that did not meet the expectations that it raised when introduced, targeting "Mr. Bigs," who is out of the reach of justice and lives well beyond his lawful means. Some of our interviewees who have played a significant role in introduction of unexplained wealth stated that they were disenchanted with the law as it failed to achieve the results it indented to. Others however believed that UWOs have had an impact on reducing crime rates but there is no significant reported impact that made a noticeable change. However, most of the interviewees agreed that UWO had little impact in thwarting crime, criticizing the DPP for not making greater use of its UWO powers. Although many consider that UWOs have the potential to be powerful weapons against crime, they remain a largely untested weapon.

Factors affecting application of UWOs are multiple and complex. One of the leading factors is the existence of automatic confiscation provisions of property belonging to a declared drug trafficker. The requirements imposed on the prosecution are not high and a conviction leads to automatic confiscation. Nonetheless, some argue that because UWOs are a non-conviction–based forfeiture regime, there are situations other than those related to drug traffickers when a UWO could be used. The amount of funds recovered under Declared Drug Traffickers provisions are substantial and may largely use resources that otherwise could have been used for UWO work. As we were told, resources go where there is a need, and in this case, investigative resources are being focused on recovering property through Declared Drug Traffickers provisions.

Another reason there have been only a small number of UWO investigations is that they are resource intensive. To undertake successful UWO applications, a professional forensic accountant is critical along with computer technicians and well-trained investigators. Efforts are being made in this regard in that both the DPP and the police are expanding, hiring forensic accountants and other specialized personnel to escalate their activities. All of the investigative work is performed by the WA state police, who conduct the investigation, gather the intelligence, monitor financial transactions, prepare all the necessary affidavits for applications, and submit them to the DPP for review and final determination on whether or not to pursue with a UWO. This is viewed as a client relationship creating considerable tension between the two agencies, although they continue to work together effectively. The police believe that more could be done and they had high expectations when the law was enacted believing that it would prove to be a powerful tool that enabled them to pursue a broad range of cases. Some police believe the DPP is overly conservative and not aggressive enough in pursuing these cases. The DPP, on the other hand, believes that the police are overly aggressive and that the requirements in the CPCA set a high threshold for the state to show that the person owns or possesses unexplained wealth. It seems that the police are eager to bring cases faster but the DPP is focused on pursuing only feasible cases that are well prepared. The police believe that because the DPP is overly conservative they settle easily and for far less than could be obtained. The DPP, on the other hand, believes that it recovers the optimal amount from each case.

Tensions between the police and the DPP as well as DPP's reluctance to take a proactive approach in instituting UWOs may be why the WA Attorney General's Office initiated an inquiry into establishment of a separate entity or a transfer of forfeiture powers to the Corruption and Crime Commission (CCC) of WA. The idea is being discussed but no decisions have been made as to which parts of the Confiscation Practice of the DPP will be transferred to the CCC, only those related to UWO or also crime-used and crime-derived and declared drug dealers. If they follow the model designed by the Commonwealth, they will move toward the Irish Criminal Asset Bureau multiagency model (described supra) bringing the powers of various agencies together under one umbrella agency to facilitate and improve coordination and ensure effective implementation of the law. Thus, there is a temporary moratorium on the review of OWOs until a final decision is made to determine the future use of UWOs.

The DPP stated that one of the main reasons for so few unexplained wealth applications is the standard of evidence imposed on the prosecution. As discussed earlier, although the CPCA provides for reversal of the burden of proof onto the respondent to justify the lawfulness of the property subject to a proceeding,

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the threshold for the burden of proof the state must meet in reality is much higher than the burden on the respondent. According to the DPP and the specific requirements in the CPCA the DPP and the police must identify, trace, and value each item of the property of the respondent, show the totality of the respondent's wealth, and the unexplained portion of the wealth. In a case, this means that if the DPP were to go after a person who does not have a predicate offense they must identify and trace any property, transactions, gifts, purchases, and sales and show that they have reasonable grounds to believe that the person owns unexplained wealth. This requires access to tax and other records and skillful forensic accountants who can compile clear and concise affidavits for the court. Also as noted that Australian tax law differs from U.S. tax law (and as will be discussed later, Ireland as well) gifts, inheritance, and income acquired through gambling is not taxed and need not be reported for tax purposes. This has enabled respondents to discharge their burden of proof by simply stating that the money is a result of gambling or a gift from overseas. Furthermore, the *Brigenshaw* standard, mentioned previously, sets a standard of proof higher than the balance of probabilities to show that the person owns unexplained wealth. In contrast, the courts have accepted a lower burden of proof for the respondent, whereas a credible denial on oath would be considered sufficient to discharge the burden. A defense attorney corroborated the statement of the DPP that the standard of proof is higher for the state based on the *Brigenshaw* principle, while the standard of proof for the respondent is much lower. The unpredictable judicial process and the courts leaning or favoring the respondent has caused the DPP to shy away from bringing UWOs.

Although the law does not require a predicate offense, in general, the DPP believes that it must show evidence that the person has been engaged in some sort of criminal activity. In this regard, hearsay evidence is admissible in the court. Defense attorneys believe that the DPP so far has done a good job in showing that the person has been engaged in criminal activity and/or associated with criminals. The key challenges identified by the DPP and police in applying UWOs are lack of resources and skills to effectively perform investigatory work and prepare affidavits that could lead to successful finalization of cases. One approach was to send DPP lawyers to the police to work together in preparing cases, gathering evidence, and setting standards for preparation of evidence. This idea may be workable under the new entity responsible in the future for implementation of UWO.

The key bottleneck of UWO and other asset forfeiture schemes are the delays in hearing cases by the courts. It takes up to three months before a case is heard by the District or a Supreme Court in WA. Similarly when an application for examination order is made it takes up to three months before an order is served onto the respondent and the examination takes place. Because many countries do not contain similar statutes that provide for forfeiture of unexplained wealth it is difficult to successfully forfeit property outside of Australia. Further calculation of UWO is time consuming, labor intensive as it is hard to identify, trace and value property, with an unpredictable outcome.

The most common approach to commencing a UWO order is via an application for an examination order to gather information on properties of the respondent. An example was used by the DPP where a drug dealer known to DPP had transferred all of his property to his mother, through the use of an examination order the DPP was able to gather sufficient evidence to show that the property was in actual control of the respondent). One of the issues that impede the investigation is the intertwined finances or joined ownerships of property by more than one person. However, use of information obtained under an examination order is limited to the forfeiture proceeding and could not be used to press criminal charges. A further limitation imposed by the CPCA is the judicial overview, with the powers vested to a judge to delineate the scope of questions the examinee can be asked and those are frequently around sources and the origin of the property.

From the data available we can discern that most of the cases pursued by the DPP are cases of suspected drug dealers, bikers groups dealing with drug trafficking and cash seizure. Forfeited funds go to a Criminal Proceeds Account, mainly to support crime fighting activities, 25% is given to the police and parts of it goes to support victims of crime.

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The team heard that the Act has some deficiencies and that amendments could lead to a more frequent use of UWO. However no legislative proposal has been put forward to amend the CPCA and make it more workable. The next step in WA is determination of where the powers for UWO will lay and how will the new institutional framework look like and the powers attributed to it.

Although relatively few UWO cases have been litigated, Western Australian and the federal courts have played an important role in interpreting provisions of CPCA, narrowing the scope of some of the provisions under the CPCA, raising the threshold the government has to prove and significantly reducing it for the respondents (property owners). In the next section we discuss some of the key cases under CPCA reviewed by the Supreme Court of Western Australia and the High Court of federal government (and equivalent of the Supreme Court in the United States).

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Australian Case Law

Forfeiture provisions of the Commonwealth PoCA of 1987 were challenged early on by the respondents and defendants affected by them, challenging the proportionality of measures, their unjust nature, and, in particular, the reversal of the burden of proof onto the respondent. However, the courts have upheld the reversed burden of proof acknowledging the need for it in confiscation laws, recognizing the difficulty the prosecution would face in identifying or assessing proceeds of crime in determining the lawfulness of the property or a specific part of the property. An authoritative decision was issued by the High Court of Australia on the topic, justifying the need for reversed burden of proof as follows:

> The broad primary principles guiding a Court in the administration of justice are that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be frustrated and the very rules intended for the maintenance of the law would defeat their own objective. The usual path leading to justice if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct vindication of the law... the primary rule should be relaxed when the subject matter of the allegation lies peculiarly within the knowledge of one of the parties[190]

The necessity of shifting the burden of proof onto the defendant to show the lawfulness of his or her benefit and determine the value derived from criminal activities was acknowledged by the state and federal courts.

The reversed burden of proof was also upheld by courts in WA; although it still continued to be challenged by the respondents. Courts in WA have affirmed the reversed burden of proof to the respondent in two applications for UWOs and other CBD applications. In *Dung v. DPP*[191] the respondent was stopped by the police, and, during search, a sum of AUD$213,852.40 was found in his car. A UWO application was made by the DPP, and subsequently, a sum of AUD$200,000, the lawful source of which the respondent was unable to justify, was declared unexplained wealth and the rest was returned to the respondent. In reviewing the facts of the case, the court cited McKechnie in the matter of *Permanent Trustee Co LTD v. The State of Western Australia*[192] that explains the background of the legislation where it was stated that "it is no longer necessary for the state to establish proof of an offense beyond reasonable doubt before a person's property may be confiscated. Mere unexplained wealth may, in certain circumstances trigger confiscation".

Similarly, in *Director of Public Prosecution (WA) v. Morris,*[193]the respondent was stopped by the police, and a sum of AUD$108,390 was found. The DPP, by an *ex parte* notice, made an application for a freezing order with respect to the money and an application for an unexplained wealth declaration. The respondent applied to set aside the freezing order and objected to the automatic confiscation of his property. Prior to the hearing, the respondent submitted an affidavit tendering evidence that he had a quantity of lawfully acquired wealth. Because there are so few defended applications for unexplained wealth, the court relied on the explanatory memorandum of the Criminal Property Confiscation Bill and the second reading of the Bill, which held that:

> the most significant of these proposed reforms is the confiscation of unexplained wealth as provided by part 3 of the Bill. These provisions target those people who apparently live beyond their legitimate means of support.…More importantly it is not relevant whether or not the person has committed any offense. The clear intention of the bill is to deprive people of wealth which has been unlawfully acquired. In this regard, the bill requires a person to establish that the ultimate source of his or her wealth was lawful.

[190] *Williamson v. Ah On* (1926) 39 LR 95 at 113–114.
[191] *DPP v. Dung* [2006] WADC.
[192] *Permanent Trustee Co LTD v. The State of Western Australia,* [2002] WASC 22.
[193] *Director of Public Prosecution v. Morris* [2010] WADC 148(District Court).

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Reversed burden of proof was also upheld in *Director of Public Prosecution (WA) v. Gypsy Jokers Motorcycle Club Inc.*[194]where the court held that any person who has acquired substantial wealth by legitimate means ought reasonably to be expected to prove on balance of probabilities the source of his or her wealth.

Although the Act does not specify the type of proof required to satisfy the courts that the property subject to a UWO application, the two cases on UWO (*Morris* and *Deng*) show that courts are prone to accept as admissible evidence witness statements and any other related documents that will justify the origin of property if direct transaction records are not available. In *Morris*, the respondent was able to produce sufficient evidence through witnesses to satisfy the court, on balance of probabilities, that it was more likely than not that his property was derived from lawful sources. Subsequently, the court did not make a declaration for unexplained wealth. Conversely, in *Deng*, the respondent's failure to disclose the names of witnesses and to tender evidence to justify the origin of the frozen property resulted in its subsequent forfeiture.

Most of the existing case law under the CPCA (2000) in WA comes from court decisions concerning cases instituted under the Criminal Benefit Declarations (CBD). Although these cases are not directly related to unexplained wealth provisions, the study team ascertained from their review the approach courts have taken to interpreting and applying CPCA provisions. In addition, general provisions related to freezing orders, scope of the powers of the court, and reversed burden of proof apply for both forfeiture schemes under the CBD and the UWOs.

Although the courts have repeatedly recognized the sweeping nature of the legislation, they have in general upheld the provisions of the CPCA even though only one case challenging its constitutionality was brought to the courts. In *DPP for WA v. Hafner*[195], the respondent challenged the constitutionality on the grounds that the law had an extra-territorial effect and as such violated Chapter III of the Constitution that vests the power to enact extra-territorial legislation with the Australian federal Parliament. The case was brought by the DPP for a CBD pursuant to Section 30 of the Act, following the conviction of the defendant for a drug offense under the Misuse of Drug Act 1981 (WA), and who was liable to be declared a drug trafficker. When a person is declared a drug trafficker pursuant to Section 32(A) of the Misuse of Drug Act, all of his or her property, whether owned or effectively controlled or given away at any time before the declaration was made, is liable for confiscation. Section 30 of the Act also enables the DPP to apply for a confiscation order for any property owned or effectively controlled by the defendant, regardless of whether the property is located in WA or elsewhere. The court upheld the constitutionality of the Act relying on the authority of the decision in *Broken Hill South Ltd v. Deputy Commissioner of Taxation*,[196] where the court held that: "a state may legislate extra territorially if there is a connection between the subject matter of the legislation and the state. Once there is sufficient connection, it is for the legislature to decide how far it will go." The legislation clearly intended for the WA CPCA to have an extra-territorial effect, and in the present case, there was a sufficient connection because the respondent was convicted of a serious offense and was declared a drug trafficker by the District Court of WA. This decision is also important because it presents an opinion on the admissibility of hearsay evidence in the court. Hearsay evidence is admissible evidence in court unless the respondent challenges the evidence submitted by the applicant. The respondent's failure to object means that this evidence may be used as proof to the extent of whatever rational persuasive power it may have. The evidence so received is to be treated as if it were admissible evidence.

From a review of decisions by the courts of the state of WA and the High Court of Australia, although it must be noted that only one case under the CPCA was reviewed and decided by the High Court it can be concluded that the courts of WA interpret the provisions of the WA CPCA more narrowly, rigorously

[194]*Director of Public Prosecution (WA) v. Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61.
[195]*Director of Public Prosecution for Western Australia v. Hafner* [2004] WASC 32.
[196]*Broken Hill South Ltd v. Deputy Commissioner of Taxation*, [NSW] (19370 56 CLR 337 at 375.

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following the intent of the legislators expressed in the Act and the Second Reading of the Bill. For example, provisions in the WA CPCA stipulate that the courts must issue UWOs, CBDs, or freezing orders if requirements of the Act are to be met. On this matter, the High Court of Australia, in the only case brought before it under the CPCA, *Mansfield v. DPP of WA*[197] construed the provisions of the statute more broadly, relying on the inherent power of the courts to exercise their judicial authority. The court held that the powers conferred to the court pursuant to Section 48 of the statute are permissive and not mandatory which means that the court has the discretionary power to decide whether to issue a freezing order or not and is not compelled by the statute to issue such an order. In making its decision, the court relied on the arguments in *Bennett & Co v. Director of Public Prosecutions (WA)*[198] where the court held that it was not the intent of the legislature to compel the court to issue an order merely on the advice of the DPP and that an application for an examination order might be sought. The court will decide whether to issue such an order by considering whether or not the application was based on reasonable grounds and if it was a bona fide application.

The *Bennet* case was an appeal brought by the respondent challenging the decision of the Supreme Court of WA, Appellate Division, on two grounds: (i) that the Appellate Court found that under the WA CPCA, the DPP was not required to make any undertakings as to the damages caused by the freezing order; and (ii) the court erred in denying the power of the Supreme Court in a freezing order to allow for a payment of reasonable legal costs for the defense of related civil or criminal proceedings. The court upheld both appeals and held that the Supreme Court has been conferred the power, by Section 45 of the WA CPCA to issue varying orders in regard to the frozen property and to attach conditions or require the provisions of undertakings to diminish the possibility of oppression and injustice. The debate concentrated on the scope of the powers of the Supreme Court conferred by the WA CPCA, citing remarks of Gaudron J in *Knight v. FP Special Assets Ltd:*,[199]

> …[A] grant of power should be construed in accordance with ordinary principles and thus the words used should be given their full meaning unless there is something to indicate the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. The necessity for the power to be exercised judicially tends in favor of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse.

With this decision, the court set a higher standard of proof for the prosecution, specifying the burden of proof the DPP must meet to be granted a freezing order. Similar contentions were made in *DPP v. Gypsy Jokers Motorcycle Club Inc.*,[200] stating that the WA CPCA does not intend to prevent the court from exercising its powers in dealing with potential abuses of its processes.

The appellant sought relief requiring the DPP to provide an undertaking as to damages as a condition for the continuation of the freezing order and to release funds to fund his defense proceedings. The release of funds was refused by the Court of Appeal on the grounds that there was no power under the statute to allow release of funds for that purpose. The appeal brought by the respondent was allowed on the grounds that the WA CPCA is draconian in its operation and complex in several of its provisions and therefore there is no implicit denial of the powers of the Supreme Court to issue any order under the Act. The court, in reviewing the general impact of the WA CPCA held that the release of funds for the payment of legal expenses not only assists the respondent but also improves the efficiency of the Act.

[197] *Mansfield v. DPP for WA*, [2006] HCA 38 (2006).
[198] *Bennett & Co v. Director of Public Prosecutions (WA)*, [2005] A Crim R 279.
[199] *Gaudron J in Knight v. FP Special Assets Ltd*, [1992] 174 CLR *at 205.*
[200] *DPP (WA) v. Gypsy Jokers Motorcycle Club Inc.*, [2005] WASC 61.

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Conversely, from the decision of the High Court, the Supreme Court of WA, in *DPP (WA) v. Mansfield*,[201] decided that the Act did not grant powers to the court to vary a freezing order to allow for the release of funds to cover legal expenses. In its reasoning, the court relied on the Second Reading Speech of Mr. Barron-Sullivan, in which he stated: "…property frozen under a freezing order can be released by a court only for payment of living or business expenses. No frozen property can be released for payment of legal expenses". Similarly, in regard to the undertaking as to damages, the court held that it was the intent of the legislators not to confer powers on the court to impose the giving of an undertaking as to damages.

The Supreme Court of WA, the Final Court of Appeal took under review whether or not payment of a mortgage could be categorized as a reasonable living cost and what constitutes a criminal benefit under Section 16 of the Act in *Mansfield v. Director of Public Prosecution & Anor*.[202]The first instance court refused the respondent's request to release frozen funds to allow for the mortgage payment for the property, which also was subject to a freezing order. On appeal, the higher court reversed the decision of the first instance court holding that there is nothing in the WA CPCA that prevents the court from regarding mortgage payments as reasonable living expenses. In this case, the WA Supreme Court also considered the construction of the WA CPCA regarding the making of CBDs and what constitutes criminal benefit for the purpose of the Act. The state construed the WA Act in a way that CBD should encompass the entirety of the proceeds of the sale of the shares (traded with inside information, including the value of the shares themselves). The court disagreed with the state, holding that it doubted that the legislature intended to confiscate or take away the entirety of the property, including part of the property that was lawfully acquired. The court, relying on the explanatory memorandum of the Bill, which stated that the WA Act *is aimed at removing ill-gotten gains* and that Section 16 is *directed to wealth acquired as a result of the crime,* interpreted that the intent of the legislators was to ensure that criminals did not benefit from their criminal activities and not to impose penalties over and above those that might be imposed in a court of criminal jurisdiction. Therefore, the court specified that a CBD would cover only the actual benefits derived from the commission of the offense and not the net profits specifying that the assessed value of the benefit should be not more than what was acquired.

In *DPP (WA) v. Gypsy Jokers Motorcycle Club Inc.* (an application for CBD), the prosecution refused to disclose one of the affidavits to the respondent, relying on Section70 of the Act (Secrecy Requirements) that imposes an obligation on a person not to disclose to anyone except, as permitted, information related to an application. Although the court accepted that there might be a situation in which disclosure of information might not be in the public interest it rejected the prosecutors' contentions relying on the decision in *Re Smith; Ex part e Director of Public Prosecution for Western Australia*,[203] which held that there was nothing in Section 70 of the WA Act prohibiting the disclosure of evidence filed in support of an application for a freezing order and there was nothing in this affidavit that would justify its non-disclosure. This decision is also important because it affirms the absence of a requirement to establish a nexus between an offense and the property subject to an application. The court held that Section 43(8) enables the state to issue a freezing order over specific property if there are reasonable grounds to suspect that the property has been used in, or derived from, an offense punishable by at least two years of imprisonment; however, Section 106 makes it unnecessary to link it to a specific offense. For the purpose of issuing a freezing order it is sufficient to show that any confiscable offense was committed.

The DPP's contention that the respondent can seek leave of appeal, but that no appeal can be brought against an interlocutory order or a judgment without the leave of the judge or the Court of Appeal, was dismissed by the court. Judge Templeman held that if there was no right for appeal when dealing with

[201]*DPP (WA v. Mansfield),* [2005] WASC 79.
[202]*Mansfield v. Director of Public Prosecution &Anor*, [2007] WASCA 39.

[203]*Re Smith; Ex parte Director of Public Prosecution for Western Australia,* (No. 1) [2004] WASC 145.

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freezing orders. The court would be acting in an administrative capacity and the legislative intent of the Parliament could not have been to undermine the judicial role of the court.

Finally, in *Director of Public Prosecutions for Western Australia v. Bridge* & Ors,[204] the court dealt with the issues of retroactivity of the WA Act whereby the respondent challenged a criminal benefit declaration on the grounds that the offense is not an offense because it was committed before the Act came into effect. The court dismissed the respondent's contention and held that the WA PoCA clearly stipulates that a person has acquired criminal benefit whether or not the property was acquired or the confiscation offense was committed before or after the Act came into effect.

[204] *Director of Public Prosecutions for Western Australia v. Bridge & Ors*, [2005] WASC 36.

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Australia Conclusions

At the core of the UWO provisions of the Commonwealth PoCA 2010 is the reversal of the burden of proof to the respondent to justify that his or her wealth was acquired by lawful means and is not the proceeds of any illegal activity. The second element is the lack of requirement for the state to show that an offense has been committed or that the property owner is suspected of having committed an offense. However, the Commonwealth UWOs impose a requirement on the state to show that an offense was committed when a restraining order is sought. Any person can be the subject of UWO proceedings if there are reasonable grounds to suspect that he or she owns or possesses wealth that is not lawful. This approach expands the concept of attacking the proceeds of crime in that it attacks any property that is not acquired lawfully, whether it was acquired through a commission of one offense or a series of offenses, what type of offense was committed, and over what time period. The burden of proof on the prosecution is lower, because it must show only that a person has a lifestyle beyond his or her means. This is sufficient to satisfy the court to direct a person to produce evidence and establish the lawful origin of the property. The prosecution is not required to show that any offense was committed, further easing the burden on the prosecution in initiating proceedings.

Although UWOs were introduced for the first time as an innovative and powerful tool against crime in WA, we can conclude that their impact on fighting crime is moderate with a rather small amount of assets recovered to the state. Automatic confiscation of the declared drug trafficker, limited forensic accounting resources, tensions between the DPP and the police and lack of sympathy from the courts toward the statute, were some of the factors that dissuaded from more frequent application of UWO. However, establishment of the Task Force at the federal level seems a concerted effort of the government to ensure effective and frequent use of powers under the Commonwealth PoCA. Thus it is important for future evaluations of the UWO to monitor the application and the use of the UWO at the federal level, by the U.S. and other countries contemplating introduction of UWO. Successes or failure of application of UWOs and their successful completion rate will indicate their effectiveness.

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3.2.2 Ireland

Background

In Ireland, civil forfeiture laws reversing the burden of proof onto the respondent to justify lawful origin of property were introduced in two laws: the Proceeds of Crime Act (PoCA[205]) and the Criminal Asset Bureau (CAB) Act, both of 1996. PoCA sets out the legislative framework that enables the state to attack proceeds of crime while the CAB Act establishes the institutional framework to support its implementation. By enacting PoCA, Ireland become one of the first countries in Europe to adopt a civil forfeiture regime that reverses the burden of proof onto the respondent. At the time of enactment of the law, Irish academics pointed out that the legislation marked a new approach to crime, transitioning it from a reactive conviction-based confiscation of assets to a proactive crime control strategy.[206] Although there was little opposition to the law when it was enacted, its broad nature has been recognized by academics, practitioners, and courts. The defense bar has gone so far as to label it "radical" and "Kafkaesque".[207] Prosecutors justified its enactment on the grounds that it was a necessary response to the serious threat that organized crime posed to society. The constitutionality of PoCA has been challenged on many grounds by respondents but to date it has been upheld by the courts.

Introduction of civil asset forfeiture, in itself, does not mark a new chapter in the Irish common law tradition. It has been a longstanding principle of common law that *nemodat quod non habet* i.e., a thief cannot convey a lawful title to stolen property nor can any person into whose hands it comes resist a claim by the true owner for its return. A number of seizure and forfeiture schemes existed through various Revenue and Customs Acts[208] and other statutory regimes. More recent conviction-based confiscation schemes are found in the Misuse of Drug Act of 1997,[209] which provides for the confiscation of property following conviction of a drug offense if it was established that it was related to the offense. In 1994, the Irish Parliament introduced the Criminal Justice Act[210] which provides for a broader confiscation regime targeting proceeds of crime derived from commission of any offense, not only proceeds associated with drug-related offenses. However, the prerequisite for confiscation remained prior conviction of an offense. Under this regime, the standard for conviction of a person for commission of an offense is the criminal standard of proof—beyond reasonable doubt—the confiscation of assets is conducted in a subsequent civil proceeding with a lower standard of proof—balance of probabilities. The lower standard of proof was justified on the grounds that it was inherently difficult for the prosecution to prove a direct link between a specific offense and specific property derived from it. Forfeiture of property also was provided for under the Offenses against the State Act of 1985 which introduced a rapid confiscation scheme that granted authority to the Minister of Justice to issue an order freezing assets within a very short period of time if he or she had reasonable grounds to believe those assets belonged to an unlawful organization. There was no prerequisite requirement of the existence of a predicate offense. The minister was authorized to issue an order directing financial institutions to pay the money held in a related bank account to the Minister of Finance. In addition, the Act provided for reversal of the burden of proof, requiring the asset owner to demonstrate the legitimacy of his or her assets. According to many, key provisions of the PoCA of 1996 were modeled after the PoCA of 1985.

The PoCA of 1996 was enacted following two tragic events in Ireland. In summer 1996 two people, journalist Veronica Guerin and a detective of the An Garda Siochana (Irish police, hereinafter "Garda")

[205] Proceeds of Crime Act (1996), available at: http://www.irishstatutebook.ie/1996/en/act/pub/0030/index.html.
[206] Felix J. McKeena and Kate Egan,"Ireland: A multi-disciplinary approach to proceeds of crime," In *Civil Forfeiture of Criminal Property—Legal Measures for Targeting the Proceeds of Crime*," Simon N.M. Young, 2009. Published by Edward Elgar Publishing, Inc. (citing the work of Walsh and McCutcheon).
[207] Counselor for the respondent in *Gilligan*, p.5.
[208] *Revenue and Customs Act* (NEED TO ADD HERE)
[209] *Misuse of Drug Act of 1997*, available at: http://www.irishstatutebook.ie/1977/en/act/pub/0012/sec0001.html
[210] *Criminal Justice Act* of 1994, available at http://www.irishstatutebook.ie/1994/en/act/pub/0015/index.html

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Gerry McCabe[211], were murdered, shocking and outraging the public. In addition, the crime rate over the previous ten years had spiked, and organized crime groups involved in drug trafficking had committed what were known as "gangland murders" to protect their markets. According to statistics introduced by the Deputy Commissioner of the Garda, between 1987 and 1995, recorded indictable crime had increased by 20 percent, and serious crime had increased by almost 50 percent.[212] In this context, with the public outraged at the blatant and violent murdering of prominent figures and the drastic increase in the crime rate, it was relatively easy to introduce and gain popular support for tough-on-crime laws. It is reported that it took less than five weeks to draft and enact two laws that constitute the foundation of the civil forfeiture proceedings, PoCA and CAB Acts. It is relevant that there was no major legal opposition to PoCA, either from the private bar or civil liberties organizations. However, a number of academics expressed dissent, holding that PoCA was draconian because it infringed on the fundamental and procedural rights of respondents.

Law enforcement proponents argued that it was necessary to introduce non-conviction–based asset forfeiture because the conviction-based confiscation regimes were yielding poor results. In fact by the time of the enactment of PoCA no post-conviction confiscation order has been made or ever applied for. The laws in place required that a person be prosecuted and convicted of an offense to justify confiscation of proceeds and benefits derived from illegal activities. Members of serious and organized crime groups, especially their leaders, were becoming increasingly skilled in distancing themselves from the actual crimes. Their foot soldiers were caught and convicted, while they remained safe and out of reach of the legal system. Further, law enforcement agencies claimed that the existing law adversely affected society as a whole. The fact that very few criminals were caught and indicted served as an enticement to others to engage in criminal activities while disappointed and disillusioned citizens lost their trust in the justice system discouraging them from cooperating with law enforcement. At the same time the principals of criminal organizations assembled wealth and commanded respect which motivated others to engage in unlawful activities. Therefore, PoCA and the activities of the CAB were designed specifically to enable the state to identify and target indirectly the economic base of the principals of criminal organizations so that they no longer would be able to benefit freely from their unlawful activities.[213]

Note that not long before the law was enacted, there was a general consensus that Ireland had no need to introduce civil asset forfeiture and that the conviction-based confiscation fit the country's needs, despite its lack of results. This popular belief was further supported by the Law Reform Commission of Ireland in 1991, which, after considering the possibility of introducing civil asset forfeiture, concluded that conviction-based asset forfeiture was sufficient and corresponded to the circumstances in the country.[214] Thus, it could be stated that the public outrage in response to the Veronica Guerin and Gerry McCabe murders shifted the general approach to fighting crime and increased support for enactment of tough-on-crime laws.

Since its enactment in 1996, PoCA has been labeled a radical and disproportionate response to crime by the respondents and their attorneys, and has been challenged on the grounds that it is a de facto criminal law, thus violating basic constitutional principles and depriving respondents of the protections guaranteed by criminal law and the constitution. One of the defense attorneys in *Gilligan* stated that the Act "carves out uncharted terrain…at a great cost to civil liberties and constitutional rights, and seeks to transplant the draconian legislation of emergency powers into a different set of legal relationships".[215]Although the courts have recognized repeatedly the broad nature of PoCA and the impact it has had on fundamental civil rights, they have upheld the Act as constitutional and as a balanced measure to address crime. PoCA

[211] Gerry McCabe, detective of the Garda Siochana, was murdered June 6, 1996; Veronica Guerin, investigative reporter with the *Sunday Independent* in Dublin, was killed June 26, 1996.
[212] Statement of Deputy Commissioner Conroy in *Gilligan v. Criminal Asset Bureau,* [1997] IEHC 106 (HC), p.9.
[213] Ibid. at 4.
[214]The Law Reform Commission, "The Confiscation of the Proceeds of Crime" Ireland, 1991.
[215]*Gilligan v. CAB,* [1997] 1 IR 526 (HC).

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has, to date, survived many constitutional challenges, and continues to be implemented successfully. It also has served as a model for many other countries in designing and drafting forfeiture regimes.[216] The Council of Europe Group for Evaluation of Corruption (GRECO)[217] concluded in its annual report that Ireland had a solid legislative framework with regard to the proceeds of crime. It said, in regard to the civil forfeiture scheme, that it "was impressed by the civil forfeiture scheme which has provided the Criminal Asset Bureau with effective tools to identify and seize proceeds of crime." In addition, the CAB, the agency established to implement the PoCA, played a major role in leading the development of the Camden Asset Recovery Inter-agency Network (CARIN[218]). The CAB held the presidency of the CARIN network for several years and assisted in developing its professional and administrative capabilities.

In addition to the events of the summer of 1996, asset forfeiture and confiscation regimes in Ireland have evolved as a result of international conventions and treaties, such as the United Nations Conventions against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the Basel Statement of Principles, the Financial Action Task Force (FATF), the Strasbourg Convention on money laundering (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime), and the UN Convention against Transnational Organized Crime (2000) For the past 14 years, the length of time the law has been in existence, it has been considered moderately to very successful and there is a general consensus that it has had an impact on reducing and deterring crime. Representatives of CAB believe that during the first five years of the PoCA's implementation, many individuals involved in unlawful activities moved their activities to other regions outside of Ireland, thus significantly reducing crime rates in Ireland.

Before discussing the PoCA in detail, it is useful to examine the Criminal Justice Act (CJA) passed two years before PoCA, which provides for conviction-based confiscation. It is relevant because the Irish legal system incorporates the principle that always favors or prioritizes conviction-based confiscation over civil forfeiture. A civil forfeiture proceeding would be instituted against a person only if there was insufficient evidence to prosecute that person. If, during the investigation, more information became available and a prosecution could be initiated, civil forfeiture proceedings would cease and all the materials would be passed to the prosecutor. All investigations, for both civil and criminal proceedings, are carried out by the Irish police and the CAB.

Conviction based forfeiture

Conviction based forfeiture is governed by the CJA, providing for forfeiture of proceeds derived from drug-trafficking offenses and terrorism (Sections 4 and 8B) and all other offenses (Section 9). The CJA allows for both direct and indirect forfeiture of the proceeds of crime; that is, assets can be directly removed from the defendants or indirectly removed if assets or benefits are transferred to a third party to avoid seizure and confiscation. The court in such a case can consider it a money-laundering offense and order forfeiture. Asset forfeiture following conviction is conducted as part of the sentencing process by the trial judge. A lower standard of proof applies—balance of probabilities. Application of the lower standard of proof is justified by the difficulty of establishing the link between the offense and the proceeds because of the way the crimes are committed and the steps often taken by the convicted persons to conceal the proceeds of crime.

The Director of Public Prosecutions (DPP) applies to the High Court with a request to investigate whether or not the defendant has gained any benefit from the crime of which he has been convicted. If the court is

[216] CAB annual reports identify numerous countries that have visited the CAB to familiarize themselves with the workings of the Act. Other countries include Australia, countries in Africa, and others.
[217] Groups of States Against Corruption, "Second Evaluation Round, Evaluation Report on Ireland," 2005.
[218] CARIN was initiated in 2002 and officially launched in Hague in September. The aim of CARIN is to enhance the effectiveness of efforts in depriving criminals of their illicit profits, with particular reference to financial deprivation. Europol is the secretariat of the CARIN network.

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satisfied, based on the civil standard of proof, that the defendant has gained profit, the court may make a confiscation order. A great deal of confusion has arisen by reason of the use of the word "confiscation." In fact the court assesses the amount of the benefit and then orders the convicted person to pay that sum to the prosecution. The Order is stated to be the equivalent of an order of the High Court for the payment of a monetary sum. If the defendant is convicted of a drug trafficking offense then the court embarks on an enquiry as to the benefit of the Defendant from drug trafficking (not confined to the benefit from the offense of which he has been convicted). There is a statutory presumption that all property received by the convict within six years from the day the proceedings were initiated against him are the proceeds of drug trafficking. This is a rebuttable presumption and can be countered by evidence led by the convict. For any other offense the confiscation order may cover only the benefit derived from commission of the specific criminal offense. The legislative amendments of 1999 require that the trial court always consider whether or not it is appropriate to impose a confiscation order, no longer requiring an application by the DPP. If he or she fails to make the payment ordered by the court, he or she can be imprisoned for a period of up to ten years which if imposed must be consecutive to the sentence imposed in respect of the primary offense. If a convict refuses to pay the amount of confiscation order there is power to appoint a receivership to sell any property that can be located.

The defendant's assets and property can be restrained (frozen) pending a criminal trial to ensure that the property will be available if a confiscation order is made following the criminal conviction. The restraining order can be issued in anticipation of the conviction on an application made by the DPP. The law does not impose any statutory requirements of proof to order freezing of property. It is left to the discretion of the court to make the final decision.

Proceeds of Crime Act 1996

Just as the CJA formed the basis of conviction-based forfeiture in Ireland, the foundation of the non-conviction forfeiture of the proceeds of crime is set out in the PoCA of 1996.[219] This continues to be considered the most sweeping effort to attack the proceeds of crime in Europe. The objective of the Act as set out in the preamble is defined to be "a measure aimed at depriving the respondent of property suspected of being the proceeds of crime." As such, it aims to deprive wrongdoers of their profit as well as to diminish their capacity to finance future criminal activities. There are several elements that make the Irish PoCA unique. First, it can be applied to any property acquired before or after PoCA came into effect. Second, the state is not required to establish a nexus between a specific offense and the property, i.e., there is no predicate offense requirement. Third, what in Ireland is known as "belief evidence" or reasonable grounds to suspect that a person owns or possesses property that is directly or indirectly the proceeds of crime, is admissible evidence in PoCA proceedings. And, finally, the burden of proof at a certain stage of the proceeding shifts to the respondent to show the legitimacy of the property sought to be frozen under PoCA. Although the PoCa of 1996 contains some of the features similar to Australian UWOs, the UWO term is not used. The proceedings under the Act are commonly referred to as proceeds of crime.

Key elements of Irish PoCA:

- It is applied to any property constituting proceeds of crime
- No need to show a nexus between an offense and the property
- Hearsay evidence is admissible evidence at court
- The burden of proof shifts to the respondent

To gain a full understanding of the operation of the PoCA, it is also important to understand the CAB Act.[220] The CAB is a multidisciplinary agency whose members are from the Garda, Revenue Services, and Social Welfare, and whose primary responsibility is to implement the PoCA. The CAB carries out

[219]

[220] Criminal Asset Bureau Act (1996), available at: http://www.irishstatutebook.ie/1996/en/act/pub/0031/index.html.

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investigations of the suspected proceeds of crime and works closely with the Irish police as well as with the aforementioned Revenue Services and Social Welfare Ministry. The head of CAB, known as the Chief Bureau Officer, comes from the Irish police and must hold the rank of Chief Superintendent; the Bureau Legal Officer is appointed by the Minister of Justice, Equality, and Law Reform. Revenue Service staff are appointed by the Revenue Commissioner, and Social Welfare officers are appointed by the Minister for Social Community and Family Affairs. Members of the CAB continue to perform the duties of and remain employees of their originating offices while also performing their tasks as members of CAB. However, they must exercise their powers and functions under the direction and control of the Chief Bureau Officer. They bring to CAB the powers of and access to the body of information of their respective agencies; for example, the police have access to the police databases and the revenue officers have full access to tax records and they use their respective information for CAB needs. Further, each has the power of the other when working together, e.g., the Social Welfare officer would have the full arrest authority of the Garda officer. The concentration and assemblage of all of these powers and information at the CAB has made it a powerful and effective institution in dealing with crime. It has been repeatedly stated that the CAB has played a key role in the success of PoCA.

The preamble of the CAB Act defines its objective "to identify assets, wherever situated, or persons who derive or are suspected to derive, directly or indirectly, from criminal conduct, to take appropriate action to deprive those persons of such assets in whole or in part and to carry out any investigation or preparatory work in relation to any proceedings under the Act."[221] The CAB Act provides that all CAB officers operate under anonymity,[222] except for the Chief Bureau Officer and the Bureau's Legal Officer and that all measures should be taken to not reveal the identity of the officers. Even in situations when an officer of the CAB is exercising his or her duties under the Act, he or she will not disclose his or her identity but will be accompanied by a member of the police. In addition, whenever a task is performed in writing documentation is signed on behalf of the CAB.

As part of the legislative package Parliament enacted the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996, which, among others, enabled the Revenue Services to share internal tax information with CAB officers.

The PoCA and CAB Acts contain definitions of key concepts that clarify the objectives of the Acts as well as interpret the intent of the legislature. The "proceeds of crime" under the PoCA is defined to "include any property obtained or received at any time, whether before or after the passing of the legislation, by or as a result of or in connection with criminal conduct."[223] This is linked to the concept of criminal conduct, which is defined to include any offense that has taken place inside the state, or any offense that would constitute an offense if it occurred in the state, or an offense against the law of that state or if the property resulting from that offense is situated within the state. The inclusion of proceeds from offenses committed outside the jurisdiction of the court was rejected by the Irish courts which stated that there was no legislative intent expressed in the PoCA to target proceeds derived from offenses in other states. However, the PoCA was amended in 2005 to include the proceeds of foreign offenses that were held at any time in Ireland.

Another important concept in the PoCA is the mandatory requirement to identify a person who is in control or possession of property. However, proceedings under the PoCA are considered *in rem* proceedings instituted against property and not *in personam* proceedings. The process under the act was designed to ensure a *legitimus contradictor* as well as to identify for the public in suitable cases the person being deprived of the benefits of his criminal conduct. This issue was challenged by a respondent, who argued that the PoCA was a sanction and a penalty. The Supreme Court dismissed the argument and

[221] Ibid., s. 4.
[222] Ibid., s. 10.
[223] Proceeds of Crime Act (amendment) of 2005, Part 2, Section 3.a, available at: http://www.irishstatutebook.ie/2005/en/act/pub/0001/print.html, accessed April 3, 2011.

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held that forfeiture proceedings operate *in rem* because there is no threat of imprisonment or conviction when these measures are imposed.

The amendment of 2005 was important in remedying a number of deficiencies of the original PoCA. For example, it enabled the CAB to bring cases in the corporate name as an alternative to the personal name of the Garda Chief Superintendent or an authorized Revenue Officer. The amendment of 2005 also provided for a consensual disposition of assets before the expiration of a seven-year period[224] pursuant to a Section 3 order. In addition, it introduced provisions that enabled the CAB to institute proceedings for damages against persons or companies enriched by corrupt conduct.

Proceedings Under PoCA

Freezing Order The first stage of the asset forfeiture in civil proceedings is an interim order, which is considered one of the most difficult stages for the applicant. It is governed by Section 2 of the PoCA. However, application may be made by Garda Bureau Officer to a District Court for a search warrant of a place or a production order sought in relation to a solicitor or a financial institution. A Chief Bureau Officer can make an interim order application to the High Court on an *ex parte* basis. Given the 2005 amendments to the PoCA, applications no longer are brought in the name of the Chief Bureau Officer but rather in the name of the CAB. The applicant bears the initial *evidentiary* burden of proof and must show by the civil standard of proof—balance of probabilities – the following: (i) that a person is in possession or control of property, (ii) that that property constitutes directly or indirectly the proceeds of crime, and (iii) that its value is greater than £10,000 or €13,000 ($18,000). The applicant files an affidavit stating the requisite belief and the court may ask him to state his belief in oral evidence. If the court is satisfied that there are reasonable grounds to believe that the property in question is the proceeds of crime it will issue an interim order prohibiting the person named as the respondent, and any other person having notice of the making of the order from disposing of or otherwise dealing with all, or if appropriate, a specified part of the property or from diminishing its value during a period of 21 days from the date the order was issued. The interim order will notify parties, or any other person who may be affected by it, of the freezing of property for a period of 21 days, as well as any other conditions or restrictions considered necessary.

To prevent abuse of power and the commission of serious injustice, each phase of the PoCA contains safeguards prohibiting the court from issuing any order to freeze assets when there is a possibility for "serious risk of injustice", and enables the respondent or any other person claiming ownership of the property to seek a varying or discharging order. The court will issue a discharging order if the respondent is successful in proving that the property subject to the order is not the proceeds of crime or that its value is less than €13,000. The interim order lapses 21 days from the issuance date unless an application for an interlocutory order is brought by the CAB during that period. The Supreme Court, in *McKv. F and other*[225], held that the application must be brought within 21 days, but it does not have to be actually heard in courts during that period.

In addition an essential safeguard is contained in Section 16 of the PoCA whereby if an interim or an interlocutory order is improperly made; the Court can order the stat to pay compensation. To date no such order has been made

[224] Pursuant to Section 3 of the PoCA, the interlocutory order has to be in effect for 7 years, before an applicant can make an application for a disposal order pursuant to Section 4
[225] *McK v F and another*, [2005] IESC 5 (SC)

Appendix B
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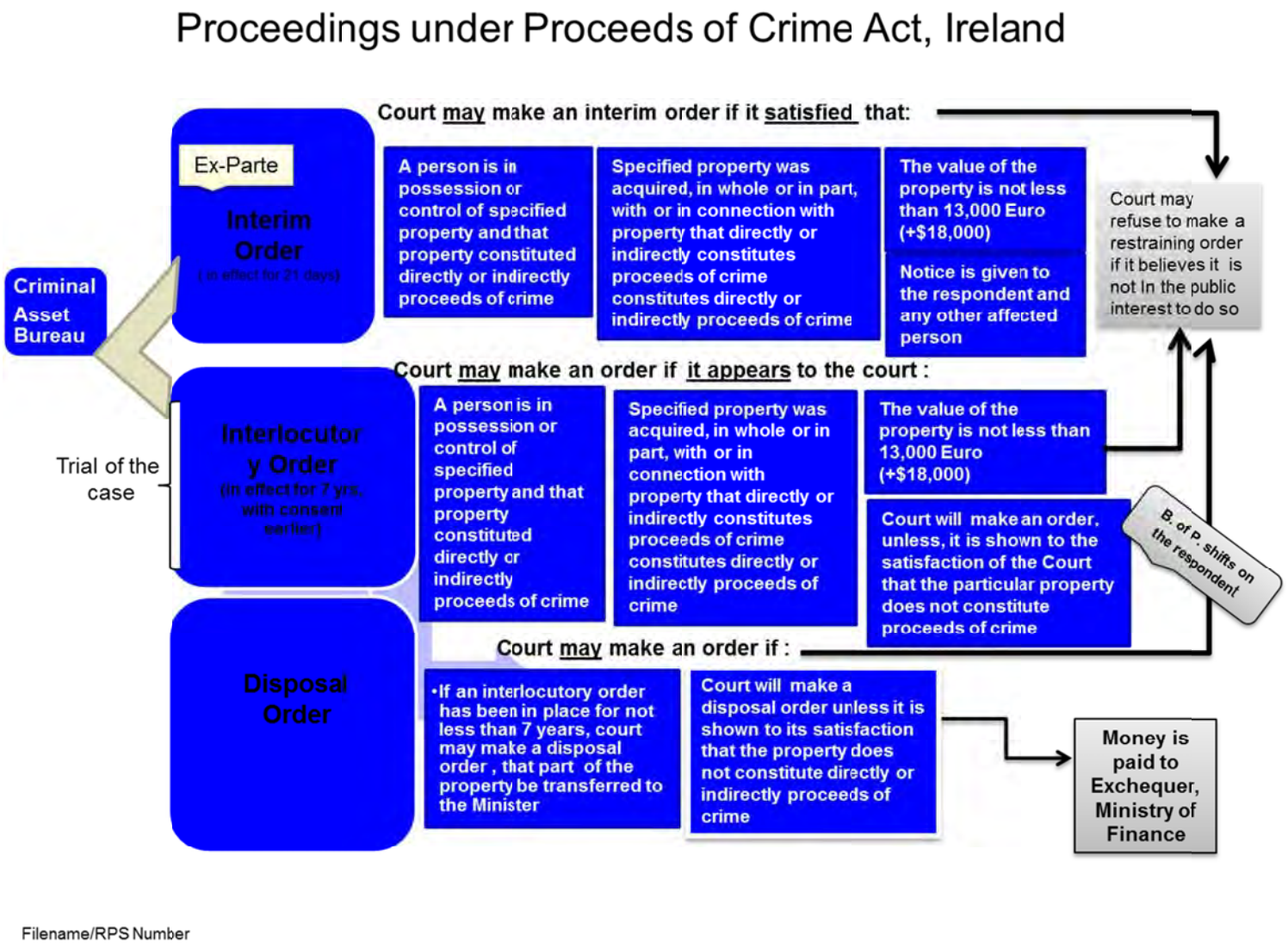

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Interlocutory-Restraining Orde*r* The second phase is the interlocutory order for which the same conditions apply as for an interim order. The applicant is required to tender evidence to the High Court that a person owns or controls property, that the property constitutes the proceeds of crime and that the property value exceeds £10,000 (€13,000). If the court is satisfied that there are reasonable grounds to believe that the property is proceeds of crime as defined it grants an interlocutory order unless the respondent provides evidence proving that the property does not constitute the proceeds of crime or is of lesser value than as required by the PoCA. It also is provided that the court shall not issue the order if it is satisfied that there would be a risk of serious injustice. At any time during an application for a Section 2 or Section 3 order, the court may issue an order, pursuant to Section 9, compelling the respondent to file an affidavit with the High Court specifying the source of the property and any income acquired during the previous ten years (later limited to six years) from the day the proceedings were initiated.

The interlocutory order remains in place until: (1) an application for a disposal order is made; (2) the time has expired for bringing an appeal from that determination; or (3) an appeal is brought and is determined or the appeal is abandoned. Otherwise, the interlocutory order remains in effect for seven years before an applicant can make an application for a disposal order pursuant to Section 4. Under the amendments of 2005, the interlocutory order also can expire before seven years if the parties agree to dispose of the property at an earlier stage, but not earlier than four years. Given that the seven-year requirement is one of the major difficulties CAB officers face, work is in process to propose an amendment to this section to reduce the period of seven years to a more reasonable timeframe.

The Irish Supreme Court, in *McK (F) v. F (A)*,[226] held that the name "interlocutory order" caused confusion, creating an impression that it was a provisional intermediary measure aimed at maintaining the just equilibrium between parties until their rights were substantively determined, implying that the court would determine the substantive issues as soon as reasonably possible, and that at a later stage the entire substance of the material could be reopened. The court went further to say that, while it is true that the court is empowered to issue an order of the type of the Mareva injunction[227], it is designed to restrain and freeze property without disposing of it. The court outlined five reasons the interlocutory order of Section 3 of the PoCA that did not have the traditional meaning of an interlocutory injunction. First, it is a free-standing substantive remedy imposing a complete embargo on any dealing with property. Second, it is not ancillary to an order to be issued under Section 4. Third, the substantive allegation is that the subject property represents the proceeds of crime and the court must be satisfied of this essential fact at the time it issues an interlocutory order. Fourth, an order is in force indefinitely unless applicants apply for it to be discharged or varied. Finally, given the length of time it must be in effect it is impossible to regard it as interlocutory in the traditional sense. The court held that this was a substantive remedy and not an ancillary order to a Section 4 order. The court also held that it is a final order that completed the Section 3 proceeding. In another case, *Mckv. F and another*,[228]the court clarified that the purpose of the Section 3 order was to freeze the property, not to deprive the owner of it.

As a safeguard, the Irish PoCA empowers the respondent or any other third person claiming ownership of the property or the respondent's dependents to apply to the High Court to discharge or vary the interlocutory order. If satisfactory evidence is tendered to the court, it may discharge or vary the order as appropriate.

At any time after the court has issued an interim order or interlocutory order the court may, on application by the applicant pursuant to Section 7 of the Act, appoint a receiver giving him or her powers to possess the property and in accordance with the court's decision to manage, keep possession, or dispose of the property. This was done to avoid potential problems arising from the issuing of an interim or interlocutory

[226]*McK (F) v. F (A)*, [2002] IESC 4 (SC).
[227] Mareva injunction is a is a court order which freezes assets so that a respondent cannot dissipate their assets until a final disposition order is made.
[228]*Mck v. F and another*, [2005] IESC 5 (SC).

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order and to prevent the owner from transferring the property to another jurisdiction dissipating or diminishing its value. The court may give the receiver powers as appropriate in individual cases including the power to take possession of the property to which the order relates and, according to the court's direction, manage, possess, or dispose of or otherwise deal with the property. In the majority of cases, the duty of the receiver is assigned to CAB legal officers.

While an interim or interlocutory order is in force the court may make ancillary or varying orders with regard to the property subject to an order. The court may, on application by the respondent or any of his or her dependents, pursuant to Section 6, issue an order enabling the respondent to cover reasonable living expenses or incurred legal expenses from the restrained property. In addition, the court can issue an order enabling the respondent to carry on a business or a profession involving the restrained property. The applications of these provisions have led to difficulties in a number of cases which prompted the Irish Department of Justice to implement an ad hoc legal aid scheme for the respondents.

Disposal Order The final phase is the disposal order or forfeiture phase governed by Section 4 of the PoCA. The interim and interlocutory phases present a transition to the final confiscation of property which is materialized with the disposal order. For the court to issue a disposal order, the interlocutory order must be in place for no less than seven years, and, in accordance with the amendment of 2005, it can be completed earlier if there is consent of all parties concerned (Section 4a of the Act). The law provides two safeguards to protect the property and assets of innocent individuals: (1) the court must give an opportunity to every person claiming that he or she owns parts of the property and who tenders sufficient evidence to satisfy the court that the property should not be confiscated, and (2) the court has the discretion not to issue a disposal order if there is a risk of serious injustice. If the respondent cannot be located, the court may adjourn the hearing of an application for a disposal order for a period not exceeding two years or as the court considers reasonable. The final decision will deprive the respondent of his or her property and transfer the title to the Ministry of Finance or to the exchequer.

Section 8 of the Act contains provisions in relation to evidence and proceedings under PoCA and provides for the admissibility into evidence of the belief of a member of Garda or an authorized officer that the assets in possession or control of the respondent constitute proceeds of crime, provided that the court is satisfied that there are reasonable grounds for the belief. Section 8 provides that a statement made by an authorized officer shall be considered as evidence if the court is satisfied that the officer had reasonable grounds. Subsection 2 of Section 8 provides that the standard of proof required to determine any questions arising under the Act is the civil standard of proof—balance of probabilities. Courts have continually accepted hearsay evidence tendered by the CAB. Further, the PoCA specifies that hearings for an interim order are heard otherwise than in public, and that the respondent can request that any hearing be heard otherwise than in public or *in camera*. Similarly, the court may, if it considers it appropriate, prohibit publication of information under the proceeding, including information related to the application and the persons to whom the application relates.

Further, Section 9 on Disclosure of Information, can be invoked at any time during the application for a an Interim or a Restraining order, which de facto shifts the burden of proof to the respondent to justify the legitimacy of his or her property or assets. The applicant can apply to a court for a Section 9 order, requesting the respondent to file an affidavit with a court specifying: (1) the property of which the respondent is in possession or control, or (2) the income and the sources of the income during such a period (not exceeding ten years) ending on the date of the application for the order, as the court concerned may specify. This order compels the respondent to produce evidence and facts that satisfy the court that the property subject to any of the orders does not constitute the proceeds of crime. The constitutionality of Section 9has been challenged by respondents, but was upheld by the Supreme Court. Although the court recognized PoCA's far reaching character, it went further to consider it an appropriate measure against the sophisticated methods of operation adopted by criminals.

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Sections 10 through 14 of PoCA deal with matters such as the registration of interim and interlocutory orders, the situation where a respondent is bankrupt and the winding up of a company in possession or control of property subject to any of the orders. Section 15 empowers a member of Garda or a Customs and Excise Officer to seize property that is the subject of the order. Section 16 provides for the granting of compensation to a respondent or any third party with an interest in the property if an interim or interlocutory order was wrongfully issued. The party making an application for compensation must satisfy the court that he or she is the owner of the property (or part of the property) and that the property does not constitute proceeds of crime.

Under the amendments of 2005, a new remedy for corrupt enrichment was introduced, empowering the court to issue an order, on application by an authorized officer, directing the respondent suspected of committing a corruption offense to pay to the Minister of Finance or another entity an amount of money equivalent to the suspected value of the enriched corruption. The court will issue such an order if it is satisfied that the respondent has benefited from his or her position or has, by virtue of exercise of his or her position, benefited some other person and if he or she does not account satisfactorily for the source of his or her income and property. In such a case, the court will presume that the property is derived from a corrupt enrichment unless the contrary is established.

Investigations and Search

Unlike Australia and many other jurisdictions (e.g., Canada, New Zealand), Ireland does not have coercive investigative powers incorporated in the PoCA of 1996; but these powers are granted to the CAB. Section 14 of the CAB Act authorized it to search, seize, and detain any property if there are reasonable grounds to suspect that the property may constitute proceeds of crime. Pursuant to Section 14 of the Act, a district court judge, or in urgent cases, a bureau officer who is a member of Garda not below the rank of superintendent, may issue a warrant for the search of that place and any person found at that place on hearing evidence by police under oath and being satisfied that there are reasonable grounds to suspect that evidence related to assets or proceeds derived from criminal activities are to be found here. In addition, the officer also is authorized to retain any materials found at the place or in possession of a person found at that place which the officer believes to be evidence related to the assets in question. A search warrant expires after seven days from the moment it is issued. In addition, the CAB can issue examination and production orders requesting any person to respond to that order. According to CAB officers, monitoring orders have not been used so far although there is nothing in the legislation preventing their use. If any person fails to respect the order, or obstructs the officer in carrying out his professional duties, he or she can be fined or imprisoned for a period not exceeding six months or both. In addition, the CAB is authorized to arrest any person if they have reasonable cause to suspect that person is committing or has committed an offense under the Finance Act.

CAB officers conduct investigatory work on all civil confiscation cases. Cases are referred to them by the regular police. On completion of an investigation the results are submitted to the DPP which makes a determination based on the evidence whether or not to initiate a criminal proceeding. A decision to bring PoCA proceedings or tax action is a responsibility of the CAB.

An important feature of the 1996 PoCA is the authorization of the CAB to apply the powers of the Tax Act and the Ministry of Social Welfare, ensuring that the proceeds of criminal activity or suspected criminal activity are subject to tax and that the Revenue Acts are applied fully to such proceeds. The provisions of the Disclosure of Certain Information for Taxation and Other Purposes Act of 1996 have been used extensively in the exchange of information between the Revenue Commission and the CAB. The CAB has initiated financial investigations based on information received from the Revenue authorities and the Revenue authorities have used information resulting from financial investigations conducted by the CAB. The implementation of the tax action on suspected proceeds of crime was forecast to be an extremely effective weapon in the process of taking the benefit from crime. Tax action was usually the third option after criminal prosecution/confiscation and PoCA action. Taxation powers were

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used in cases in which even under the PoCA proceedings were not successful. Some of the largest criminals were successfully targeted under the taxation powers[229]. Again on the social welfare side the public greatly appreciated the fresh approach in depriving obviously wealthy criminals of social welfare benefit which they were claiming wholesale.

3.2.2.1 Evaluating the Effectiveness of Ireland's UWOs

Effectiveness of the Proceeds of Crime Act

After 14 years of implementation of the PoCA in Ireland, there are ample data on the cases instituted under it and the body of jurisprudence developed by the Irish courts. This section evaluates the impact of the PoCA and its effectiveness in combating organized crime in Ireland. Recognizing the difficulty of evaluating the effectiveness of the law in a precise way, the study team took a two-prong approach: (1) assess the effectiveness of the Act from the available statistics by reviewing the number of applications made under the Act, the number of successful applications that led to forfeiture, the number of decisions overturned by higher courts, and the total value of assets forfeited to the state. In addition (2), being aware of the difficulty in assessing the impact of the Act in fighting and preventing crime, the team interviewed people and agencies directly involved with the PoCA and the CAB Act who were well able to express informed opinions on the impact of the Act. In this regard, the team interviewed former and current representatives of the CAB, the DPP, defense bar, academics, and police and reviewed media coverage of activities of the CAB and cases brought under the PoCA.

All interviewees expressed certainty that the PoCA has had a significant impact on dismantling and disrupting criminal activities in Ireland. It is widely believed (and anecdotally reported) that during the first five years of implementation of the Act, those engaged in criminal activities experienced a significant setback, whereby many criminals and principals of criminal organizations were deprived of their illegal profits and properties. It is important to highlight that the success of the Act often is attributed to the CAB which played a major role in making the PoCA a success. The Irish approach to attacking proceeds of crime has served as a model for other countries; indeed, during the site-visit to Australia, the research team learned that the Australian federal government is using the Irish CAB as a model to design a multiagency task force to implement its PoCA. In addition, other countries—South Africa, United Kingdom, Seychelles, Bulgaria, and others—have used the Irish PoCA as a model to develop non-conviction based forfeiture legislation in their countries as an approach to attack proceeds derived from criminal conduct.

The initial strategy of the CAB was to target well-known criminals and the principals of criminal organizations who were engaged in criminal activities and had accumulated large amounts of property with no apparent legitimate sources of income. These were criminals who had been on the radar screen of law enforcement for a long time, but on whom there was insufficient evidence to lead to a criminal conviction. Early CAB actions led to seizure and restraining of sizable property considered to constitute proceeds of crime. The immediate success was ascribed to the fact that those engaged in criminal activities were not skilled and did not see a need to hide the proceeds of their criminal conduct. The only remedy available to the state before the PoCA was to confiscate proceeds deriving from a specific offense following conviction of the defendant for that offense. Because the principals of criminal gangs distanced themselves from criminal activities the risk of potential prosecution and confiscation was nonexistent. This situation enabled them to freely enjoy their illegally acquired wealth. This situation changed noticeably with introduction of the PoCA and the CAB Act. The subsequent response of criminal groups was to relocate their operations in neighboring countries (e.g., Holland, Spain). In its 2004 annual report, the CAB noted that there was an increasing trend of criminals moving large amounts of cash to other jurisdictions to avoid seizure. One of the academics interviewed[230],although expressing dissatisfaction

[229] Well known criminal Gerry Hutch alias "The Monk" was successfully targeted.
[230] Interview: Dr. Colin King, University of Leeds (May 5th, 2011)

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concerning the lack of an assessment of the impact of the PoCA on combating organized crime and its current focus on numbers, still stated that "it is safe to say that the establishment of CAB and the enactment of PoCA has had significant impact, particularly in driving many criminal figures out of Ireland, but there is also the issue of that vacuum being subsequently filled by other crime gangs, or indeed whether the criminals in exile are simply running their operations from the likes of Spain and Holland".

The relocation of criminals to other countries has not had as much effect as initially contemplated because most of the criminals have maintained their illegal operations in Ireland, but at the same time are out of reach of the justice system. However, there are examples where the CAB has instituted proceedings for forfeiture of assets in Ireland in absence of a person. An example of such a case is *M v. D*, where a procedure was instituted against an alleged drug dealer to forfeit the person's property in Ireland. The overall opinion is that the PoCA has had an impact on decreasing crime rates in Ireland and, in particular, on disrupting drug trafficking operations.

After the initial operations of targeting the principals of criminal organizations, partly because of the jurisdiction issue, the CAB shifted its strategy to pursuing small and middle ranking criminals. CAB adopted a strategy to pursue cases that have a large impact in community, regardless of the size and the value of the recovered property. They targeted drug dealers living easy lives, driving expensive cars without legitimate employment. In this regard the CAB forfeited numerous properties including high end vehicle owned by drug dealers. This approach according to the CAB has had a significant impact in the community as one of the interviewees stated "mothers would be able to point to their growing children and say that crime does not pay."

Finally, the team heard that the significant impact the CAB had at the beginning is starting to diminish. Fourteen years of operation had led to successful disruption of criminal organizations and activities and there is less for the CAB to do. Also, criminals are becoming more skilled and better at concealing their operations and their proceeds through money-laundering activities. However, the conclusion of the team is that the PoCA has been effective in combating organized crime and to some degree acting as a deterrent to future engagement in criminal activities.

An advantage of assessing the statistical data of the PoCA is that all of the information on forfeiture of assets is collected and published by the CAB on annual basis and most of it is easily accessible.[231] However, there are a number of problems related to data that make it difficult to give precise figures on monies forfeited to the state. One difficulty is that the information on monies recovered before 2001, when Ireland entered the Euro zone, replacing the Irish Punt with the Euro, makes it difficult to give an accurate overall figure of funds forfeited to the state over the past 14 years.[232] Further, because most of the cases instituted by the CAB are settled, the available data are not disaggregated by number of cases settled versus those tried. Therefore, readers must bear in mind these limitations when reading the report.

The conclusion that was drawn from the information presented in Table 6 is that over the 14 years of PoCA implementation, the CAB has used the PoCA extensively to attack the proceeds of crime. From 1998 through 2009 (date of the last annual report), the CAB has made 107 applications for an interim order and 110 applications for an interlocutory order, which have resulted in 68 disposal orders. As shown by the numbers available, the CAB initiated each year an average of ten cases (except in 1999, when it made only one application for an interim order and three applications for interlocutory orders). The data

[231] Note: CAB Annual Reports from 2002 to 2009 are available online. Annual Reports from 1998 to 2001 are not available online, data were collected during team's trip to Ireland.

[232] Because we do not have the exchange rate of the Irish Punt to the US dollar during those years, we converted all numbers from both Irish Punts and Euros to Dollars based on current rates. Thus, the numbers given for the earlier years are not to be considered as precise amounts forfeited to the state. The decision to use the conversion was made to give general and approximate numbers for the funds forfeited to the state.

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show that out of 110 restraining orders, 68[233] have led to successful forfeiture of assets to the state. It is important to note that one element that affects the CAB's efficiency is that an interlocutory order must be in effect for seven years before the property can be forfeited to the state, unless the parties agree to dispose of it earlier, as provided for by the 2005 amendments of the PoCA. Therefore, there is not a direct correlation between the number of restraining orders and the number of disposal orders because the numbers of final dispositions include only the cases finally disposed. Also, the number of interlocutory orders includes cases that may have been disposed of through the tax powers as well as active cases (i.e., still on trial). Furthermore, in looking at the earlier years of the PoCA (1998–2003), no assets were forfeited to the state. The first forfeiture took place in 2004, seven years after the Act was implemented. Thus, there is a trend from 2004 onward that the number of disposal orders is higher than the number of interlocutory orders or even.

Table 6: Number of Applications Made Under the Proceeds of Crime Act

	Total Number of Orders											
Year	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
Interim Orders	7	1	5	4	12	11	10	10	7	16	24	17
Interlocutory Orders	6	3	7	13	7	6	10	11	9	8	14	16
Variation Orders						NA				2	2	2
Disposal Order (S4)						NA	2	13	3	3	2	7
Disposal Order (S4 A)									14	4	11	9
Receivership		2	6	12	7	9	15	13	8	11	25	20
2007												
Total Forfeiture Orders	0		0		0		2	13	17	7	13	16

The total amount of assets forfeited to the state (converted to $US) since 2004, when the first forfeiture took place, is $15,744,100. On average, as shown in Table 7, each year the CAB forfeited from €1.5 million (approx. $US2M) to €3 million (approx. $US4M) to the state, with the largest amount of funds forfeited to the state in 2006 and the smallest amount in 2004. From the numbers of applications (Table 7), it can be concluded that CAB activities were consistent, with approximately the same number of applications being made each year (except for 1999).

One of the CAB's most effective weapons is its tax powers, the ability to tax property derived from crime. The largest amounts of funds collected by the CAB are under its revenue powers. Since 1998 (period of 14 years), the CAB has forfeited to the state a total of US$160M.

[233] The number of 68 orders include only number of the Proceeds of Crime orders made by the court. In this number are not included tax and social welfare orders that are also used to target proceeds of crime. The reason why these orders are not included is because such data do not exist, the only information available is the lump sum of monies recovered through these schemes.

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Table 7: Amount of Funds Forfeited to the State from 1998 to 2009

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Disposal Order (S4)	**€0**	**€0**	**€0**	**€0**	**€0**	**€0**	**€276K**	**€2,003K**	**€685K**	**€907K**	**€785K**	**€870K**
Disposal Order (S4 A)	**€0**	**€0**	**€0**	**€0**	**€0**	**€0**	**€0**	**€0**	**€2,537K**	**€528K**	**€2,017K**	**€393K**
Total Forfeited	**€0**	**€0**	**€0**	**€0**	**€0**	**€0**	**€276**	**€2,003K**	**€3,222K**	**€1,435K**	**€2,802K**	**€1,263K**

Recovered funds using the tax powers include tax and interest collected on income, capital gains, value added tax (VAT), and corporation tax. The largest amount collected is under the income tax, followed by the VAT and the corporate tax. It is important to note that a number of proceedings instituted under the PoCA could also have resulted in taxation of those proceeds in addition to forfeiture of the property, or, if unable to forfeit property, unpaid taxes would be collected. Smaller amounts of funds were recovered through the powers of social welfare, totaling about $9 million overall.

As noted in Table 6 and Table 7, monies recovered under the PoCA are not large. However, if they are looked at in combination with the money recovered from the tax powers available to the CAB, it substantially increases the total amount of funds forfeited to the state. On average as it can be seen from the Table 8, the CAB received €5-7 million. In 2007 for example, the CAB received from the state an annual budget of €5,1M (US$7.2M[234]) and they forfeited to the exchequer €10M (UA$ 14M), of which €1.4M (US$1.9M) were from the PoCA. However, it is important to note that there is not a direct correlation between the CAB's budget and the funds recovered under the Proceeds of Crime Act, as the funds are used to investigate and pursue cases under revenue and social welfare powers attributed to the CAB. In general it could be concluded that the CAB has recovered substantially more assets than it has received from the Parliament, with largest amounts of funds are recovered from the revenue powers. Substantial amounts of tax, running to many millions of Euros, were paid in by individuals with a greater or lesser connection with crime voluntarily. This was perceived to have motivated the CAB's involvement in targeting proceeds of crime through revenue provisions. And finally it is important to note that the success rate of the implementation of civil forfeiture to date is almost 100 percent, with two cases not leading to forfeiture.

[234]Conversion rate: €1=US $1,41, on July 12th, 2011

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Table 8: Annual budget of the CAB and funds recovered[235]

Year	CAB Annual Budget €	US $	Forfeited to the Exchequer	US$
2004	€ 5,675,000	$8,014,746	N/A	$0
2005	€ 5,246,000	$7,408,873	€ 18,500,000	$26,127,365
2006	€ 5,205,000	$7,350,969	N/A	$0
2007	€ 5,108,688	$7,214,949	€ 10,000,000	$14,122,900
2008	€ 7,509,000	$10,604,886	€ 12,000,000	$16,947,480
2009	€ 6,877,000	$9,712,318	€ 6,600,000	$9,321,114

As stated previously, the success of PoCA is attributed to the excellent multidisciplinary teams of the CAB, composed of members of Garda, Revenue Commissioners (including tax and customs officers), and employees of the Department of Social, Community and Family Affairs, who operate under the guidance of the Chief Bureau Officer (CBO) selected from the ranks of senior Garda. In addition, the CAB has a Legal Officer who reports directly to the CBO as well as administrative and technical staff who support CAB operations.

The CBO is appointed by the Commissioner of the Irish police; the CAB Legal Officer is appointed by the Minister for Justice, Equality and Law Reform, with the consent of the Attorney General. Similarly, representatives of the Revenue, Social Welfare, and Police are nominated by their respective organizations and appointed by the Ministry of Justice. There was a substantial effort made to attract and retain highly motivated, qualified, and skilled members for the CAB, using such incentives as danger pay and anonymity provisions to safeguard the identity of CAB members and their families.

What makes the CAB unique is that it brings together the powers of, and personnel from, three different agencies under the umbrella of an independent agency who work together to combat organized crime. That is, the members of the CAB—police, revenue, and social welfare officers—retain the powers and duties vested in them within their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime from three different aspects, forfeiting property constituting proceeds of crime, taxing it, and denying social welfare payments to the respondents who own or control such property. In this regard, the CAB has access to the police database PULSE[236] (containing comprehensive information on any individual on purchases, misdemeanor offenses, and other activities), tax, and customs and social welfare records, which enables the CAB to gather large and comprehensive amounts of information on any individual targeted by the CAB. The CAB's access to such a large body and variety of information is considered one of its most formidable powers, and it is said that it creates an uneven playing field for respondents and their attorneys. In addition, when bringing a tax assessment application against a person the CAB, it is permitted by the statute not to share the sources of information with the respondent making it difficult for the respondent to challenge the allegations of the CAB and to discharge the burden of proof. However, the CAB's reputation according to our interviewees is stellar, and it is considered a highly professional, skilled, and serious organization.

The CAB has a total staff of 60–80 employees that has been maintained for a number of years since the CAB was established, although the number of employees at the earlier days was around 40. Within the CAB are four teams, each of which includes Bureau's investigation representatives from customs, the police, and tax and social welfare. Each team has a team leader, who usually is a member of the police.

[235]Funds received and recovered from 2004 to date. Only figures since 2004 have been selected since the first property under the PoCA was forfeited in in 2004, seven years after enactment of the PoCA.
[236] Police Using Leading Systems Effectively (PULSE) is a database of the police force of the Republic of Ireland.

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The CAB also engages highly skilled computer technicians and forensic accountants to assist with the case work and has trained asset profilers throughout the ranks of the Irish police who are the primary source of information for new cases. In addition, the CAB can draw on specific expertise when needed by calling lawyers, bankers, and other professionals. Resources, financial and human, did not seem to be an issue for the CAB.

The High Court appoints a judge to work on civil forfeiture cases for a period of at least two years, assisted by a special registrar. This is considered one of the major factors contributing to the high success rate of civil forfeiture proceedings. However, it is important to note that some cases have dragged on for a long time delaying confiscation indefinitely.

As stated previously, the CAB has a stellar reputation, and often, when problems arise in other areas outside the purview of the CAB, there are references made to engaging the Bureau to resolve arising problems, i.e., citizens ask, "Where is the CAB" even though the problem is outside of the area of its operation. In this regard, with the 2005 amendments to the PoCA, the CAB's powers were extended to deal with politicians who profited from corruption (e.g., bribery for land rezoning, allocation of specific licenses to individuals or corporations). It is difficult to determine from the available statistics if any cases of corruption have been instituted to date.

The CAB worked hard to establish it reputation and continues to work hard to maintain it. There are several factors that play a part in this reputation. One, it selects highly skilled and committed team members. Two, it carefully screens and selects the cases it will pursue, scrutinizing each case against three criteria: (1) feasibility; (2) assets, and (3) criminality. That means that for the CAB to pursue a case there must be sufficient evidence to raise a reasonable suspicion that the person has been engaged in criminal activity. This does not impose a requirement of a predicate offense. It means only that there must be sufficient grounds to lead the CAB to believe that the person is engaged in criminal activity. The other two criteria are related to assets the person owns or possesses and the feasibility of the case. The first scrutiny of the case is performed by one of the teams and the team leader; the second filter is the team leader and the Bureau's Legal Officer; and the third filter is the Chief Bureau Officer. The CBO makes the final decision on each case. This deliberate and careful selection of cases has had a positive impact on the efficiency of the CAB's work as well as its reputation. This has resulted with more than 90% success rate of concluded cases. Only two decisions have been overturned by the Supreme Court.

Although the CAB has played a large part in making civil asset forfeiture a success, the PoCA itself also has merit. The law is well drafted and is broad enough that it vests sufficiently broad powers on the CAB that enable it to attack the proceeds of crime from many angles. The team was told that the way PoCA is structured there is not much what the Bureau could not do. Obviously, although this has been an advantage for the CAB, it has been considered abuse of power by the state[237], as a result causing inequality of arms whereby the respondent must face a powerful organization with unlimited resources and access to any information available.

The strengths of the PoCA are: (i) it is a comprehensive forfeiture law that enables the CAB to forfeit proceeds derived from any criminal conduct; (ii) it does not have a requirement of a predicate offense, it is sufficient for the state to show that there are reasonable grounds to believe that the respondent has been engaged in unlawful activity; (iii) it reverses the burden of proof onto the respondent to show the legitimacy of his or her assets; and (iv) it provides for a discovery order, whereby a court can order the respondent to disclose any assets he or she owns or controls and their source.

In rem civil forfeiture is not new to Ireland, but civil forfeiture of proceeds of crime has introduced a new approach to attacking tainted property derived from criminal conduct. With the introduction of the PoCA, Ireland created comprehensive forfeiture legislation that enabled the state to forfeit property or assets constituting proceeds of crime derived from any type of offense. A large majority of civil asset forfeiture

[237] Interview with Dara Robinson, Dublin, June 10th, 2011.

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provisions in the U.S. are found in numerous laws and statutes and are subject of different rules. In Ireland, this has been resolved with an all-inclusive forfeiture scheme and creation of a statutory entity solely responsible for implementing the PoCA.

There is an ongoing debate whether the PoCA is an *in rem* or an *in personam* forfeiture scheme. The Act has a requirement that to commence any proceeding, a person who is in control or possession of property must be identified. An exception is provided when the owner cannot be identified or has absconded. In all other cases, applications for any of the orders can be brought against the person/property owner and any property that the person owns or controls if he or she cannot show that the property was lawfully obtained. However, the Irish courts have held that the proceedings are *in rem* because they target the property and not the person, so no action is taken against the person and no sanction is imposed. Further, the absence of a requirement to establish a nexus between an offense and the property leads to the conclusion that the PoCA targets criminal conduct of a person and the property related to criminal conduct. Thus, the CAB does not have to prove that specific funds were derived from a specific offense and were transferred or used in acquiring a specific property. It requires only that it be shown that a person has been engaged in criminal conduct and that he or she has lived beyond his lawful means. These two elements are the key elements that make a proceeding an *in personam* proceeding, as the Act is not construed to deal with instruments of crime and the proceeds derived from commission of a specific offense. The Act is construed more broadly to target the property of the person engaged in criminal conduct. Although the argument of the courts that this is not a sanction imposed against the person is true, it is nonetheless a measure that is imposed against an individual.

The reversal of the burden of proof onto the respondent is controversial and highly challenged around the world. Many other countries have contemplated introducing the reversal of the burden of proof onto the respondent, who is in the best position to justify the legitimacy of the property. However, because the controversy and the belief that it violates fundamental principles of human rights—presumption of innocence—many countries have withdrawn it, and the PoCA was often criticized by the European Union as too far reaching and radical. However, in reality and in practice, the reversal of the burden of proof is less controversial and not as harsh as it is thought to be. First, for the burden of proof to shift onto the respondent the state must meet its burden, known in Ireland as the evidentiary burden of proof.

As the team witnessed, both in Ireland and in Australia, the evidentiary burden of proof the state must meet has a higher threshold than that of the respondents. Whether this is a result of the work of the CAB or the Australian DPP, it is difficult to ascertain, but we have repeatedly heard that the courts have played an important role in raising the bar. The CAB is careful to prepare high-quality and convincing evidence for each case because CAB personnel know that the courts will judiciously scrutinizes and demand convincing and persuading evidence. The quality of the affidavits and the evidence put together by the CAB for each case is of exceptional quality. Members of the defense bar (barristers) recognized this, stating that although they had issues with the way the statute was construed regarding the powers of the CAB, the work of the CAB was highly professional.

An application for an interim order or an interlocutory order prepared by the CAB presents a comprehensive overview of the respondent's lifestyle, presenting reasonable grounds to suspect that a person has been engaged in criminal conduct. These statements can be supported by the statements of the Chief Bureau Officer, police officers, and any other person. Further, the affidavits are supported by evidence prepared by forensic accountants on the basis of lifestyle analysis (income and expenditure), banks and other financial institution records, revenue records and social welfare, as well as criminal activity. All the evidence is presented to the court when an application is made. However, this is not sufficient to shift the burden of proof onto the respondent. During the hearing, the court must determine the credibility of the evidence according to the standard set by Justice McCracken in *McK v. D*,[238] where it was held that Section 8of the Act envisages a two-stage process for evaluating the evidence; initially,

[238] *McK v. D*, [May 2004], Unreported case (transcript of hearing).

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the court hears the evidence and invites the applicant as well as the respondent to cross-examine the witnesses, and then the judge determines the weight he or she will attach to the testimony. Only when a judge determines that the evidence is credible does the burden shift onto the respondent. Thus, the respondent is given an opportunity to cross-examine the witnesses and to challenge the allegations made by the CAB before he or she bears the burden to establish the legitimacy of the property subject to a proceeding. Thus, the state must meet a higher threshold of the burden of proof before it shifts the burden onto the respondent to rebut the state's allegations. However, opponents of the reversed burden of proof hold that the state, with its powers and access to considerable resources, has far greater possibilities to present evidence against an individual who may lack the knowledge, information, and resources to counter the state's allegations. On the other hand, the reversal of the burden of proof in a civil proceeding does not violate the presumption of innocence because no one is pronounced guilty, or tried for commission of a specific offense. This is a civil proceeding and the principles of the criminal law such as presumption of innocence are not applicable. Furthermore, in practice, the burden shifts onto the respondent only after the court is satisfied that the person has acquired property through illegal activities, regardless what those activities are or when they occurred.

Finally, one of the distinctive features that makes the PoCA unique is Section 9, or disclosure orders. This provision provides that a court, on an application by the CBO, can direct the respondent to disclose all properties and incomes that he or she owns or possesses, and their sources. The statute does not foresee any sanction if the respondent does not comply. However, the inherent powers of the court apply, whereby a person can be held in contempt of the court, or, if he or she provides false information, can be charged with an offense. The severe nature of the disclosure order, otherwise known as discovery, has been recognized by both the CAB and the courts. The CAB has rarely invoked this power, and only a few applications for a discovery order have been made. The courts have ruled that when a discovery order is made use of the information must be limited to civil forfeiture proceedings; it cannot be used to make criminal charges against a person. The DPP is required to give an under taking that the material will not be used in a criminal prosecution of the person in this regard.

Assets forfeited by the CAB are transferred to the Exchequer. Part of the funds can be used to cover the reasonable legal expenses of the respondent as well as to cover the receiver's costs for managing and maintaining the property, as well as payments to other countries party to a proceeding or paying the victims of offenses. Unlike many state forfeiture programs in the U.S., none of the funds forfeited are transferred to the CAB because of a perceived conflict of interest.

The general sentiment of the public is that the CAB has not abused the powers available to it, and has always, with exceptions, targeted those known for their criminal activities. Our search of media reports found little criticism in regard to cases instituted by the CAB that have led to forfeiture of assets.

The PoCA legislation is perceived as being well construed but it does have flaws and the CAB has taken actions to amend it. First, the PoCA was amended in 2005 allowing for the forfeiture of proceeds deriving from crimes committed outside of Ireland. Although it was considered that this was provided for in the original Act, the court ruled that proceeds of foreign offenses could not be the subject of a proceeding in Ireland.

The second perceived weakness of the PoCA is the requirement for a restraining order to be in place for a period of seven years before the property can be forfeited. An attempt to remedy the situation was made in 2007, when the Act was amended to allow for forfeiture of property with mutual consent of the parties, before expiration of the seven-year period. However, problems continue. Having a property under a restraining order for a long period of time may result in possible depreciation and devaluation of the property and it also requires resources and assets to be monitored and managed. In particular, property under a restraining order may continue being used by the respondent or his or her dependents. In addition, the global financial crisis has depreciated the value of non-fungible property under restraining orders. Therefore, the CAB is in the process of preparing a draft proposal to reduce the time period required for

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an interlocutory order to be in effect from seven years to two years, and to maintain the provision that provides for disposition of property with the parties' consent.

The CAB identified an issue that requires attention: its ability or lack of ability to dispose of property while the interlocutory order is in effect. That is, maintaining and controlling the property often has become strenuous and expensive for the CAB because resources are used to maintain a property that may not be worth it. Thus, the CAB seeks to amend the Act and incorporate a provision that enables the CAB to dispose of certain properties and deposit funds in an account until final disposition of the case.

An impediment the CAB faced at the onset was coordination and access to tax records. The revenue code limited the use of tax records for purposes of tax administration, preventing revenue officers from sharing them with CAB officers. However, the situation was remedied with the Disclosure of Certain Information for Taxation and Other Purposes Act in 1996, which amended the code to facilitate the assessment and collection of taxes by a body like the CAB. The most important amendment is the provision to the 1994 Act that permits the exchange of information between the Revenue Commissioners and the Irish police in appropriate circumstances.[239]

Other challenges faced on the course of implementation of the PoCA were: (i) delays in final disposition, (ii) delays at the court due to a large backlog of cases at the Supreme Court, and (iii) difficulty in obtaining sufficient admissible evidence that would lead to asset forfeiture and lawyers have used the process to avoid confiscation. Provisions have been made to ensure sufficient protection for the respondent and any innocent owner, but this feature has and is being abused by respondents and their attorneys. There are a number of cases that have been in the courts for more than 14 years; for example, Gilligan, which is one of the earlier cases brought under the PoCA. The most recent decision was made in January 2011, to which there is an appeal in the process. However, the abilities to remedy the situation are limited.

The PoCA was and continues to be subject to criticism by academics, the defense bar, and others, including European countries that consider civil forfeiture to be a drastic response to crime. The broad nature of the Act has been recognized by the Irish Supreme Court as well as by other courts, but they have justified it as a measured and proportionate response to the crime and the threat it poses to society. On the other hand, academics believe that it is a fundamental breach of traditional justice violating the right to due process and is open to abuse.[240] Similarly, members of the defense bar believe that powers vested in the CAB are too far reaching and create a gross imbalance of power between the respondent and the state.[241] It has been especially criticized for the investigative power of the CAB. This power derives from the combination of revenue, police, and social welfare, and access to a large amount of information, a powerful weapon in the hands of the CAB. Critics state that this power discriminates against the individual party to a proceeding. Although it was stated that there is not a sentiment that the CAB has abused these powers, it is believed that the CAB uses them extensively to investigate and pursue proceeds of crime cases.

Defense bar members also criticize features of the PoCA that the CAB considers critical to successful application of the Act. These features include the admissibility of "belief evidence" or a statement by an authorized officer that there are reasonable grounds to believe that the respondent owns or controls property that is proceeds of crime. They further criticize the provisions safeguarding the anonymity of the CAB members as well as that of witnesses on whose information the CAB relies, and the use of the PULSE database for information. The defense bar also claims that the PoCA breaches fundamental property rights.

[239] Felix J. McKenna and Kate Egan, "Ireland: A multi-disciplinary approach to proceeds of crime," p. 52–92, in Simon N.M. Young, *Civil Forfeiture of Criminal Property*, 2009, Edward Elgar Publishing, Inc.
[240] Interview: Demot Walsh, Professor of Law, University of Limerick (March 4th, 2011)
[241] Interview: Dara Robinson, Barrister, Ireland (May, 10th, 2011)

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In most cases, the main concern expressed by legislators, legal professionals, and others is the potential for abuse of power under the PoCA. In the study's review of a considerable amount of case law, and during the team's interviews with representatives of various agencies, this concern was never expressed, nor were there cases in which there was a potential for abuse. Further, during the past 14 years of implementation there have never been accusations or media reports of potential abuses of the Act. This speaks highly of the professionalism of the CAB officers and the cases they chose to pursue.

Finally, the PoCA has been highly targeted on and limited to specific areas of criminal activity. The major areas of criminal activists against which the Act has been used are drug-trafficking offenses, financial fraud, VAT fraud, corruption, and corporation offenses.

In Ireland, both the anecdotal and statistical evidence lead us to believe that the PoCA and the CAB, with its extensive powers, have had an impact in reducing criminal activities in Ireland. Statistics show that the CAB has used these powers extensively and quite effectively. The available data on the number of cases commenced by the CAB and the number of orders made, as well as the successful application of the cases, show that the CAB has continued to work consistently in attacking proceeds of crime and that it is doing so successfully.

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Irish Case Law

Since enactment of the PoCA in 1996, Irish courts have developed significant jurisprudence on it, clarifying and interpreting provisions of the Act, delineating timelines, and providing future guidance for the CAB and the respondents. The courts have on many occasions recognized the broad nature of the legislation permitting a person to be deprived of his or her property based on allegations supported by hearsay evidence. Nevertheless, they continue to uphold its constitutionality holding that the PoCA is a proportional response to the risk society faces from serious and organized crime. The structure and the workings of PoCA have been justified on the grounds that professional criminals have adopted sophisticated means to conceal the proceeds of their criminal activities from authorities and the state should respond proportionately.

PoCA also has been challenged by respondents on the basis that it does not uphold the fundamental rights guaranteed under the European Convention of Human Rights (ECHR). Irish courts have contended that the decisions of the ECHR cannot present grounds on which local legislation can be declared unconstitutional. The Judge of the High Court, in *Murphy v. GM PB PC Ltd*,[242] held that, "I am bound by the repeated decisions of the Supreme Court that the European Convention of Human Rights is not part of the domestic law of this jurisdiction." He added that most of the protections afforded by it were already enshrined in the Irish constitution.

The constitutionality of PoCA was challenged on the grounds that it was ersatz de facto civil law and that it violated the constitution because it did not uphold the rights guaranteed by it such as the presumption of innocence, privilege not to self-incriminate, and the right to private property. Whenever reviewing the constitutionality of PoCA of 1996, as well as other Acts passed by the Oireachtas (the Irish parliament), Irish courts have followed a number of principles stipulated in *East Donegal Co-operative Limited v. Attorney General*[243], cited in *Gilligan v. CAB*,[244] where it was stated that the court would consider the challenged provisions constitutional until the contrary was clearly established by the respondent. The court would always favor the provisions in case of doubt and would not declare them unconstitutional if they could be construed to be in accordance with the constitution. It would be presumed that it was the intention of the legislators for the proceedings to be in accordance with the principles of constitutional justice. However, in *Murphy* the court held that because of the circumstances in which the Act was passed, the presumption of constitutionality in this case was less strong than in other cases. However, the court added that the presumption of constitutionality arises from the obligation the courts have toward the Oireachtas legislators.

Another challenge was that in substance, it was a criminal law without the protections afforded by the criminal law, such as presumption of innocence and application of the standard of proof—beyond reasonable doubt—required in criminal cases. The High Court, in *Murphy v. GM PB PC Ltd*,[245]upheld the civil nature of the Act and reasoned that the proceedings under the Act do not contain the "indicia of crime" as prescribed by Justice Kingsmill Moore J., in *Mellingv. O'Mathghamhna*[246] where it ruled that no one is charged with a criminal offense, there are no prosecutors, no offense is created, no sanctions are imposed, and there is no *mensrea*. The court further held that forfeiture under the PoCA is an *in rem* proceeding and that forfeiture does not constitute a penalty or a punishment but that it is a measure imposed on the respondent whose aim is to restore or remedy the situation. This conclusion was further supported in *Goodman v Hamilton*,[247] stating that there is nothing in the Irish constitution requiring that charges be brought only in one of the proceedings. Similar contentions were made by the respondent in

[242]*Murphy v. GM PB PC Ltd*,[1999] IEHC 5 (HC).
[243]*East Donegal Co-operative Limitedv. Attorney Genera [1970] IR 317*
[244]*Gilligan v. CAB*, [1997] 1 IR 526 (HC).
[245] Ibid. at 26.
[246]*Melling v. O'Mathghahn*, [1962] IR 1 at pp 24/25.
[247]*Goodman v. Hamilton* (No. 1), [1992] 2 IR 542.

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Gilligan v. CAB[248] but the court dismissed the claims, relying on the authority of the decision of the Supreme Court in the *Southern Industrial Trust*[249] case which established that forfeiture proceedings are not necessarily criminal in nature. It was further held in *Gilligan* that there is no constitutional bar on the determination in civil or other proceedings of matters that may constitute elements of criminal offenses and affirmed that the proceedings under the PoCA are civil in nature. The court, in *Murphy v. M(G)*[250] even relied on several U.S. Supreme Court decisions[251] contending that proceedings under Sections 3 and 4 are civil proceedings.

In reviewing whether or not enactment of the PoCA was a proportionate response to the threat posed to society, the High Court, in *Gilligan*, held that the legislature was justified in enacting the PoCA of 1996 restricting certain rights through the Act. The court held that the Supreme Court and the High Court "have accepted the principles that rights, even constitutional rights, are not absolute, but may be restricted where required by the common good or the need to protect society.[252]" This ruling cited a number of landmark cases where the court stated that citizens' rights are not unlimited and that the state is entitled to encroach on those rights by imposing forfeiture to prevent and deter future crime. In determining the proportionality of PoCA, the court relied on the judgment in *Heaney and McGuiness v. Ireland*[253] which laid out authoritatively the test of proportionality, attempting to maintain the balance between the notion of minimal restraints of rights and the necessity of the common good. The court there cited a recent formulation of the Supreme Court of Canada which held that:

> The objective of the impugned provisions must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test, they must; a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; b) impair the right as little as possible; and c) be such that their effects on rights are proportional to the objective.[254]

This test also is frequently adopted in the ECHR.[255] The court reasoned that restraining some rights was justifiable but went further and added that it was essential to limit any restriction of those rights as much as possible and that those rights must be balanced with various safeguards included in the Act. Grounds for justifying the limitation of rights included the sophisticated criminal operations carried out by criminals who were able to make themselves immune to the ordinary procedures of criminal investigation and prosecution, and who, through fear and threat, prevent others from passing information to the police. Finally, the court held that it was particularly concerned about Section 9 of the Act and the manner in which it may affect the privilege against self-incrimination, and about Section 8, which permits admissibility of hearsay evidence. The court emphasized that courts must be careful when issuing an order under Section 9 limiting the use of the information obtained under this section and not allowing the use of this information for any future criminal prosecution.

The burden of proof under the PoCA shifts to the respondent in two situations. First, Section 9 of the Act authorizes a court to issue an order compelling the respondent to disclose and specify property in his or her possession or control and sources of income. Second, under Sections 2 and 3 of the Act, after the CAB establishes and satisfies the court that the concerned property constitutes proceeds of crime, the

[248] *Gilligan v. CAB*,[1997] 1 IR 526 (HC).
[249] *Attorney General v. Southern Industrial Trust Limited and Simons*,[1960] 94 I.L.T.R. 161.
[250] *Murphy v. M(G)*, [2001] IESC82 (SC).
[251] Including *United States v. Ursery*,(1996) 135 L Ed 2D549, citing Reihnquist C.J., that the U.S. Congress has authorized the government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based on the same underlying events. *Various Items of Personal Property v. United States*, 282 US 577, ... forfeiture proceedings are instituted against the property, while a criminal prosecution is instituted against a person, and forfeiture is no part of the punishment for the criminal offense.
[252] *Gilligan v Criminal Asset Bureau and Others*(Transcript) 1997
[253] *Heaney and McGuiness v. Ireland*, [1994] 3 IR 593.
[254] *Chaulk v R* [199O] 3 SCR 1303 pp 1335 and 1336
[255] *Kearns Newspapers Limited v. United Kingdom*, [1979] 2 EHRR 245.

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respondent must tender evidence to establish the contrary and refute the state's claims. The provisions that shift the burden of proof to the respondent have been challenged frequently by respondents on the grounds that they violate the privilege against self-incrimination, the right to silence, and the presumption of innocence. In *Murphy v. M (G)*, the respondent held that there was no equality of arms between the parties because evidence of opinion was permitted in the case of the applicant but not in the case of the respondent. The court disagreed, stating that the respondents, as property owners, should be able to submit evidence regarding the origin of the property without calling on opinion evidence. In support of the decision, the court referred to a decision of the Privy Council, in *McIntosh v Lord Advocate*[256] in which it was stated that:

> Direct proof of the proceeds is often difficult, if not impossible… assumptions that property held by the accused could in certain circumstances be assumed to have been received in connection with drug trafficking…. They related to matter that ought to be within the accuser's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.

The court further referred to the decision of the ECHR, in *Phillips v. United Kingdom*[257], in which the court disagreed with the appellant's contentions that assumptions under the Act of 1994 violated the right to be presumed innocent holding that the court had carried out judicial procedure including holding public hearing, requiring advance disclosure of the prosecution case, and enabling the applicant to submit further evidence. The court held that the appellant could have rebutted assumptions under the Act, on balance of probabilities, and showed lawful origin of his property. The court held that it was a matter for the court, in considering hearsay evidence, to decide what weight should be given to the evidence.

Respondents in *Gilligan v. CAB [1997]*[258] (same parties but different appeal) contended that the reversal of the burden of proof was unfair and impermissible and that it violated Article 38.1 of the Constitution, breaching the natural justice and constitutional justice. Counsel for the respondent also claimed that Sections 2 and 3 of PoCA were in breach of Article 38.1 of the Constitution because they required the plaintiff to establish that the property that was frozen under those sections was not the proceeds of crime, failing to protect the presumption of innocence. In earlier debates, it was considered that the legislation did not foresee the reversal of the burden of proof but merely a reduced standard of proof. However, the Supreme Court, in recent cases, has concluded that the burden of proof was in fact reversed but that it occurred only after the court was satisfied on the evidence produced by the appellant. It also added that extra examination is allowed in the procedure and there is no prohibition to placing the burden on the person and seeking to have him or her negate the inferences from evidence adduced that a criminal offense has been committed. Further, in *Felix J. McKenna v. H and another*,[259] the courts held that the respondent would be in possession or control of the property and should be in the best position to give evidence to the court. In essence, respondents are in the best position to counter any evidence, including hearsay evidence, which could be tendered by the applicants in relation to such property.

In *Gilligan*[260], the courts held that the state bore the evidentiary burden of proof because the state must satisfy the court, on the balance of probabilities that the respondents were in possession or control of property that was proceeds of crime. In other words, the property was directly or indirectly, in whole or in part, derived through unlawful activities and that the property exceeded a defined threshold. A court held that then and only then did the burden of proof shift to the respondent to furnish any evidence to the court. The court also held that the respondent was free to challenge and discredit evidence tendered by the applicant, via cross examination, on an affidavit or by introducing new evidence and/or witnesses. With regard to the presumption of innocence, the court added that once it was established that the proceedings

[256] *McIntosh v Lord Advocate* (2001) 2 All ER 638
[257] *Phillips v. United Kingdom*, (U/R. Judgment delivered 5 July 2001)
[258] *Gilligan v. Criminal Assets Bureau*, [1997] IEHC 106 (HC).
[259] *Felix J. McKenna v. H and another*,[2006] IESC (November 2006).
[260] Gilligan V CAB [1997] (Transcript) p. 18

Appendix B
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under the PoCA were civil in nature, there was no constitutional impediment in reversing the burden onto the respondent and the presumption of innocence principle did not apply.

The constitutionality of the PoCA also was recently challenged in *CAB v. O'Brien & Anor*[261]and the court relying on the authoritative decision of McKracken in *M v. D*,[262]defined the standards of evidence required to establish that a property constituted proceeds of crime. The court held that "evidence adduced on behalf of the applicant constitutes a prima facie case under both s.2 and 3, the burden thereafter shifts on the respondents." The court went further to find that the applicant had satisfied the court that the property subject to the proceeding constituted proceeds of crime by producing evidence to prove that the respondent had been involved in criminal activities, had no continuous employment, and had no regular sources of income yet there were a number of uncorroborated transfers to his bank accounts. Cross-examination of the applicant further reinforced the evidence. Thus, the court held that the funds available to the respondents from unexplained, unknown and uncorroborated sources could rationally be explained as funds derived from criminal activities. The court held that the inability of the respondents to present evidence or witnesses that would explain the sources of the funds or property available was sufficient to show that the funds were derived from criminal activities.

The provisions that shift the burden of proof also were challenged on the basis that they breach the respondent's privilege not to self-incriminate and the right to silence. Justice Moriarty, in *M v. D*,[263] expressed reservations about the statement "innocents have nothing to fear," stating that it does not hold up in this case because of the closeness between the applicant and the DPP, and requested that the DPP make an undertaking to prevent use of information in any future criminal proceedings. This was further affirmed in *Gilligan* where the court required that the type of undertakings required by *Moriarty* were essential in every case in which orders under Section 9 were sought.

The court attempted to strike a balance in protecting the fundamental rights guaranteed by the prosecution and enable the working of orders under Section 9. The court affirmed that respondents' right to silence and the privilege not to self-incriminate were not absolute and could be curtailed in the public interest, validating the respondent's obligation to respond to an order of the court otherwise he or she would invoke the court's contempt. However, the court decided to limit the use of information secured under PoCA to the proceedings for which the disclosure was made, relying on the authority of the decision in *Re O*,[264] too. The court stated that the state should be careful to protect a respondent's privilege in releasing information that could later be used in a criminal prosecution.

Respondents also have argued that the use of hearsay evidence in a proceeding under PoCA is unconstitutional because it is based on evidence of belief tendered by the applicant and that there is no direct evidence that the property represents proceeds of crime. In *Murphy v. G.M*, the court held that the evidence of belief under Section 8 did not have to be direct. Similarly, *Moriarty* held, in *M v. D*, that although PoCA was silent on the nature of proof sufficient to persuade a court to issue a Section 3 order, it was widely accepted that courts would accept hearsay evidence in affidavits filed on behalf of the parties but that the conclusiveness of the evidence would be corroborated by either facts or cross examination by the respondent. He added that the courts must remain vigilant in safeguarding the liberty of citizens, particularly in cases where hearsay evidence is admissible mainly by ensuring that the respondents were provided with an opportunity to cross examine the witnesses. Arguing that PoCA was designed to deprive those engaged in unlawful activities, Moriarty added:

[261]*CAB v. O'Brien &Anor*, [2010] IEHC 12 (HC).
[262]*M v. D*, IR 175 (unreported judgment)–Moriarty J. (HC) (December 1996).
[263] Ibid. at 38
[264]*In Re O* [1991] 2 QB 520.In this case an order restraining assets under Section 77 of the Criminal Justice Act, and subsequently requiring that the defendant disclose his or her assets by affidavit. The request was appealed by the defendant, claiming that the court had no jurisdiction to make such an order. Court held that in absence of any express jurisdiction there was an ancillary power to make a disclosure.

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> I am clearly entitled to take notice of the international phenomenon, when significant numbers of persons who engage as principals in lucrative professional crime, particularly that referable to the illicit supply of controlled drugs, are alert and effectively able to insulate themselves against the risk of successful criminal prosecution through deployment of intermediaries….. thus the Act is designed …… not to achieve penal sanctions but to deprive such persons of illicit financial fruits of their labor.

The respondent also contested the use by the applicant of the transcript from an earlier trial as a proof, a contention the court dismissed, holding that there are no grounds for objection because the transcript was used only to account for what was stated in the course of the trial. Further, in *McKv. D*, the court held that Section 8 envisioned a two-stage process in evaluating the evidence. First, the court heard evidence of an authorized officer but this was not sufficient to make it evidence. The applicant also was invited to call as witnesses persons on whose information he relied. Although the court reasoned this was not necessary it helped in establishing the reasonableness of the applicant's belief. It then was up to the judge to evaluate the weight attached to the testimony. A distinction must always be made between the existence of evidence and its persuasive value.

In the same case, Justice McCracken, dissenting with Justice Fenelly, laid out a seven-step process for a trial judge when reviewing evidence tendered pursuant to Section 8:

> (1) He should firstly consider the position under section 8. He should consider the evidence given by the member or authorized officer of his belief, and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief.
>
> (2) If he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorized officer is evidence.
>
> (3) Only then should he go on to consider the position under section 3. He should consider the evidence tendered by the applicant, which in the present case would be both the evidence of the member or authorized officer under section 8 and indeed the evidence of the other police officers.
>
> (4) He should make a finding whether this evidence constitutes a prima facie case under section 3, and if he does so find, the onus shifts to the respondent or other specified person.
>
> (5) He should then consider the evidence furnished by the respondent or other specified person and determine whether he is satisfied that the onus undertaken by the respondent or other specified person has been fulfilled.
>
> (6) If he is satisfied that the respondent or other specified person has satisfied his onus of proof then the proceedings should be dismissed.
>
> (7) If he is not so satisfied he should then consider whether there would a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case.

This decision has, according to CAB legal officer, guided the work of the CAB in filing applications and in preparing evidence to satisfy the court that the property subject to a proceeding constitutes proceeds of crime. The decision is also important because it specifies the moment at which the burden of proof shifts to the respondent to adduce new evidence and prove the legitimate source of the property.

Another important element of the Irish PoCA that makes it unique in its approach is that there is no requirement that the applicant (i.e., the state), when initiating a proceeding, show that an offense was committed or that the property in question was derived from commission of a specific offense. It was held by the Supreme Court, in *McKv. F and H*,[265] that Parliament designed the Act in a way that it is applicable

[265] *McKv. F and McKv. H*[2005] 2 IR 163 (SC)

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in circumstances in which the applicant is not able to show a relationship between the property alleged to be proceeds of crime and a specific crime or crimes. The court went further to add that PoCA would be useless and unworkable if specific assets had to be related to a specific crime and this was not the intention of the Act. To support its decision, the court cited a statement made in an unreported judgment of the High Court, where the judge held that:

> I am satisfied that it is unnecessary for the plaintiff to rely upon specific crimes or to relate items of property sought to be attached by an order under s. 3 of the Proceeds of Crime Act, 1996 to the commission of a specific crime and the plaintiff can make a sufficient case by relaying on opinion of evidence that the property in question constituted directly or indirectly the proceeds of crime or that the property was acquired in whole or in part with or in connection with the property that directly or indirectly constitutes the proceeds of crime.

This decision was further affirmed in *F & F*[266] where the court held that it was unnecessary for the applicant to rely on specific crimes or to relate to the commission of specific crime the specific property sought to be restrained by the order.

PoCA also was challenged on the basis that it violated Article 40.3 of the Constitution because it does not protect private property from an unjust attack. In *Gilligan v. CAB* it was held that, while forfeiture provisions of the Act admittedly affect the property rights of the respondent, the effect involved does not rise to the level of an unjust attack, which is necessary for constitutional protection, considering that the applicant must first show that the property at issue constituted the proceeds of crime. The judge also added that the right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired. Finally, the court dismissed the respondent's contention that the PoCA violated the right to private property, referring to *Clancy v. Ireland*, where Barrington J stated that "abridgment of property rights provided for under the Act was a permissible delimitation of property rights… and was not a breach of fair procedures", citing also the decision of the U.S. Supreme Court, in *Calero-Toledo v. Pearson Yacht Leasing Company*, (1974) 416 US 66. In *M v. D*, the court held that although it could be argued that the Act did not provide sufficient protection for private property, "this erosion must be balanced against the public interest inherent in the section, so that the unjust attack on property rights is in fact disclosed.

The issue of jurisdiction was often debated by the courts, although initially, in *F. Mck. v A.F.*, the Supreme Court held that the 1996 PoCA did not apply to the proceeds of crime committed in another jurisdiction. A similar challenge was brought in *Gilligan.* The court later concluded, in *Murphy*, that the operation of the standard canons of construction determined that the words "proceeds of crime" included criminal offenses committed abroad. However, this contention was overturned by the Supreme Court. This prompted the government to amend the 1996 Act in 2005, and to include the proceeds of extra-territorial criminality within the statute. In relation to the statute of limitations, the court held that it did not apply at any stage of proceedings under PoCA.

On the retroactivity point, it was held that the acquisition of assets derived from crime was not an illegal activity before the passage of the 1996 Act and so did not become illegal because of the 1996 Act. Therefore, no law was imposed retroactively.

[266] *McKv. A.F. and J.F*[2002] IESC (30 January 2002)

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Ireland Conclusions

It can be concluded that the Proceeds of Crime Act 1996 has had an impact in in fighting and deterring crime in Ireland. The majority of our interviewees were explicit in their assertions that during the first five years of the implementation of the Act it had a remarkable impact, as those engaged in criminal activities were not experienced and prepared in hiding proceeds derived from unlawful activities. During the first few years, the CAB was successful in tracing, identifying, freezing and subsequently forfeiting assets or property considered to be proceeds of crime. It is reported that the Bureau had forfeited and transferred to the Irish Exchequer in excess of €105M, or US$140M in revenues and had over €55M or US$76M, of assets frozen. As a consequence, it is widely believed that many engaged in criminal activities moved their activities and assets outside Ireland and resulting in a noticeable reduction of crime in the country, although no quantifiable and statistically sound evidence exists. The reduction of crime rates in Ireland may be also a result of criminals adjusting to the new circumstances created after the enactment of the law and being better skilled in hiding their assets. The success rate of the implementation of civil confiscation to date is considered to be 100%.

Conclusions drawn from experience of Ireland and Australia

As found in both Australia and Ireland, UWOs have the potential to be a powerful weapon in the fight against organized and serious crime. If used appropriately they can deprive criminals of their ill-gotten gains, they are especially effective in forfeiting assets that are difficult to be connected to an offense. However it is important to emphasize that their effectiveness is limited. While powerful, expectations about their impact should be moderate and realistic.

Active and judicious enforcement is critical for any law including UWOs. As discussed earlier in the report, the Irish CAB has actively and successfully applied the Proceeds of Crime Act and other forfeiture powers available to it. In Ireland a number of UWOs were brought against high profile cases, including John Gilligan, one of the biggest drug lords in Ireland at that time, who was also suspected of being involved in the murder of the Journalist Veronica Guerin. Other high profile cases include a soccer player involved in drug dealing, VAT tax fraud, insurance fraud and a high profile corruption case. On the other hand, UWOs have not been extensively used and their potential was not exploited in full in Western Australia, thus failing to meet the expectations and the objectives it was set out to achieve. However some cases have been instituted, for example against people who had no apparent source of income and lived lavished lifestyles, including a motorbike gang and unemployed but rich individuals. However, no so-called “big fish” have been targeted until recently.

Although there is a lack of data gathered in Ireland to evaluate the impact the UWO has had on crime, the authors of the report, based on a series of interviews with relevant Irish stakeholders, have come to a conclusion that the law has had a positive impact in fighting crime. Our interviewees, representing various powerful institutions and agencies in Ireland, including academics and civil society groups, were unanimous in their belief that the CAB has played a significant role in reducing crime, in particular drug trafficking, forcing a number of criminals out of the country or at least out of sight. A large portion of the success of the Irish forfeiture regime is attributed to the CAB and the way the Irish government planned and executed introduction of the new forfeiture regime.

The success of the Irish forfeiture regime is also attributed to the excellent multidisciplinary teams of the CAB. Personnel from police, customs, tax and social welfare are brought to work together collectively. While working for CAB they retain the powers and duties vested in them within their home agencies and also have the powers of their CAB colleagues, i.e., each is cross-deputized. Combining these resources, skills, and experience in one agency enables the CAB to attack the proceeds of crime from three different aspects, forfeiting property constituting proceeds of crime, taxing it, and denying social welfare payments to the respondents who own or control such property. From the outset the agency was given adequate financial and human resources, including highly skilled legal officers, computer technicians, forensic

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accountants, and a well-trained law enforcement officer. Further they have continuously provided training to CAB officers, as well as complete anonymity, and attractive compensation packages. The CAB leaders have been reluctant to grow and expand, holding that a small group of highly trained and committed professionals is more likely to be effective and efficient.

In contrast, the study team was told that the state of Western Australia had not allocated sufficient human and financial resources to the DPP, which was given the authority to institute UWOs and other forfeiture schemes available under the Criminal Property Confiscation Act of 2002. This has resulted with a small number of UWO applications. The DPP partly explains the small number of UWO applications because of the availability of other forfeiture schemes, including powerful automatic confiscation of both lawful and unlawful property owned by a declared drug trafficker, which has overshadowed and drawn resources from UWOs. Still, the DPP recognized that it has not given the attention to asset forfeiture they should, as they were more focused on prosecuting criminals rather than targeting assets. Initially, when the CPCA was introduced, the DPP has allocated only one confiscation lawyer to deal with all asset forfeiture schemes (later increased to three) available under the Act; it was only over the past couple of years that more resources have been allocated. Now the confiscation team numbers a total of 18 confiscation lawyers and the police, and now have six forensic accountants (up from one). This expansion correlates with a high number of UWO applications being made over the past three years. Moreover, the state of WA is also considering of delegating the UWO powers to a Corruption Commission that will be focused solely on targeting tainted assets.

As new and untested legislation, the original UWO laws have had a number of weaknesses and deficiencies that have hindered efficient and successful operation of the Act. The Irish CAB proposed and succeeded to amend the Proceeds of Crime Act several times, improving its efficiency and scope. In this regard, the scope has now been extended to cover proceeds of foreign offenses, shortened the seven years waiting period to four before the property is forfeited to the state with mutual consent of the parties. Additional amendments are being debated such as including the proposal to reduce the waiting period further, allowing for disposal of property while the interlocutory (restraining) order is in effect enabling the CAB to preserve the value of the property.

Similarly, Western Australia has noted that the law contains deficiencies that make application of the Act more difficult and burdensome for the DPP. One of the key weaknesses of the legislation highlighted is the overly prescriptive valuation of assets method provided in the law. The provisions as interpreted by the DPP and the courts implying that for the court to determine that the respondent owns or controls unexplained wealth, it will need a full inventory of his/ her wealth, including the wealth consumed. These valuation methods are considered cumbersome and demanding imposing a heavy burden on the DPP to identify, trace, value, and determine the origin of each item of the property including those consumed and discarded. However, unlike in Ireland, no legislative proposal has been made to date to amend these deficiencies.

It is also notable that both Ireland and Australia apply a higher standard of proof in UWO cases than that inferred by the law. Both laws provide that the standard of proof in an unexplained wealth forfeiture proceeding is the preponderance of evidence (balance of probabilities), however in practice both Ireland and WA prosecutors have used a higher standard - - clear and convincing evidence - that the property constitutes unexplained or tainted property. Ireland's CAB self-imposed this higher burden of proof and with that has gained the trust and sympathy of the court and wider public. In WA a higher standard of proof was imposed by the High Court of Australia.

The ability to pursue forfeiture of property without tying it to a predicate offense has been one of the plus points of legislation in both countries. Lack of a predicate offense requirement has been upheld by the courts in Australia and Ireland, recognizing the importance of seizing assets without having to prove a connection with an offense. Moreover, the courts of both countries have held that if such a requirement

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were to be included in the law it would make the law unworkable and defeat its purpose. However, both the DPP and the CAB have been pressed to show some form of criminal conduct. In reality and in many cases, the state has tendered sufficient evidence that there are reasonable grounds to believe that the respondent has been engaged in criminal activity, without having to show that the person has actually committed an offense.

The Australian UWO forfeiture scheme is *in personam*, an action is brought against the person, on whom a penalty is imposed and not a sanction. In this regard, the courts have been careful to differentiate that the forfeiture of property is not a sanction imposed on the individual but rather a penalty imposed on the property. Similarly, although Ireland holds that its O is an *in rem* proceeding, the law requires that a property owner be identified in the application. Exceptions are only allowed if the owner has absconded or has died, in all other cases the property owner has to be identified.

Allocating specialized judges to forfeiture cases has affected successful application of the law in Ireland. Because of the complex nature of the law and the cases that are heard, the CAB requested early on that judges be allocated to hear forfeiture cases, creating a bench well-versed in UWO and non-conviction forfeiture regimes. In addition, this ensured that cases are heard more quickly. Without this provision, backlogs have been cited in Australia to be one of the reasons affecting the efficiency of the application.

Further, careful and appropriate selection of cases, as well as highly professional preparation of cases, has resulted in successful applications leading to forfeiture of property in Ireland. The CAB has a complex and judicious screening process in place ensuring that only meritorious cases are pursued. Cases are prepared and presented in a comprehensive and professional manner using charts and diagrams to portray complex information understandable to non-financial experts. Exceptional work quality helped CAB establish and maintain a good reputation and earn the trust of public opinion. Although CAB has operated for over 14 years, no concerns have been raised by the media regarding inappropriate targeting of cases or abuse of powers by the CAB. WA has also been careful in selecting and targeting its cases. Their carefulness however is seen as overly conservative, failing to make unexplained wealth applications when they should. This may have increased after 2004 after DPP was publicly criticized for making an unexplained wealth application for an elderly couple's house, after they were convicted of having cannabis that their son concealed drugs on their property. It is believed that because of this criticism the DPP did not make any unexplained wealth application between 2004 and 2007.

Ireland has avoided criticism by not adopting equitable sharing. All assets and monies recovered from the forfeiture schemes under PoCA are transferred to the Irish budget and no funds are directed or transferred to support activities of the CAB. Although equitable sharing is a practice used in the US the Irish have refused to do so. However, it is important to note that resources have never been an issue for the CAB. The Irish government continues to regard the work of the CAB as a priority and they have never faced budget cuts. While Australia has in place an equitable sharing system, whereby 20 percent of forfeited assets are transferred to the police to support asset forfeiture squad, this has never been raised as an issue of concern by the public or opponents of the Act. It may as well be that this is due to relatively low amount being forfeited to date.

UWO laws have been in place for over ten years and Ireland has made significant progress in improving the legislation and addressing the weakness in the implementation policies and operations of the Act.

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IV. REVIEW OF THE U.S. SYSTEM

4.1 General Overview of Asset Forfeiture in the U.S.

Much has been written on U.S. asset forfeiture both by its supporters and critics.[267] Therefore for this report, we provide only a brief overview of federal statutes containing civil asset forfeiture provisions, focusing on the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, which is the only statute that attempts to provide for uniform forfeiture proceedings for a broad variety of offenses. The bulk of this section of the report focuses on transferability of UWO laws to the U.S., should the government contemplate enactment of a similar statute.

History of Civil Asset Forfeiture in the United States

Civil asset forfeiture has existed in the United States since the English colonies applied it in enforcing forfeiture statutes. The concept of *in rem* forfeiture proceedings can be traced to the Biblical era and ancient English common law. In these laws, an object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a *deodand*[268] to support funeral costs of the deceased. In addition, English common law allowed forfeiture of estates as a consequence of criminal conviction and treason.[269] English common law also provided for seizure and forfeiture of vessels and cargos violating customs laws.

Forfeiture laws in the United States, however, did not originate from the law on *deodand* or other forfeiture laws following conviction of the defendant of an offense. They were based on the 17th century British Navigation Act that provided for forfeiture of vessels and contraband goods. In 1789, the first Congress of the United States introduced civil asset forfeiture, authorizing seizure and forfeiture of ships and cargos involved in customs offenses.[270] Since then, civil asset forfeiture laws have expanded significantly, as noted by Justice Douglas in *Calero-Toledo*[271]stating, "the enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise."

Civil forfeiture is an *in rem* civil proceeding instituted against the property itself, attaching guilt to the property, and thus resorting to the legal fiction that the property itself is guilty of an offense. Moreover, the standard of proof is a civil standard—probable cause or preponderance of evidence, which is a much lower standard of proof than the beyond a reasonable doubt standard required in criminal proceedings. Because it is a civil proceeding, many of the constitutional protections afforded to the defendant in a criminal proceeding are not applicable. Early cases of *in rem* forfeiture were upheld by the Supreme Court of the United States,[272] allowing the government to seize and subsequently declare property

[267] See Stefan D. Casella, Overview of Asset Forfeiture Law in the United States, January 2004; Casella, *The Development of Asset Forfeiture Law in the United States*, available at http://works.bepress.com/stefan_cassella/9.
Marc B. Stahl, Asset Forfeiture, Burdens of Proof and the War on Drugs, 83 J. Crim. L.& Criminology 274, 1992–1993,
Christine M. Durkin *Civil Forfeiture under Federal Narcotics Law; The Impact of the Shifting Burden of Proof upon the Fifth Amendment Privilege Against Self Incrimination*, etc.
[268] *"given to God"*
[269] *Calero-Toledo v. Pearson Yacht Leasing Co*., 416 U.S. 663 (1974)—Justice Douglas gave a brief historical overview of the development of asset forfeiture in English common law and in the United States.
[270] Stefan D. Casella *The Development of Asset Forfeiture Law in the United States*, available at http://works.bepress.com/stefan_cassella/20
[271] Ibid. at 2
[272] See *Austin v. United States*, 509 U.S. 618, Bennis, 516 U.S. 472 (1996)

Appendix B

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forfeited, regardless of the owner's guilt or innocence.[273] It further enabled the courts to overcome jurisdictional issues; often in smuggling cases, the property was found within the jurisdiction of the United States but the property owner was in another country or could not be located at all. In this regard, the Supreme Court held that civil forfeiture was closely tied to the practical necessities of enforcing admiralty, piracy, and customs laws.[274] Therefore, only an *in rem* forfeiture proceeding, instituted against the property, would enable the government to seize and declare forfeited property that was involved in the commission of an offense. It enabled the government to remove the property from circulation and subsequently prevent and deter the wrongdoers from using it again to commit an offense. It also enabled the government to collect customs duties owed to it on the imported goods.[275] In this regard, the Supreme Court held in *Austin*[276] that—

> Forfeiture of property used for illegal activity serves a deterrent purpose, distinct from any punitive purpose, both by preventing further illegal use of the property and by imposing an economic penalty, thereby rendering illegal behavior unprofitable; by providing for the forfeiture of an innocent owner's interest in the property.

As indicated above, initially, the concept of *in rem* forfeiture was applied to the property as an "offender," attaching guilt to the property itself. It was only much later that the concept of the instrumentality of crime evolved; the property itself is not guilty of wrongdoing but as stated in *Austin*, it is an instrumentality of an offense—"the actual means by which an offense was committed."

Although civil forfeiture laws were greatly expanded during the 20th century to cover forfeiture of property derived from other offenses, including counterfeiting, gambling, alien smuggling, and drug trafficking,[277] they in essence were limited to directing forfeiture of the property considered an instrument of an offense. It was only after the Congress amended drug forfeiture statutes between 1978 and 1984, that the *proceeds* of an offense and later property used to facilitate commission of an offense could be subject of a forfeiture proceeding.[278] Further in the 1970s, Congress introduced *in personam* criminal forfeiture following conviction of the defendant of a criminal offense. Although criminal forfeiture was widely applied in English common law, the U.S. Congress refused to enact *in personam* forfeiture as punishment for federal crimes,[279] and reenacted this ban several times over the course of two centuries

[273]Historically the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See *Origet v. United States*, 125 U.S. 240, 246 (1888), "The merchandise is to be forfeited irrespective of any criminal prosecution…"

[274] "Policing for Profit; The Abuse of Civil Asset Forfeiture"—Miriam Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D., Scott Bullock—Published by Institute for Justice, March 2010, citing *The Palmyra*, 25 U.S.

[275] See *Bajakjian*, 524 U.S—stating that *in rem* forfeiture of smuggled goods served to vindicate the government's underlying property right in customs duties.

[276] See Ibid. at 5.

[277]Stefan D. Cassella. "The Development of Asset Forfeiture Law in the United States" *ActaJuridica*. Ed. J. Burchell and A. Erasmus. Cape Town, South Africa: JUTA & Company, LTD, 2003. 314-359.
Available at: http://works.bepress.com/stefan_cassella/15

[278] See Drug Abuse Prevention and Control Act 21 U.S.C 881—provides for forfeiture of controlled substances, materials and equipment, containers, conveyances, and records involved in unlawful drug related activity. Section 21 U.S.C. 881 (a)(6) 1978—provides for forfeiture of the proceeds of illegal drug transaction if a traceable connection between the property and the illegal activity exists; 21 U.S.C. 881(a)(7) 1984—provides for forfeiture of real property used or intended to be used to commit or to facilitate the commission of a drug offense.

[279] As cited in *United States v.Bajakajian* No. 96-1487 (1998): "Act of April, 30, 1790 ch. 9, §24, 1 Stat, 117 ("No conviction or judgment ….shall work corruption of blood, or any forfeiture of estate").and reenacted this ban several times over the course of two centuries. See Rev. Stat §5826 (1875), Act of March. 4 1909, ch. 321, §341, 35 Stat, 1159: Act of June 25, 1948, ch. 645, §3563, 62 Stat. 837, codified at 18 U.S.C. §3563 (1982 ed.); repealed effective Nov. 1,1987, Pub. L. 98-473, 98 Stat.1987".

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until 1970 when Congress resurrected English Common law of punitive forfeiture as a tool to combat organized crime and drug trafficking as part of Organized Crime Control Act of 1970, and Comprehensive Drug Abuse Prevention and Control Act of 1970.[280]

It is important to note that the courts have continuously held that *in rem* proceedings have a remedial and non-punitive character. They do not constitute a punishment against an individual for an offense; its remedial purpose is to compensate the government for lost revenue.[281]

Forfeiture laws today have expanded to cover proceeds and instrumentalities of most federal criminal offenses, although the U.S. does not have a comprehensive forfeiture statute that covers proceeds and instrumentalities used or derived from any type of offense. Quite to the contrary, forfeiture provisions are scattered throughout numerous federal and state statutes. However, *in rem* forfeiture continues to be the primary forfeiture proceeding with an action instituted against the property and the innocence or guilt of the property owner remaining unimportant.

Asset Forfeiture Laws in the United States

Contrary to the existing practices in other countries, including the two that are the focus of this report—Australia and Ireland—the U.S. does not have a comprehensive forfeiture statute providing for forfeiture of property for all type of offenses. The closest the U.S. has come to enacting a comprehensive federal forfeiture statute is CAFRA of 2000, although other federal statutes continue to operate in parallel that provide for seizure and forfeiture of property constituting proceeds or instrumentalities of a crime. As Casella[282] noted, "because the asset forfeiture laws in the United States developed piecemeal over a long period of time, they were not written in generic terms….Congress enacted different forfeiture provisions at different times for different offenses." Civil asset forfeiture provisions are found in more than one hundred federal statutes including the: (a) Racketeering and Influenced and Corrupt Organizations Act (RICO)[283] which authorizes the government to "forfeit any property and any interest the person has acquired or maintained in violation of section 1962, including interest in security, claims or property or contractual right of any kind"; (b) Comprehensive Drug Abuse Prevention and Control Act (1970)[284] and subsequent amendments in 1978 and 1984, which broadened the reach of forfeiture, authorizing the government to forfeit all property used to commit a drug offense, to facilitate trade of narcotics, and facilitating property and proceeds derived from drug trade; (c) PATRIOT Act[285] which authorizes the government to confiscate everything the wrongdoer owns, i.e., forfeiture of all assets of a person engaged in terrorism; (d) the Customs Act[286] which orders

[280]See Organized Crime Control Act of 1970, 18 U.S.C. §1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §848(a). In providing for this mode of punishment, which had long been used in this country, the Senate Judiciary Committee acknowledged that "criminal forfeiture….Represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." Senate Report Np. 91–617, p. 79 (1969).
[281] See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 91972)—noting that remedial action is action brought to obtain compensation or indemnity.
[282] Stefan D. Casella Overview of Asset Forfeiture Law in the United States, January 2004 available at: *http://works.bepress.com/stefan_cassella*
[283] 18 U.S.C. 1963 (a)
[284] Comprehensive Drug Abuse Prevention and Control Act of 1970, amended in 1984. 21 U.S.C § 881 authorized the government to demand forfeit of all controlled substances, raw materials, and equipment used to manufacture controlled substances, and all vehicles used to distribute controlled substances. In 1978, the reach of forfeiture provisions was expanded to cover all profits from the drug trade and all assets purchased with such proceeds. §881(a)(6), further in 1984 Congress added §881 (a)(7) authorizing forfeiture of all property used in any manner to facilitate a violation of drug laws.
[285] 18 U.S.C.§ 981(a)(1)(G)
[286]19 U.S.C

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forfeiture of contraband goods and conveyances; and (e) CAFRA, which is described in more detail below.

Types of non- conviction based forfeiture

Summary forfeiture authorizes law enforcement to summarily make on-the-spot seizures of property to which no one claims ownership, without a requirement for a legal proceeding. Summary forfeiture is applied in cases of seizure of contraband goods where the ownership is vested with the law enforcement because no legal ownership can be claimed of property that is not legal, e.g., illegal narcotics.

Administrative forfeiture authorizes law enforcement to seize property during an investigation if there is probable cause to believe that the property is subject to forfeiture. Once the property is seized, law enforcement commences an administrative forfeiture and notices are sent to any person with an interest in the property and interested in contesting forfeiture within a prescribed period of time. If forfeiture of the property is not contested within the period prescribed by law, law enforcement can require forfeiture of the property by making a declaration of forfeiture that has the same force and effect as a judicial order. Under the CAFRA, the seizing agency must begin the forfeiture proceeding within a fixed period of time (60 days) and must give the owner sufficient time to file a claim. If the owner files a claim, law enforcement is required to refer the case to prosecution to institute a forfeiture proceeding. Administrative forfeitures are controversial because they begin with a summary seizure of property and any type of movable property that can be carried can be seized. To reclaim the property, the property owner is required to file a claim. However, these proceedings can be expensive in the case where a property owner is not legally educated and able to defend himself/herself in court and may or may not be able to afford a lawyer, shifting additional costs to the state. Administrative forfeitures constitute the vast majority if federal forfeitures because most forfeiters (85 percent) in drug cases are not contested.[287]

Civil Judicial Proceedings are used to institute forfeiture proceedings against real estate, i.e., immovable property. The government institutes *in rem* proceedings against the property itself and bears the burden to establish the civil standard of proof - preponderance of evidence - that the property is tainted. The government must successfully establish a substantial connection between the property subject to forfeiture and a specific offense.

Civil Asset Reform Forfeiture Act

The CAFRA[288] of 2000 is a federal statute designed to provide a uniform procedure for federal civil forfeiture. It is the only comprehensive civil asset forfeiture law that has been enacted by Congress. It provides for seizure and subsequent forfeiture of the proceeds of a large number of federal offenses, including fraud, bribery, embezzlement, and theft. Further, it authorizes the government to seize and declare forfeited proceeds and instrumentalities of state offenses, including murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking. The CAFRA does not

[287]Cited by Stefan D. Cassella in *Overview of Asset Forfeiture Law in the United States*, January 2004. "Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested, Since CAFRA which made it easier to contest a forfeiture action, the number of uncontested DEA cases may have dropped to 80 percent. Other seizing agencies report similar figures".
[288]18 U.S.C. A. § 981

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apply to forfeitures handled by the U.S. Customs Service or to forfeiture statutes enforced by the Internal Revenue Service.[289]

Before enactment of CAFRA, federal forfeiture statutes enabled the government and law enforcement to obtain forfeiture of property by showing probable cause that the property was used either to commit or facilitate a crime. Once the government was able to show probable cause, the burden shifted to the property owner, appearing at a hearing as a claimant, to show that the property was not used to commit an offense or it did not constitute the proceeds of crime. For example, 21 U.S.C. § 881(d) provides that the customs laws govern the procedure for forfeitures under § 881. 19. U.S.C. § 1615 (1992) establishes the burden of proof in such forfeiture actions:

> In all suits or actions . . .brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court.

In addition, federal statutes did not contain provisions for protecting the interests of innocent owners. The Supreme Court held in *Dobbins's Distillery v. United States*,[290] "that the Acts of Congress in question made no exception whatsoever whether the alleged aggression was with or without the co-operation of the owners." In this case the distillery owner leased the property to the distillery operator. It was the distillery operator who allegedly acted to defraud the U.S. of its public revenue in violation of 15. Stat. 132. The U.S. sought the civil forfeiture of the distillery and all related real and personal property, which the circuit court ordered following a jury verdict in the U.S.'s favor. The distillery owner argued that he was unaware of the alleged fraud, and therefore, he should not have had to forfeit his property. Affirming the judgment, the Court held that it was not necessary that the distillery owner knew that the distillery operator was committing fraud on the public revenue in order to maintain the information of forfeiture. Thus, court ordered forfeiture of property stating that the action was not brought against the owner, but against the property.

Further, forfeiture statutes pre-CAFRA required that a claimant or a property owner file a bond of 10 percent of the total value of the property to protect the property from forfeiture. Meaning, that any property owner whose property was subject to forfeiture in order to file a claim to protect his property from forfeiture was required to file a bond. This request has been repealed by CAFRA and the claimants are no longer required to file any bonds. Finally, the statutes had no provisions for compensation for damages to the property while held in seizure and there were no provisions allowing recovery of legal costs and attorney's fees. CAFRA also contains provisions that allow the respondent to file a petition for the release of property pending trial to avoid hardship, among other things the property owner will have to show that the property may be destroyed, damaged or lost if not returned to the owner.

[289] Other exemptions include Tariff Act 1930, Federal Food, Drug, and Cosmetic Act, and Trading with the Enemy Act (18 U.S.C. Section 983(I)).
[290]96,U.S. 395 (1878)-

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CAFRA was the result of a seven-year effort to reform the civil asset forfeiture laws[291] to create a comprehensive and more just civil forfeiture procedure. The initiative to reform civil asset forfeiture was spearheaded by Rep. Henry J. Hyde, who proposed his bill in 1996–1997 with the Department of Justice presenting its counter-proposal. Hearings before the House of Representatives and the House Judicial Committee lasted four years until the CAFRA was enacted.[292] The initiative to reform forfeiture statutes came from the public protest regarding what was considered harsh and unjust forfeiture statutes, depriving citizens of private property without due process. Although the criminal defense bar had been voicing concerns about forfeiture statutes, a new statute was not enacted until an increasing number of middle class citizens had become the target of forfeiture statutes[293] and began voicing complaints to their representatives. Courts, including the Supreme Court, continued to uphold the constitutionality of the forfeiture statutes in numerous cases.[294] These outcomes were harshly criticized by the media and wider public.[295]

Many of the more controversial features of the earlier laws were removed by the CAFRA, which placed the burden on the government to show that the property was an instrument or proceeds of an offense and no longer required the property owner to show that the property was not used or derived from an unlawful activity. Hearsay evidence is no longer admissible evidence in court; the CAFRA introduced a uniform "innocent owner" provision, which provides for recovery of attorney's fees, provides for compensation of damages or loss of property, imposes new time limits on the government, and requires proof of substantial connection between the forfeited property and the underlying crime. Although the CAFRA has introduced other changes to the civil asset forfeiture statutes, we have highlighted the ones that are relevant to this report.[296]

4.2. Transferability Analysis—Implications of Adopting UWO in the United States

A number of features make UWOs a unique form of non-conviction based civil asset forfeiture. As shown throughout this report, the main features distinguishing UWOs from other non-conviction based asset forfeiture statutes are:(1) they can be instituted against any person if there are reasonable grounds to believe that the person owns or controls unexplained wealth; (2) they do not require establishment of the nexus between the property subject of the proceeding and a specific offense, or only require a minimal connection;[297] (3) once the state establishes that the respondent owns or possesses unexplained wealth or property constituting proceeds of crime, the burden shifts to the property owner to establish the contrary;

[291] 146 Cong. Rec. H@)$^ (daily ex. April 11, 2000) Statement of Rep. Hyde).
[292] Stefan D. Casella The Civil Asset Forfeiture Reform Act of 2000, available at: *http://works.bepress.com/stefan_cassella*
[293] ABA Journal/October 1993, *A Law Run Wild*—identifying cases against whom forfeiture proceedings were instituted: 1) the owner of a landscaping service who paid cash for an airline ticket. The purchase led Nashville police to search his luggage and confiscate nearly $10,000 in cash. He could not post the bond and challenge the seizure, and as a result, was nearly driven out of business; 2) the owners of an air charter business were driven into bankruptcy when their plane was seized flying a man from Arkansas to California who allegedly carried drug money.
[294] United States v. Pearson Yacht Leasing Co.; Austin v. United States, Dobbins's Distillery; Bennis v. United States, etc.
[295] ABA Journal December/1995 and ABA Journal November/1993
[296] For more detailed information on the history of the Civil Asset Reform Forfeiture Act of 2000, see Civil Asset Reform Act of 2000 Stefan D. Casella.
[297] UWO of WA and NT do not contain the requirement to show a nexus between an offense and the property, while the UWO of the Commonwealth requires that there is a nexus between the property and a specific indictable offense. Similarly, the Irish Proceeds of Crime Act does not have a requirement that the connection between the property and specific offense be established.

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and (4) the proceedings are *in personam* proceedings, instituted against the property owner, or in the case of Ireland have *in personam* features.[298]

As noted earlier, the U.S. has had *in rem* non-conviction based forfeiture statutes since its inception, with the first forfeiture statute being enacted soon after the Constitution was adopted. Forfeiture statutes have evolved over time, their application broadened to cover proceeds and instrumentalities of a broad range of offenses, and their application increased. However, the U.S. civil asset forfeiture statutes differ from UWOs in that that they do not contain some of these key UWO features 1) reversal of the burden of proof to the respondent to justify lawful origin of property; 2) *in peronam* proceedings, whereby an action is brought against the person not the property; and 3) there is no requirement to show a substantial connection between an offense and property subject of forfeiture. Below we attempt to provide insight on where the U.S. stands or the key issues that U.S. would have to consider if it were to adopt a similar type of law.

***In personam* versus *in rem* forfeiture proceeding**— One of the differentiating features of the UWO of Australia is that it is an *in personam* proceeding. A proceeding is instituted against the property owner or the person who is considered to be in effective control of the property. As noted earlier, the Irish UWO (Proceeds of Crime Act) is deemed to be an *in rem* proceeding, or against the property; however, the statute requires that to commence a forfeiture proceeding, the owner of the property must be identified making it an *in personam* proceeding in practice. Also, differing from the U.S. *in rem* proceedings, the key respondent in the case is the property owner and not the property itself, e.g., *Criminal Asset Bureau v. Gilligan*, or *Mck. V. D.*

Bringing an action against the respondent in accordance with Australian and Irish legislation enables the government to require forfeiture to the state of any part of the property that is allegedly unlawful or constitutes proceeds of crime, rather than targeting a specific piece of property. For example, if a person owns more wealth that he/she can lawfully explain, or it is believed that the person owns property constituting the proceeds of crime, the government, if successful, is able to obtain forfeiture to the state of the value of unlawful property, regardless of whether the person owns or controls the tainted property.

In personam non-conviction proceedings have long been accepted in Australia and no case has been brought to a court challenging the constitutionality of *in personam* proceedings or labeling them as punitive. In Ireland, although it is held that the PoCA is an in rem proceeding, the state has to identify the property owner, whose property is subject to forfeiture. The state can make an application for forfeiture without identifying the owner only in cases when the property owner has absconded or has died. This provision was challenged at the Supreme Court by the respondents, stating that it violates presumption of innocence. The High Court in *Murphy v GM PB PC Ltd*[299] upheld the in rem character of forfeiture proceedings under PoCA, stating that

> No one is charged with a criminal offense, there is no prosecutor, no offense is created, no sanctions are imposed and there is no *mensrea*. Court further held that forfeiture under the Proceeds of Crime Act is an *in rem* proceeding and held that forfeiture does not constitute a

[298] The O provisions of the WA, NT, and Commonwealth are *in personam* proceedings identified as such in the statute. The Irish PoCA, however, uses an *in rem* proceedings but the statute requires that the property owner be identified in the proceedings and the action is brought against him/her as the owner.

[299] [1999] IEHC 5 (HC)

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> penalty or a punishment and that it is a measure imposed on the respondent, which aim is to restore or remedy the situation.

While the U.S. has an *in personam* criminal forfeiture scheme imposed against a defendant following conviction of an offense, it does not have an *in personam* non-conviction forfeiture proceeding at the federal level. However, at the state level *in personam* forfeiture does exist. New York State has an *in personam* non-conviction forfeiture statute whereby an action is brought against a person to forfeit property in a civil proceeding. NY State law is considered to be a hybrid system comprised of elements of both civil and criminal forfeiture. Because of its *in personam* character, the statute has a higher burden of proof that rests with the state, provides for limitations on damages, a requirement for proportionality and statutory authorizations for interest of justice dismissals. The Civil Law Practice and Rules 13-A[300] provides more protections for the respondent than other *in rem* forfeiture statutes. The statute has been construed to reinforce the notion that forfeitures, even if *in personam,* are not punishment for double jeopardy purposes. Article 13-A states "forfeiture action shall be civil, remedial… and shall not be deemed to be a penalty or criminal forfeiture for any purpose….an action under this article is not a criminal proceeding." These specific provisions have been incorporated into the statute to show that the statute is not punitive in nature. The New York state legislature specifically resorted to defining the statute as civil in nature because this definition has an implication in determining its constitutionality.

The U.S. Supreme Court has in numerous cases upheld the constitutionality of forfeiture statutes stating that civil forfeiture proceedings do not violate the Double Jeopardy Clause because they are *in rem*, directed against the property, rather than the person. In *Helvering v. Mitchell,*[301] the U.S. Supreme Court held that civil forfeiture does not violate the Double Jeopardy Clause ruling that the criminal charge of tax evasion does not exclude civil assessment of a fine. Similarly, in *U.S. v Ursery*, the court stated that forfeiture is not a punishment for the criminal offense. The Court continued to state that—

> We do not rest our conclusion in these cases upon the long-recognized fiction that forfeiture *in rem* punishes only malfeasant property rather than a particular person. That forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy.

The Court resorted to the two-part test applied in *89 Firearms*[302] to determine whether forfeiture would be deemed punitive for double jeopardy purposes. Nevertheless, where the "clearest proof" indicates that an *in rem* civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause. Thus the New York statute has clearly identified the proceedings, although *in personam*, as civil in nature to avoid the Double jeopardy Clause.

Another successful argument invoking constitutional protection in non-conviction forfeiture laws is that property owners can be adversely affected by what happens to their property. However an argument countering this is that it has long established legal doctrine that if the property is of unlawful origin the owner does not have legitimate rights to it and therefore, the property is subject to forfeiture.

[300] 2006 New York Code - Laws: Civil Practice Law and Rules: (1310 - 1352) Proceeds Of a Crime-forfeiture
[301] 303 U.S. 391, 58 S. Ct. 630, 82 L.Ed.
[302] 465 U.S. at 363

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Reversed Burden of Proof

The Reversed burden of proof is not a new concept in U.S. legal doctrine or within the civil asset forfeiture statutes. As noted, before enactment of the CAFRA, forfeiture statutes contained provisions that reversed the burden of proof to fall on the claimant, the property owner, to show that the property was not used or derived from an unlawful offense. The government was required to make an initial showing of probable cause that the property was subject to forfeiture and then the burden shifted to the property owner to establish the property's innocence and prove, by a preponderance of evidence, that the property was not subject to forfeiture. The reversed burden of proof in the U.S. has been uniformly upheld by U.S. courts for more than 200 years in a long stream of cases[303], e.g.,in *U.S. v Ursery*, the court recognized that the statute shifts the burden of proof to the claimant, stating that:

> 19 U.S.C. §1615, which governs the burden of proof in forfeiture proceedings under §881 and §981 provides that once the Government has shown probable cause that the property is subject to forfeiture, then the "burden of proof shall lie upon the claimant.

Similarly, in *United States v. 3639 2nd St*[304] the 8th Circuit Court held that:

> It was incumbent upon the government to establish presence of probable cause. Probable cause in a forfeiture proceeding is a reasonable ground for belief of guilt, supported by less than *prima facie* evidence but more than mere suspicion….Once the initial showing has been made, the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that is not subject to forfeiture or that a defense to forfeiture is applicable.

Further, the constitutionality of the reversed burden of proof was challenged on the grounds that it violated the Fifth Amendment privilege against self-incrimination. The Supreme Court has held that the Fifth Amendment privilege may apply in some civil forfeiture proceedings but because of the civil character of such proceedings, it is difficult to determine the reach of constitutional protections.[305] In *Boyd v. United States*, 116 U.S. 616, 634 (1886), the Supreme Court held that the forfeitures were of a quasi-criminal nature and within the privilege against self-incrimination. In this case, the Supreme Court reviewed whether the lower court erred in awarding judgment in favor of the federal government in a customs action for forfeiture where the appellant, an importer, was ordered to give incriminating evidence against himself pursuant to 18 Stat. 186, § 12 (1874). The appellant alleged that the law was an unconstitutional violation of the Fifth Amendment. The Supreme Court held that the lower court erred, granting a new trial to the appellant. However, in *United States v. Riverband Farms Inc.* 847 f.2d 553, 558 (9th Cir. 1988) the Court held that not all constitutional protections apply to civil forfeiture. Courts have held that while the Fourth Amendment applies to civil forfeiture proceedings, the Fifth Amendment

[303] *United States v. Brock*, 747 F 2d 761 (D.C. Cir. 1984), *United States v. 4492 Livonia Rd.* 889 Fd. 1258, 1267 (2d Cir. 1989)—in a forfeiture proceeding brought under §881, the burden is initially on the government to establish its right to forfeiture by probable cause, 906 F.2d 110, 111 (4th Cir. 1990)—"in a civil forfeiture proceeding….once the government has showed by probable cause that the property is subject to forfeiture, the burden shifts to the claimant to prove by a preponderance of evidence that the factual predicates for forfeiture have not been meet."
[304] 869 F.2d 1093, 1095 (8th Cir. 1989)
[305] Christine Durkin ; Civil Forfeiture under Federal Narcotics Law, 24 Suffolk U. L. Rev. 705 1990 citing *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971)

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Double Jeopardy Clause does not apply because forfeiture is a civil proceeding and is not subject to the procedural rules of criminal sanction.[306]

This led to situations in which the government could force forfeiture of property if it had probable cause following a lawful arrest or search, and simply wait for the property owner to contest the proposed forfeiture. It was considered that the filing of a verified complaint was enough for the government to meet the burden in a forfeiture proceeding. The CAFRA, as stated earlier, revoked the reversed burden of proof, and under the new regime, the government is now required to show, by a preponderance of evidence, that the property is the proceeds, instrumentality, or facilitating property of an offense. It is important to note that the courts have upheld the constitutionality of the reversed burden of proof; however, it was public dissatisfaction with the operation of the reverse burden of proof that led to the legislative decision to revoke it.[307]

Interestingly, Title 19 of the U.S.C §1615 (customs laws) has and continues to contain a provision reversing the burden of proof to the property owner or the claimant to establish the "innocence" of the property. The §1615 provisions states:

> In all suits or actions….brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant; Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court….

Even proceedings that are clearly criminal in nature, the constitutionality of the reversed burden of proof in, in limited circumstances, has been upheld by the U.S. Supreme Court, noting that it is not unconstitutional to shift the burden of proving an affirmative defense to the defendant in a criminal case.[308] In this case, the defendant was charged with second-degree murder under New York Penal Law§ 125.25 for killing his wife's friend. After the defendant was convicted of murder, he appealed the verdict on the basis that the need to prove the affirmative defense of extreme emotional disturbance was a violation of the Fourteenth Amendment. The Court held that there was no violation of defendant's due process rights because the defendant had the burden to prove the affirmative defense of extreme emotional disturbance by a preponderance of evidence after the state had to establish beyond reasonable doubt that the defendant had committed the crime of which he was charged before the burden shifted on him.[309] This decision upholds the constitutionality of the reversal of the burden of proof to the defendant

[306] See *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235-37 (1972)—court held that forfeiture is not barred by double jeopardy clause because it is civil and remedial.

[307] ABA Journal /October 1993—" …government need show to justify a seizure is probable cause that the property is subject to forfeiture. Probable cause can be provided by hearsay evidence….. Then you must prove that the property is "innocent". In essence, the standard is guilty until proven innocent" citing Henry Hyde (R-III);National Review, February 20 (1995)—Property can be seized on mere suspicion, and the burden is then on the owner to get it back.

[308] Patterson v. New York, 432 U.S. 197 (1977).

[309] See *Mullaney v. Wilbur*, 421 U.S. 684, 697 (1975); in Re Winship, 397 U.S. 357, 364 (1970) noting that the government needs to prove beyond reasonable doubt every fact necessary to constitute a crime required to convict; *Leland v. Oregon*, 343, U.S. 790, 794 (1952) noting that the prosecution is required to prove beyond a reasonable doubt every element of crime charged. The court confirmed that it remained constitutional to burden the defendant with proving his insanity defense. In *Morrison v. California*, 288 U.S. 591 (1933), the court held that it did not violate the due process clause for the State to place on the defendant the

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for elements that are not necessary for conviction, such as the affirmative defense, and based on a lower standard of proof—preponderance of evidence.

Standard of Proof in UWOs - Australia

- Under the Statute - Balance of probabilities
- In Practice — Clear and convincing evidence (a.k.a the Briginshaw principle)

The reversal of the burden of proof is also permissible under the Revenue Code 26 U.S.C. The U.S. Supreme Court, in *Raleigh v. Illinois Department of Revenue,*[310] held that the burden of proof on tax claims remained on the respondent, where the substantive tax law puts it. In this case, the Illinois Department of Revenue discovered that a corporation had unpaid taxes after it was defunct and issued both a notice of tax liability against the corporation and a notice of penalty liability against the debtor. The Illinois tax law shifted the burden of proof both on production and persuasion to the responsible officer once a notice of penalty liability was issued. The appellate court held that the burden of proof for the tax claim in bankruptcy court remained on the petitioner, the debtor's trustee, and ruled in favor of the Department of Revenue. The Appellate Court held that bankruptcy did not alter the burden imposed by the substantive law, and the Supreme Court affirmed.[311]

Standard of Proof, UWOs – Ireland

- Under the Statute – Balance of Probabilities
- In Practice – A higher standard of proof than balance of probabilities standard as clearly outlined in Mck v. D

Of note for the reversed burden of proof is the *standard* of proof the government must meet before the burden shifts to the property owner, as well as the standard imposed on the respondent. Before enactment of the CAFRA, federal forfeiture statutes required that the government meet the lower standard of a criminal proceeding, probable cause, which was slightly higher than a mere suspicion that the property constituted proceeds or instrumentality of an offense, before the burden shifted to the respondent. But under CAFRA the government not only bears the burden of proof throughout the entire proceeding but has to show by a preponderance of evidence that the property subject to forfeiture is either an instrument or proceeds of a crime.

Although the statutory requirement in both Australia and Ireland for the standard of proof is based on a preponderance of the evidence (balance of probabilities), in practice the standard of proof the government must meet is much higher, corresponding more closely to the U.S. standard of "clear and convincing evidence." standard In Ireland, according to the representatives of the Criminal Asset Bureau, recognizing the far-reaching and serious effects forfeiture can have on the property owners, the CAB self-imposed a

"burden of proving citizenship as a defense." In *Cooper v. Oklahoma* 116 S. Ct, 1373 *1996), the U.S. Supreme Court held that an Oklahoma law that presumed a criminal defendant competent to stand trial unless he proved his incompetence by clear and convincing evidence violated the defendant's Fourteenth Amendment right to due process, while a statute that requires of the defendant to prove his competence by a preponderance of evidence is constitutional.

[310] 528 U.S. 1151 (2000)

[311] In this civil case, the Illinois tax law places the burden of proof on the responsible officer, in this case the trustee overseeing bankruptcy. Several compelling rationales for this shift were listed by the court—the government's vital interest in acquiring its revenue, the taxpayer's readier access to the relevant information, and the importance of encouraging voluntary compliance —are powerful justifications not to be disregarded lightly. The Bankruptcy Code makes no provision for altering the burden of proof on a tax claim, and its silence indicates that no change was intended. Pp. 4-6. In *United States v. Reach* F.2d 10(1st Cir. P.R. 1073)—the Supreme Court held that the burden should have been on the taxpayer.

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higher standard of proof than the one required by law. However, the High Court, in *Mck v. D* set a detailed seven-step process for evaluation of evidence brought by the CAB. Similarly, in Australia, the High Court has imposed a higher standard of proof on the government than that stated in the statute. This higher standard is known as the *Briginshaw*[312] principle, whereby a standard of proof higher than preponderance of evidence is required of the government before the burden shifts to the property owner. The standard of proof the respondent bears is lower than the preponderance of evidence, with the justification that the state, with its large apparatus and resources, is better equipped to meet a higher standard compared with an individual whose access to resources may be limited. Thus the fact that the government must meet a higher standard of proof, and must show clear and convincing evidence that the person or property owner possesses property that constitutes unexplained wealth or proceeds of crime, may make the notion of the reverse burden of proof more acceptable. Both Irish and Australian courts have, in a long stream of cases, accepted that the reverse burden of proof in necessary in cases when the respondent is in the best position to explain lawfulness of his/her property.[313]

Nexus between an Offense and Property

As highlighted previously UWOs are a specific type of non-conviction asset forfeiture and therefore can be introduced separately from any other action. The UWOs in Australia and Ireland do not have a requirement to show a connection between the property subject to forfeiture and an offense. Conversely, under the U.S. forfeiture statutes, including CAFRA, there is a requirement to show a substantial connection between a specific offense and the property.

As discussed in sections 3.2.1.2 (WA) and 3.2.2 (Ireland) under the UWOs in both Australia and Ireland, the government is only required to show, on preponderance of evidence, that the property constitutes proceeds of crime or unexplained wealth, before the burden shifts to the respondent. Evidence supporting the affidavits must show that there are reasonable grounds to conclude the respondent has been engaged in criminal conduct. However the government is not required to show that the respondent has been engaged in the commission of a specific offense or show that the property subject to forfeiture is connected to a crime. This is substantially different from the civil forfeiture statutes of the U.S. because these set forth *in rem* proceedings; property is the subject of forfeiture because "guilt" is attached to it, it is an instrumentality of an offense, or property facilitating commission of an offense, or proceeds of a specific offense. Forfeiture is limited to the specific property involved in the crime; the government can only demand forfeiture of the actual property derived from or used to commit the offense (see *United States v $ 8,221.877.16 in U.S. Currency* [314]). The government is required to trace the seized property directly to the offense giving rise to the forfeiture. In most of the cases, the connection between the offense and the property is substantial and easy to prove. Therefore, applying UWOs to the U.S. would require a significant change in this doctrine, shifting the proceeding such that the government is no longer required to show that the respondent has been engaged in the commission of a specific offense or show that the property subject to forfeiture is connected to a crime.

[312] *Briginshaw v. Briginshaw* (1938) 60 CLR 336. See also Section 3.2.1.7, Australian Case Law
[313] See Section.3.2.2.2, Irish Case Law; *Giligan v. CAB* [1997], *Felix J. McKenna v. H and another*; Australia, see Section 3.2.1.7 Australian Case Law and cases *Dung v. DPP, DPP v. Morris.*
[314] 330 F3d 141 (3rd Cir. 2003)

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Equitable Sharing

One of the biggest criticisms of the U.S. forfeiture laws is equitable sharing, raising concerns regarding the motives of law enforcement concerning forfeiture. Questions have been continuously raised regarding whether the primary motive of forfeiture actions is revenue generation or crime reduction. The most controversial state and federal laws have empowered law enforcement authorities not only to seize and forfeit assets but also to receive proceeds from such activities. Critics of asset forfeiture laws have argued that forfeiture laws encourage seizure of assets and not suppression of crime and that policing for profit has taken predominance over policing to fight crime, particularly on the state level.

The Psychotropic Substance Act of 1984 was amended to authorize law enforcement to keep the rewards of civil asset forfeiture. Before this 1984 amendment, assets were deposited with the U.S. Treasury, but thereafter, proceeds have been deposited directly into the Department of Justice Asset Forfeiture Fund and the Department of the Treasury's Forfeiture Fund. State law enforcement agencies benefit from this arrangement as well. If the state laws are strict in that they do not allow law enforcement to reap the benefits of the forfeited assets, state and local officials can pursue so-called "adaptive" forfeitures in which case they ask federal officials to handle the forfeiture action. If such a forfeiture action succeeds, state and local entities can receive up to 80 percent of what is ultimately forfeited.

Irish and Australian UWOs do not contain provisions on equitable sharing; proceeds resulting from forfeiture are transferred to the Exchequer in Ireland and to the Confiscation Crime Account in WA. Only recently, in 2008, has a decision been made in WA to transfer to law enforcement 15 percent of the proceeds recovered to support crime fighting objectives. Since this change is recent and UWOs are not that widely used in WA, it has not been raised as a concern or an issue by the wider public. Conversely, Ireland transfers all the funds to the Exchequer and no funds are received by law enforcement from the recovered funds. This in effect, is another point of departure relative to U.S. law. It appears that the public's negative perception of OWOs (in the case of Australia and Ireland) is mitigated when statutes limit the amount of proceeds entitled to local law officials.

Other Issues to Be Considered

Information sharing—Cooperation and information sharing between law enforcement and revenue services is one of the key accomplishments of PoCA in Ireland. It is this multiagency approach that brought powers of several agencies under an umbrella of one agency, enabling cooperation, coordination, and exchange of information. This approach is not entirely alien to the U.S. The Organized Crime Strike Forces established under Attorney General Kennedy, and which operated separately from U.S. Attorney's Offices until the late 1980's, are a close analogy to the CAB. Therefore, were the U.S. to apply UWOs, there is precedent of a CAB type agency. This is quite notable considering that the CAB is attributed as the primary reason for the success of the Irish UWO, even held as a model and objective to attain in Australia. However, in the U.S. a controversial issue would be the sharing of information between the law enforcement agencies and the revenue services.

Property/asset substitution or payment of an amount equivalent to the value of unexplained wealth. The Australian and Irish statutes also provide for property asset/property substitution. When a court concludes that the person owns or possesses unexplained wealth, the owner can make a payment to the government equivalent to the amount of unexplained wealth. Thus in cases when the constituting the proceeds of crime has been consumed or discarded and is no longer available for forfeiture, in those cases

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the court can either order the respondent to pay an equivalent to the amount of the original property or forfeit another property. No such provision exists in the U.S. civil forfeiture statute because the action is brought against the property, and if the property is no longer available, if it is disposed or dissipated, the prosecution cannot bring any case. This tends to happen in cases where the proceeds of crime are cash or money derived from a fraud or drug offense. The only solution in these cases is that cash and electronic funds are considered fungible for one year after the offense is committed (*United States v. U.S. Currency Deposited in Account No 1115000763247 For Active Trade Company*, 176 F3d 941 (7th Cir. 1999)). Once the government has established a probable cause to believe that the amount of money laundered through a bank account in the past year exceeds the balance in the account at the time of seizure, the entire balance is subject to forfeiture under S 20984. In some cases where the statute stipulates, it is unnecessary for the government to comply with the strict tracing requirements that otherwise govern civil forfeiture cases. In *United States v Douglas*, 55 F3d 584 (11th Cir. 1995), the government's position in obtaining a preliminary order of forfeiture was not substantially justified where the government failed to take notice that property had been awarded to third party in an action enforcing civil judgment. If the U.S. was to enact UWOs it is of ultimate importance to consider provisions providing for forfeiture of substitute property or payment of an equivalent amount of money to the amount of unexplained wealth.

Notice Requirements

In *United States v James Daniel Good Real Property,*[315] the court held "the seizure of real property…is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." Prior to *James Daniel Good*, the Supreme Court held that the government could seize property without giving notice to property owners that such action was imminent (*Colero-Toledo v Pearson Yacht Leasing Co.*, 1974). This does not mean that notice has to be given in all cases. When it is a matter of cash, the state can seize cash without notifying a person that his or her assets will be seized, if such notification would cause money to dissipate or disappear. However, courts have held that the government cannot always seize cash without proper notification. In *United States v. $506,231 in U.S. Currency* (1997, p. 442), the 7th Circuit severely criticized the Chicago police and the U.S. government officials' attempt to forfeit half a million dollars in cash, based on the assumption that most people do not carry such large amounts of cash. In the court's words:

> As has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process that is buried in those statutes.

Under UWOs in Australia and Ireland, cash and any other property can be seized within a short period of time (48-72 hours) until an application for a freezing order is made. Application for a freezing order is made *ex parte* and the statute requires that a notice be sent to the parties as soon as practicable. In addition, only movable property such as cash, cars, etc. are seized while for other property an application for a freezing order and a subsequent notice is required. If U.S. is to enact UWOs it has to include provisions on timely notification of all parties of seizure and restrain of property.

[315] United States v. James Daniel Good Real Property, (1993) p.62

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Admissibility of Hearsay Evidence

It is also relevant to note that Ireland and Australia statutes provide that hearsay evidence is admissible evidence in court. Frequently, UWOs cases are initiated on the grounds of hearsay evidence stated in an affidavit by an authorized officer and further supported by witnesses. Admissibility of hearsay evidence has been upheld by both the Australian and the Irish Supreme Courts. Prior to CAFRA this was also true in the U.S., however the CAFRA makes hearsay evidence no longer acceptable.

Applicability of the lessons learned in Australia and Ireland to the U.S.

The need for UWO-type laws that enable the state to deprive criminals of their ill-gotten assets has been long recognized. Yet, few countries have ventured in that direction, while many more expressed increased caution, fearing the response of the courts, legislators and the wider public. As relatively new laws, very little data has been collected to date to prove their effectiveness and substantiate claims of their power and effectiveness in fighting and deterring crime. However, the study team concluded that they can be effective if they are used appropriately and judiciously. In other words the government has to carefully target the UWO. In addition, the establishment of a task force similar to the CAB with broad powers allowing share of information between different agencies is a crucial element to successful UWOs. They can bolster the state's ability to combat organized and serious crime.

In contrast with Ireland and Australia that have comprehensive and unified conviction and non-conviction based forfeiture regimes in place, U.S forfeiture laws are many, target all sorts of property used in, or derived from various offenses, can be applied to different offenses, and are scattered through different federal statutes and state laws. Ireland and Australia had an advantage when they enacted UWOs as they did not have a multitude of other laws in place and were able to build a non-conviction based legislation applicable to all offenses. In considering whether to enact UWOs, the U.S. would have to demonstrate more caution as it already has a multitude of non-conviction forfeiture schemes in place, and introducing a UWO applicable to all offenses would be overambitious and ineffective. In this regard, U.S. policy makers have to identify the specific type of organized or serious crime offenses that they could be applied to, for example money laundering offenses, as the existing laws require a predicate offense before laundered proceeds can be forfeited. However, crucial to this effort is identifying a specific type of serious and organized crime offense which would justify adoption of such radical legislation.

The forfeiture laws the U.S. has in place have essential differences from UWOs, notably they do not provide for the reversal of the burden of proof (except in the revenue and customs offenses), they do have the requirement to show a substantial connection between the property and a predicate offense, and lastly a forfeiture proceeding is brought against the property, not the property owner.

Fundamental elements that make UWOs powerful and compelling are the ability to forfeit property without the need to identify a particular crime and to reverse the burden of proof to the respondent to justify the legitimacy of the property. Both these features have proved to be crucial in bringing and successfully concluding UWO application. For example even in the case of the infamous John Gilligan who has been convicted of numerous offenses, including drug dealing, without the Irish UWOs (PoCA) it would have been difficult to forfeit his property due to his ability to launder the proceeds and re-invest them in other businesses. This UWO law has allowed the state to target all of his property proving on balance of probability that it has derived from some criminal activity and not from specific offenses. Reversing the burden of proof on the respondent has in this case eased government's burden to show a

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connection between each property and offense, shifting the burden to the respondent to show that the property was acquired lawfully. In this case he failed to show any legitimate source of income and as a result lost most of his property. This is only to illustrate that without these elements the UWOs are unworkable and will not produce the intended results.

Another crucial element that has made Irish PoCA successful is the CAB and the excellent coordination it has achieved to establish between various agencies involved in the implementation of the law such as tax, revenue, customs and law enforcement. While co-location is important, it is not necessary to have effective coordination in place. Agreements between different agencies on share of information and intelligence are essential to make the Act workable and successful. The Irish model is being followed by the Australian federal government, who is in the process of convening a task force with similar powers. This concept is also not new to the U.S as there are numerous task forces that have been created to fight specific types of crime and would be key for successful implementation of UWOs.

If the UWO laws are to be enacted in the U.S., legislators will need to determine the level of evidence that will be required to show that a person owns or possesses unexplained wealth. As discussed earlier while the unexplained wealth laws do not have a requirement to show that any offense was committed, both Australia and Ireland have opted to show that there are reasonable suspicions to believe that the person has been engaged in some criminal activity. In this regard, acceptance of hearsay evidence is essential. Thus instead of showing a predicate offense they show a predicate criminal conduct. If the U.S. contemplates enactment of a similar law, the legislation must ensure that the linkage between property and specifically, individual crime is not required to be proved. However, it would be sensible to include a requirement to show that there are reasonable suspicions that the person has been engaged in criminal conduct. This would be a substantially lower burden of proof then showing a predicate offense. Yet this will assist in thwarting possible criticism that the law can be used against innocent citizens and silence the voices about the potential abuse by law enforcement. For UWOs to be effective, they must also be capable of also dealing with the proceeds of crime which have been co-mingled with other lawful assets, or transferred to other people, or have changed form. The Australian model provides that property owned or effectively controlled by the respondent is subject to forfeiture, enabling the state to forfeit property that effectively owned by the respondent, but whose legal ownership has been transferred to a third party, including family members.

Similarly, the burden of proof required to show that the person owns or possess unexplained wealth can be set to a higher threshold of a civil standard of proof of clear and convincing evidence. This may satisfy critics of the law by showing that only those clearly engaged in criminal activities will be targeted with this legislation. The downside is that it will raise the burden on the government to show that a person has engaged in some criminal activity to the extent it may make cases unworkable. However, the Irish, and to some extent the Australian UWOs, have shown that using a higher threshold of proof have helped in concluding more cases and establishing a trustworthy reputation with the courts and the public.

Although the issues of the reversal of the burden of proof is an issue that has been widely criticized in the U.S., to the point that it was revoked with the CAFRA in 2002, if it used only for specific type of serious and organized crime cases which are selected appropriately, it might be acceptable to the wider public. Safeguards need to be built in the law, including a judicious screening process of cases in order to convince law-makers and critics that it will be used only in meritorious cases, where there is convincing

Appendix B
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evidence that wealth has been acquired illegally. This, coupled with a higher burden of proof on the side of the state, create sufficient safeguards to prevent potential abuse of the law in the future and provide sufficient protection for innocent citizens and third parties. Also, the practice in Ireland and Australia has shown that the reversal of the burden of proof is less controversial and not as harsh as it is thought to be. First, for the burden of proof to shift onto the respondent the state must meet its initial burden, known in Ireland as the evidentiary burden of proof. As the team has witnessed, both in Ireland and in Australia, the effective or practiced evidentiary burden of proof the state must meet is higher that the statutes require. Reversed burden of proof has been also upheld by the courts on the grounds that the property owner is in the best position and is the only person with access to information to show legitimacy and origin of the property.

A general lesson learned applicable to the U.S. and for that matter to any other country, is careful selection of cases. The CAB has established a stellar reputation with the Irish public and gained the trust of the judiciary and the broader government by only going after those individuals that have been engaged in criminal activities.

In summary, the reversed burden of proof in civil forfeiture proceedings has existed for two centuries in the U.S., *in personam* proceedings have been applied in the state of New York with no major controversy, and instrumentalities and proceeds of crime have been the subject of forfeiture proceedings for a long time, surviving constitutional challenges. However, two concepts are novel and would be innovations to the U.S. statutes—the unexplained wealth concept and the lack of a requirement to show a nexus between an offense and the property. If the U.S. were to consider enactment of a similar statute, it would have to resolve these issues to the satisfaction of reviewing courts. Also, modeling the law after a statute that is less controversial and far-reaching such as the Australian Commonwealth UWO, that provides greater forfeiture protections to the respondents and innocent property owners, has a requirement to show a nexus between an offense and the property and gives courts the authority to dismiss cases on the grounds that they are unjust.

Unexplained wealth laws, authorizing forfeiture of property acquired through unlawful activities, were introduced as a result of extraordinary events, the increase in crime and drug trafficking in the Irish and Australian societies. Additionally, in Ireland, the law was introduced following the murder of two public personas that outraged the entire society. Collective shock created a unified and conducive environment to enact a far reaching law that would have otherwise been unacceptable, without generating massive dissatisfaction and major opposition. On the contrary, the Australian and Irish citizenry as a whole are supportive and in favor of the law. Thus when enacting UWOs, one of the most important objectives should be its justification and linkage to solving real or perceived needs in society.

We have attempted to highlight some of the main issues which have arisen during our study, draw on the lessons learned from Australia and Ireland as possible options for the U.S. policymakers considering introduction of UWO legislation. With the federal government of Australia beginning the application of its new UWO law, these options may either expand in number or, alternatively, become more refined. Continuous evaluation of the various models can be anticipated. As Freiberg noted, forfeiture laws have been "introduced, amended, adjusted, reviewed, reinforced, enhanced and, in some cases, repealed and then re-legislated."[316] Unexplained Wealth Order laws are likely to follow the same winding road.

[316] *Anthon Kennedy* " Designing a civil forfeiture system; an issues list for policymakers and legislators", J. of Fin. Crime; 2006: 13, 2; p.132

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Appendix A

Table of Countries with UWOs

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Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
a) Countries that have implemented true UWO and apply them to all offences and reverse the burden of proof										
Australia	Self standing legislation Western Australia (WA) 2000[1], Northern Territory (NT[2])[3] and Commonwealth[4]. New South Wales[5] recently enacted Unexplained Wealth provisions in 2010.	Common Law	Civil	Primary target is organized crime, but covers all types of offences	On the respondent			• Prosecutor applies to the court for an order • Courts have minimal discretion when deciding on orders (WT, NT) while Commonwealth legislation and NSW give courts more discretion to refuse making the orders • Settlement is permitted • WA and NT statutes do not require to show that any offence was committed, while the Cth and NSW require the prosecution to show on balance of probabilities that an offence was committed • The burden of proof is on the respondent to justify legitimacy of his property • Unexplained wealth is defined to be the difference between the total value of the wealth of a person and the value of his lawfully acquired wealth • Provisions apply retroactively • Coercive powers use is provided by law such as examination, production and monitoring orders. Persons subject of these order are prohibited in sharing with anyone that they have been examined or asked to produce such orders • Legal and professional obligation to confidentiality are not applicable under these Acts • Property can be seized or restrained ex officio for 48 hours. Search warrants can be obtained for so –called emergency cases via means of electronic communications.	WA from 2000-09) 27 declarations of UWO, of which 18 lead to forfeiture decisions. The NT statute is considered as more effective. Commonwealth of Australia amended its civil asset forfeiture Act POCA 2002 to include UWO. Na cases have been filed to date under this Act.	Australia does not have a bill of rights, and this vacuum has provided Australian parliaments with the opportunity to enact laws that supersede common law liberties and restrict basic rights. In addition the reversed burden of proof has been applied in Australia for some time now in criminal proceedings.

[1] Criminal Property Confiscation Act (2000)
[2] Criminal Property Forfeiture Act (2002)
[3] Criminal Asset Recovery Act 1990, amended in 2010 to include UWO
[4] Proceeds of Crime Act enacted in 2001, amended in 2010 to include Unexplained Wealth provisions
[5] Criminal Asset Recovery Act enacted in 1990, amended in 2010 to include provisions on Unexplained Wealth

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Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
Colombia	Asset Recovery Law (Law 793), 2002 Illicit enrichment targeting PEP's[6]		Civil	Organized crime, public officials	The respondent		The defendant for corruption offences	• Law enforcement is responsible to collect information and evidence and send it to the Office of Attorney General (OAG), customs officials, and army. • Investigations are conducted by OAG establishing facts, upon which the request for forfeiture order is submitted to a court • The court makes a decision on forfeiture in a civil proceeding • The respondent bears the burden to justify the source of property • Property can be forfeited during the inheritance procedure if it is considered and if it can be shown on civil standard of proof that it is derived from unlawful activities. • Special Administrative Unit is established to manage seized assets until the court makes the decision on forfeiture. This seems to be the most problematic procedure of the Colombian forfeiture law	Reversal of the burden of proof was challenged by respondent, and it was upheld by the Constitutional Court of Colombia.	Colombia has adopted a number of laws that target unexplained wealth laws. While the law are comprehensive and well written, the practical application is less effective. Proceedings are lengthy are and are slowed done by administrative procedures. I is also alleged that corruption and abuse of power has affected the implementation process.
Ireland	The Proceeds of Crime Act 1996 and The Proceeds of Crime Act 2005 (Amendment)	Common Law	Civil	Organized Crime	State has initial evidentiary burden of proof, and then the burden shifts to the respondent .	(Act of '94) Conviction based, state bears the burden of proof (Balance of probabilities	Respondent Act of 1996	Civil Asset Forfeiture • Multi agency approach (Irish National Police, Revenue Service & Department for Social Welfare) work under the umbrella of the Criminal Asset Bureau (CAB) • Proceedings are developed in three phases:: • *Interim Stage* –High Court decides ex parte to freeze the property for 21 days on CAB request, based on belief that the property is a proceed of crime and it exceeds € 13,000 • *Interlocutory stage* – request should be made within 21 days by the applicant, full trial takes place, until final disposal of the property. This stage is 7 years	Implementation of The Act 1996 is evaluated as effective by Irish legal scholars, stating it has helped enormously in fight against organized crime causing "mass exodus" of criminals. Also CAB has	Transferability in this early stage of evaluation to the US probable, considering the Irish criminal justice system was built on US code RICO

[6] Article 148 of the Criminal Code

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								• *Third and final phase* –disposal phase, the final decision on the confiscation of assets/property is made Criminal confiscation • Confiscation is completed following conviction • The civil standard of proof balance of probabilities is applied • Once the court is satisfied the property is the proceeds of crime, the burden shifts to the defendant to prove otherwise	forfeited more than 105 million Euros in revenues, with more than 55 million still frozen. 2007 - €254,651 were paid to MoF[7]	
b) Countries with civil asset forfeiture that apply to all offences with a presumption in favor of forfeiture										
Antigua & Barbuda	Proceeds of Crime Act (POCA) -1993 and Money Laundering and Forfeiture Act (MLFA) of 1996	Common Law	Civil	Organized Crime,	Civil			Proceeds of Crime Act • Provides two tracks for forfeiture; a) in rem forfeiture and b) conviction based forfeiture • Proceedings are instituted by the DPP, following the conviction of the defendant of a scheduled offence, no later than 12 months from the day the conviction was made • The defendant will be order to pay a certain amount of money equivalent to the property or sum derived from the offence • Status has in place a number of safeguards, enabling third parties or the defendant to exclude whole or parts of property from an order • The statute is unique in that it provides that forfeiture orders can be changed after they have been made if new evidence became available, or new property is identified Money Laundry Forfeiture Act • Provides for both conviction and non conviction based forfeiture • Non conviction based forfeiture provisions empower the court to forfeit property subject to a freezing order issued on the grounds that a		

[7] 12th Annual Report of CAB for 2007

Appendix B

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								person will be charged for an offence. • DPP bears the initial burden of proof to show that the property in question is tainted property • The burden than shifts on the defendant to establish legitimacy of the property • Court will order forfeiture 90 after the forfeiture order has been made. • The respondent can seek an exclusion of part or whole property form a forfeiture order		
Canada	Civil Law, Ontario[8], Manitoba[9], Saskatchewan[10] British Colombia[11], Nova Scotia[12] and Quebec[13]	Common Law	Civil	Civil Asset Forfeiture	Except for the Ontario statute, all others contain statutory presumption favoring forfeiture			• Provides for forfeiture of assets by reversing the burden of proof on the respondent • The prosecution (chief of police/ Attorney General) or another entity established by law for this purpose can apply to a court for a forfeiture, or freezing/restraining order of proceeds and instruments of unlawful activities • The standard of evidence is on civil standard of proof. Court will make the order if it is satisfied that there are reasonable grounds to believe property is proceeds or an instrument. • The statutes contain a presumption that the property that is subject of an order is an instrument or derived from, unless the contrary is established • The state bears the initial burden of proof to show that a person was engaged frequently in unlawful activities, was associated with criminal organizations, or charged but acquitted of an offence.	Civil forfeiture statutes have been considered effective in reducing crime. However, it appears from the case law that vast majority of cases fall in the category of cash seizure and growing narcotics.	

[8] Civil Remedies Act of 2001
[9] Criminal Property Forfeiture Act in 2004
[10] Seizure of Criminal Property Act of 2005
[11] Civil Forfeiture Act 2006
[12] Civil Forfeiture Act 2007
[13] Respecting the Forfeiture, Administration and Appropriation of Proceeds and Instruments of Unlawful Activity Act, 2007

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								• The constitutionality of the Ontario Act was challenged at the Supreme Court of Canada in 2007 and it was upheld by the court.		
New Zealand	Civil Recovery of Proceeds Act 2009	Common Law	Civil	Unlawful activities, including serious and minor offences	Provides for the reversal of the burden of proof			• The Act provides for conviction-based asset forfeiture of instruments of crime, identified as qualifying instrument of crime • And non-conviction-based asset forfeiture of property considered to be tainted property or profit derived from significant criminal activity • Restraining orders are made on an application of the Commissioner of Police, for up to 1 year • Court will make a forfeiture order if it satisfied on the balance of probabilities that the property is "tainted" meaning that it has derived from unlawful activities. Profit derived from significant criminal activity will be forfeited; if the Commissioner shows that the respondent was engaged over the past 7 years in significant unlawful activities and that the person has derived profit from those activities. Significant unlawful activity is an activity for which a punishment of 5 yrs imprisonment can be imposed • The burden of proof than shifts on the respondent in the form of an opportunity to rebut the presumptions made by the Commissioner • Law is applied retroactively • Official Assignee is responsible for management of restrained assets	The law was adopted recently and there is no significant case law available to evaluate the effectiveness of the legislation. The law itself is relatively comprehensive, but is not consistent in setting forth the standards for the prosecution to establish that a property is tainted property, while clearly outlining the standard for profit of unlawful activities	
South Africa	Prevention of Organized Crime (chapter 5So-called criminal forfeiture following conviction-Chapter 6-	Common Law	Civil	Organized Crime	On prosecution. Standard: balance of probabilities			• Provisions of chapter 6 provide for forfeiture of assets without prior conviction or initiation of criminal proceedings against an individual • Established the Asset Forfeiture Unit (AFU), under National Prosecutorial Authority (NDPP) • AFU/NDPP applies to the court for preservation order, standard of proof is reasonable grounds	Significant development of case law and jurisprudence	pp

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	Civil forfeiture – non conviction based) 1998							• AFU applies to the court for a forfeiture order. Standard of proof; Balance of Probabilities • Assets obtained up to seven years ago can be object of forfeiture		
UK	Proceeds of Crime Act 2002	Common Law	Criminal and civil	Organized crime, drug & human trafficking	The prosecution establishes illegal origin of assets, than the burden shifts on the defendant [14] Standard: Balance of probabilities	Government		• Criminal Confiscation Confiscation procedure can be initiated following conviction of the defendant. Two types of confiscation; 1) criminal lifestyle is established – all assets obtained over 6 yrs can be confiscated and civil standard of proof applies. 2) if the criminal lifestyle is not established – only assets derived from a specific crime can be taken; standard of proof- beyond reasonable doubt • Civil Recovery: it is a non conviction based forfeiture; the proceedings can be initiated against any person suspected to have in ownership proceeds resulting from unlawful conduct. • ARA (SOCA) has to prove on the civil standard balance of probabilities, that respondent has benefited from unlawful conduct. • The burden than shifts on the defendant to prove the legal origin of his assets. Statute of limitation is 12 yrs for civil forfeiture proceedings. • Court can issue interim freezing and restraining order to prevent the respondent from dissipating or transferring the property. • Cash recovery – seizure and forfeiture of cash intercepted anywhere which is suspected to derive from crime • Taxation – SOCA (ARA) can initiate assessment of taxable income of those suspected to have benefited from unlawful conduct. Enhanced cooperation and information sharing between	Civil recovery is considered to have had e some impact on crime reduction, mainly due to lengthy proceedings.	ppp

[14] For offences related to drug trafficking

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								the Agency and Internal Revenue.		

c) Countries that have some form of illicit enrichment provisions that are applicable to all offences, reversing the burden of proof to the defendant in a criminal proceeding

Austria	Criminal Code, 1996	Civil	Criminal and civil	Organized crime/Terrorist organizations	Civil *in rem*	Burden of certification of origin is on the defendant		• Austria has both a criminal and civil forfeiture system • Confiscation proceedings are non conviction based, standalone procedure and sanction • Burden of proof is short of a complete reversal of burden of proof recognizing the reversal of the burden of certification of origin on the defendant, representing defendants obligation to present facts concerning the origin of assets/property • Prosecution/investigative judge can issue an injunction to seize assets. • Prosecution needs to establish for all defendants i) that proceeds derive from illegal activities and for organized criminal organizations, that the defendant ii) was a member of a criminal organization.	Austria	Criminal Code, 1996
France	Criminal Code of 1994 (as amended in '96, '99, '03 & '04)	Civil Law	Criminal	Organized Crime (Money Laundering, Drug Trafficking)		Provides for reversal of burden of proof	Includes corruption offences	• French criminal law allows confiscation only upon conviction. There are two types of confiscation; 1)Obligatory confiscation – covering all goods defined to be dangerous, materials and proceeds used or resulting from some offences, drug and human trafficking, criminal organization, terrorism, etc. and 2)Discretionary – for all custodial penalties targeting property of individuals, authorizing the judge to decide its imposition • France has over the last decade introduced a number of criminal offences, whereby the central element is a reversed burden of proof, stating that if a person cannot justify his		

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								lifestyle will be punished with imprisonment and a fine[15] and confiscation of his assets.		
Italy	Provisions incorporated in the Criminal Code	Civil Law Patrimonial preventive measures introduced in 1956, amended in 1982 & 1994 introducing property measures; 2.Judicial penal measures 1965 (*Note: Declared unconstitutional, in part, in 1994)*	Criminal	Mafia type associations and organized crime		Burden of proof is on the defendant[16]		1. Preventive (administrative) personal and property measures, are non conviction based and provides for reversal of burden of proof. These are considered extra-judicial measures, though they are subject to judicial review. 2. Penal judicial type - conviction based. Reversal of burden of proof is provided for upon conviction of the defendant for offences associated to mafia type crimes. Confiscation is a compulsory measure for crimes associated to mafia. The reversal of the burden of proof in criminal proceedings was declared unconstitutional by the CC of Italy. The legislators approved an amended law within the same year, including the reversal of the burden of proof with more stringent conditions.	Effectiveness of preventive measures varies from year to year; influenced by enactment of new legislation, constitutional court decisions and raise of crime [17]	
Netherlands	Criminal Code "Strip them" Act	Civil Law	Criminal	Organized Crime			On the prosecutor to establish existence of	• Dutch law foresees four cases where confiscation is possible: 1) upon conviction; 2) on the basis of similar offence of which the person is convicted; 3) for cases in which the	The enactment of the legislation has increased the use of	

[15] Articles; 225-6, 225-12-5, 225-4-8, 312-7-1, 421-2-3, 450-2-1 of the Criminal Code of France. English translation is available at http://195.83.177.9/code/index.phtml?lang=uk

[16] Second paragraph of the **12 quinquies** shifted the burden of proof on the defendant. This was declared unconstitutional by the CC, on the grounds that it conflicted with the principle of the presumption of innocence guaranteed by the Italian Constitution (article 27). Article 12sexies restricted the compulsory requirement of confiscation to those condemned of mafia crimes. No direct link is required between goods to be confiscated and accomplishment of a crime.

[17] Murder of a judge and a prosecutor in Italy has affected an increased usage of preventive measures and particularly confiscation as a measure to fight organized crime. Generally, there is a lack of data gathered by different institutions to evaluate the effectiveness of the property (preventive) measures.

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							criminal lifestyle, then the burden shifts to the respondent (partial reversal)	person has been imposed a fine of over €45,000 and 4) for profit generated by an offence committed by anyone in whatever way; for which a fine of over €45,000 can be imposed' and criminal financial investigation are conducted. • If during financial investigation the origin of property cannot be justified, the burden shifts on the defendant. • Court calculates the extent of the illegally obtained profit by using property analysis method and cash position method • The law allows for settlement Request for confiscation can be made in a separate procedure	confiscation	
Switzerland	Criminal Code and Criminal Procedure Code	Civil Law	Criminal	Organized Crime		Burden of proof on prosecution Standard of proof "Intimate conviction" Reversed burden of proof for organized crime suspects		• In rem forfeiture is governed by the Swiss Criminal Code Article 69 to 72. • Standard of proof is a lower criminal standard of proof called "Intimate conviction". • Burden of proof is on the prosecution. • Prosecution needs to prove commission of the offense and prove that the concerned assets have derived from the commission of that particular offence. • In specific circumstances as provide for by the Article 260 of the Criminal Code, the burden of proof can shift, when the suspect is a member or has supported criminal organizations. In these instances the prosecution must prove that the person was a member of a criminal organization.		
d) Countries that have illicit enrichment targeting PEP's, reversing the burden of proof to the defendant in a criminal proceeding										
Argentina	Criminal Code (Article 268 (2)), 1999	Civil Law System	Criminal	Official Corruption (PEPs)		Reversed burden of proof		• The criminal offence of illicit enrichment as a result of corruption was introduced in 1964 and amended in 1999. This provision stipulates the duty of the Public Officials or third parties to account for their income and assets	From 1999 to 2003, 76 cases were opened on illicit enrichment, 19 were reported to the	

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								acquired while holding public office, for up to two years after leaving the public office. • Anti-corruption Agency is established as an administrative agency with investigatory powers which has developed a system of public financial disclosure forms for all public officials, used to monitor public officials.	judiciary, 22 were dismissed and 35 were still under investigation, Between 2004 and 2006, 136 additional cases were under investigation.[18]	
Botswana	Corruption and Economic Crime 1994	Botswana has a dual legal system with elements of the Roman-Dutch and common law	Criminal	Economic crime and corruption			The burden is on the defendant to justify the origin of his wealth	• The Corruption and Economic Crime Act '94, created a new corruption offence, including possession or control of disproportionate assets or maintaining an unexplained high standard of living. In 2009 money laundering was also added to the duties the DCEC • Act created a new Body Directorate on Corruption and Economic Crime (DCEC) with powers of investigation, arrest, search and seizure • The Director may inquire or investigate any alleged or suspected offences, demand records from public or private agencies, arrest any person if the Director reasonably believes the person has committed an offence[19]. • If the person fails to give a satisfactory explanation to the Director or the officer as to how he was able to maintain such a standard of living or	DCEC was modeled after Hong Kong's ICAC. By the end of 1999 the DCEC had received 5250 report. Reports are received from public. Of reports received, 1565 investigations were conducted of which 1018 were completed. !97 persons have been prosecuted with a conviction rate of 84%[20]	

[18] Anticorruption Office Annual Reports at http://www.anticorrupcion.gov.ar/gestion.asp

[19] The most important offences defined in the Act of '94 are: bribery, conflict of interest, diversion of public revenue, possession of unexplained property (living beyond visible income)

[20] Independent Commission Against Corruption (ICAC) available at: http://www.icac.org.hk/newsl/issue1/content.asp?chapter=4, accessed march 7th, 2011

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								how such resources or property came under his control or possession, he will be considered guilty of corruption offence • If a court is satisfied in any proceedings for an offence if there is reason to believe that any person was holding pecuniary resources or property in trust for or on behalf of the accused, or acquired such resources or property as a gift, or loan without adequate consideration, from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.	No	
Brunei Darussalam	Prevention of Corruption Act 1982[21]	Common Law	Criminal	Corruption offences (PEPs)			Presumption of corruption	• Act establishes the Anti-Corruption Bureau (ABC) with powers to investigate complaints against corruption. • Article 12 of the act includes *"offences for possession of unexplained property or maintaining a standard of living above that which is commensurate with his past or present emoluments"*. • The Act foresees punishment of individuals up to $500 if they fail to report a received gratification. • Article 25 – provides for presumption of corruption in certain cases • The defendant is presumed to be guilty unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living. Penalty, a fine of $30,000 and imprisonment for 7 years.		

[21] Available at: www.anti-corruption.gov.bn/prevention.htm, accessed March 8th, 2011

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								• In addition to the above penalties the court may order a person convicted of an offence to pay to the Government a sum not exceeding the amount of the pecuniary resources; or (a) a sum not exceeding the value of the property, the acquisition of which by him was not explained to the satisfaction of the court and any such sum ordered to be paid shall be recoverable as a fine.		
Egypt	Illicit Enrichment Law No. 62 1975 (Articles 2 and 18 of the Law)	Civil Law	Criminal	Corruption Offences		Reverses the burden of proof on the defendant		• Article 2 of the Law 62 provides that all assets acquired by any person subject to the provisions of this law, due to position and job abuse or due to a behavior contradictory to the criminal law or public morals are considered illicit enrichment. • The law also includes any increases in wealth that take place abruptly after holding the post or assuming the title by the person, as a result of job abuse or misconduct, whenever such increase is not consistent with their resources and she/he fails to prove the legitimate source for it. • Further Article 18 stipulates that whoever acquires illicit wealth, for himself or others, shall be sentenced to imprisonment (3-15 years as stipulated in article 16 of the penal code) and a fine equal to the value of the illicit wealth and the return of such gain.		
Ethiopia	The Criminal Code of the Federal Democratic Republic of Ethiopia	Dual legal system with elements of the civil and	Criminal					• Provisions of the CC provide that any public servant having been in a public office and maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means, and is		

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	Proclamation No. 414/2004	common law						in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine. • If a court during proceeding, is satisfied that there is reason to believe that a third party has in his possession or control resources for the defendant, court will in the absence of evidence to the contrary, presume that these resources are under the control of the accused.		
India	The Prevention of Corruption Act, 1988	Common law	Criminal and Civil	Official Corruption			Defendant	• The Law Commission of India in its 166th Report recommended for enactment of a separate law providing for forfeiture of property acquired by the holders of public office through corrupt means. • The recommendations confiscations of illegally acquired property could be achieved by incorporating the provision of the Criminal Law (Amendment) Ordinance, 1944 in the Prevention of Corruption Act, 1988 itself with suitable modifications. • Therefore, it is proposed to insert a new Chapter IVA in the Prevention of	In 1964, India established the Central Vigilance Commission (CVC) which is an independent watchdog agency to undertake inquiries or investigations of transactions involving certain Categories of public servants. However,	

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								Corruption Act which empowers the special judge to exercise the powers of attachment before judgment. The procedure provided will be more effective and speedy.	corruption remains widespread in the country and there have been many instances of political and bureaucratic corruption, public funds embezzlement, fraudulent procurement practices, and judicial corruption.	
Indonesia	Anti Corruption Law[22] 1999	Based on civil law of Holland and *adat* (cultural law of Indonesia)	Criminal	Corruption			Reversal of burden of proof	• Article 27 provides that in the event a corrupt act is detected and is hard to prove, a joint team shall set up under the coordination of the Attorney General • Article 28 provides for reversal of burden of proof requesting from the defendant to provide information on all his assets, assets of spouse, children, and the assets of anyone who are alleged to be proceeds of an offence • The Anti-Corruption Law 31/1999, Articles 18-19 permits forfeiture of any property which is the subject-matter of a corruption offence, or has been used in the commission of such an offence.	In Indonesia, A number of reforms have tackled the problem of corruption head-on. As in the case of legal reform, their failings are evident, but they do show what has been attempted. Corruption remains a very significant issue	

[22] The regime to seize, freeze and confiscate criminal property is generally limited. The AML Law provides for provisional measures related to the ML offence, while the Criminal Code and Criminal Procedure Code provide for limited forfeiture, freezing and seizing of criminal proceeds

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								• 'Property' under the Corruption Law is not defined but Article18 (1)(a) allows confiscation of mobile goods and immobile goods used for or obtained from the criminal act of corruption.	for all aspects of Indonesian society and a challenge for AML/CFT implementation.[23]	
Malaysia	ACT 575 Anti-Corruption Act , 1997		Criminal and Civil	Official Corruption			Defendant	• Section 36 of the ACT 575 provides that for any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject-matter of the offence or to have been used in the commission of the offence where- the offence is proved against the accused; or the offence is not proved against the accused but the court is satisfied- that the accused is not the true and lawful owner of such property; and that no other person is entitled to the property as a purchaser in good faith for valuable consideration. • Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.	According to a minister in the Prime Minister's office, The 1997 Anti-Corruption Act was an improvement on previous anti-corruption laws but unfortunately, it has remained a dead letter as its new and stronger provisions were never invoked and enforced to fight corruption.	
Pakistan	Prevention of Corruption Act, 1947 And 1999	Based on English common law with	Criminal and Civil	Official Corruption			Defendant	• When a public officer or employee during his incumbency has acquired property that is manifestly	Although Pakistan inherited the Prevention of	

[23] http://www.apgml.org/documents/docs/17/Indonesia%20MER2_FINAL.pdf

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	National Accountability Bureau Ordinance (Art. 9, Corruption and Corrupt Practices)	some provisions of Islamic Law						disproportionate to his or her salary level and other lawfully earned income, such assets are presumed *prima facie* to have been unlawfully acquired, unless the official can justify their legitimacy. Such assets may be frozen during investigation and confiscated after conviction.	Corruption Act (PCA) at Independence in 1947, the initiatives, did not bring about a meaningful improvement in the situation where corruption kept consistently rising and the legislations in place kept failing.	
Philippines	Anti-Corruption Law Article XI of the 1987 Constitution, entitled "Accountability of Public Officers"			Official Corruption			Defendant	• One of the biggest challenges in fighting corruption is the recovery of public properties or moneys acquired unlawfully. • *Philippine National Police* authorities are having a difficult time retrieving properties or moneys which were obtained through corruption. • In relation to this concern, it is important to note that the anti-corruption law provides for confiscation of unexplained wealth.	Despite some impressive world-class anti-corruption safeguards, the Philippines government still faces a major problem of corruption. This can be attributed to the following factors: 1. The Filipino culture of gift giving justifies bribery and extortion thereby making it hard for law enforcement and anti-corruption agencies to	

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					Civil	Criminal	Anti - Corruption			
									arrest the problem 2. Agencies deputized to fight corruption are not well funded by the government. Also, Despite the passage of numerous anti-corruption laws in the Philippines and ratification of the *UN Convention Against Corruption,*116 the perception that cases filed against corrupt officials and employees do not succeed still persists.	
Singapore	Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, Chapter 65A, 1999	Common Law	Criminal and Civil	Organized Crime, Drug Trafficking and Corruption			Defendant	• Allows the Court to confiscate properties from convicted and corrupt offenders, if the said properties are found to be benefits of corruption offences, drug trafficking and criminal conduct. • Proceedings are civil in nature and the civil standard of proof applies • The statute provides for the reversal of the burden of proof to the defendant to justify legitimacy of his assets • Act provides for production and examination orders, and search	Prior to the introduction of the Corruption and Drug Trafficking law, syndicated corruption and greasing the palms of public officers in return for the services was common. After	

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Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
								warrants • The Act imposes a responsibility on anyone to disclose information related to property that is considered to be proceeds or an instrument of a drug offence or a criminal conduct, excluding solicitors and lawyers due to legal privilege. • Singaporean authorities can use the domestic asset recovery mechanisms to confiscate the assets of an offender convicted of laundering funds generated by corruption offences in Indonesia. • Implemented by the Corrupt Practices investigation Bureau, Police Force and the Minister of Home Affairs	independence from the British the law was introduced and later revamped to give more powers to officers and punishments for corruption offences were enhanced. No notable increase in confiscation since the introduction of the law. The law is supposedly reviewed regularly to ensure that offenders do not escape from legal punishment.	
Hong Kong *Conviction based*	Prevention of Bribery Ordinance (PBO) 1971 , Drug Trafficking Recovery of Proceeds Ordinance (DTROPO), 1989, and Organized and Serious Crime	Common Law		Drug trafficking, serious crime and corruption			The defendant	• PBO contains provisions on Possession of Unexplained Wealth, which provide that any person who, being or having been the Chief Executive or a prescribed officer (Amended 14 of 2003 s. 17; 22 of 2008 s. 4): (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control,		

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Country	Type of legislation	Type of legal system	Criminal or Civil	Who is the primary target(Organized Crime, Public officials and/or PEPs)	Burden of Proof			Main characteristics	Evidence of effectiveness	Transferability to U.S.
					Civil	Criminal	Anti - Corruption			
	Ordinance (OSCO), 1994.							be guilty of an offence. • ICAC[24] can freeze all of the property of a suspected person, whether tainted or not. However, on the conviction of the suspect the PBO does not provide for forfeiture or confiscation of the restrained property. Prosecution relies on the provisions of OSCO to confiscate restrained property. • On the other hand DTROPO and OSCO provide for confiscation of proceeds of crime, following conviction of the defendant. • Further DTROPO also provides for civil forfeiture of money imported or exported from Hong Kong, considered to be proceeds of or is intended for use in drug trafficking.		

[24] Independent Commission Against Corruption

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Appendix B

Copies of Legal Statutes

B(i) - Criminal Property Confiscation Act 2000/Western Australia

B(ii) - Proceeds of Crime Act 2002/ Australia

B(iii) - Proceeds of Crime Act 1996/Australia

B(iv) - Criminal Assets Bureau Act 1996/Ireland

B(v) - Proceeds of Crime (Amendment) Act 2005/Ireland

B(vi) - Disclosure of Certain Information For Taxation and Other Purposes Act, 1996/Ireland

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Appendix B(i)

Criminal Property Confiscation Act 2000
Western Australia

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Western Australia

Criminal Property Confiscation Act 2000

As at18 Oct 2010 Version 02-i0-00

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Western Australia

Criminal Property Confiscation Act 2000

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Western Australia

Criminal Property Confiscation Act 2000

An Act to provide for the confiscation in certain circumstances of property acquired as a result of criminal activity and property used for criminal activity, to provide for the reciprocal enforcement of certain Australian legislation relating to the confiscation of profits of crime and the confiscation of other property, and for connected purposes.

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Part 1 — Preliminary

1. Short title

This Act may be cited as the *Criminal Property Confiscation Act 2000* [1].

2. Commencement

This Act comes into operation on a day fixed by proclamation [1].

3. Meaning of terms used in this Act

The Glossary at the end of this Act defines or affects the meaning of some of the words and expressions used in this Act.

4. Confiscable property — synopsis

Property of the following kinds is confiscable to the extent provided by this Act —

(a) property equal in value to any amount by which the total value of a person's wealth exceeds the value of the person's lawfully acquired wealth (***unexplained wealth*** — see section 144);

(b) certain property, services, advantages and benefits obtained by a person who has been involved in the commission of a confiscation offence (***criminal benefits*** — see section 145);

(c) property used in or in connection with the commission of a confiscation offence, or property of equal value (***crime-used property*** — see section 146);

(d) property derived directly or indirectly from the commission of a confiscation offence (***crime-derived property*** — see section 148);

(e) property owned, effectively controlled or given away by a person who is declared to be a drug trafficker under

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section 32A(1) of the *Misuse of Drugs Act 1981*, or who absconds before a declaration can be made (***declared drug trafficker*** — see section 159).

5. Application of Act to confiscable property

(1) This Act applies to a person's unexplained wealth whether any property, service, advantage or benefit that is a constituent of the person's wealth was acquired before or after the commencement of this Act.

(2) This Act applies to criminal benefits, crime-used property and crime-derived property —

(a) whether the relevant confiscation offence was committed in Western Australia or elsewhere;

(b) whether the relevant confiscation offence was committed before or after the commencement of this Act;

(c) whether or not anyone has been charged with, or convicted of, the relevant confiscation offence; and

(d) if someone has been convicted of the relevant confiscation offence — whether the conviction took place before or after the commencement of this Act.

(3) This Act applies —

(a) to property in Western Australia; and

(b) to the fullest extent of the capacity of the Parliament to make laws with respect to property outside the State, to property outside Western Australia.

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Part 2 — Confiscation of property

6. When property is confiscated

Property is confiscated when it is given or taken in satisfaction of a person's liability under section 14, 20 or 24 to pay the amount specified in an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration.

7. When frozen property is confiscated automatically

(1) Frozen property is confiscated if an objection to the confiscation of the property is not filed on or before the 28th day after the service cut off date for the property.

(2) If an objection to the confiscation of frozen property is filed on or before the 28th day after the service cut off date for the property, the property is confiscated if —

(a) the objection, or each objection if there are more than one, is finally determined;

(b) where the property is subject to a freezing notice — the freezing notice is not cancelled or set aside; and

(c) where the property is subject to a freezing order — the freezing order is not set aside.

(3) However, property frozen under a freezing notice is not confiscated under subsection (1) or (2) until the freezing notice is filed in accordance with section 36(6)(a).

8. Drug trafficker's property

(1) When a person is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of a confiscation offence that was committed after the commencement of this Act, the following property is confiscated —

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(a) all the property that the person owns or effectively controls at the time the declaration is made;

(b) all property that the person gave away at any time before the declaration was made, whether the gift was made before or after the commencement of this Act.

(2) When a person is taken to be a declared drug trafficker under section 159(2), the following property is confiscated —

(a) all the property that the person owned or effectively controlled at the time that the person absconded;

(b) all property that the person gave away at any time before the person absconded, whether the gift was made before or after the commencement of this Act.

(3) Nothing in subsection (1) or (2) prevents the confiscation of crime-derived property or crime-used property owned, effectively controlled or given away by a person, whether the relevant confiscation offence was committed, or is likely to have been committed, before or after the commencement of this Act.

(4) Nothing in subsection (1) or (2) prevents a criminal benefits declaration from being made against a person, whether the relevant confiscation offence was committed, or is likely to have been committed, before or after the commencement of this Act.

(5) Nothing in subsection (1) or (2) prevents an unexplained wealth declaration from being made against a declared drug trafficker or a person who has been charged with an offence that may lead to his or her being declared a drug trafficker.

9. Time and effect of confiscation of registrable real property

(1) Registrable real property that is confiscated under section 6, 7 or 8 vests absolutely in the State when —

(a) the court declares under section 30 that the property has been confiscated; and

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(b) a memorial of the making of the declaration is registered under section 113(1).

(2) When registrable real property vests in the State under subsection (1) —

(a) the property vests free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants);

(b) any caveat in force in relation to the property is taken to have been withdrawn; and

(c) the title in the property passes to the State.

(3) If registrable real property has been confiscated under section 6, 7 or 8, but has not vested in the State under subsection (1), sections 50 and 51 and Part 7 apply to the property as if it were subject to a freezing order.

10. Time and effect of confiscation of other property

(1) Property (except registrable real property) that is confiscated under section 6, 7 or 8 vests absolutely in the State when the section takes effect in relation to the property.

(2) When property (except registrable real property) that is registrable under an enactment is confiscated, the DPP must notify the registrar of the confiscation.

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Part 3 — Identifying and recovering confiscable property

Division 1 — Unexplained wealth

11. Applying for unexplained wealth declarations

(1) The DPP may apply to the court for an unexplained wealth declaration against a person.

(2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to confiscation, or at any other time.

12. Making unexplained wealth declarations

(1) On hearing an application under section 11(1), the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the person's wealth is greater than the value of the person's lawfully acquired wealth.

(2) Any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.

(3) Without limiting the matters to which the court may have regard, for the purpose of deciding whether the respondent has unexplained wealth, the court may have regard to the amount of the respondent's income and expenditure at any time or at all times.

(4) When making a declaration, the court is to —

(a) assess the value of the respondent's unexplained wealth in accordance with section 13; and

(b) specify the assessed value of the unexplained wealth in the declaration.

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(5) The court may make any necessary or convenient ancillary orders.

13. Assessing the value of unexplained wealth

(1) The value of the respondent's unexplained wealth is the amount equal to the difference between —

(a) the total value of the respondent's wealth; and

(b) the value of the respondent's lawfully acquired wealth.

(2) For the purposes of subsection (1), the value of any property, service, advantage or benefit that has been given away, used, consumed or discarded, or that is for any other reason no longer available, is the greater of —

(a) its value at the time that it was acquired; and

(b) its value immediately before it was given away, or was used, consumed or discarded, or stopped being available.

(3) The value of any other property, service, advantage or benefit is the greater of —

(a) its value at the time that it was acquired; and

(b) its value on the day that the application for the unexplained wealth declaration was made.

(4) However, when assessing the value of the respondent's unexplained wealth, the court is not to take account of —

(a) any property that has been confiscated under this Act or any other enactment;

(b) any property, service, advantage or benefit that was taken into account for the purpose of making an earlier unexplained wealth declaration against the respondent; or

(c) any property, service, advantage or benefit in relation to which a criminal benefits declaration has been made.

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14. Unexplained wealth payable to State

When the court makes an unexplained wealth declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the respondent's unexplained wealth.

Division 2 — Criminal benefits

15. Applying for criminal benefits declarations

(1) The DPP may apply to the court for a criminal benefits declaration.

(2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to confiscation, or at any other time.

16. Making criminal benefits declarations for crime-derived property

(1) On hearing an application under section 15(1), the court must declare that the respondent has acquired a criminal benefit if it is more likely than not that —

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth;

(b) the respondent is or was involved in the commission of a confiscation offence; and

(c) the property, service, advantage or benefit was wholly or partly derived or realised, directly or indirectly, as a result of the respondent's involvement in the commission of the confiscation offence, whether or not it was lawfully acquired.

(2) For the purposes of subsection (1)(b), if the respondent has been convicted of the confiscation offence, the respondent is

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conclusively presumed to have been involved in the commission of the offence.

(3) The property, service, advantage or benefit is presumed to have been directly or indirectly acquired as a result of the respondent's involvement in a confiscation offence unless the respondent establishes otherwise.

17. Making criminal benefits declarations for unlawfully acquired property

(1) On hearing an application under section 15(1), the court must declare that the respondent has acquired a criminal benefit if it is more likely than not that —

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and

(b) the property, service, advantage or benefit was not lawfully acquired.

(2) If the respondent has been convicted of a confiscation offence, or it is more likely than not that the respondent is or has been involved in the commission of a confiscation offence, then it is presumed that the property, service, advantage or benefit was not lawfully acquired unless the respondent establishes the contrary.

18. Limitations and ancillary orders

(1) The court is not to make a criminal benefits declaration in relation to any property, service, advantage or benefit if —

(a) a criminal benefits declaration has already been made in relation to the property, service, advantage or benefit;

(b) the property, service, advantage or benefit has been confiscated under this Act or any other enactment; or

(c) the property, service, advantage or benefit, or its value, has been taken into account for the purpose of making

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an unexplained wealth declaration against the respondent.

(2) When making a criminal benefits declaration, the court is to —

(a) assess the value of the criminal benefit acquired by the respondent in accordance with section 19; and

(b) specify the assessed value of the criminal benefit in the declaration.

(3) When making a criminal benefits declaration, the court may make any necessary or convenient ancillary orders.

19. Assessing the value of criminal benefits

(1) The value of any property, service, advantage or benefit that has been given away, used, consumed or discarded, or that is for any other reason no longer available, is the greater of —

(a) its value at the time that it was acquired; and

(b) its value at the time that it was given away, or was used, consumed or discarded, or stopped being available.

(2) The value of any other property, service, advantage or benefit is the greater of —

(a) its value at the time that it was acquired; and

(b) its value on the day that the application for the criminal benefits declaration was made.

20. Criminal benefits payable to State

When the court makes a criminal benefits declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the criminal benefit acquired by the respondent.

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Division 3 — Crime-used property substitution

21. Applying for crime-used property substitution declaration

(1) The DPP may apply to the court for a crime-used property substitution declaration against a person.

(2) An application may be made in conjunction with an application for a freezing order, in proceedings for the hearing of an objection to the confiscation of property, or at any other time.

22. Making crime-used property substitution declarations

(1) On hearing an application under section 21, the court must declare that property owned by the respondent is available for confiscation instead of crime-used property if —

(a) the crime-used property is not available for confiscation as mentioned in subsection (2); and

(b) it is more likely than not that the respondent made criminal use of the crime-used property.

(2) For the purposes of subsection (1)(a), the crime-used property is not available for confiscation if —

(a) the respondent does not own, and does not have effective control of, the property;

(b) where the property was or is owned or effectively controlled by the respondent, and was or is frozen — the freezing notice or freezing order has been or is to be set aside under section 82(3) in favour of the spouse, a de facto partner or a dependant of the respondent; or

(c) in any other case — the property has been sold or otherwise disposed of, or cannot be found for any other reason.

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(3) If the respondent has been convicted of the relevant confiscation offence, it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.

(4) If the respondent has not been convicted of the relevant confiscation offence, but the applicant establishes that it is more likely than not that the crime-used property was in the respondent's possession at the time that the offence was committed or immediately afterwards, then it is presumed that the respondent made criminal use of the property unless the respondent establishes the contrary.

(5) In any circumstances except those set out in subsection (3) or (4), the applicant bears the onus of establishing that the respondent made criminal use of the property.

(6) When making a declaration, the court is to —

(a) assess the value of the crime-used property in accordance with section 23; and

(b) specify the assessed value of the crime-used property in the declaration.

(7) The court may make any necessary or convenient ancillary orders.

[Section 22 amended by No. 28 of 2003 s. 40.]

23. Assessing the value of crime-used property

(1) The value of crime-used property is the amount equal to the value of the property at the time that the relevant confiscation offence was or is likely to have been committed.

(2) The value of the crime-used property is taken to be its full value even if the respondent did not outlay any amount for the purpose of obtaining or making criminal use of the property, or did not outlay an amount equal to its full value for that purpose.

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(3) The court may make a crime-used property substitution declaration against 2 or more respondents in respect of the same crime-used property, whether or not the applications for the respective declarations are heard in the same proceedings.

24. Substituted property payable to State

(1) When a court makes a crime-used property substitution declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the crime-used property.

(2) If a crime-used property substitution declaration is made against 2 or more respondents in respect of the same crime-used property, the respondents are jointly and severally liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the property.

Division 4 — Recovery of confiscable property

25. Recovery of unexplained wealth, criminal benefits or substituted property

(1) The amount payable by a respondent under section 14, 20 or 24 is payable —

(a) within one month after the date on which the respective unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration was made; or

(b) within any further time allowed by the court.

(2) The court may allow further time even if the due date has passed.

(3) If part or all of the amount is not paid within the time allowed, the unpaid amount is recoverable from the respondent by the

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State in a court of competent jurisdiction as a debt due to the State.

26. Use of frozen property to meet liability

(1) Frozen property owned by a respondent may be taken, with the respondent's consent, in payment or part-payment of an amount payable by the respondent under section 14, 20 or 24.

(2) However, if part or all of the amount payable by the respondent is not paid within the time allowed under section 25(1), then despite any other provision of this Act, any frozen property that is owned by the respondent is available for the purpose of satisfying the respondent's liability as if the property had been taken from the respondent's possession under a writ, warrant or other process of execution.

(3) Nothing in subsection (1) or (2) limits any other means of satisfying a debt due to the State under section 25(3).

27. Applying for confiscable property declarations

(1) The DPP may apply to the court for a confiscable property declaration.

(2) An application may be made in the course of proceedings for an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration, or at any other time.

28. Making confiscable property declarations

(1) On hearing an application under section 27 the court may declare that property that is not owned by the respondent is available to satisfy the respondent's liability under section 14, 20 or 24 if it is more likely than not that —

(a) if the property is frozen — the respondent effectively controlled the property at the time that the freezing

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notice was issued or the freezing order was made for the property;

(b) if the property is not frozen — the respondent effectively controlled the property at the time that the application for the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration was made; or

(c) the respondent gave the property away at any earlier time.

(2) It is presumed that the respondent effectively controlled the property at the material time, or gave the property away, unless the respondent establishes the contrary.

(3) The court may make any necessary or convenient ancillary orders.

29. Restrictions on confiscation of declared confiscable property

(1) Property that is effectively controlled, or was given away, by a respondent is not available to satisfy the respondent's liability under section 14, 20 or 24 unless the property is specified in a confiscable property declaration against the respondent.

(2) The property specified in a confiscable property declaration is only available to satisfy the respondent's liability —

(a) in accordance with the declaration; and

(b) to the extent that property owned by the respondent is not available or is insufficient to satisfy the liability.

30. Applying for and making declarations of confiscation

(1) The DPP may apply to the court for a declaration that property has been confiscated.

(2) On considering an application, if the court finds that the property described in the application has been confiscated under

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section 6, 7 or 8, the court must make a declaration to that effect.

31. Notice of confiscation of registrable property

(1) When the court declares under section 30 that registrable real property has been confiscated, the DPP must lodge a memorial of the confiscation with the Registrar of Titles.

(2) When the court declares under section 30 that property that is registrable under any enactment except the *Transfer of Land Act 1893* has been confiscated, the DPP must lodge with the registrar —

(a) a copy of the declaration; and

(b) a notice giving particulars of the confiscation.

32. Varying declarations

If the court has made a declaration under this Part, the DPP may at any time apply to the court for a variation of the declaration, or for a further declaration, to give effect, or better to give effect, to the previous declaration.

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Part 4 — Preventing dealings in confiscable property

Division 1 — Seizure of crime-used and crime-derived property

33. Seizure of crime-used or crime-derived property

(1) A police officer may seize any property if there are reasonable grounds for suspecting that the property —

(a) is crime-used property;

(b) is crime-derived property; or

(c) is owned or effectively controlled by a person who has been charged with an offence, and who could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.

(2) A police officer may —

(a) at any time remove the seized property from the place in which it was found and retain it; or

(b) guard the property in the place in which it was found.

(3) A police officer may retain or guard the property —

(a) if a freezing notice is issued for the property within 72 hours after it was seized — while the freezing notice is in force; or

(b) if not — for not more than 72 hours after the property was seized.

(4) Any income or other property derived from seized property while it is being retained or guarded is taken for all purposes to be part of the seized property.

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Division 2 — Freezing notices for crime-used and crime-derived property

34. Issue of freezing notices

(1) The DPP or a police officer may apply to a Justice of the Peace for the issue of a freezing notice.

(2) A Justice of the Peace may issue a freezing notice for any property if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.

(3) A Justice of the Peace may issue a freezing notice for all or any property that is owned or effectively controlled by a person, or that the person has at any time given away if —

(a) the person has been charged with an offence, or the applicant for the notice advises the Justice of the Peace that the person is likely to be charged with an offence within 21 days after the day on which the freezing notice is issued; and

(b) the person could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.

(4) A freezing notice may be issued under subsection (3) for all or any property that is owned or effectively controlled by the person, whether or not any of the property is described or identified in the application.

(5) A freezing notice may be issued under subsection (3) for all property acquired after the order is made —

(a) by the person; or

(b) by another person at the request or direction of the first-mentioned person.

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(6) When considering an application for a freezing notice, a Justice of the Peace must —

(a) consider each matter that is alleged by the applicant as a ground for issuing the freezing notice; and

(b) if the justice decides to issue the freezing notice — set out in the notice each ground that the justice finds is a ground on which the notice may be issued.

(7) Any income or other property derived from the property while the freezing notice is in force is taken to be part of the property.

35. Form of freezing notices

(1) A freezing notice must —

(a) describe the property covered by the notice;

(b) include an estimate of the value of the property;

(c) if the property has been removed from the place in which it was found — indicate where, when and from whom it was taken;

(d) summarise the effect of the notice;

(e) advise the recipient to the effect that the property described in the order may be confiscated automatically under this Act unless an objection to the confiscation of the property is filed in the court specified in the notice within 28 days after the date of service of the notice;

(f) tell the recipient that he or she may be eligible to file an objection to the confiscation of the property;

(g) give details of the recipient's obligations under section 37; and

(h) give any directions necessary for the security and management of the property while the notice is in force.

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(2) For the purposes of subsection (1)(b), a police officer may estimate the value of the property, or may have the property valued by an appropriately qualified valuer.

(3) For the purposes of subsection (1)(h), a police officer or the DPP may arrange for an inventory to be taken of any fittings, fixtures or moveable goods in or on the property.

36. Service and filing of freezing notices

(1) As soon as practicable after a freezing notice is issued, the applicant for the notice must arrange for a copy of it to be served personally on each of the following persons —

(a) if the property covered by the notice was taken from a person — that person;

(b) if, at the time that the freezing notice is issued, the applicant is aware of any other person who is, or may be, or claims to be, an interested party — that person.

(2) If the property is registrable real property, the applicant must lodge a memorial of the issue of the notice with the Registrar of Titles.

(3) If the property is registrable under any enactment except the *Transfer of Land Act 1893*, the applicant must notify the registrar of the issue of the notice.

(4) If, as a result of information in a statutory declaration given, in accordance with section 37, by a person who was served with a copy of the freezing notice under subsection (1), the applicant becomes aware that any other person is or may be or claims to be an interested party, then the applicant must arrange for a copy of the notice to be served on the person personally, as soon as practicable.

(5) Nothing in subsection (1) or (4) prevents the applicant from serving a copy of the notice at any time on any other person whom the applicant becomes aware is, or may be or claims to be

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an interested party, but the service cut off date for the property is not affected by any service outside the requirements of subsection (1) or (4).

(6) The applicant must ensure that —

(a) the freezing notice is filed in the court specified in the notice;

(b) an affidavit of service is endorsed on a copy of each copy of the freezing notice that is served on a person; and

(c) each endorsed copy is filed in the court.

37. Persons served with freezing notices to declare any other interested parties

(1) A person who is served with a copy of a freezing notice under section 36 must give a statutory declaration to the officer in charge of the police station specified in the notice.

(2) The statutory declaration must be given within 7 days after the day on which the copy of the freezing notice was served on the person.

(3) In the statutory declaration, the declarant must —

(a) state the name and, if known, the address of any other person whom the declarant is aware is or may be, or claims to be, an interested party; or

(b) if the declarant is not aware of any other person who is or may be, or claims to be, an interested party — make a statement to that effect.

Penalty: $5 000.

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38. Duration of freezing notices for registrable real property

(1) A freezing notice for registrable real property comes into force when a memorial of the issue of the freezing notice is registered under section 113(1).

(2) A freezing notice for registrable real property stops being in force when a memorial under subsection (4) or (5) in relation to the property is registered under section 113(1).

(3) However, if the freezing notice was issued on 2 or more grounds, but a memorial has not been lodged under subsection (4) or (5) in relation to each of those grounds, the freezing notice continues in force as if it had been made on each remaining ground.

(4) If a freezing notice under section 34(2) is in force for registrable real property, the applicant for the freezing notice must lodge a memorial with the Registrar of Titles if —

(a) the freezing notice is cancelled under section 40;

(b) the freezing notice is set aside under Part 6; or

(c) the property is confiscated under section 6, 7 or 8.

(5) If a freezing notice for registrable real property was issued under section 34(3) on the basis that a person has been or is likely to be charged with an offence, the applicant for the freezing notice must lodge a memorial with the Registrar of Titles if —

(a) when the notice was issued on the basis of advice given under section 34(3)(a) — the person is not charged with the offence within 21 days after the date of the freezing notice;

(b) the charge against the person is disposed of;

(c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

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(d) the freezing notice is cancelled under section 40;

(e) the freezing notice is set aside under Part 6; or

(f) the property is confiscated under section 6, 7 or 8.

39. Duration of freezing notices for other property

(1) A freezing notice for any property except registrable real property comes into force when the notice is issued.

(2) A freezing notice issued under section 34(2) for any property except registrable real property stops being in force as soon as any of the following happens —

(a) the property is confiscated under section 6, 7 or 8;

(b) the freezing notice is cancelled under section 40;

(c) the freezing notice is set aside under Part 6.

(3) A freezing notice for property (except registrable real property) issued under section 34(3) on the basis that a person has been or is likely to be charged with an offence stops being in force as soon as one of the following happens —

(a) where the notice was issued on the basis of advice given under section 34(3)(a) — the person is not charged with the offence within 21 days after the date of the freezing notice;

(b) the charge against the person is disposed of;

(c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

(d) the freezing notice is cancelled under section 40;

(e) the freezing notice is set aside under Part 6; or

(f) the property is confiscated under section 6, 7 or 8.

(4) However, if the freezing notice was issued on 2 or more grounds, but the notice has not ceased to be in force under

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subsection (3) or (4) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.

(5) When a freezing notice stops being in force for property (except registrable real property) that is registrable under an enactment, the applicant for the notice must notify the registrar to that effect.

40. Cancellation of freezing notices

(1) A police officer or the DPP must cancel a freezing notice issued under section 34(2) for property if the grounds for suspecting that the property is crime-used or crime-derived no longer exist.

(2) A police officer or the DPP must ensure that —

(a) notice of the cancellation is served personally, as soon as practicable, on each person on whom a copy of the notice was served under section 36;

(b) if the notice has been filed in a court — a notice of the cancellation is filed in the court;

(c) any property covered by the notice that is being guarded under section 33(2)(b) is released from guard;

(d) any property covered by the notice that is being retained under section 33(3) is returned to the person from whom it was seized unless it is to be otherwise dealt with under this Act or another enactment; and

(e) if the police officer or the DPP is aware that the person to whom the property is to be returned under paragraph (d) is not the owner of the property — the owner is notified, where practicable, of the cancellation and return.

Division 3 — Freezing orders for confiscable property

41. Applying for freezing orders

(1) The DPP may apply to the court for a freezing order for property.

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(2) An application may be made ex parte.

42. Proceedings for freezing orders, court's powers in

In proceedings for a freezing order, the court may do any or all of the following —

(a) order that the whole or any part of the proceedings is to be heard in closed court;

(b) order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings;

(c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.

43. Making freezing orders

(1) The court may make a freezing order for property if —

(a) an examination order, a monitoring order or a suspension order is in force in relation to the property; or

(b) the DPP advises the court that an application for an examination order, a monitoring order or a suspension order has been made in relation to the property, or is likely to be made in relation to the property within 21 days after the freezing order is made.

(2) The court may make a freezing order under subsection (1) whether or not the person against whom the examination order, monitoring order or suspension order is made, or is to be sought, owns or effectively controls the property.

(3) The court may make a freezing order for all or any property that is owned or effectively controlled by the person or that the person has at any time given away if —

(a) a production order has been made against the person;

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(b) an application has been made against the person for an unexplained wealth declaration, criminal benefits declaration, crime-used property substitution declaration or production order; or

(c) the DPP advises the court that such an application is likely to be made within 21 days after the freezing order is made.

(4) The court is not to refuse to make a freezing order for property under subsection (3) only because the value of the property exceeds, or could exceed, the amount that a person could be liable to pay under section 14, 20 or 24 if the declaration is made.

(5) The court may make a freezing order for all or any property that is owned or effectively controlled by a person, or that the person has at any time given away if —

(a) the person has been charged with an offence, or the DPP advises the court that a person is likely to be charged with an offence within 21 days after the day on which the freezing order is made; and

(b) the person could be declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* if he or she is convicted of the offence.

(6) A freezing order may be made under subsection (3) or (5) for all property owned or effectively controlled by the person, whether or not any of the property is described or identified in the application.

(7) A freezing order may be made under subsection (3) or (5) for all property acquired after the order is made —

(a) by the person; or

(b) by another person at the request or direction of the first-mentioned person.

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(8) The court may make a freezing order for property if there are reasonable grounds for suspecting that the property is crime-used or crime-derived.

44. Grounds for freezing orders to be considered and specified by court

When considering an application for a freezing order, the court must —

(a) consider each matter that is alleged by the applicant, either in the application or in the course of the proceedings, as a ground for making the order; and

(b) set out in the order each ground that the court finds is a ground on which the order may be made.

45. Scope of freezing orders

In a freezing order, the court may do any or all of the following —

(a) direct that any income or other property derived from the property while the order is in force is to be treated as part of the property;

(b) if the property is moveable — direct that the property is not to be moved except in accordance with the order;

(c) appoint the DPP, the Public Trustee or the Commissioner of Police to manage the property while the order is in force;

(d) give any other directions necessary to provide for the security and management of the property while the order is in force;

(e) provide for meeting the reasonable living and business expenses of the owner of the property.

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46. Service of freezing orders

(1) As soon as practicable after a freezing order is made, the applicant for the order must arrange for a copy of the order and a notice that complies with subsection (6) to be served personally on each of the following persons —

(a) if the frozen property was taken from a person, or is in the custody of a person — that person;

(b) if, at the time that the freezing order is made, the applicant is aware of any other person who is, or may be, or claims to be, an interested party — that person.

(2) If the property is registrable real property, the applicant must lodge a memorial of the making of the order with the Registrar of Titles.

(3) If the property is registrable under any enactment except the *Transfer of Land Act 1893*, the applicant must notify the registrar of the making of the order.

(4) If, as a result of information in a statutory declaration given, in accordance with section 47, by a person who was served with a copy of the freezing order under subsection (1), the applicant becomes aware that any other person is or may be or claims to be an interested party, then the applicant must arrange for a copy of the freezing order and a notice that complies with subsection (6) to be served on the person personally, as soon as practicable.

(5) Nothing in subsection (1) or (4) prevents the applicant from serving a copy of the freezing order and a notice at any time on any other person whom the applicant becomes aware is, or may be or claims to be an interested party, but the service cut off date for the property is not affected by any service outside the requirements of subsection (1) or (4).

(6) The notice must —

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(a) summarise the effect of the order;

(b) advise the recipient to the effect that the property described in the order may be confiscated automatically under this Act unless an objection to the confiscation of the property is filed in the court specified in the notice within 28 days after the date of service of the notice;

(c) tell the recipient that he or she may be eligible to file an objection to the confiscation of the property; and

(d) give details of the recipient's obligations under section 47.

(7) When service is effected on a person under this section, the server must file an affidavit to that effect stating the name and address of the person served.

47. Persons served with freezing orders to declare any other interested parties

(1) A person who is served under section 46 with a copy of a freezing order and a notice must give a statutory declaration to the DPP.

(2) The statutory declaration must be given within 7 days after the day on which the notice was served on the person.

(3) In the statutory declaration, the declarant must —

(a) state the name and, if known, the address of any other person whom the declarant is aware is or may be, or claims to be, an interested party; or

(b) if the declarant is not aware of any other person who is or may be, or claims to be, an interested party — make a statement to that effect.

Penalty: $5 000.

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48. Duration of freezing orders for registrable real property

(1) A freezing order for registrable real property comes into force when a memorial of the making of the order is registered under section 113(1).

(2) A freezing order for registrable real property stops being in force when a memorial under subsection (4), (5), (6) or (7) in relation to the property is registered under section 113(1).

(3) However, if the freezing order was made on 2 or more grounds, but a memorial has not been lodged under subsection (4) or (5) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.

(4) If a freezing order for registrable real property was made under section 43(1) on the basis that an application for another order has been or is likely to be made, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —

(a) where the freezing order was made on the basis of advice given to the court under section 43(1)(b) — an application for the other order is not made within 21 days after the date of the freezing order;

(b) the application for the other order is withdrawn;

(c) the application for the other order is finally determined but the court does not make the other order;

(d) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection; or

(e) the property is confiscated under section 6, 7 or 8.

(5) If a freezing order for registrable real property was made under section 43(3) on the basis that an application for a declaration or another order has been or is likely to be made, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —

(a) where the freezing order was made on the basis of advice given to the court under section 43(3)(c) — an

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application for the declaration or other order is not made within 21 days after the date of the freezing order;

(b) the application for the declaration or other order is withdrawn;

(c) the application for the declaration or other order is finally determined, but the court does not make the declaration or other order;

(d) in the case of a declaration — the declaration is made, and the respondent's liability to pay an amount under section 14, 20 or 24 is satisfied, whether or not any or all of the frozen property is given or taken in satisfaction of the liability;

(e) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection; or

(f) the property is confiscated under section 6, 7 or 8.

(6) If a freezing order for registrable real property was made under section 43(5) on the basis that a person has been or is likely to be charged with an offence, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —

(a) where the freezing order was made on the basis of advice given to the court under section 43(5)(a) — the person is not charged with the offence within 21 days after the date of the freezing order;

(b) the charge against the person is disposed of;

(c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

(d) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection; or

(e) the property is confiscated under section 6, 7 or 8.

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(7) If a freezing order was made under section 43(8) for registrable real property on the basis that the property was suspected of being crime-used or crime-derived, the applicant for the freezing order must lodge a memorial with the Registrar of Titles if —

(a) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection; or

(b) the property is confiscated under section 6, 7 or 8.

49. Duration of freezing orders for other property

(1) A freezing order for property (except registrable real property) comes into force when the freezing order is made.

(2) If a freezing order for property (except registrable real property) was made under section 43(1) on the basis that an application for another order has been or is likely to be made, the freezing order stops being in force as soon as one of the following happens —

(a) if the freezing order was made on the basis of advice given to the court under section 43(1)(b) — an application for the other order is not made within 21 days after the date of the order;

(b) the application for the other order is withdrawn;

(c) the application for the other order is finally determined but the court does not make the other order;

(d) the freezing order is set aside at the request of the applicant for the freezing order or in proceedings on an objection;

(e) the property is confiscated under section 6, 7 or 8.

(3) A freezing order for property (except registrable real property) made under section 43(3) on the basis that an application for a declaration or another order has been or is likely to be made stops being in force as soon as one of the following happens —

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(a) if the freezing order was made on the basis of advice given to the court under section 43(3)(c) — an application for the declaration or other order is not made within 21 days after the date of the freezing order;

(b) the application for the declaration or other order is withdrawn;

(c) the application for the declaration or other order is finally determined, but the court does not make the declaration or other order;

(d) in the case of a declaration — the declaration is made, and the respondent's liability to pay an amount under section 14, 20 or 24 is satisfied, whether or not any or all of the frozen property is given or taken in satisfaction of the liability;

(e) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;

(f) the property is confiscated under section 6, 7 or 8.

(4) A freezing order for property (except registrable real property) made under section 43(5) on the basis that a person has been or is likely to be charged with an offence stops being in force as soon as one of the following happens —

(a) if the freezing order was made on the basis of advice given to the court under section 43(5)(a) — the person is not charged with the offence within 21 days after the date of the order;

(b) the charge against the person is disposed of;

(c) the charge is finally determined, but the person is not declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981*;

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(d) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;

(e) the property is confiscated under section 6, 7 or 8.

(5) A freezing order made under section 43(8) for property (except registrable real property) on the basis that it was suspected of being crime-used or crime-derived stops being in force as soon as one of the following happens —

(a) the freezing order is set aside on all grounds at the request of the applicant for the freezing order or in proceedings on an objection;

(b) the property is confiscated under section 6, 7 or 8.

(6) However, if the freezing order was made on 2 or more grounds, but the order has not stopped being in force under subsection (2), (3), (4) or (5) in relation to each of those grounds, the freezing order continues in force as if it had been made on each remaining ground.

Division 4 — Dealing with seized or frozen property

50. Prohibited dealings

(1) A person must not deal with seized or frozen property in any way.

Penalty: $100 000 or the value of the property, whichever is greater, or imprisonment for 5 years, or both.

(2) Subsection (1) does not apply to —

(a) a person acting in accordance with an order under section 45(c), 91(2) or 93(2);

(b) in the case of seized property — a police officer acting under section 33, or a person acting under the direction of a police officer who is acting in accordance with this Act; or

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(c) in the case of frozen property — a person acting in accordance with the freezing notice or freezing order.

(3) It is a defence to a prosecution for an offence under subsection (1) in relation to seized property if the accused establishes that he or she did not know, and can not reasonably be expected to have known, that the property was being retained or guarded under section 33(2) at the relevant time.

(4) It is a defence to a prosecution for an offence under subsection (1) in relation to frozen property if the respondent establishes that he or she did not know, and can not reasonably be expected to have known, that the freezing notice or freezing order was in force at the material time.

(5) Subsection (1) does not prevent a person from being dealt with for a contempt of the court for a contravention of a freezing order, but the person is not punishable for both a contempt and an offence under subsection (1) arising from the same contravention.

[Section 50 amended by No. 84 of 2004 s. 82.]

51. Effect of prohibited dealings in frozen property

Despite any other enactment, any dealing with property that contravenes section 50 has no effect, whether at law, in equity or otherwise, on the rights of the State under this Act.

52. Permitted dealings in mortgaged property

If mortgaged property is frozen, nothing in this Act —

(a) prevents the mortgagor from making payments to the mortgagee in accordance with the mortgage if the payments are made with money that has not been seized or frozen; or

(b) prevent the mortgagee from accepting payments from the mortgagor in accordance with the mortgage.

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Part 5 — Investigation and search

Division 1 — Preliminary inquiries

53. Financial institutions may volunteer information

A financial institution that has information about a transaction with the institution may give the information to the DPP or a police officer if there are reasonable grounds for suspecting that the information —

(a) may be relevant to the investigation of a confiscation offence;

(b) may assist a court in deciding whether or not to make an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration; or

(c) may otherwise facilitate the operation of this Act or the regulations.

54. Financial institutions may be required to give information

(1) For the purposes of any proceedings under this Act, or for the purposes of deciding whether to apply for a freezing notice, or for any order, declaration or warrant under this Act, the DPP or a police officer may require a financial institution to do any or all of the following —

(a) give information about whether a person described in the requirement holds an account with the institution;

(b) give information about whether or not an account described in the requirement is held with the institution;

(c) identify an account held with the institution;

(d) identify the holder of an account held with the institution;

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(e) give information about the existence of any other kind of transaction between the institution and a person described in the requirement;

(f) if a transaction referred to in paragraph (e) has taken place, is taking place or is to take place — give prescribed particulars of the transaction.

(2) A requirement must —

(a) be in writing served on the institution; and

(b) specify the information required.

(3) Service of the requirement on the institution may be effected by properly addressed email or fax, or by any other means provided by section 76 of the *Interpretation Act 1984*.

(4) The financial institution must comply with the requirement.

Penalty: $500 000.

55. Protection for financial institutions

(1) An action, suit or proceeding in relation to the giving of information under section 53 does not lie against —

(a) the financial institution that gives the information; or

(b) an officer of the institution acting within his or her authority.

(2) An action, suit or proceeding in relation to a financial institution's response to a requirement under section 54 does not lie against —

(a) the financial institution; or

(b) an officer of the financial institution who is acting within his or her authority.

56. Financial institutions giving false or misleading information

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A financial institution commits an offence if the institution knowingly —

(a) provides false or misleading information under section 53; or

(b) provides false or misleading information in purported compliance with a requirement under section 54.

Penalty: $500 000.

Division 2 — Examinations

57. Applying for orders for examination

(1) The DPP may apply to the District Court for an order for the examination of a person.

(2) An application may be made ex parte.

58. Making orders for examination

(1) The court may order a person to submit to an examination about any or all of the following —

(a) the nature, location and source of frozen property;

(b) the nature, location and source of property that is not frozen, but is suspected on reasonable grounds of being confiscable;

(c) the wealth, liabilities, income and expenditure of a person who has been convicted of a confiscation offence;

(d) the wealth, liabilities, income and expenditure of a person who is suspected on reasonable grounds of being involved or of having been involved in the commission of a confiscation offence;

(e) the wealth, liabilities, income and expenditure of a person who has, or is suspected on reasonable grounds of having, unexplained wealth;

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(f) the wealth, liabilities, income and expenditure of a declared drug trafficker;

(g) the nature, location and source of any property-tracking documents.

(2) The examination order may do any or all of the following —

(a) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about the property described in the order;

(b) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about the person's wealth, liabilities, expenditure or income;

(c) require the person to give to the court any documents (including property-tracking documents) or information in the person's possession or control about another person's wealth, liabilities, expenditure or income;

(d) require the person to give to the court any information in the person's possession or control that could help to locate, identify or quantify any property, property-tracking documents, other documents or information referred to in subsection (1);

(e) require the person to give any required information by affidavit, or require the person to attend the court for examination, or both;

(f) give any directions, or make any ancillary orders, that are necessary or convenient for giving effect to the examination order or for ensuring that the person complies with the order.

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59. Service of orders for examination

(1) The applicant for an examination order must arrange for a copy of the order to be served personally on the person to be examined.

(2) A copy of the order is not to be served on anyone except the person to be examined.

60. Conduct of examinations

(1) An examination is to be held in camera.

(2) The person to be examined may be represented by his or her legal representative.

61. Examination orders, contravening, admissibility of information given under

(1) If an owner of frozen property, who is to be examined in connection with the property under an examination order, contravenes the order or the examiner's requirements under the order —

(a) the owner is not entitled to file an objection to the confiscation of the property;

(b) if the owner has already filed an objection — the objection is of no effect; and

(c) the owner commits an offence.

(2) A person convicted of an offence under subsection (1)(c) is liable to a fine of $100 000 or an amount equal to the value of the property, whichever is greater, or imprisonment for 5 years, or both.

(3) If a person examined under an examination order in connection with another person's wealth, liabilities, income or expenditure

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contravenes the order, or the examiner's requirements under the order, the person commits an offence and is liable —

(a) to a maximum fine of an amount equal to the value of the frozen property or of $50 000, whichever is greater;

(b) to imprisonment for a maximum of 2 years; or

(c) to both a fine under paragraph (a) and imprisonment under paragraph (b).

(4) Without limiting subsection (1), (2) or (3), a person who is examined under an examination order contravenes the order for the purposes of the respective subsection if —

(a) the person fails to disclose material information, or gives false information or a false document, in purported compliance with the order; and

(b) the person was aware, or could reasonably have been expected to have been aware, that the information was material, or that the information or document was false.

(5) A person is not entitled to contravene an examination order or the examiner's requirements under the order on the grounds that complying with the order —

(a) might incriminate the person or might render him or her liable to a penalty; or

(b) could result in the confiscation of property.

(6) A person is not excused from complying with an examination order on the grounds that complying with the order would be in breach of an obligation of the person not to disclose information, or not to disclose the existence or contents of a document, whether the obligation arose under an enactment or otherwise.

(7) A statement or disclosure made by a person in the course of complying with an examination order is admissible as evidence against the person —

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(a) in a proceeding against the person for an offence under this section;

(b) in any civil proceeding; and

(c) in any proceeding under this Act that could lead to the confiscation of property owned, effectively controlled or given away by the person, but only for the purpose of facilitating the identification of such property.

Division 3 — Production of documents

62. Applying for production orders

(1) The DPP may apply to the District Court for a production order for a property-tracking document.

(2) An application may be made ex parte.

63. Making production orders

(1) On hearing an application under section 62, the court must order a person identified in the application to produce the property-tracking document described in the application if there are reasonable grounds for suspecting that the person has the document in his or her possession or control.

(2) The order may direct the person —

(a) to give the property-tracking document to the DPP or a police officer; or

(b) to make it available to the DPP or a police officer for inspection.

(3) The order must specify the time and place for the document to be given or made available.

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64. Inspection of property-tracking documents

(1) When a property-tracking document is given to the DPP or a police officer in accordance with a direction under section 63(2)(a), the DPP or police officer may do any or all of the following —

(a) inspect the document;

(b) take extracts from the document;

(c) make copies of the document;

(d) retain the document for as long as its retention is reasonably required for the purposes of this Act.

(2) If the DPP or police officer retains the property-tracking document, the DPP or police officer must, on the request of the person required by the order to produce the document —

(a) permit the person to inspect the document, take extracts from it or make copies of it; or

(b) give the person a copy of the document certified by the DPP or police officer in writing to be a true copy of the document.

(3) When a property-tracking document is made available to the DPP or a police officer for inspection in accordance with a direction under section 63(2)(b), the DPP or police officer may do any one or more of the following —

(a) inspect the document;

(b) take extracts from the document;

(c) make copies of the document.

65. Production orders, contravening, admissibility of information given under

(1) A person who contravenes a production order without reasonable excuse commits an offence.

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(2) A person commits an offence if the person, in purported compliance with a production order, produces or makes available to the DPP or a police officer a document that the person knows, or could reasonably be expected to know, is false or misleading in a material particular.

(3) However, the person does not commit an offence under subsection (2) if, as soon as practicable after becoming aware that the document is false or misleading, the person —

(a) tells the DPP or a police officer that the document is false or misleading;

(b) indicates the respects in which it is false or misleading; and

(c) gives the DPP or a police officer any correct information which is in the person's possession or control.

(4) A person convicted of an offence under subsection (1) or (2) is liable to a fine of $100 000 or imprisonment for 5 years, or both.

(5) A person is not excused from complying with a production order on the grounds that complying with the order would tend to incriminate the person or render him or her liable to a penalty.

(6) A person is not excused from complying with a production order on the grounds that complying with the order would be in breach of an obligation of the person not to disclose the existence or contents of the document, whether the obligation arose under an enactment or otherwise.

(7) Any information contained in a property-tracking document produced under a production order, or any statement or disclosure made by a person in the course of complying with a production order, is admissible in evidence against the person —

(a) in a proceeding against the person for an offence under this section;

(b) in any civil proceeding; and

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(c) in any proceeding under this Act that could lead to the confiscation of property owned, effectively controlled or given away by the person, but only for the purpose of facilitating the identification of such property.

66. Varying production orders

(1) If a production order requires a person to give a property-tracking document to the DPP or a police officer, the person may apply to the court that made the order to vary it so that it requires the person to make the document available to the DPP or a police officer for inspection.

(2) The court may vary the order accordingly if it finds that the document is essential to the business activities of the person.

Division 4 — Monitoring financial transactions

67. Applying for monitoring orders and suspension orders

(1) The DPP may apply to the District Court for a monitoring order.

(2) The DPP may apply to the District Court for a suspension order.

(3) An application may be made ex parte.

68. Making monitoring orders and suspension orders

(1) The court may order a financial institution to give information to the DPP or a police officer about all transactions carried out through an account held with the institution by a person named in the order.

(2) The court may order a financial institution —

(a) to notify the DPP or a police officer immediately of any transaction that has been initiated in connection with an account held with the institution by a person named in the order;

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(b) to notify the DPP or a police officer immediately if there are reasonable grounds for suspecting that a transaction is about to be initiated in connection with the account; and

(c) to refrain from completing or effecting the transaction for 48 hours.

(3) The court may make a monitoring order or suspension order if there are reasonable grounds for suspecting that the named person —

(a) has been, or is about to be, involved in the commission of a confiscation offence;

(b) has acquired, or is about to acquire, directly or indirectly, any crime-derived property; or

(c) has benefited, or is about to benefit, directly or indirectly, from the commission of a confiscation offence.

(4) A monitoring order or suspension order applies to all transactions carried out or to be carried out through the bank account during the monitoring period or suspension period specified in the order.

(5) The monitoring order or suspension order must specify —

(a) the financial institution to which the order applies;

(b) the name or names in which the account is believed to be held;

(c) the class of information that the institution is required to give;

(d) the manner in which the information is to be given; and

(e) the monitoring period, or suspension period, in accordance with subsection (6).

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(6) The monitoring period or suspension period —

(a) is not to commence earlier than the day on which notice of the order is served on the financial institution; and

(b) is not to end more than 3 months after the date of the order.

69. Contravening monitoring orders or suspension orders

A person commits an offence if the person knowingly —

(a) contravenes a monitoring order or suspension order; or

(b) provides false or misleading information in purported compliance with the order.

Penalty: $100 000.

Division 5 — Secrecy requirements

70. Restricted disclosures

(1) A person must not make a disclosure to anyone, except as permitted under section 71, about —

(a) the fact that a financial institution, or an officer of a financial institution, intends to give or has given information to the DPP under section 53;

(b) the nature of any information given under section 53;

(c) the fact that a requirement or a response to it has been or is to be made under section 54;

(d) the content of a requirement or response made under section 54;

(e) the fact that the person or anyone else is or has been subject to a production order, an examination order, a monitoring order or a suspension order; or

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(f) the contents of any examination order, production order, monitoring order or suspension order.

Penalty: $100 000, or imprisonment for 5 years, or both.

(2) Without limiting subsection (1), a person makes a disclosure for the purposes of the subsection if the person —

(a) discloses information to a person from which the person could reasonably be expected to infer that a requirement or response under section 54 has been or is to be made;

(b) discloses information to a person from which the person could reasonably be expected to infer anything about the nature or contents of a requirement or response under section 54;

(c) makes or keeps a record of any information about a requirement or response under section 54;

(d) discloses anything about the existence or operation of an examination order, a production order, a monitoring order or a suspension order;

(e) discloses information to a person from which the person could reasonably be expected to infer anything about the existence or operation of an examination order, a production order, a monitoring order or a suspension order; or

(f) makes or keeps a record of any information about the existence or operation of an examination order, a production order, a monitoring order or a suspension order.

71. Who restricted disclosures may be made to

(1) A corporation, or an officer of a corporation, may make a restricted disclosure to any one or more of the following —

(a) the DPP or a police officer;

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(b) an officer of the corporation, for the purpose of giving information under section 53;

(c) an officer of the corporation, for the purpose of ensuring that a requirement under section 54 is complied with;

(d) an officer of the corporation, for the purpose of ensuring that an examination order, a production order, a monitoring order or a suspension order is complied with;

(e) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to giving information under section 53 or complying with a requirement under section 54;

(f) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to an examination order, a production order, a monitoring order or a suspension order.

(2) An individual who is not acting in the capacity of an officer of a corporation or of a legal practitioner may make a restricted disclosure to either or both of the following —

(a) the DPP or a police officer; or

(b) a legal practitioner, for the purpose of obtaining legal advice or representation in relation to an examination order.

(3) A legal practitioner to whom a restricted disclosure is made under subsection (1) or (2) may make a restricted disclosure to a person to whom the disclosure could have been made under the respective subsection for the purpose of giving legal advice or representing a person in relation to the matter disclosed.

(4) A person (except a legal practitioner) to whom a restricted disclosure is made under subsection (1) or (2) may make a restricted disclosure to a person to whom the disclosure could have been made under the respective subsection.

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(5) However, if a restricted disclosure about a particular matter may only be made under subsection (1) or (2) in particular circumstances or for a particular purpose, then a person must not make a restricted disclosure under subsection (4) about the matter except in those circumstances or for that purpose.

(6) If a person to whom a restricted disclosure about a particular matter is made under this section stops being a person of a kind to whom the disclosure may be made, the person must not, in any circumstances, make a restricted disclosure about the matter to anyone.

72. Disclosure to court

A person is not required to make a restricted disclosure to any court for any purpose.

Division 6 — Detention, search and seizure

73. Power to detain and search persons for property or documents

(1) A police officer may, at any time, stop and detain a person if there are reasonable grounds for suspecting that the person has confiscable property, or property-tracking documents, in his or her possession.

(2) A police officer may, at any time, stop and detain a person if there are reasonable grounds for suspecting that another person is holding confiscable property, or property-tracking documents, on behalf of the person to be detained.

(3) For the purpose of exercising his or her powers under subsection (1) or (2), a police officer may stop and detain a vehicle.

(4) When a police officer detains a person under subsection (1) or (2), the officer may —

(a) search the person in accordance with section 75; and

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(b) search any baggage, package, vehicle or anything else apparently in the possession or under the control of the person.

(5) When exercising his or her powers under this section, a police officer may use any necessary force and any assistance the officer thinks necessary.

74. Search warrants

(1) A police officer may apply to a Justice of the Peace for a search warrant.

(2) A Justice of the Peace may issue a warrant to search any vehicle, premises or place if satisfied, by information on oath, that there are reasonable grounds for suspecting that any confiscable property, or any property-tracking documents —

(a) is or are in or on the vehicle, premises or place; or

(b) will be in or on the vehicle, premises or place within the next 72 hours.

(3) The search warrant may authorise a police officer to do any or all of the following, using any necessary force and with any assistance the officer thinks necessary —

(a) enter the vehicle, premises or place described in the warrant;

(b) search the vehicle, premises or place;

(c) search any baggage, package or anything else found in or on the vehicle, premises or place;

(d) detain any person in or on the vehicle, premises or place and search the person in accordance with section 75.

(4) A warrant —

(a) may be executed at any time of night or day; and

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(b) continues in force for 30 days after the day on which it was issued.

75. Searching detained persons

(1) When a police officer exercises his or her power to search a person under section 73 or under a warrant under section 74, the officer must ensure that the person is searched by a person of the same sex or a medical practitioner.

(2) If a suitable person is not available to search the detained person as required by subsection (1), the police officer may —

(a) continue to detain the person for as long as is reasonably necessary for a suitable person to become available; and

(b) if appropriate, convey the person to a place where a suitable person is available.

76. Additional powers for powers under s. 73 and 74

(1) When a police officer exercises any of his or her powers under section 73 or under a warrant under section 74, the officer may do any or all of the following —

(a) seize and detain any documents found in the course of exercising those powers if there are reasonable grounds for suspecting that they are property-tracking documents;

(b) take extracts from or make copies of, or download or print out, any property-tracking documents found in the course of exercising those powers;

(c) require a person who has control of any property-tracking documents found in the course of exercising those powers to make copies of, or download or print out, any property-tracking documents found in the course of exercising those powers;

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(d) require a person to give to the officer any information within the person's knowledge or control that is relevant to locating property that is reasonably suspected of being confiscable;

(e) require a person to give to the officer any information within the person's knowledge or control that is relevant to determining whether or not property is confiscable;

(f) require a person to give the officer, or arrange for the officer to be given, any translation, codes, passwords or other information necessary to gain access to or to interpret and understand any property-tracking documents or information located or obtained in the course of exercising the officer's powers under the warrant.

(2) A person who, without lawful excuse, contravenes a requirement commits an offence.

Penalty: $100 000 or imprisonment for 5 years, or both.

(3) Without limiting subsection (2), a person contravenes a requirement if the person —

(a) does not disclose material information of which the person had knowledge, or gives false information or a false document, in purported compliance with the requirement; and

(b) was aware, or could reasonably have been expected to have been aware, that the information was material, or that the information or document was false.

(4) A person is not excused from complying with a requirement on the grounds that complying with it would tend to incriminate the person or render him or her liable to a penalty, but any information given in compliance with the requirement is not admissible in evidence in proceedings against the person for any offence except an offence under subsection (2).

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77. Warrant under s. 74 extends to documents produced later

If a warrant under section 74 authorises any action to be taken in relation to a document that was in existence at the time that the warrant was issued, but at the time that the warrant was executed it was physically impossible for the document to be produced, then a police officer may take the action when the document becomes available.

78. Other laws on search warrants not affected

Nothing in this Act affects the operation of any other enactment requiring or authorising a police officer to obtain a warrant to enter or search property.

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Part 6 — Objections to confiscation

79. Objecting to confiscation of frozen property

(1) A person may file an objection to the confiscation of frozen property.

(2) If a copy of the freezing notice or freezing order was served on the objector, the objection must be filed —

(a) within 28 days after the day on which the copy of the notice or order was served on the objector; or

(b) within any further time allowed by the court.

(3) If a copy of the freezing notice or freezing order was not served on the objector, the objection must be filed —

(a) within 28 days after the day on which the objector becomes aware, or could reasonably be expected to have become aware, that the property has been frozen; or

(b) within any further time allowed by the court.

(4) The court may allow further time under subsection (2) or (3) even if the time for filing the objection has expired.

80. Parties to objection proceedings

The State is a party to proceedings on an objection.

81. Court may release frozen property under s. 82, 83 or 84

(1) On hearing an objection to the confiscation of frozen property, the court may set aside the freezing notice or freezing order to the extent permitted under section 82, 83 or 84.

(2) However, if the property was frozen on 2 or more grounds, but the court does not set aside the freezing notice or freezing order in relation to both or all the grounds, the freezing notice or freezing order continues in force as if it had been made on each remaining ground.

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82. Release of crime-used property

(1) The court may set aside a freezing notice or freezing order for property that was frozen on the ground that it is crime-used if the objector establishes that it is more likely than not that the property is not crime-used.

(2) If the court finds that the property is crime-used, or is not required to decide whether the property is crime-used, the court may make an order under subsection (3) or (4).

(3) The court may set aside the freezing notice or freezing order for the property if the objector establishes that it is more likely than not that —

(a) the objector is the spouse, a de facto partner or a dependant of an owner of the property;

(b) the objector is an innocent party, or is less than 18 years old;

(c) the objector was usually resident on the property at the time the relevant confiscation offence was committed, or is most likely to have been committed;

(d) the objector was usually resident on the property at the time the objection was filed;

(e) the objector has no other residence at the time of hearing the objection;

(f) the objector would suffer undue hardship if the property is confiscated; and

(g) it is not practicable to make adequate provision for the objector by some other means.

(4) The court may set aside the freezing notice or freezing order if the objector establishes that it is more likely than not that —

(a) the objector is the owner of the property, or is one of 2 or more owners of the property;

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(b) the property is not effectively controlled by a person who made criminal use of the property;

(c) the objector is an innocent party in relation to the property; and

(d) each other owner (if there are more than one) is an innocent party in relation to the property.

(5) If the objector establishes the matters set out in subsection (4)(a), (b) and (c), but fails to establish the matter set out in subsection (4)(d), the court may order that, when the property is sold after confiscation, the objector is to be paid an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.

(6) In an order under subsection (5), the court is to specify the proportion that it finds to be the objector's share of the property.

(7) On the application of the DPP or an owner of the property, the court may set aside the freezing notice or freezing order for the property if it also orders the objector to pay to the State an amount equal to the value of the property.

(8) Sections 22(6), 22(7), 23, 24, 25 and 26 apply in relation to making an order under subsection (7) and to the objector as if the order was a crime-used property substitution declaration and the objector was the respondent in relation to the declaration.

[Section 82 amended by No. 28 of 2003 s. 41.]

83. Release of crime-derived property

(1) The court may set aside a freezing notice or freezing order for property that was frozen on the ground that it is crime-derived if the objector establishes that it is more likely than not that the property is not crime-derived.

(2) If the court finds that the property is crime-derived, or is not required to decide whether the property is crime-derived, the

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court may set aside the freezing notice or freezing order if the objector establishes that it is more likely than not that —

(a) the objector is the owner of the property, or is one of 2 or more owners of the property;

(b) the property is not effectively controlled by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence;

(c) the objector is an innocent party in relation to the property; and

(d) each other owner (if there are more than one) is an innocent party in relation to the property.

(3) If the objector establishes the matters set out in subsection (2)(a), (b) and (c), but fails to establish the matter set out in subsection (2)(d), the court may order that, when the property is sold after confiscation, the objector is to be paid an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.

(4) In an order under subsection (3), the court is to specify the proportion that it finds to be the objector's share of the property.

(5) On the application of the DPP or an owner of the property, the court may set aside the freezing notice or freezing order for the property if it also orders the objector to pay to the State the amount assessed by the court as the amount equal to the value of the property at the time of the application.

(6) Sections 20, 25 and 26 apply in relation to making an order under subsection (5) and to the objector as if the order was a criminal benefits declaration and the objector was the respondent in relation to the declaration.

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(7) When making an order under this section, the court may make any necessary or convenient ancillary orders.

84. Release of other frozen property

(1) The court may set aside a freezing order for property that was frozen under section 43(3) if the court finds that it is more likely than not that the person who is or will be the respondent to the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration does not own or effectively control the property, and has not at any time given it away.

(2) The court may set aside a freezing notice issued for property under section 34(3) or a freezing order for property that was frozen under section 43(5) if the court finds that it is more likely than not that the person who is or will be charged with the offence does not own or effectively control the property, and has not at any time given it away.

(3) The court may make any necessary or convenient ancillary orders.

85. Applying for release of confiscated property

(1) A person may apply to the court for the release of property that has been confiscated under section 6 or 7.

(2) The application must be made within 28 days after the person became aware, or can reasonably be expected to have become aware, that the property has been confiscated.

86. Parties to proceedings

The State is a party to proceedings on an application under section 85.

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87. Release of confiscated property

(1) On hearing an application under section 85, the court may order the release of any property if it is more likely than not that —

(a) immediately before the confiscation of the property, the applicant owned the property, or was one of 2 or more owners of the property;

(b) the property is not effectively controlled by a person who made criminal use of the property, or by a person who wholly or partly derived or realised the property, directly or indirectly, from the commission of a confiscation offence;

(c) the applicant did not become aware, and can not reasonably be expected to have become aware, until after the property was confiscated, that the property was liable to confiscation under section 6 or 7;

(d) the applicant is or was an innocent party in relation to the property; and

(e) each other owner (if there are more than one) is or was an innocent party in relation to the property.

(2) If the court orders the release of the property —

(a) if the property is money — an amount equal to the amount of the money is to be paid to the objector from the Confiscation Proceeds Account;

(b) if the property is not money, and has not been disposed of — the property is to be given to the objector; and

(c) if the property is not money, and has been sold — an amount equal to the value of the property is to be paid to the objector from the Confiscation Proceeds Account.

(3) If the objector establishes the matters set out in subsection (1)(a), (b), (c) and (d), but fails to establish the matter set out in subsection (1)(e), the court may order the release of the objector's share of the property.

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(4) In an order under subsection (3) the court is to specify the proportion that it finds to be the objector's share of the property.

(5) If the court makes an order under subsection (3), the objector is to be paid out of the Confiscation Proceeds Account —

(a) if the property is money — an amount equal to the objector's share of the money; and

(b) if the property is not money — an amount equal to the amount that bears to the value of the property the same proportion as the objector's share of the property bears to the whole property.

(6) The court may make any necessary or convenient ancillary orders.

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Part 7 — Management of seized, frozen and confiscated property

Division 1 — Control and management of property

88. Management of seized property

(1) The Commissioner of Police has responsibility for the control and management of property seized under section 33(1) or under a warrant under section 74.

(2) The power conferred by section 9 of the *Police Act 1892* is taken to include power to make orders as to the performance by members of the Police Force on behalf of the Commissioner of Police of functions conferred on the Commissioner of Police by this Act.

89. Management of frozen or confiscated property

(1) The DPP has responsibility for the control and management of frozen property unless the court otherwise orders under section 45(c) or 91(2).

(2) The DPP has responsibility for the control and management of confiscated property until it is disposed of.

(3) The DPP may appoint any of the following persons to manage property for which the DPP has responsibility under subsection (1) or (2) —

(a) the Public Trustee;

(b) the Commissioner of Police;

(c) in the case of frozen property — a person who owns the property.

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90. DPP's capacity to carry out transactions

To facilitate the destruction, sale or other disposal of property under this Act, the DPP may enter into a contract, and may execute a transfer or other instrument.

91. Applications by owner for control and management

(1) An owner of frozen property may apply to the court for an order under subsection (2) in relation to the property.

(2) On hearing an application, the court may, if it thinks fit, by order appoint the person —

(a) to control and manage the property while the freezing notice or freezing order is in force; or

(b) to sell or destroy the property.

92. Duties of person responsible for property

A person who has responsibility for the control or management of property under this Act or under an order under this Act, must take reasonable steps to ensure that the property is appropriately stored or appropriately managed, and that it is appropriately maintained, until one of the following happens in accordance with this Act —

(a) the property is returned to the person from whom it was seized or to a person who owns it;

(b) another person becomes responsible for the control and management of the property;

(c) the property is sold or destroyed; or

(d) the property is otherwise disposed of.

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Division 2 — Disposal of deteriorating or undesirable property

93. Destruction of property on grounds of public interest

(1) A person who has responsibility for the control or management of seized, frozen or confiscated property may apply to the court for an order under subsection (2).

(2) On hearing an application, the court may order that the property is to be destroyed if it would not be in the public interest to preserve the property.

94. Sale of deteriorating property

(1) A person who has responsibility for the control or management of frozen property may apply to the court for an order under subsection (2).

(2) The court may order that the property is to be sold if it is more likely than not that —

(a) the property is or will be subject to substantial waste or loss of value if it is retained until it is dealt with under another provision of this Act; or

(b) the cost of managing or protecting the property will exceed the value of the property if it is retained until it is dealt with under another provision of this Act.

(3) If the Public Trustee has the control or management of frozen property under this Act, the Public Trustee may sell the property in the circumstances referred to in subsection (2), without obtaining an order under that subsection, if —

(a) the Public Trustee gives adequate notice of the proposed sale to the owner of the property; and

(b) the owner does not file an objection to the sale in the court that made the freezing order.

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(4) When frozen property is sold under an order under subsection (1), or under subsection (2), the net proceeds of the sale are taken to be frozen property that is subject to the freezing notice or freezing order made in respect of the sold property.

95. Valuation and inventory of frozen property

(1) A person who has the control or management of frozen property under this Act may do either or both of the following —

(a) arrange for the property to be valued by an appropriately qualified valuer;

(b) arrange for an inventory to be taken of any fittings, fixtures or moveable goods in or on the property.

(2) The person must arrange for a copy of the inventory to be served on each person on whom a copy of the freezing notice or freezing order was served under section 36 or 46.

Division 3 — Management of property by Public Trustee

96. Public Trustee's power to appoint a manager

If the Public Trustee has the control or management of property under this Act, the Public Trustee may appoint a person to perform all or any of the Public Trustee's functions in relation to the property.

97. Public Trustee's liability for charges on frozen property

(1) If State taxes imposed on frozen or confiscated property fall due while the property is under the control or management of the Public Trustee, the Public Trustee is liable for the taxes only to the extent of any rents and profits received by the Public Trustee in respect of the property.

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(2) If the property is a business, the Public Trustee is not liable for —

(a) any payment in respect of long service leave for which the business or the owner of the business is liable; or

(b) any payment in respect of long service leave to which a person employed by the Public Trustee to manage the business, or the legal personal representative of such a person, becomes entitled as a result of managing the business, after the date of the freezing order.

98. Managing interstate property

(1) The Public Trustee may make an agreement for the management of property frozen under a registered interstate freezing order with an official who is required under the order to take control of the property.

(2) The Public Trustee may perform, in accordance with the agreement, the same functions in relation to the property as the official would be able to perform under the order if the property were in the State in which the order was made.

99. Fees payable to Public Trustee

The Public Trustee is entitled to receive the fees prescribed by or under the *Public Trustee Act 1941* for performing its functions under this Act in relation to frozen or confiscated property.

100. Obstructing Public Trustee

A person must not hinder or obstruct the Public Trustee, or a Deputy Public Trustee, or an officer, servant or agent of the Public Trustee, in exercising the functions of the Public Trustee under this Act.

Penalty: $100 000 or imprisonment for 5 years, or both.

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Part 8 — Court jurisdiction and evidentiary matters

101. Courts' jurisdiction

(1) The Supreme Court has jurisdiction in any proceedings under this Act.

(2) The District Court has jurisdiction in any proceedings under this Act in connection with property if —

(a) the property is not registrable real property; and

(b) the value of the property is not more than the jurisdictional limit (within the meaning of section 6 of the *District Court of Western Australia Act 1969*).

(3) The Magistrates Court has jurisdiction in proceedings under this Act in connection with property if —

(a) the property is not registrable real property; and

(b) the value of the property is not more than the jurisdictional limit (within the meaning of section 4 of the *Magistrates Court (Civil Proceedings) Act 2004*).

(4) Despite subsection (3), the Magistrates Court has no jurisdiction in proceedings for an unexplained wealth declaration or an examination order.

(5) Despite subsections (3) and (4), if both the applicant and the respondent consent, the Magistrates Court may hear and determine —

(a) an objection; or

(b) an application for —

(i) an unexplained wealth declaration;

(ii) a criminal benefits declaration; or

(iii) a crime-used property substitution declaration.

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(6) A declaration, order, finding or decision of a court under this Act in relation to property is not invalid only because the value of the property exceeds the maximum permitted to be dealt with by the court under this section.

(7) Part VI of the *District Court of Western Australia Act 1969* applies to proceedings on an application under this Act as if a reference in the first-mentioned Act to an action were a reference to an application under this Act.

(8) Nothing in this section affects the jurisdiction of a court in criminal proceedings under this Act.

[Section 101 amended by No. 59 of 2004 s. 141; No. 2 of 2008 s. 61(2).]

102. Proceedings, general provisions about

(1) Proceedings on an application under this Act are taken to be civil proceedings for all purposes.

(2) Except in relation to an offence under this Act —

(a) a rule of construction that is applicable only in relation to the criminal law does not apply in the interpretation of this Act;

(b) the rules of evidence applicable in civil proceedings apply in proceedings under this Act;

(c) the rules of evidence applicable only in criminal proceedings do not apply in proceedings under this Act; and

(d) a question of fact to be decided by a court in proceedings on an application under this Act is to be decided on the balance of probabilities.

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103. Attorney General entitled to appear in proceedings

The Attorney General may appear in any proceedings under this Act in which the State has an interest, whether or not the DPP is also a party to the proceedings.

104. Stays of proceedings

The fact that criminal proceedings under this Act or any other enactment have been instituted or have commenced is not a ground on which the court may stay proceedings under this Act that are not criminal proceedings.

105. Opinion evidence

(1) For the purposes of making an unexplained wealth declaration or a criminal benefits declaration, the court may receive evidence of the opinion of a person of a kind listed in subsection (2) who is experienced in the investigation of illegal activities involving prohibited plants or prohibited drugs, about the following matters —

(a) the amount that was the market value at a particular time of a particular kind of prohibited plant or prohibited drug;

(b) the amount, or range of amounts, ordinarily paid at a particular time for doing anything in relation to a particular kind of prohibited plant or prohibited drug.

(2) For the purposes of subsection (1), the following persons are listed —

(a) a police officer of Western Australia;

(b) a member of the Australian Federal Police;

(c) an officer of Customs within the meaning of the *Customs Act 1901* of the Commonwealth;

(d) the DPP.

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(3) Subsections (1) and (2) have effect despite any other enactment, or any practice, relating to hearsay evidence.

106. Grounds for finding property is crime-used or crime-derived

A finding that particular property is crime-used or crime-derived, or that there are reasonable grounds for suspecting that it is crime-used or crime-derived, and any decision, declaration or order based on such a finding —

(a) need not be based on a finding as to the commission of a particular confiscation offence, but may be based on a finding that some confiscation offence or other has been committed;

(b) may be made whether or not anyone has been charged with or convicted of the relevant confiscation offence; and

(c) may be made whether or not anyone who owns or effectively controls the property has been identified.

107. Evidence relating to confiscation offence may be used in confiscation proceedings

In any proceedings under this Act in relation to property, if a person has been convicted of the relevant confiscation offence, the court may have regard to any or all of the following —

(a) a transcript of the evidence given in any proceedings for the offence;

(b) the sentencing transcript;

(c) any statement, deposition, exhibit or other material before a court in any proceedings for the offence;

(d) a copy of any statement that was served on the person, or that would have been served on the person if the person had not absconded.

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108. Transcripts of proceedings on examination orders

For the purposes of section 61(7), the transcript of an examination of a person under an examination order is admissible in any proceedings under this Act or under any other law in force in Western Australia as evidence of a statement or disclosure made by the person in the course of complying with the examination order.

109. Hearsay evidence

A decision under this Act, except under Part 6, about the existence of grounds for doing or suspecting anything may be based on hearsay evidence or hearsay information.

110. Evidence of compliance with production orders

When a person produces a document, or makes a document available, under a production order, the production or making available of the document, or any information, document or anything else acquired as a direct or indirect consequence of complying with the order, is not admissible against the person in evidence in any criminal proceedings except proceedings for an offence under section 65.

111. Certificates under *Misuse of Drugs Act 1981*

In any proceedings under this Act, a certificate referred to in section 38(2) of the *Misuse of Drugs Act 1981* is sufficient evidence of the facts stated in the certificate.

112. Enforcing compliance with Act or court order

(1) If a person fails to take any action necessary to comply with or give effect to this Act or an order under this Act —

(a) at the direction of the Supreme Court or a judge, the Registrar of the Supreme Court may take the necessary action; and

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(b) the action of the Registrar has effect for all purposes as if it had been done by the person.

(2) The person is liable to pay any costs incurred as a result of taking the action.

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Part 9 — Interests in registrable property

113. Registration of interests in registrable real property

(1) When a memorial is lodged under this Act with the Registrar of Titles, the Registrar is to register the memorial.

(2) When a memorial of the confiscation of registrable real property is lodged under section 31(1) then, in addition to registering the memorial, the Registrar of Titles is to —

(a) register the State of Western Australia as the proprietor of the property; and

(b) endorse the certificate of title of the property to the effect that, when the memorial was registered, the property ceased to be subject to or affected by any interests recorded on the certificate of title, including caveats, mortgages, charges, obligations and estates (except rights-of-way, easements and restrictive covenants) to which it was subject immediately before the registration of the memorial, or by which it was affected immediately before the registration of the memorial.

(3) The Registrar of Titles may dispense with the production of any duplicate certificate of title or any duplicate instrument for the purposes of entering on the duplicate certificate or duplicate instrument any memorandum that would, but for this subsection, be required to be entered under the *Transfer of Land Act 1893* as a result of registering a memorial under this Act or of doing anything else required or permitted by this Act.

(4) If, under subsection (3), the Registrar of Titles dispenses with the production of a duplicate certificate of title or duplicate instrument —

(a) the Registrar must endorse the certificate of title to the effect that the memorandum concerned has not been

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entered on the duplicate certificate of title or the duplicate instrument; and

(b) any subsequent dealing in the property has effect as if the memorandum had been entered on the duplicate certificate of title or the duplicate instrument.

(5) If, under subsection (3), the Registrar of Titles dispenses with the production of a duplicate certificate of title, then, on the application of the registered proprietor, the Registrar may cancel the certificate of title for which the duplicate was issued, and create and register a new certificate of title for the property.

(6) The Registrar of Titles is not required to obtain the consent or direction of the Commissioner of Titles to perform a function conferred on the Registrar under this Act.

(7) To the extent that a provision of this Act relating to registrable real property is inconsistent with the *Transfer of Land Act 1893*, the provision of this Act prevails, but this Act does not otherwise affect the operation of the *Transfer of Land Act 1893* in relation to registrable real property dealt with under this Act.

(8) Nothing in this Act prevents a person from lodging with the Registrar of Titles —

(a) a caveat relating to frozen registrable real property;

(b) an instrument relating to a dealing or purported dealing in registrable real property that is frozen at the time that the instrument is lodged; or

(c) an instrument relating to a dealing or purported dealing in registrable real property that was frozen at the time that the dealing or purported dealing was carried out.

(9) Nothing in this Act prevents the Registrar of Titles from —

(a) giving notice to a person that a caveat has been lodged in relation to frozen registrable real property;

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(b) accepting an instrument relating to a dealing or purported dealing in registrable real property that is frozen at the time that the instrument is lodged; or

(c) accepting a memorial of a dealing or purported dealing in registrable real property that was frozen at the time that the dealing or purported dealing was carried out.

(10) However, despite any other law in force in Western Australia, if an instrument (other than a memorial lodged under this Act) is lodged or registered in relation to frozen registrable real property —

(a) the instrument and its lodgement or registration have no effect, at law, in equity or otherwise, while the freezing notice or freezing order is in force; and

(b) if the freezing notice or freezing order ceases to be in force, and the property is not confiscated, then the memorial, and its lodgement or registration (if any), have effect as if the property had not been frozen at the time that the instrument was lodged or registered, or at the time that the dealing or purported dealing to which the instrument relates was carried out.

114. Registration of interests in other property

If a registrar of property registered under any enactment except the *Transfer of Land Act 1893* is notified under this Act that a freezing notice or freezing order for the property has been issued or made, or has ceased to be in force, or that the property has been confiscated, the registrar is to note the relevant particulars in the register.

115. Imputation of knowledge that property is frozen

(1) If a memorial of the issue of a freezing notice or the making of a freezing order for registrable real property has been registered under section 113(1), any person who deals with the property

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while the freezing notice or freezing order is in force is taken to have notice, for all purposes, that the freezing notice or freezing order is in force.

(2) If particulars of a freezing notice or freezing order for any property (except registrable real property) have been noted in the register under section 114, any person who deals with the property while the freezing notice or freezing order is in force is taken to have notice, for all purposes, that it is in force.

116. Form of documents lodged with the Registrar of Titles

(1) The Registrar of Titles may approve the form of memorials or any other instruments lodged with the Registrar under or for the purposes of this Act.

(2) A memorial or other instrument lodged with the Registrar under or for the purposes of this Act must be in a form approved under subsection (1).

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Part 10 — Mutual recognition of freezing orders and confiscation of property

Division 1 — Registration of WA orders in other jurisdictions

117. Interstate registration of freezing notices and orders

(1) For the purpose of enabling a freezing notice or freezing order to be registered under a corresponding law of another State or a Territory, the notice or order may be expressed to apply to property in the State or Territory.

(2) The notice or order does not apply to property in another State or a Territory except to the extent that —

(a) a corresponding law of the State or Territory provides that the notice or order has effect in the State or Territory when it is registered under that law; or

(b) if the property is moveable — when the order took effect, the property was not located in a State or Territory in which a corresponding law is in force.

Division 2 — Recognition of orders of other jurisdictions

118. Registration of interstate orders

(1) If an interstate freezing order, or an interstate confiscation declaration, expressly applies to property that is in this State, the order may be registered under this Act.

(2) An order is registered under this Act when a copy of the order, sealed by the court that made the order, is registered in accordance with the rules of the Supreme Court.

(3) Any amendments made to an interstate freezing order or an interstate confiscation declaration may be registered in the same way, whether the amendments were made before or after the

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registration of the original declaration, but the amendments are of no effect until they are registered.

(4) An application for registration may be made by the applicant for the interstate order or declaration or amendments, by the DPP, or by any person affected by the order or amendments.

119. Effect of registration of interstate freezing orders

(1) A registered interstate freezing order may be enforced in this State as if the order had been made under section 43.

(2) This Act (except sections 41 and 46) applies to a registered interstate freezing order as if the order had been made under section 43.

120. Effect of registration of interstate confiscation declarations

(1) A registered interstate confiscation declaration may be enforced in this State as if the property to which it relates had been confiscated under section 6, 7 or 8.

(2) A registered interstate confiscation declaration does not operate so as to vest property in any person or entity except this State.

(3) A registered interstate confiscation declaration does not operate so as to vest property in this State if the order has already operated to vest the property in the Commonwealth, a Territory or another State, or in some other person or entity.

121. Duration of registration of interstate orders

A registered interstate freezing order or registered interstate confiscation declaration is enforceable in this State under this Act until its registration is cancelled under section 122, even if the order has already ceased to be in force under the law of the Commonwealth, or of the State or Territory, under which the order was made.

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122. Cancellation of registration of interstate orders

(1) The Supreme Court may cancel the registration of an interstate freezing order or interstate confiscation declaration if —

(a) registration was improperly obtained; or

(b) the order ceases to be in force under the law of the Commonwealth, or of the State or Territory, under which the order was made.

(2) An application for the cancellation of the registration may be made by the person who applied for its registration, by the DPP, or by a person affected by the order.

Division 3 — Charges on interstate property

123. Creation of charge

(1) A charge is created on property that is frozen under a registered interstate freezing order if —

(a) the order was made in connection with a confiscation offence committed interstate by the owner of the property;

(b) an interstate criminal benefits declaration is made against the person in connection with the confiscation offence; and

(c) the interstate criminal benefits declaration is registered in a court of this State under the *Service and Execution of Process Act 1992* of the Commonwealth.

(2) The charge is created as soon as both the interstate freezing order and the interstate criminal benefits declaration are registered in a court of this State.

(3) The charge is created to the extent necessary to secure the payment of the amount due under the interstate criminal benefits declaration.

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124. Cessation of charge

(1) A charge created on property under section 123(1) ceases to have effect as soon as any one of the following happens —

(a) the interstate criminal benefits declaration that gave rise to the charge ceases to have effect;

(b) the declaration is set aside by a court;

(c) the amount due under or as a result of the declaration is paid;

(d) the owner of the property becomes, according to the *Interpretation Act 1984* section 13D, a bankrupt;

(e) the property is sold to a purchaser in good faith for value who, at the time of purchase, had no notice of the charge;

(f) the property is sold or otherwise disposed of in accordance with subsection (2).

(2) For the purposes of subsection (1)(f), property may be sold or otherwise disposed of —

(a) under an order made by a court under the corresponding law of the Commonwealth, or of the State or Territory, under which the interstate criminal benefits declaration was made;

(b) by the owner of the property with the consent of the court that made the interstate criminal benefits declaration; or

(c) where an order of a court directs a person to take control of the property — by the owner of the property with the consent of the person.

[Section 124 amended by No. 18 of 2009 s. 27.]

125. Priority of charge

A charge created on property under section 123(1) —

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(a) is subject to every encumbrance on the property that came into existence before the charge and that would, apart from this subsection, have priority over the charge;

(b) has priority over all other encumbrances; and

(c) subject to section 124, is not affected by any change of ownership of the property.

126. Registration of charge on land

(1) If a charge is created on land under section 123, the DPP or the Public Trustee may lodge a memorial of a charge on an interest in land under the *Transfer of Land Act 1893* or the *Registration of Deeds Act 1856* and the memorial may be registered in accordance with the respective Act.

(2) Anyone who purchases or otherwise acquires an interest in the property after the memorial is lodged is taken to have notice of the charge, for the purposes of section 124(1)(e), at the time of the purchase or acquisition.

(3) If the charge ceases to have effect, the DPP or the Public Trustee may withdraw the memorial in accordance with the Act under which it was registered, and the registration may be cancelled in accordance with that Act.

127. Registration of charge on property other than land

(1) The DPP or the Public Trustee may lodge a memorial of a charge on property of a kind other than land under any enactment that provides for the registration of interests in property of that kind, and the memorial may be registered in accordance with the enactment.

(2) Anyone who purchases or otherwise acquires an interest in the property after the memorial is lodged is taken to have notice of the charge, for the purposes of section 124(1)(e), at the time of the purchase or acquisition.

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(3) If the charge ceases to have effect, the DPP or the Public Trustee may withdraw the memorial in accordance with the enactment, and the registration of the memorial may be cancelled in accordance with the enactment.

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Part 11 — Miscellaneous

128. Act binds States, Territories and Commonwealth

(1) This Act binds this State, the Commonwealth, each other State, the Australian Capital Territory and the Northern Territory, to the extent that the legislative power of Parliament permits.

(2) Nothing in this Act renders this State, the Commonwealth, another State or a Territory liable to prosecution for an offence.

129. Property protected from seizure and confiscation

(1) Property of any of the following kinds is protected from confiscation if it is not crime-used property —

(a) family photographs;

(b) family portraits;

(c) necessary clothing.

(2) Property of any of the following kinds is protected from confiscation if it is not crime-used property or crime-derived property —

(a) ordinary tools of trade;

(b) professional instruments;

(c) reference books.

(3) However, ordinary tools of trade, professional instruments and reference books that are owned or effectively controlled by the same person are protected from confiscation only to the extent that the combined value of the tools, instruments and books does not exceed the amount prescribed for the purposes of section 75(1)(c) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

(4) Property that is protected from confiscation —

(a) is not confiscated under section 6, 7 or 8;

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(b) is not to be frozen;

(c) is not to be taken, under a warrant of execution or otherwise, for the purpose of satisfying a person's liability under section 14, 20 or 24; and

(d) is not to be seized under this Act or under a warrant under this Act.

130. Confiscation Proceeds Account

(1) An agency special purpose account called the Confiscation Proceeds Account is established under section 16 of the *Financial Management Act 2006*.

(2) The provisions of the *Financial Management Act 2006* and the *Auditor General Act 2006* regulating the financial administration, audit and reporting of departments apply to the Confiscation Proceeds Account.

(3) For the purposes of section 52 of the *Financial Management Act 2006*, the administration of the Confiscation Proceeds Account is to be regarded as a service of the department principally assisting the Minister in the administration of this Act.

[Section 130 amended by No. 77 of 2006 s. 17.]

131. Payments into and out of the Confiscation Proceeds Account

(1) The following are to be paid into the Confiscation Proceeds Account —

(a) money that, under this Act, is paid to the State, recovered by the State or confiscated;

(b) proceeds of the disposal of other confiscated property;

(c) money paid to the State under the *Proceeds of Crime Act 1987* of the Commonwealth from the Confiscated Assets Reserve established under that Act or any other

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fund established for a similar purpose under a law of the Commonwealth;

(d) money that the *Road Traffic Act 1974* section 80J(7)(j)(ii) requires to be paid to the credit of the account.

(2) Money may be paid out of the Confiscation Proceeds Account at the direction of the Attorney General, as reimbursement or otherwise —

(a) for a purpose associated with the administration of this Act;

(b) for the development and administration of programmes or activities designed to prevent or reduce drug-related criminal activity and the abuse of prohibited drugs;

(c) to provide support services and other assistance to victims of crime;

(d) to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating persons involved in the commission of a confiscation offence;

(e) to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating confiscable property;

(f) to cover any costs of storing, seizing or managing frozen or confiscated property that are incurred by the Police Force, the DPP or a person appointed under this Act to manage the property; and

(g) for any other purposes in aid of law enforcement.

[Section 131 amended by No. 4 of 2007 s. 26.]

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132. Obstructing police officers

(1) A person commits an offence if the person wilfully delays or obstructs a police officer in the performance of the functions of a police officer under this Act, or a person assisting a police officer in the performance of those functions.

Penalty: $100 000 or imprisonment for 5 years, or both.

(2) A person commits an offence if the person wilfully does not produce any property to, or wilfully conceals or attempts to conceal any property from, a police officer in the performance of the police officer's functions under this Act, or a person assisting a police officer in the performance of those functions.

Penalty: $100 000 or imprisonment for 5 years, or both.

133. Later applications, notices, orders or findings

The fact that a freezing notice has been issued for property or that an application, order or finding has been made under this Act in relation to any property, person or confiscation offence does not prevent another freezing notice from being issued for the property, or prevent another application, order or finding, or a different application, order or finding, from being made under this Act in relation to the property, the person or the offence.

134. DPP's power to delegate

(1) The DPP may delegate the performance of any of the functions of the DPP under this Act, except this power of delegation, to an officer referred to in section 30 of the *Director of Public Prosecutions Act 1991*.

(2) A delegation —

(a) must be made by written instrument;

(b) is made on behalf of and subject to the direction and control of the DPP; and

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(c) may be made generally or as otherwise provided by the instrument.

135. Orders relating to sham transactions

(1) The DPP may apply to the court for an order under subsection (2).

(2) On hearing an application, if the court is satisfied that a person is carrying out, or has carried out, a sham transaction, the court may, to defeat the purpose of the transaction, by order —

(a) declare that the transaction is void in whole or in part; or

(b) vary the operation of the transaction in whole or in part.

(3) The court may make any ancillary orders that are just in the circumstances for or with respect to any consequential or related matter, including orders relating to —

(a) dealing with property;

(b) the disposition of any proceeds from the sale of property;

(c) making payments of money; and

(d) creating a charge on property in favour of any person and the enforcement of the charge.

(4) The court may rescind or vary an order made under this section.

136. Proceedings against body corporate

(1) If a body corporate commits an offence under this Act and it is proved that the offence occurred with the consent or connivance of an officer of the body corporate, or a person purporting to act as an officer of the body corporate, that person, as well as the body corporate, commits the offence.

(2) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member's functions of

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management as if the member were a director of the body corporate.

(3) If, in proceedings under this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show that —

(a) the conduct was engaged in by an officer of the body corporate within the scope of his or her actual or apparent authority; and

(b) the officer had that state of mind.

(4) If an officer of a body corporate engages in conduct on behalf of the body corporate within the scope of his or her actual authority then, for the purposes of proceedings under this Act, the body corporate is taken also to have engaged in the conduct unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

137. Liability for carrying out functions under this Act

A person on whom this Act confers a function is not personally liable in civil proceedings, and the State is not liable, for anything done or default made by the person in good faith for the purpose of carrying this Act into effect.

138. Effect of owner's death

(1) A reference in this Act to property of a person who is dead is to be read as a reference to property owned or effectively controlled by the person immediately before his or her death, or given away by the person at any time before his or her death.

(2) An order may be applied for and made under this Act —

(a) in respect of property that is or was owned or effectively controlled or given away by a person even if the person is dead; and

(b) on the basis of the activities of a person who is dead.

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(3) If a person who owns frozen property dies, this Act continues to apply to the property in all respects as if the person had not died, regardless of whether the administrator of the person's estate or any other person in whom the property vests as a result of the death is an innocent party in relation to the property.

(4) Without limiting the remainder of this section, if a person who is a joint tenant of frozen property dies —

(a) the person's death does not operate to vest the property in the surviving joint tenant or tenants; and

(b) the freezing notice or freezing order continues to apply to the property as if the person had not died.

139. Legal professional privilege withdrawn

(1) A person is not entitled to contravene an order or requirement under this Act in relation to any information or any property-tracking document or other document, on the basis that the information, property-tracking document or other document is subject to legal professional privilege, or contains or is likely to contain information that would, apart from this subsection, be subject to legal professional privilege.

(2) A warrant under section 74 may be issued and executed in relation to a property-tracking document whether or not the document would, apart from this subsection, be subject to legal professional privilege, or contains or is likely to contain information that would, apart from this subsection, be subject to legal professional privilege.

(3) Any information or property-tracking document or other document produced or obtained under or for the purposes of this Act, or any information in a property-tracking document or other document produced or obtained under or for the purposes of this Act is not inadmissible in any proceedings under this Act only because the information, property-tracking document or

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other document would, apart from this subsection, be subject to legal professional privilege.

140. Regulations

(1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to this Act.

(2) Without limiting subsection (1), the regulations may —

(a) provide for carrying out the destruction of property under an order under section 93;

(b) provide for carrying out the sale of deteriorating property under an order under section 94;

(c) provide for obtaining possession of confiscated property;

(d) provide for the storage and management of confiscated property;

(e) provide for the disposal of confiscated property that has vested in the State; and

(f) authorise persons or persons in a class of persons to carry out any or all of the functions of a police officer under this Act.

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Part 12 — Interpretation

141. Term used: confiscation offence

(1) In this Act, ***confiscation offence*** means —

(a) an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more; or

(b) any other offence that is prescribed for the purposes of this definition.

(2) An offence of a kind referred to in subsection (1)(a) is a confiscation offence even if a charge against a person for the offence is dealt with by a court whose jurisdiction is limited to the imposition of sentences of imprisonment of less than 2 years.

142. Term used: confiscable

Property is confiscable for the purposes of this Act if the property is —

(a) owned or effectively controlled, or has at any time been given away, by a person who has unexplained wealth;

(b) owned or effectively controlled, or has at any time been given away, by a person who has acquired a criminal benefit;

(c) crime-used property;

(d) crime-derived property; or

(e) owned or effectively controlled, or has at any time been given away, by a declared drug trafficker.

143. Term used: wealth

(1) The following property, services, advantages and benefits together constitute a person's wealth —

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(a) all property that the person owns, whether the property was acquired before or after the commencement of this Act;

(b) all property that the person effectively controls, whether the person acquired effective control of the property before or after the commencement of this Act;

(c) all property that the person has given away at any time, whether before or after the commencement of this Act;

(d) all other property acquired by the person at any time, whether before or after the commencement of this Act, including consumer goods and consumer durables that have been consumed or discarded;

(e) all services, advantages and benefits that the person has acquired at any time, whether before or after the commencement of this Act; and

(f) all property, services, advantages and benefits acquired, at the request or direction of the person, by another person at any time, whether before or after the commencement of this Act, including consumer goods and consumer durables that have been consumed or discarded.

(2) Without limiting subsection (1), a reference in that subsection to property, services, advantages or benefits acquired by a person or by another person at the request or direction of the first-mentioned person is to be read as including a reference to any thing of monetary value acquired, in Australia or elsewhere, from the commercial exploitation of any product, or of any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the first-mentioned person's involvement in the commission of a confiscation offence, whether or not the thing was lawfully acquired and whether or not the first-mentioned person has been charged with or convicted of the offence.

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144. Term used: unexplained wealth

(1) For the purposes of this Act, a person has unexplained wealth if the value of the person's wealth under subsection (2) is greater than the value of the person's lawfully acquired wealth under subsection (3).

(2) The value of the person's wealth is the amount equal to the sum of the values of all the items of property, and all the services, advantages and benefits, that together constitute the person's wealth.

(3) The value of the person's lawfully acquired wealth is the amount equal to the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired.

145. Term used: criminal benefit

(1) For the purposes of this Act, a person has acquired a criminal benefit if —

(a) any property, service, advantage or benefit that is a constituent of the person's wealth was directly or indirectly acquired as a result of the person's involvement in the commission of a confiscation offence, whether or not the property, service, advantage or benefit was lawfully acquired; or

(b) the person has been involved in the commission of a confiscation offence, and any property, service, advantage or benefit that is a constituent of the person's wealth was not lawfully acquired, whether or not the property, service, advantage or benefit was acquired as a result of the person's involvement in the commission of the offence.

(2) Without limiting subsection (1), the person has acquired a criminal benefit —

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(a) whether the property, service, advantage or benefit was acquired before, during or after the confiscation offence was or is likely to have been committed;

(b) whether or not the property, service, advantage or benefit was acquired before or after the commencement of this Act; and

(c) whether or not the confiscation offence was committed before or after the commencement of this Act.

146. Term used: crime-used

(1) For the purposes of this Act, property is crime-used if —

(a) the property is or was used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence;

(b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence; or

(c) any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence.

(2) Without limiting subsection (1), property described in that subsection is crime-used whether or not —

(a) the property is also used, or intended or able to be used, for another purpose;

(b) anyone who used or intended to use the property as mentioned in subsection (1) has been identified;

(c) anyone who did or omitted to do anything that constitutes all or part of the relevant confiscation offence has been identified; or

(d) anybody has been charged with or convicted of the relevant confiscation offence.

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(3) Without limiting subsection (1) or (2), any property in or on which an offence under Chapter XXII or XXXI of *The Criminal Code* is committed is crime-used property.

147. Term used: criminal use

For the purposes of this Act, a person makes criminal use of property if the person, alone or with anyone else (who need not be identified) uses or intends to use the property in a way that brings the property within the definition of crime-used property.

148. Term used: crime-derived

(1) Property that is wholly or partly derived or realised, directly or indirectly, from the commission of a confiscation offence is crime-derived, whether or not —

(a) anyone has been charged with or convicted of the offence;

(b) anyone who directly or indirectly derived or realised the property from the commission of the offence has been identified; or

(c) anyone who directly or indirectly derived or realised the property from the commission of the offence was involved in the commission of the offence.

(2) Without limiting subsection (1), property of the following kinds is crime-derived —

(a) stolen property;

(b) property bought with or exchanged for crime-derived property;

(c) property acquired by legitimate means that could not have been acquired if crime-derived property had not been used for other purposes;

(d) any thing of monetary value acquired, in Australia or elsewhere, from the commercial exploitation of any

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product, or of any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from a person's involvement in the commission of a confiscation offence, whether or not the thing was lawfully acquired and whether or not anyone has been charged with or convicted of the offence.

(3) The reference in subsection (2)(b) to crime-derived property is not limited to crime-derived property described in subsection (1) or in subsection (2)(a), (c) or (d), but also includes a reference to property that is crime-derived property because of a previous operation or previous operations of subsection (2)(b).

(4) Once property becomes crime-derived property it remains crime-derived property even if it is disposed of, used to acquire other property or otherwise dealt with, unless it stops being crime-derived property under subsection (8).

(5) Property owned by 2 or more people, whether jointly or as tenants in common, is crime-derived if any part of the share of any of the owners is crime-derived, whether or not any of the owners is an innocent party in relation to the share or part-share that is crime-derived.

(6) If a person once owned crime-derived property, but was divested of the property in such a way that it stopped being crime-derived property under subsection (8), then, if the person acquires the property again, it becomes crime-derived property again.

(7) For the purposes of deciding whether property is crime-derived, the proceeds of a sale or other dealing do not lose their identity as those proceeds only as a result of being credited to an account.

(8) Crime-derived property stops being crime-derived property —

(a) when it is acquired by an innocent party;

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(b) if it is frozen property — when the freezing order is set aside under section 83;

(c) if it has been confiscated — when the court orders its release under section 87;

(d) if it is money to be paid into the Confiscation Proceeds Account under section 131(1) — when it is paid into the Confiscation Proceeds Account;

(e) if it has been confiscated, but is not money — when the property is disposed of in accordance with regulations under section 140(2)(e); or

(f) in any other circumstances prescribed by the regulations.

149. Term used: lawfully acquired

Any property, service, advantage or benefit is lawfully acquired only if —

(a) the property, service, advantage or benefit was lawfully acquired; and

(b) any consideration given for the property, service, advantage or benefit was lawfully acquired.

150. Term used: service cut off date

For the purpose of determining when frozen property is confiscated under section 7, the service cut off date is —

(a) for property frozen under a freezing notice — the date of the last day on which a copy of the freezing notice was served on anyone under section 36(4); and

(b) for property frozen under a freezing order — the date of the last day on which a copy of the freezing order was served on anyone under section 46(4).

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151. Term used: deal (in relation to property)

A reference in this Act to dealing with property includes a reference to doing or attempting to do any of the following —

(a) sell the property or give it away;

(b) dispose of the property in any other way;

(c) move or use the property;

(d) accept the property as a gift;

(e) take any profit, benefit or proceeds from the property;

(f) create, increase or alter any legal or equitable right or obligation in relation to the property;

(g) effect a change in the effective control of the property.

152. Term used: value (in relation to property sold by or for the State)

(1) If property is sold by or for the State under this Act, the value of the property is taken to be equal to the proceeds of the sale after taking account of the following —

(a) costs, charges and expenses arising from the sale;

(b) if a freezing notice or freezing order is or was in force for the property — expenses incurred by the State or a person appointed to manage the property while the notice or order was in force;

(c) if the property has been confiscated — any expenses incurred by the State or a person appointed to manage the property after it was confiscated;

(d) any charges on the property.

(2) If the property is subject to a mortgage which is also security against other property then, despite any other enactment and any inconsistent term of the mortgage, the extent of the security over the sold property is the proportion that the value of the sold

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property bore to the total value of all the secured property at the time that the security over the sold property was given.

153. Term used: innocent party

(1) A person is an innocent party in relation to crime-used property if the person —

(a) was not in any way involved in the commission of the relevant confiscation offence; and

(b) did not know, and had no reasonable grounds for suspecting, that the relevant confiscation offence was being or would be committed, or took all reasonable steps to prevent its commission.

(2) A person is an innocent party in relation to crime-used property if the person —

(a) did not know, and had no reasonable grounds for suspecting, that the property was being or would be used in or in connection with the commission of the relevant confiscation offence; or

(b) took all reasonable steps to prevent its use.

(3) A person who owns or effectively controls crime-used property is an innocent party in relation to the property if —

(a) the person did not acquire the property or its effective control before the time that the relevant confiscation offence was committed or is likely to have been committed;

(b) at the time of acquiring the property or its effective control, the person did not know and had no reasonable grounds for suspecting that the property was crime-used;

(c) if the person acquired the property for valuable consideration — the consideration was lawfully acquired; and

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(d) the person did not acquire the property or its effective control, either as a gift or for valuable consideration, with the intention of avoiding the operation of this Act.

(4) A person is an innocent party in relation to crime-derived property if —

(a) the person acquired the property, or the person's share of it (if it is owned by more than one person), for valuable consideration;

(b) the consideration was lawfully acquired;

(c) before acquiring the property or share, the person made reasonable inquiries, and took all other action reasonable in the circumstances, to ascertain whether or not the property was crime-derived;

(d) despite the inquiries made under paragraph (c), at the time of acquiring the property or share, the person did not know and had no reasonable grounds for suspecting that the property was crime-derived; and

(e) the person did not acquire the property or share with the intention of avoiding the operation of this Act.

154. Term used: value (in relation to transfer of property)

For the purposes of this Act —

(a) property transferred under a will or administration of an intestate estate is not taken to be transferred for value; and

(b) property transferred in the course of proceedings in the Family Court of Western Australia or the Family Court of Australia is taken to be transferred for value.

155. Term used: property-tracking document

For the purposes of this Act, a document is a property-tracking document if the document is relevant to —

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(a) identifying or locating crime-used property or crime-derived property;

(b) determining the value of any crime-used property or crime-derived property;

(c) identifying or locating any or all constituents of a person's wealth;

(d) determining the value of any or all constituents of a person's wealth; or

(e) identifying or locating any document relating to the transfer of frozen or confiscated property.

156. Term used: effective control (in relation to property)

(1) For the purposes of this Act, a person has effective control of property if the person does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person.

(2) Without limiting subsection (1), when determining whether a person has effective control of any property, the following matters may be taken into account —

(a) any shareholdings in, debentures over or directorships of any corporation that has a direct or indirect interest in the property;

(b) any trust that has a relationship to the property;

(c) family, domestic and business relationships between persons having an interest in the property;

(d) family, domestic and business relationships between persons having an interest in or in a corporation that has a direct or indirect interest in the property;

(e) family, domestic and business relationships between persons having an interest in a trust that has a relationship to the property;

(f) any other relevant matters.

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157. Term used: conviction (in relation to confiscation offence)

(1) For the purposes of this Act, a person is taken to have been convicted of a confiscation offence if —

(a) the person has been convicted of the confiscation offence, whether or not —

(i) a spent conviction order is made under section 39 of the *Sentencing Act 1995* in respect of the conviction; or

(ii) the conviction was deemed not to be a conviction by section 20 of the *Offenders Community Corrections Act 1963*[2];

(b) the person has been charged with and found guilty of a confiscation offence, but is discharged without conviction;

(c) the confiscation offence was taken into account by a court in sentencing the person for another confiscation offence; or

(d) the person was charged with a confiscation offence but absconded before the charge is finally determined.

(2) For the purposes of this Act, a person's conviction is taken to have been quashed —

(a) if the person is taken under subsection (1)(a) to have been convicted — if the conviction is quashed or set aside;

(b) if the person is taken under subsection (1)(b) to have been convicted — if the finding of guilt is quashed or set aside;

(c) if the person is taken under subsection (1)(c) to have been convicted — if the decision of the court to take the confiscation offence into account is quashed or set aside; or

(d) if the person is taken under subsection (1)(d) to have been convicted — if the person is brought before a court

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to answer the charge, and the person is discharged in respect of the confiscation offence.

158. Term used: charge (in relation to an offence)

For the purposes of this Act, a person is taken to have been charged with an offence if a prosecution of the person for the offence has been commenced, whether or not —

(a) a summons requiring the attendance of the person in relation to the prosecution has been issued;

(aa) a court hearing notice has been issued to the person in respect of the prosecution; or

(b) a warrant for the arrest of the person has been issued.

[Section 158 amended by No. 84 of 2004 s. 80.]

159. Term used: declared drug trafficker

(1) In this Act, unless the contrary intention appears —

declared drug trafficker means —

(a) a person who is declared to be a drug trafficker under section 32A(1) of the *Misuse of Drugs Act 1981* as a result of being convicted of an offence that was committed, or is more likely than not to have been committed, after the commencement of this Act; or

(b) a person who is taken to be a declared drug trafficker under subsection (2).

(2) For the purposes of this Act, a person is taken to be a declared drug trafficker if —

(a) the person is charged with a serious drug offence within the meaning of section 32A(3) of the *Misuse of Drugs Act 1981*;

(b) the offence was committed, or is more likely than not to have been committed, after the commencement of this Act;

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(c) the person could be declared to be a drug trafficker under section 32A(1) of that Act if he or she is convicted of the offence;

(d) the charge is not disposed of or finally determined; and

(e) the person absconds in connection with the offence.

160. Term used: abscond (in relation to an offence)

(1) A person charged with an offence absconds in connection with the offence if —

(a) a warrant for the person's arrest for the offence is in force, or the person was arrested without warrant either before or after the person was charged with the offence;

(b) the charge has neither been disposed of nor finally determined;

(c) at least 6 months have passed since the warrant was issued; and

(d) the person cannot be found.

(2) A person charged with an offence absconds in connection with the offence if —

(a) a warrant for the person's arrest for the offence is in force, or the person is arrested for the offence without warrant (whether before or after being charged with the offence);

(b) the charge has neither been disposed of nor finally determined; and

(c) the person dies.

161. Term used: sham transaction

(1) For the purposes of this Act, a person carries out a sham transaction if —

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(a) the person carries out a transaction within the meaning of subsection (2); and

(b) the transaction was carried out for the purpose of directly or indirectly defeating, avoiding, preventing or impeding the operation of this Act in any respect.

(2) For the purposes of subsection (1), the person carries out a transaction if the person carries out, makes, gives or designs —

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action, or course of conduct.

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Glossary

[s. 3]

1. Terms used

In this Act —

abscond, in connection with an offence, has the meaning given in section 160;

account means any facility or arrangement through which a financial institution accepts deposits or allows withdrawals and includes a facility or arrangement for fixed term deposit and a safety deposit box;

agent includes, if the agent is a corporation, an officer of the corporation;

charge, in relation to an offence, has the meaning given in section 158;

confiscated, in relation to property, means confiscated under section 6, 7 or 8;

confiscable, in relation to property, has the meaning given in section 142;

Confiscation Proceeds Account means the account established under section 130;

confiscable property declaration means a declaration made under section 28;

confiscation offence has the meaning given in section 141;

conviction, in relation to a confiscation offence, has the meaning given in section 157;

corporation means —

(a) a financial institution; or

(b) a corporation within the meaning of the *Corporations Act 2001* of the Commonwealth, other than an exempt body within the meaning of section 66A of that Act;

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corresponding law, in relation to the Commonwealth, another State or a Territory, means a law of the Commonwealth, State or Territory that is prescribed in the regulations as a law that corresponds to this Act;

court means —

(a) in relation to making an application under this Act — a court having jurisdiction under section 101 to hear and determine the application;

(b) in relation to proceedings on an application under this Act — the court in which the application was filed, or another court having jurisdiction, whether under this Act or another enactment, in the proceedings;

(c) in relation to a freezing notice — the court in which the notice was filed; or

(d) in relation to a declaration or order under this Act — the court that made the declaration or order;

crime-derived, in relation to property, has the definition given in section 148;

crime-used, in relation to property, has the meaning given in section 146;

crime-used property substitution declaration means a declaration under section 22;

criminal benefit has the definition given in section 145;

criminal benefits declaration means a declaration under section 16 or 17;

criminal use, in relation to a person and property, has the meaning given in section 147;

deal, in relation to property, has the meaning given in section 151;

declared drug trafficker has the meaning given in section 159;

director, in relation to a financial institution or a corporation, means —

(a) if the institution or corporation is a body corporate incorporated for a public purpose under a law of the Commonwealth or of a State or Territory — a constituent member of the body corporate;

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(b) a person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; or

(c) a person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act;

dispose of , in relation to a charge, means —

(a) withdraw;

(b) dismiss; or

(c) file a nolle prosequi in relation to the charge or discontinue the prosecution of it;

document includes —

(a) any publication and any matter written, expressed, or described, electronically or otherwise, upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter; and

(b) a computer disk, computer or any other substance or equipment, whether electronic or not, used to create or store any publication or matter referred to in paragraph (a);

DPP means the holder of the office of Director of Public Prosecutions created by section 4 of the *Director of Public Prosecutions Act 1991*;

effective control, in relation to property, has the definition given in section 156;

encumbrance, in relation to property, includes any interest, mortgage, charge, right, claim or demand in respect of the property;

examination means examination under an order under section 58(1);

examination order means an order under section 58(1);

executive officer, in relation to a financial institution or a corporation, means any person, by whatever name called, and whether or not he or she is a director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation;

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financial institution means —

(a) an ADI within the meaning of section 5 of the *Banking Act 1959* of the Commonwealth;

(b) the Reserve Bank of Australia;

(c) a person who carries on State banking within the meaning of section 51(xiii) of the Commonwealth Constitution;

[(d) deleted]

(e) a registered society within the meaning of the *Co-operative and Provident Societies Act 1903*;

(f) a financial corporation within the meaning of section 51(xx) of the Constitution of the Commonwealth; or

(g) a body corporate that would be a financial corporation within the meaning of section 51(xx) of the Constitution of the Commonwealth if the body had been incorporated in Australia;

freezing notice means a freezing notice issued under section 34;

freezing order means an order under section 43;

frozen, in relation to property and in relation to a freezing notice or freezing order, means subject to the freezing notice or the freezing order;

give, in relation to property, includes transfer for consideration that is significantly less than the greater of —

(a) the market value of the property at the time of transfer; and

(b) the consideration paid by the transferee;

innocent party has the meaning given in section 153;

interested party, in relation to frozen property, means a person who has an interest in the property that would enable the person to succeed on an objection to the confiscation of the property;

interstate confiscation offence means an offence (including a common law offence) against a law in force in another State or a Territory, being an offence in relation to which an interstate confiscation declaration or an interstate criminal benefits declaration may be made under a corresponding law of the State or Territory;

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interstate confiscation declaration means a declaration or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

interstate criminal benefits declaration means a declaration or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

interstate freezing order means a notice or order (however described) that is made by or under a corresponding law of another State or a Territory and that is prescribed by the regulations for the purposes of this definition;

instrument, in relation to a dealing with registrable real property, means —

(a) a memorial under this Act; or

(b) an instrument as defined in the *Transfer of Land Act 1893*;

lawfully acquired, in relation to any property, service, advantage or benefit, has the meaning given in section 149;

medical practitioner means a person registered under the *Health Practitioner Regulation National Law (Western Australia)* in the medical profession;

monitoring order means an order under section 68(1);

objection means an objection filed under section 79 to the confiscation of property;

officer, in relation to a corporation, means a director, secretary, executive officer, employee or agent of the corporation;

owner, in relation to property, means a person who has a legal or equitable interest in the property;

police officer, in relation to a function, includes a person authorised to carry out the function under regulations made under section 140(2)(f);

premises includes vessel, aircraft, vehicle, structure, building and any land or place whether built on or not;

production order means an order under section 63;

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prohibited drug has the same meaning as in the *Misuse of Drugs Act 1981*;

prohibited plant has the same meaning as in the *Misuse of Drugs Act 1981*;

property means —

(a) real or personal property of any description, wherever situated, whether tangible or intangible; or

(b) a legal or equitable interest in any property referred to in paragraph (a);

property-tracking document has the meaning given in section 155;

recipient, in relation to a freezing notice or freezing order, means a person on whom a copy of the notice or order is served under section 36 or 46;

registered, in relation to an interstate freezing order or an interstate confiscation declaration, means registered under section 118;

registrable real property means property to which the *Transfer of Land Act 1893* applies;

registration, in relation to an instrument relating to a dealing in registrable real property, has the same meaning as in section 52 of the *Transfer of Land Act 1893*;

relevant confiscation offence, in relation to confiscable property, means the confiscation offence or suspected confiscation offence that is relevant to bringing the property within the scope of this Act;

respondent means —

(a) in relation to an application for an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is sought; or

(b) in relation to an unexplained wealth declaration, a criminal benefits declaration or a crime-used property substitution declaration — the person against whom the declaration is made;

restricted disclosure means a disclosure about a matter of a kind referred to in a paragraph of section 70(1);

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seized, in relation to property, means seized under section 33(1);

service cut off date, in relation to frozen property, has the meaning given in section 150;

sham transaction has the meaning given in section 161;

State taxes, in relation to frozen property, means any rates, land tax, local government or other statutory charges imposed on the property under a law of this State;

suspension order means an order under section 68(2);

transaction, in relation to an account with a financial institution, includes —

(a) the making of a fixed term deposit;

(b) the transferring of the amount of a fixed term deposit, or any part of it, at the end of the term;

unexplained wealth has the meaning given in section 144;

unexplained wealth declaration means a declaration under section 12;

valuable consideration, in relation to the transfer of property, does not include —

(a) any consideration for the transfer arising from the fact of a family relationship between the transferor and transferee;

(b) if the transferor is the spouse or de facto partner of the transferee — the making by the transferor of a deed in favour of the transferee;

(c) a promise by the transferee to become the spouse or de facto partner of the transferor;

(d) any consideration arising from the transferor's love or affection for the transferee;

(e) the transfer of the property as a result of the distribution of a deceased estate;

(f) the transfer of the property by way of gift; or

(g) consideration that is significantly less than the greater of —

(i) the market value of the property at the time of transfer; and

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(ii) the consideration paid by the transferee;

value, in relation to —

(a) a person's unexplained wealth — means the amount calculated in accordance with section 13;

(b) a person's wealth — has the meaning given in section 144(2);

(c) a person's lawfully acquired wealth — has the meaning given in section 144(3);

(d) property sold by or for the State — has the meaning given in section 152; and

(e) the transfer of property — has the meaning given in section 154;

wealth has the meaning given in section 143.

[Glossary amended by No. 12 of 2001 s. 51; No. 20 of 2003 s. 19; No. 28 of 2003 s. 42; No. 17 of 2005 s. 25; No. 2 of 2008 s. 61(3); No. 22 of 2008 Sch. 3 cl. 17; No. 19 of 2010 s. 51; No. 35 of 2010 s. 60.]

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Notes

[1] This is a compilation of the *Criminal Property Confiscation Act 2000* and includes the amendments made by the other written laws referred to in the following table [1a]. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
Criminal Property Confiscation Act 2000	68 of 2000	6 Dec 2000	s. 1 and 2: 6 Dec 2000; Act other than s. 1 and 2: 1 Jan 2001 (see s. 2 and *Gazette* 29 Dec 2000 p. 7903)
Building Societies Amendment Act 2001 s. 51	12 of 2001	13 Jul 2001	13 Jul 2001 (see s. 2)
Corporations (Consequential Amendments) Act (No. 2) 2003 Pt. 7	20 of 2003	23 Apr 2003	15 Jul 2001 (see s. 2(1) and Cwlth *Gazette* 13 Jul 2001 No. S285)
Acts Amendment (Equality of Status) Act 2003 Pt. 15	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and *Gazette* 30 Jun 2003 p. 2579)
Courts Legislation Amendment and Repeal Act 2004 s. 141	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and *Gazette* 31 Dec 2004 p. 7128)
Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004 s. 80 and 82	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and *Gazette* 31 Dec 2004 p. 7129 (correction in *Gazette* 7 Jan 2005 p. 53))
Housing Societies Repeal Act 2005 s. 25	17 of 2005	5 Oct 2005	10 Jul 2010 (see s. 2(3) and *Gazette* 9 Jul 2010 p. 3239)
Reprint 1: The *Criminal Property Confiscation Act 2000* as at 9 Dec 2005 (includes amendments listed above except those in the *Housing Societies Repeal Act 2005* s. 25)			
Financial Legislation Amendment and Repeal Act 2006 s. 17	77 of 2006	21 Dec 2006	1 Feb 2007 (see s. 2(1) and *Gazette* 19 Jan 2007 p. 137)
Road Traffic Amendment Act 2007 s. 26	4 of 2007	11 Apr 2007	1 May 2007 (see s. 2 and *Gazette* 27 Apr 2007 p. 1831)
Criminal Law and Evidence Amendment Act 2008 s. 61	2 of 2008	12 Mar 2008	27 Apr 2008 (see s. 2 and *Gazette* 24 Apr 2008 p. 1559)
Medical Practitioners	22 of 2008	27 May 2008	1 Dec 2008 (see s. 2 and

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Short title	Number and year	Assent	Commencement
Act 2008 Sch. 3 cl. 17			*Gazette* 25 Nov 2008 p. 4989)
Reprint 2: The *Criminal Property Confiscation Act 2000* as at 20 Mar 2009 (includes amendments listed above except those in the *Housing Societies Repeal Act 2005* s. 25)			
Acts Amendment (Bankruptcy) Act 2009 s. 27	18 of 2009	16 Sep 2009	17 Sep 2009 (see s. 2(b))
Co-operatives Act 2009 s. 508	24 of 2009	22 Oct 2009	1 Sep 2010 (see s. 2(b) and *Gazette* 13 Aug 2010 p. 3975)
Standardisation of Formatting Act 2010 s. 51	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and *Gazette* 10 Sep 2010 p. 4341)
Health Practitioner Regulation National Law (WA) Act 2010 Pt. 5 Div. 18	35 of 2010	30 Aug 2010	18 Oct 2010 (see s. 2(b) and *Gazette* 1 Oct 2010 p. 5075-6)

[1a] On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

Provisions that have not come into operation

Short title	Number and year	Assent	Commencement
Co-operatives Act 2009 s. 508 and 513 [4]	24 of 2009	22 Oct 2009	1 Sep 2012 (see s. 2(c) and *Gazette* 13 Aug 2010 p. 3975)

[2] Repealed by the *Sentencing (Consequential Provisions) Act 1995* s. 77.

[3] Footnote no longer applicable.

[4] On the date as at which this compilation was prepared, the *Co-operatives Act 2009* s. 513 had not come into operation. It reads as follows:

513. *Criminal Property Confiscation Act 2000* amended

(1) This section amends the *Criminal Property Confiscation Act 2000*.

(2) In the Glossary in paragraph (e) of the definition of ***financial institution*** delete "a registered society within the meaning of the *Co-operative and Provident Societies Act 1903*, or".

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Defined Terms

[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]

Defined Term	Provision(s)
abscond	Gl.
account	Gl.
agent	Gl.
charge	Gl.
confiscable	Gl.
confiscable property declaration	Gl.
confiscated	Gl.
confiscation offence	141(1), Gl.
Confiscation Proceeds Account	Gl.
conviction	Gl.
corporation	Gl.
corresponding law	Gl.
court	Gl.
crime-derived	Gl.
crime-derived property	4(d)
crime-used	Gl.
crime-used property	4(c)
crime-used property substitution declaration	Gl.
criminal benefit	Gl.
criminal benefits	4(b)
criminal benefits declaration	Gl.
criminal use	Gl.
deal	Gl.
declared drug trafficker	4(e), 159(1), Gl.
director	Gl.
dispose of	Gl.
document	Gl.
DPP	Gl.
effective control	Gl.
encumbrance	Gl.
examination	Gl.
examination order	Gl.
executive officer	Gl.
financial institution	Gl.

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Defined Terms

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Appendix B(ii)

Proceeds of Crime Act 2002
Australia

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Proceeds of Crime Act 2002

Act No. 85 of 2002 as amended

This compilation was prepared on 26 November 2010
taking into account amendments up to Act No. 127 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

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Part 2-6—Unexplained wealth orders

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An Act to provide for confiscation of the proceeds of crime, and for other purposes

Chapter 1—Introduction

Part 1-1—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *Proceeds of Crime Act 2002*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	11 October 2002
2. Sections 3 to 338	A single day to be fixed by Proclamation, subject to subsection (3)	1 January 2003 (*Gazette* 2002, No. GN44)

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.

(3) If a provision covered by item 2 of the table does not commence under subsection (1) within the period of 6 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

3 Identifying defined terms

(1) Many of the terms in this Act are defined in the Dictionary in Chapter 6.

(2) Most of the terms that are defined in the Dictionary in Chapter 6 are identified by an asterisk appearing at the start of the term: as in "*proceeds". The footnote with the asterisk contains a signpost to the Dictionary.

(3) An asterisk usually identifies the first occurrence of a term in a section (if not divided into subsections), subsection or definition. Later occurrences of the term in the same provision are not usually asterisked.

(4) Terms are not asterisked in headings, notes, examples, explanatory tables, guides, outline provisions or diagrams.

(5) If a term is not identified by an asterisk, disregard that fact in deciding whether or not to apply to that term a definition or other interpretation provision.

(6) The following basic terms used throughout the Act are not identified with an asterisk:

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Terms that are not identified		
Item	**This term:**	**is defined in:**
1	charged	section 338
2	convicted	section 331
3	deal	section 338
4	derived	section 336
5	property	section 338

4 Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Section 5

Part 1-2—Objects

5 Principal objects

The principal objects of this Act are:

(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

(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.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Part 1-3—Outline of this Act

6 General

This Act establishes a scheme to confiscate the proceeds of crime. It does this by:

(a) setting out in Chapter 2 processes by which confiscation can occur; and

(b) setting out in Chapter 3 ways in which Commonwealth law enforcement agencies can obtain information relevant to these processes; and

(c) setting out in Chapter 4 related administrative matters.

It concludes with miscellaneous provisions and with definitions and other interpretive material.

Note: See also Part IAE of the *Crimes Act 1914* (video link evidence).

7 The confiscation scheme (Chapter 2)

Chapter 2 sets out a number of processes relating to confiscation:

(aa) freezing orders limiting withdrawals from accounts with financial institutions before courts decide applications for restraining orders to cover the accounts (see Part 2-1A); and

(a) restraining orders prohibiting disposal of or dealing with property (see Part 2-1); and

(b) forfeiture orders under which property is forfeited to the Commonwealth (see Part 2-2); and

(c) forfeiture of property to the Commonwealth on conviction of a serious offence (see Part 2-3); and

(d) pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences (see Part 2-4); and

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(e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences (see Part 2-5); and

(f) unexplained wealth orders requiring payment of unexplained wealth amounts (see Part 2-6).

8 Information gathering (Chapter 3)

(1) Chapter 3 sets out 5 ways to obtain information:

(a) examining any person about the affairs of people covered by examination orders (see Part 3-1); and

(b) requiring people, under production orders, to produce property-tracking documents or make them available for inspection (see Part 3-2); and

(c) requiring financial institutions to provide information and documents relating to accounts and transactions (see Part 3-3); and

(d) requiring financial institutions, under monitoring orders, to provide information about transactions over particular periods (see Part 3-4); and

(e) searching for and seizing tainted property or evidential material, either under search warrants or in relation to conveyances (see Part 3-5).

(2) Chapter 3 also authorises the disclosure, to certain authorities for certain purposes, of information obtained under that Chapter or certain other provisions (see Part 3-6).

9 Administration (Chapter 4)

Chapter 4 sets out the following administrative matters:

(a) the powers and duties of the Official Trustee, which largely relate to property that is subject to restraining orders (see Part 4-1);

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) the provision of legal assistance (see Part 4-2);
(c) the Confiscated Assets Account (see Part 4-3);
(d) charges over restrained property for payment of certain amounts (see Part 4-4);
(e) enforcement of interstate orders in certain Territories (see Part 4-5).

10 Miscellaneous (Chapter 5)

Chapter 5 deals with miscellaneous matters.

11 Interpreting this Act (Chapter 6)

Chapter 6 contains the Dictionary, which sets out a list of all the terms that are defined in this Act. It also sets out the meanings of some important concepts.

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Part 1-4—Application

12 Act to bind Crown

(1) This Act binds the Crown in right of the Commonwealth, each of the States and each of the *self-governing Territories.

(2) This Act does not make the Crown liable to be prosecuted for an offence.

13 Act to apply both within and outside Australia

This Act extends, except so far as the contrary intention appears:

(a) to acts, matters and things outside *Australia, whether or not in or over a foreign country; and

(b) to all persons, irrespective of their nationality or citizenship.

14 Application

This Act applies in relation to:

(a) an offence committed at any time (whether or not any person is convicted of the offence); and

(b) a person's conviction of an offence at any time;

whether the offence or conviction occurred before or after the commencement of this Act.

15 Concurrent operation of State/Territory laws

It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act.

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Chapter 2—The confiscation scheme

Part 2-1A—Freezing orders

15A Simplified outline of this Part

A freezing order can be made against an account with a financial institution if:

(a) there are grounds to suspect the account balance reflects proceeds or an instrument of certain offences; and

(b) a magistrate is satisfied that, unless the order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of the proceeds or instrument.

Division 1—Making freezing orders

15B Making freezing orders

(1) A magistrate must order that a *financial institution not allow a withdrawal from an *account with the institution, except in the manner and circumstances specified in the order, if:

(a) an *authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of ***authorised officer*** in section 338 applies for the order in accordance with Division 2; and

(b) there are reasonable grounds to suspect that the balance of the account:

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(i) is *proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) is wholly or partly an *instrument of a *serious offence; and

(c) the magistrate is satisfied that, unless an order is made under this section, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument.

Note 1: Paragraphs (a), (aa), (b) and (c) of the definition of ***authorised officer*** in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

Note 2: The balance of the account may be proceeds of an offence even though the balance is only partly derived from the offence: see section 329.

(2) An order made under subsection (1) covers the balance of the *account from time to time.

Order need not be based on commission of particular offence

(3) The reasonable grounds referred to in paragraph (1)(b), and the satisfaction referred to in paragraph (1)(c), need not be based on a finding as to the commission of a particular offence.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Division 2—How freezing orders are obtained

15C Affidavit supporting application made in person

If an *authorised officer applies in person to a magistrate for a *freezing order relating to an *account with a *financial institution, the application must be supported by an affidavit of an authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of ***authorised officer*** in section 338:

(a) setting out sufficient information to identify the account (for example, the account number); and

(b) identifying the financial institution; and

(c) setting out the grounds to suspect that the balance of the account:

(i) is *proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; or

(ii) is wholly or partly an *instrument of a *serious offence; and

(d) setting out the grounds on which a person could be satisfied that, unless the order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or of such an instrument.

Note: Paragraphs (a), (aa), (b) and (c) of the definition of ***authorised officer*** in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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15D Applying for freezing orders by telephone or other electronic means

(1) An *authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of ***authorised officer*** in section 338 may apply to a magistrate for a *freezing order by telephone, fax or other electronic means:

(a) in an urgent case; or

(b) if the delay that would occur if an application were made in person would frustrate the effectiveness of the order.

Note: Paragraphs (a), (aa), (b) and (c) of the definition of ***authorised officer*** in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

(2) An application under subsection (1):

(a) must include all information that would be required in an ordinary application for a *freezing order and supporting affidavit; and

(b) if necessary, may be made before the affidavit is sworn.

(3) The magistrate may require:

(a) communication by voice to the extent that it is practicable in the circumstances; and

(b) any further information.

15E Making order by telephone etc.

(1) The magistrate may complete and sign the same form of *freezing order that would be made under section 15B if satisfied that:

(a) a freezing order should be issued urgently; or

(b) the delay that would occur if an application were made in person would frustrate the effectiveness of the order.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(2) If the magistrate makes the *freezing order, he or she must inform the applicant, by telephone, fax or other electronic means, of the terms of the order and the day on which and the time at which it was signed.

(3) The applicant must then:
  (a) complete a form of *freezing order in terms substantially corresponding to those given by the magistrate; and
  (b) state on the form:
    (i) the name of the magistrate; and
    (ii) the day on which the order was signed; and
    (iii) the time at which the order was signed.

(4) The applicant must give the magistrate the form of *freezing order completed by the applicant by the end of:
  (a) the second *working day after the magistrate makes the order; or
  (b) the first working day after the magistrate makes the order, if it is served on the *financial institution concerned before the first working day after the magistrate makes the order.

(5) If, before the magistrate made the *freezing order, the applicant did not give the magistrate an affidavit supporting the application and meeting the description in section 15C, the applicant must do so by the time by which the applicant must give the magistrate the form of freezing order completed by the applicant.

(6) If the applicant does not comply with subsection (5), the *freezing order is taken never to have had effect.

(7) The magistrate must attach the form of *freezing order completed by the magistrate to the documents provided under subsection (4) and (if relevant) subsection (5).

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15F Unsigned freezing orders in court proceedings

If:

(a) it is material, in any proceedings, for a court to be satisfied that a *freezing order applied for under section 15D was duly made; and

(b) the form of freezing order signed by the magistrate is not produced in evidence;

the court must assume that the order was not duly made unless the contrary is proved.

15G Offence for making false statements in applications

A person commits an offence if:

(a) the person makes a statement (whether orally, in a document or in any other way); and

(b) the statement:

(i) is false or misleading; or

(ii) omits any matter or thing without which the statement is misleading; and

(c) the statement is made in, or in connection with, an application for a *freezing order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

15H Offences relating to orders made under section 15E

Offence for stating incorrect names in telephone orders

(1) A person commits an offence if:

(a) the person states a name of a magistrate in a document; and

(b) the document purports to be a form of *freezing order under section 15E; and

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(c) the name is not the name of the magistrate who made the order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Offence for unauthorised form of order

(2) A person commits an offence if:
(a) the person states a matter in a form of *freezing order under section 15E; and
(b) the matter departs in a material particular from the order made by the magistrate.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Offence for service of unauthorised form of order

(3) A person commits an offence if:
(a) the person presents a document to a person; and
(b) the document purports to be a form of *freezing order under section 15E; and
(c) the document:
(i) has not been approved by a magistrate under that section; or
(ii) departs in a material particular from the terms given by the magistrate under that section.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Offence for giving form of order different from that served

(4) A person commits an offence if:
(a) the person gives a magistrate a form of *freezing order under section 15E relating to a *financial institution; and

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(b) the person does so after presenting to the financial institution a document purporting to be a form of the freezing order; and

(c) the form given to the magistrate is not in the same form as the document presented to the financial institution.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Division 3—Giving effect to freezing orders

15J Service of freezing order etc. on financial institution and account-holder

(1) If a magistrate makes a *freezing order relating to an *account with a *financial institution, the applicant for the order must cause the things described in subsection (2) to be given to:

(a) the financial institution; and

(b) each person in whose name the account is held.

(2) The things are as follows:

(a) a copy of the order (or of a form of the order under section 15E);

(b) a written statement of the name and contact details of the *enforcement agency mentioned in the paragraph of the definition of ***authorised officer*** in section 338 that describes the applicant.

Note: If the copy of the order is given to the financial institution after the end of the first working day after the order is made, the order does not come into force: see subsection 15N(1).

15K Freezing order does not prevent withdrawal to enable financial institution to meet its liabilities

A *freezing order relating to an *account with a *financial institution does not prevent the institution from allowing a withdrawal from the account to enable the institution to meet a liability imposed on the institution by or under a written law of the Commonwealth, a State or a Territory.

15L Offence for contravening freezing orders

A *financial institution commits an offence if:

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(a) the institution allows a withdrawal from an *account with the institution; and
(b) there is a *freezing order relating to the account; and
(c) allowing the withdrawal contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units or both.

15M Protection from suits etc. for those complying with orders

No action, suit or proceeding lies against:
(a) a *financial institution; or
(b) an *officer or *agent of the institution acting in the course of that person's employment or agency;

in relation to any action taken by the institution or person in complying with a *freezing order or in the mistaken belief that action was required under a freezing order.

Note: This section does not affect any action that may lie against anyone else for the making or operation of a freezing order.

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Division 4—Duration of freezing orders

15N When a freezing order is in force

(1) A *freezing order relating to an *account with a *financial institution comes into force when a copy of the order (or of a form of the order under section 15E) is given to the institution. However, the order does not come into force if the copy is given to the institution after the end of the first *working day after the order is made.

(2) The *freezing order remains in force until:
  (a) the end of the period specified in the order (as affected by section 15P if relevant) from when the copy of the order was given to the institution; or
  (b) if, before the end of that period, a court makes a decision on an application for a *restraining order to cover the *account—the time the court makes that decision.

(3) The *freezing order, as originally made, must not specify a period of more than 3 *working days.

15P Order extending a freezing order

(1) A magistrate may make an order extending the period specified in a *freezing order made in relation to an *account with a *financial institution if:
  (a) an *authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of ***authorised officer*** in section 338 applies for the extension; and
  (b) the magistrate is satisfied that an application has been made to a court (but not decided by the court) for a *restraining order to cover the account (whether or not the restraining order is also to cover other property).

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(2) The extension may be for:
  (a) a specified number of *working days; or
  (b) the period ending when the court decides the application for the *restraining order.

(3) The extension does not have effect unless a copy of the order for the extension is given to the *financial institution before the time the *freezing order would cease to be in force apart from the extension.

(4) The following provisions apply in relation to an order extending a *freezing order in a way corresponding to the way in which they apply in relation to a freezing order:
  (a) Division 2 (except paragraphs 15C(c) and (d));
  (b) section 15J (except the note to that section).

(5) Division 2 applies because of subsection (4) as if:
  (a) section 15C also required that an affidavit supporting an application:
    (i) identify the *freezing order; and
    (ii) state that an application has been made for a *restraining order to cover the *account; and
  (b) the reference in subsection 15E(1) to section 15B were a reference to subsection (1) of this section.

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Division 5—Varying scope of freezing orders

15Q Magistrate may vary freezing order to allow withdrawal to meet reasonable expenses

(1) A magistrate may vary a *freezing order relating to an *account with a *financial institution so that the institution may allow a withdrawal from the account to meet one or more of the following relating to a person in whose name the account is held:

(a) the reasonable living expenses of the person;

(b) the reasonable living expenses of any of the *dependants of the person;

(c) the reasonable business expenses of the person;

(d) a specified debt incurred in good faith by the person.

(2) The magistrate may vary the *freezing order only if:

(a) a person in whose name the *account is held has applied for the variation; and

(b) the person has notified the *DPP in writing of the application and the grounds for the application; and

(c) the magistrate is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:

(i) proceedings under this Act; or

(ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and

(d) the magistrate is satisfied that the person cannot meet the expense or debt out of property that is not covered by:

(i) a freezing order; or

(ii) a *restraining order; or

(iii) an *interstate restraining order; or

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(iv) a *foreign restraining order that is registered under the *Mutual Assistance Act.

(3) The variation does not take effect until written notice of it is given to the *financial institution.

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Division 6—Revoking freezing orders

15R Application to revoke a freezing order

(1) A person may apply to a magistrate to revoke a *freezing order.

(2) The applicant for the revocation must give written notice of the application and the grounds on which the revocation is sought to the *enforcement agency mentioned in the paragraph of the definition of ***authorised officer*** in section 338 that describes the *authorised officer who applied for the *freezing order.

(3) One or more of the following may adduce additional material to the magistrate relating to the application to revoke the *freezing order:

(a) the *authorised officer who applied for the freezing order;

(b) the authorised officer whose affidavit supported the application for the freezing order;

(c) another authorised officer described in the paragraph of the definition of ***authorised officer*** in section 338 that describes the authorised officer mentioned in paragraph (a) or (b) of this subsection.

(4) The magistrate may revoke the *freezing order if satisfied that it is in the interests of justice to do so.

15S Notice of revocation of a freezing order

(1) If a *freezing order relating to an *account with a *financial institution is revoked under section 15R, an *authorised officer (the ***notifying officer***) described in the paragraph of the definition of ***authorised officer*** in section 338 that describes the authorised officer who applied for the freezing order must cause written notice of the revocation to be given to:

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(a) the financial institution; and
(b) each person in whose name the account is held.

(2) However, the notifying officer need not give notice to the applicant for the revocation.

(3) Subsection (1) does not require more than one *authorised officer to cause notice of the revocation to be given.

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Part 2-1—Restraining orders

16 Simplified outline of this Part

Restraining orders can be made against property, in relation to certain offences, on grounds that relate to possible forfeiture or confiscation orders relating to those offences. (There is not always a requirement that a person has been convicted of such an offence.)

Division 1—Making restraining orders

17 Restraining orders—people convicted of or charged with indictable offences

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) a person has been convicted of, or has been charged with, an *indictable offence, or it is proposed that he or she be charged with an indictable offence; and

(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) (unless there are no such requirements) the court is satisfied that the *authorised officer who made the affidavit holds the

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suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:

(a) all or specified property of the *suspect;

(aa) all or specified *bankruptcy property of the suspect;

(b) all property of the suspect other than specified property;

(ba) all bankruptcy property of the suspect other than specified bankruptcy property;

(c) specified property of another person (whether or not that other person's identity is known) that is subject to the *effective control of the suspect;

(d) specified property of another person (whether or not that other person's identity is known) that is *proceeds of the offence or an *instrument of the offence.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

(a) if the *suspect has not been convicted of an indictable offence—that the authorised officer suspects that the suspect committed the offence; and

(b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect—that the authorised officer suspects that:

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(i) the property is subject to the *effective control of the suspect; or

(ii) the property is *proceeds of the offence or an *instrument of the offence.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Refusal to make a restraining order

(4) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property

(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

18 Restraining orders—people suspected of committing serious offences

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

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(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that a person has committed a *serious offence; and

(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Note: A court can refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:

(a) all or specified property of the *suspect;

(aa) all or specified *bankruptcy property of the suspect;

(b) all property of the suspect other than specified property;

(ba) all bankruptcy property of the suspect other than specified bankruptcy property;

(c) specified property of another person (whether or not that other person's identity is known) that is subject to the *effective control of the suspect;

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(d) specified property of another person (whether or not that other person's identity is known) that is:

(i) in any case—*proceeds of the offence; or

(ii) if the offence to which the order relates is a *serious offence—an *instrument of the offence.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

(a) that the authorised officer suspects that the *suspect committed the offence; and

(b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect—that the authorised officer suspects that:

(i) the property is subject to the *effective control of the suspect; or

(ii) in any case—the property is *proceeds of the offence; or

(iii) if the offence to which the order relates is a *serious offence—the property is an *instrument of the offence.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Restraining order need not be based on commission of a particular offence

(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *serious offence.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

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Later acquisitions of property

(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

19 Restraining orders—property suspected of being proceeds of indictable offences etc.

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that the property is:

(i) the *proceeds of a *terrorism offence or any other *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) an *instrument of a *serious offence; and

(e) the application for the order is supported by an affidavit of an *authorised officer stating that the authorised officer suspects that:

(i) in any case—the property is proceeds of the offence; or

(ii) if the offence to which the order relates is a serious offence—the property is an *instrument of the offence;

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and including the grounds on which the authorised officer holds the suspicion; and

(f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:

(a) in any case—*proceeds of the offence; or

(b) if the offence to which the order relates is a *serious offence—an *instrument of the offence.

Refusal to make a restraining order

(3) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Restraining order need not be based on commission of a particular offence

(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular offence.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

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20 Restraining orders—people suspected of deriving literary proceeds from indictable offences etc.

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that a person has committed an *indictable offence or a *foreign indictable offence, and that the person has derived *literary proceeds in relation to the offence; and

(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) (unless there are no such requirements) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:

(a) all or specified property of the *suspect;

(aa) all or specified *bankruptcy property of the suspect;

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(b) all property of the suspect other than specified property;

(ba) all bankruptcy property of the suspect other than specified bankruptcy property;

(c) specified property of another person (whether or not that other person's identity is known) that is subject to the *effective control of the suspect.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

(a) if the *suspect has not been convicted of the offence—that the authorised officer suspects that the suspect committed the offence; and

(c) that the authorised officer suspects that the suspect derived *literary proceeds in relation to the offence; and

(d) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect—that the authorised officer suspects that the property is subject to the *effective control of the suspect.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Refusal to make a restraining order

(4) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

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Restraining order need not be based on commission of a particular offence

(5) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *indictable offence or *foreign indictable offence (as the case requires).

Risk of property being disposed of etc.

(6) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property

(7) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

20A Restraining orders—unexplained wealth

When a restraining order must be made

(1) A court with *proceeds jurisdiction may order that:

(a) property must not be disposed of or otherwise dealt with by any person; or

(b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

if:

(c) the *DPP applies for the order; and

(d) there are reasonable grounds to suspect that a person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and

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(e) any affidavit requirements in subsection (3) for the application have been met; and

(f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds; and

(g) there are reasonable grounds to suspect either or both of the following:

(i) that the person has committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;

(ii) that the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:

(a) all or specified property of the *suspect;

(b) all or specified *bankruptcy property of the suspect;

(c) all property of the suspect other than specified property;

(d) all bankruptcy property of the suspect other than specified bankruptcy property;

(e) specified property of another person (whether or not that other person's identity is known) that is subject to the *effective control of the suspect.

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Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

(a) that the authorised officer suspects that the *total wealth of the *suspect exceeds the value of the suspect's *wealth that was *lawfully acquired; and

(b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the *suspect—that the authorised officer suspects that the property is subject to the *effective control of the suspect; and

(c) that the authorised officer suspects either or both of the following:

(i) that the suspect has committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;

(ii) that the whole or any part of the suspect's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

The affidavit must include the grounds on which the authorised officer holds those suspicions.

Legal expenses

(3A) Without limiting the manner and circumstances that may be specified in an order under paragraph (1)(b), the court may order that specified property may be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.

(3B) The court may make an order under subsection (3A) despite anything in section 24.

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(3C) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property covered by an order under subsection (3A) and may make any further or ancillary orders it considers appropriate.

Refusal to make a restraining order

(4) Despite subsection (1), the court may refuse to make a *restraining order if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

(4A) If the court refuses to make a *restraining order under subsection (1), it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

Risk of property being disposed of etc.

(5) The court may make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property

(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

21 Refusal to make an order for failure to give undertaking

(1) The court may refuse to make a *restraining order if the Commonwealth refuses or fails to give the court an appropriate

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undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.

(2) The *DPP may give such an undertaking on behalf of the Commonwealth.

22 Restraining orders must only relate to one suspect

(1) A *restraining order must only relate to one *suspect.

Note: A restraining order might not relate to any suspect if the person who is suspected of committing the offence is not known and the restraining order only restrains proceeds of the offence. The restraining order may also cover the property of one or more other persons who are not the suspect.

(2) A *restraining order may relate to more than one offence in relation to that *suspect.

23 Conditions on restraining orders

A *restraining order may be made subject to conditions.

24 Allowance for expenses

(1) The court may allow any one or more of the following to be met out of property, or a specified part of property, covered by a *restraining order:

(a) the reasonable living expenses of the person whose property is restrained;

(b) the reasonable living expenses of any of the *dependants of that person;

(c) the reasonable business expenses of that person;

(d) a specified debt incurred in good faith by that person.

(2) The court may only make an order under subsection (1) if:

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(a) the person whose property is restrained has applied for the order; and

(b) the person has notified the *DPP in writing of the application and the grounds for the application; and

(c) the person has disclosed all of his or her *interests in property, and his or her liabilities, in a statement on oath that has been filed in the court; and

(ca) the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with:

(i) proceedings under this Act; or

(ii) proceedings for an offence against a law of the Commonwealth, a State or a Territory; and

(d) the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by:

(i) a *restraining order; or

(ii) an *interstate restraining order; or

(iii) a *foreign restraining order that is registered under the *Mutual Assistance Act.

(3) Property that is covered by:

(a) a *restraining order; or

(b) an *interstate restraining order; or

(c) a *foreign restraining order that is registered under the *Mutual Assistance Act;

is taken, for the purposes of paragraph (2)(d), not to be covered by the order if it would not be reasonably practicable for the *Official Trustee to take custody and control of the property.

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24A Excluding property from or revoking restraining orders in certain cases when expenses are not allowed

(1) If:

(a) because of the operation of subsection 24(3), property that is covered by a *restraining order is taken, for the purposes of paragraph 24(2)(d), not to be covered by the order; and

(b) as a result, and for no other reason, the court refuses an application to make an order under subsection 24(1);

the court may:

(c) exclude the property from the restraining order; or

(d) if the property is the only property covered by the restraining order—revoke the restraining order.

(2) The court must not exclude the property or revoke the order unless the court is satisfied that the property is needed to meet any one or more of the following:

(a) the reasonable living expenses of the person whose property is restrained;

(b) the reasonable living expenses of any of the *dependants of that person;

(c) the reasonable business expenses of that person;

(d) a specified debt incurred in good faith by that person.

(3) If the court excludes the property from the *restraining order, the *DPP must give written notice of the exclusion to:

(a) the owner of the property (if the owner is known); and

(b) any other person the DPP reasonably believes may have an *interest in the property.

However, the DPP need not give notice to the applicant for the order under subsection 24(1).

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(4) If the court revokes the *restraining order, the *DPP must give written notice of the revocation to:

(a) the owner of any property covered by the restraining order (if the owner is known); and

(b) any other person the DPP reasonably believes may have an *interest in the property.

However, the DPP need not give notice to the applicant for the order under subsection 24(1).

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Division 2—How restraining orders are obtained

25 DPP may apply for a restraining order

The *DPP may apply for a *restraining order.

26 Notice of application

(1) Subject to subsection (4), the *DPP must:

(a) give written notice of an application for a *restraining order covering property to the owner of the property (if the owner is known); and

(b) include with the notice a copy of the application and any affidavit supporting the application.

(2) Subject to subsection (4), the *DPP must also:

(a) give written notice of an application for a *restraining order covering property to any other person the DPP reasonably believes may have an *interest in the property; and

(b) include with the notice:

(i) a copy of the application; and

(ii) a further notice that the person may request that the DPP give the person a copy of any affidavit supporting the application.

The DPP must comply with any such request as soon as practicable.

(3) The court must not (unless subsection (4) applies) hear the application unless it is satisfied that the owner of the property to which the application relates has received reasonable notice of the application.

(4) The court must consider the application without notice having been given if the *DPP requests the court to do so.

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(5) The court may, at any time before finally determining the application, direct the *DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

(6) A person who claims an *interest in property may appear and adduce evidence at the hearing of the application.

27 DPP may choose under which section it applies for a restraining order

To avoid doubt, the fact that the *DPP may apply for a *restraining order under a section of Division 1 against property in relation to an offence does not prevent the DPP from applying for a *restraining order under a different section of Division 1 against that property in relation to that offence.

28 Prejudice to investigations

A witness who is giving evidence relating to an application for a *restraining order is not required to answer a question or produce a document if the court is satisfied that the answer or document may prejudice the investigation of, or the prosecution of a person for, an offence.

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Division 3—Excluding property from restraining orders

Note: In addition to this Division, section 44 provides for property to be excluded from a restraining order on the giving of satisfactory security.

29 Excluding property from certain restraining orders

(1) The court to which an application for a *restraining order under section 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified *interest in property from the order if:

(a) an application is made under section 30 or 31; and

(b) the court is satisfied that the relevant reason under subsection (2) or (3) for excluding the interest from the order exists.

Note: Section 32 may prevent the court from hearing the application until the DPP has had a reasonable opportunity to conduct an examination of the applicant.

(2) The reasons for excluding a specified *interest in property from a *restraining order are:

(a) for a restraining order under section 17 if the offence, or any of the offences, to which the order relates is a *serious offence—the interest is neither *proceeds nor an *instrument of *unlawful activity; or

(b) for a restraining order under section 17 if paragraph (a) does not apply—the interest is neither proceeds nor an instrument of the offence, or any offence, to which the order relates; or

(c) for a restraining order under section 18—the interest is neither:

(i) in any case—proceeds of unlawful activity; nor

(ii) if an offence to which the order relates is a serious offence—an *instrument of any serious offence; or

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(d) for a restraining order under section 19—the interest is neither:

(i) in any case—proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; nor

(ii) if an offence to which the order relates is a serious offence—an *instrument of any serious offence.

Note: One of the circumstances in which property ceases to be proceeds of an offence or unlawful activity involves acquisition of the property by an innocent third party for sufficient consideration: see paragraph 330(4)(a).

(3) If the offence, or each offence, to which a *restraining order relates is a *serious offence that is an offence against section 15, 24, 29 or 31 of the *Financial Transaction Reports Act 1988* or section 53, 59, 136, 137, 139, 140, 141, 142 or 143 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, a further reason for excluding a specified *interest in property from the order is that each of the following requirements is met:

(a) there are no reasonable grounds to suspect that the interest is *proceeds of the offence, or any of the offences;

(b) there is a *suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;

(c) the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other *indictable offence, any *State indictable offence or any *foreign indictable offence;

(d) the interest could not have been covered by a restraining order if none of the offences had been serious offences.

(4) However, the court must not exclude a specified *interest in property from a *restraining order under section 17 or 18 unless it

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is also satisfied that neither a *pecuniary penalty order nor a *literary proceeds order could be made against:

(a) the person who has the interest; or

(b) if the interest is not held by the *suspect but is under his or her *effective control—the suspect.

29A Excluding property from a restraining order made under section 20A

The court to which an application for a *restraining order under section 20A was made must, when the order is made or at a later time, exclude a specified *interest in property from the order if:

(a) an application is made under section 30 or 31; and

(b) the court is satisfied that the interest is held by a person other than the *suspect and is not subject to the *effective control of the suspect.

Note: Section 32 may prevent the court from hearing the application until the DPP has had a reasonable opportunity to conduct examinations in relation to the restraining order.

30 Application to exclude property from a restraining order before restraining order has been made

(1) A person may apply for an order under section 29 or 29A if a *restraining order that could cover property in which the person claims an *interest has been applied for, but is yet to be made.

(2) The person must give written notice to the *DPP of both the application and the grounds on which the exclusion is sought.

(3) The *DPP may appear and adduce evidence at the hearing of the application.

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(4) The *DPP must give the person notice of any grounds on which it proposes to contest the application.

31 Application to exclude property from a restraining order after restraining order has been made

(1) A person may apply for an order under section 29 or 29A if a *restraining order that covers property in which the person claims an *interest has been made.

(1A) An application under subsection (1):

(a) must be made to the court that made the *restraining order; and

(b) may be made at any time after the restraining order is made.

(2) However, unless the court gives leave, the person cannot apply if he or she:

(a) was notified of the application for the *restraining order, but did not appear at the hearing of that application; or

(b) appeared at the hearing of that application.

(3) The court may give the person leave to apply if the court is satisfied that:

(a) if paragraph (2)(a) applies—the person had a good reason for not appearing; or

(b) if paragraph (2)(b) applies—the person now has evidence relevant to the person's application that was not available to the person at the time of the hearing; or

(c) in either case—there are other special grounds for granting the leave.

(4) The person must give written notice to the *DPP of both the application and the grounds on which the exclusion is sought.

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(5) The *DPP may appear and adduce evidence at the hearing of the application.

(6) The *DPP must give the person notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

32 Application not to be heard unless DPP has had reasonable opportunity to conduct an examination

The court must not hear an application to exclude specified property from the *restraining order if:

(a) the restraining order is in force; and

(b) the *DPP has not been given a reasonable opportunity to conduct *examinations in relation to the application.

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Division 4—Giving effect to restraining orders

33 Notice of a restraining order

(1) If a court makes a *restraining order covering property that a person owns, the *DPP must give written notice of the order to the person.

Note: A person who was not notified of the application for a restraining order may apply to revoke the restraining order within 28 days of being notified of the order: see section 42.

(2) The *DPP must include a copy of the application and any affidavit supporting the application with the notice (if those documents have not already been given to the person).

(3) However, the court may order that:

(a) all or part of the application or affidavit is not to be given to the person; or

(b) the *DPP delay giving the notice (and the documents included with the notice) for a specified period;

if the DPP requests the court to do so and the court considers that this is appropriate in order to protect the integrity of any investigation or prosecution.

(4) If the court orders the *DPP to delay giving the notice (and the documents included with the notice) for a specified period, the DPP must give the notice as soon as practicable after the end of that period.

34 Registering restraining orders

(1) A *registration authority that keeps a register of property of a particular kind may record in the register particulars of a *restraining order covering property of that kind.

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(2) The *registration authority can only do so on the application of the *DPP.

(3) Each person who subsequently deals with the property:
   (a) is taken not to be acting in good faith for the purposes of section 36; and
   (b) is taken to have notice of the *restraining order for the purposes of section 37.

35 Notifying registration authorities of exclusions from or variations to restraining orders

(1) If the *DPP has previously applied to a *registration authority under section 34 for the recording in a register of particulars of a *restraining order covering particular property, the DPP must notify the registration authority if:
   (a) the property is no longer covered by the order because it is excluded from the order under section 29 or 29A or because the property covered by the order is varied under section 39; or
   (b) a condition to which a restraining order is subject is varied under section 39.

(2) The notice must be given within a reasonable time after the order under section 39 is made.

36 Court may set aside a disposition contravening a restraining order

(1) The *DPP may apply to the court to set aside a disposition or dealing with property that contravenes a *restraining order if that disposition or dealing was:
   (a) not for *sufficient consideration; or
   (b) not in favour of a person who acted in good faith.

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(2) The *DPP must give, to each party to the disposition or dealing, written notice of both the application and the grounds on which it seeks the setting aside of the disposition or dealing.

(3) The court may:
  (a) set aside the disposition or dealing from the day it occurred; or
  (b) set aside the disposition or dealing from the day on which the order is made and declare the rights of any persons who acquired *interests in the property on or after the day of the disposition or dealing and before the day on which the order is made.

37 Contravening restraining orders

(1) A person is guilty of an offence if:
  (a) the person disposes of, or otherwise deals with, property; and
  (b) the person knows that, or is reckless as to the fact that, the property is covered by a *restraining order; and
  (c) the disposition or dealing contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(2) A person is guilty of an offence if:
  (a) the person disposes of, or otherwise deals with, property; and
  (b) the property is covered by a *restraining order; and
  (c) the disposition or dealing contravenes the order; and
  (d) either:
    (i) particulars of the order were recorded in a register under subsection 34(1); or
    (ii) the person was given notice of the order under section 33.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

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(3) Strict liability applies to paragraphs (2)(b) and (c) and subparagraph (2)(d)(i).

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Division 5—Further orders

38 Court may order Official Trustee to take custody and control of property

The court may order the *Official Trustee to take custody and control of property, or specified property, covered by a *restraining order if the court is satisfied that this is required.

Note: Part 4-1 sets out the Official Trustee's powers over the property.

39 Ancillary orders

(1) The court that made a *restraining order, or any other court that could have made the restraining order, may make any ancillary orders that the court considers appropriate and, without limiting the generality of this, the court may make any one or more of the following orders:

(a) an order varying the property covered by the *restraining order;

(b) an order varying a condition to which the restraining order is subject;

(c) an order relating to an undertaking required under section 21;

(ca) an order directing the *suspect in relation to the restraining order to give a sworn statement to a specified person, within a specified period, setting out all of his or her *interests in property, and his or her liabilities;

(d) an order directing the owner or a previous owner of the property (including, if the owner or previous owner is a body corporate, a specified *director of the body corporate) to give a sworn statement to a specified person, within a specified period, setting out particulars of, or dealings with, the property;

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(da) if the court is satisfied that there are reasonable grounds to suspect that a person (other than the owner or a previous owner) has information relevant to identifying, locating or quantifying the property—an order directing the person to give a sworn statement to a specified person, within a specified period, setting out particulars of, or dealings with, the property;

(e) if the *Official Trustee is ordered under section 38 to take custody and control of property:

(i) an order regulating the manner in which the Official Trustee may exercise its powers or perform its duties under the restraining order; or

(ii) an order determining any question relating to the property, including a question relating to the liabilities of the owner or the exercise of powers or the performance of duties of the Official Trustee; or

(iii) an order directing any person to do anything necessary or convenient to enable the Official Trustee to take custody and control of the property;

(f) an order giving directions about the operation of the restraining order and any one or more of the following:

(i) a *forfeiture order that covers the same property as the restraining order;

(ii) a *pecuniary penalty order or a *literary proceeds order that relates to the same offence as the restraining order;

(g) an order requiring a person whose property is covered by a restraining order, or who has *effective control of property covered by a restraining order, to do anything necessary or convenient to bring the property within the jurisdiction.

Note 1: If there is a pecuniary penalty order that relates to the same offence as a restraining order, the court may also order the Official Trustee to pay an amount equal to the relevant pecuniary penalty out of property covered by the restraining order: see section 282.

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Note 2: If there is an unexplained wealth order that relates to a restraining order under section 20A, the court may also order the Official Trustee to pay an amount equal to the unexplained wealth amount out of property covered by the restraining order: see section 282A.

(2) The court can only make an ancillary order on the application of:
  (a) the *DPP; or
  (b) the owner of the property covered by the order; or
  (c) if the *Official Trustee was ordered to take custody and control of the property—the Official Trustee; or
  (d) any other person who has the leave of the court.

(3) A person who applies for an ancillary order must give written notice of the application to all other persons entitled to make such an application.

(3A) Despite subsection (3), the court must consider an application for an ancillary order without notice having been given under that subsection if:
  (a) the *DPP requests the court to do so; and
  (b) the *restraining order to which the application relates was considered, in accordance with subsection 26(4), without notice having been given.

(4) An ancillary order may be made:
  (a) if it is made by the court that made the *restraining order—when making the restraining order; or
  (b) in any case—at any time after the restraining order is made.

(4A) The court may, at any time before finally determining the application, direct the *DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

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(4B) If the court makes the ancillary order after a request under subsection (3A), the *DPP must give written notice to any person whom the DPP reasonably believes may be affected by the order.

(5) An order that is ancillary to a *restraining order does not cease to have effect merely because the restraining order, or part of it, ceases to be in force under subsection 45(4) or (5).

Note: A restraining order ceases to be in force under those subsections if a confiscation order covering the same property or relating to the same offence is satisfied.

39A Privilege against self incrimination etc. does not apply

(1) A person is not excused from giving a sworn statement under paragraph 39(1)(ca), (d) or (da) on the grounds that to do so would tend to incriminate the person or expose the person to a penalty.

(2) However, in the case of a natural person, a sworn statement is not admissible in civil or criminal proceedings against the person who made the statement except:

(a) in criminal proceedings for giving false or misleading information; or

(b) in proceedings on an application under this Act; or

(c) in proceedings ancillary to an application under this Act; or

(d) in proceedings for enforcement of a *confiscation order.

39B Application to revoke ancillary order

(1) A person may apply to the court that made an ancillary order under section 39 to revoke the order if:

(a) the person is affected by the order; and

(b) the application for the ancillary order was heard without notice having been given under subsection 39(3) following a request under subsection 39(3A).

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(2) The application must be made within 14 days after the person was notified of the ancillary order.

(3) The applicant must give written notice of the application, and the grounds on which the revocation is sought, to any person who was entitled to make the application for the ancillary order (see subsection 39(2)).

(4) The effect of the ancillary order is stayed until the court determines the application.

(5) The court may revoke the ancillary order on application under subsection (1) if it considers it appropriate to do so.

(6) The court may have regard to any matter it considers appropriate in determining the application.

(7) If:

(a) the ancillary order directed a person to do a thing within a particular period; and

(b) an application is made to revoke the order under this section;

the court may, if it considers it appropriate to do so, vary the order to extend that period by a specified period.

40 Contravening ancillary orders relating to foreign property

A person is guilty of an offence if:

(a) the court makes an order under paragraph 39(1)(g); and

(b) the person contravenes the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

Note: An order under paragraph 39(1)(g) requires a person whose property is covered by a restraining order, or who has effective control of property covered by a restraining order, to do anything necessary or convenient to bring the property within the jurisdiction.

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Division 6—Duration of restraining orders

41 When a restraining order is in force

A *restraining order is in force from the time at which it is made.

42 Application to revoke a restraining order

(1) A person who was not notified of the application for a *restraining order may apply to the court to revoke the order.

(1A) The application must be made:

(a) within 28 days after the person is notified of the order; or

(b) if the person applies to the court, within that period of 28 days, for an extension of the time for applying for revocation—within such longer period, not exceeding 3 months, as the court allows.

(2) The applicant must give written notice to the *DPP and the *Official Trustee of both the application and the grounds on which the revocation is sought.

(3) However, the *restraining order remains in force until the court revokes the order.

(4) The *DPP may adduce additional material to the court relating to the application to revoke the *restraining order.

(5) The court may revoke the *restraining order if satisfied that:

(a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or

(b) it is otherwise in the interests of justice to do so.

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43 Notice of revocation of a restraining order

If a *restraining order is revoked under section 42, the *DPP must give written notice of the revocation to:

(a) the owner of any property covered by the restraining order (if the owner is known); and

(b) any other person the DPP reasonably believes may have an *interest in the property.

However, the DPP need not give notice to the applicant for the revocation.

44 Giving security etc. to revoke etc. a restraining order

(1) A court may:

(a) revoke a *restraining order that covers a *suspect's property; or

(b) exclude specified property from such a restraining order;

if:

(c) the suspect applies to the court to revoke the order or exclude the property; and

(d) the suspect gives written notice of the application to the *DPP; and

(e) the suspect gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under this Act.

(2) A court may:

(a) revoke a *restraining order that covers the property of a person who is not a *suspect; or

(b) exclude specified property from such a restraining order;

if:

(c) the person applies to the court to revoke the order or exclude the property; and

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(d) the person gives written notice of the application to the *DPP; and

(e) the person gives an undertaking concerning the person's property that is satisfactory to the court.

45 Cessation of certain restraining orders

Effect on restraining orders of withdrawal of charges, acquittals etc.

(1) A *restraining order that relates to one or more offences ceases to be in force 28 days after one of the following occurs:

(a) the charge, or all of the charges, that relate to the restraining order are withdrawn;

(b) the *suspect is acquitted of the offence, or all of the offences, with which he or she was charged;

(c) the suspect's conviction for the offence, or all of the offences, of which he or she was convicted are *quashed;

unless:

(d) there is a *confiscation order that relates to the offence; or

(e) there is an application for such a confiscation order before the court; or

(f) there is an application under:

(i) Division 6 of Part 2-2; or

(ii) Division 4 of Part 2-3; or

(iii) Division 5 of Part 2-4 or 2-5;

for confirmation of a forfeiture, or a confiscation order, that relates to the offence; or

(g) the suspect is charged with a *related offence; or

(h) a new trial is ordered in relation to the offence.

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Restraining orders if there is no conviction etc.

(2) A *restraining order ceases to be in force if, within 28 days after the order was made:

(a) the *suspect has not been convicted of, or charged with, the offence, or at least one offence, to which the restraining order relates; and

(b) there is no *confiscation order or application for a confiscation order that relates to the offence.

Restraining orders and forfeiture orders etc.

(3) A *restraining order ceases to be in force in respect of property covered by the restraining order if:

(a) either:

(i) the court refuses an application for a *forfeiture order that would have covered the property; or

(ii) the court excludes the property from a forfeiture order; or

(iii) a forfeiture order that covers the property is discharged or ceases to have effect; or

(iv) the court excludes the property under section 94 from forfeiture under Part 2-3; and

(b) in the case of a refusal of an application for a *forfeiture order:

(i) the time for an appeal against the refusal has expired without an appeal being lodged; or

(ii) an appeal against the refusal has lapsed; or

(iii) an appeal against the refusal has been dismissed and finally disposed of; and

(c) no application for another *confiscation order relating to:

(i) an offence to which the restraining order relates; or

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(ii) a *related offence;

is yet to be determined; and

(d) no other confiscation order relating to such an offence is in force.

(4) A *restraining order ceases to be in force to the extent that property that it covers vests absolutely in the Commonwealth under Division 4 of Part 2-2 or Division 1 of Part 2-3.

Restraining orders, pecuniary penalty orders and literary proceeds orders

(5) A *restraining order that relates to one or more offences ceases to be in force in respect of property covered by the restraining order if:

(a) a *pecuniary penalty order or a *literary proceeds order relates to that offence or those offences; and

(b) one or more of the following occurs:

(i) the pecuniary penalty order or the literary proceeds order is satisfied;

(ii) the property is sold or disposed of to satisfy the pecuniary penalty order or literary proceeds order;

(iii) the pecuniary penalty order or the literary proceeds order is discharged or ceases to have effect.

Restraining orders and instruments owned by third parties

(6) Despite subsection (1), if:

(a) a *restraining order covers property of a person who is not a *suspect; and

(b) the property is an *instrument of an offence to which the order relates; and

(c) the property is not *proceeds of such an offence; and

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(ca) the property is not an instrument of a *serious offence to which the order relates; and

(d) the property is not subject to the *effective control of another person who is a suspect in relation to the order;

the restraining order ceases to be in force in respect of that property if the suspect has not been charged with the offence or a *related offence within 28 days after the restraining order is made.

(7) To avoid doubt, this section does not apply to a *restraining order made under section 20A.

45A Cessation of restraining orders relating to unexplained wealth

(1) A *restraining order made under section 20A ceases to be in force if, within 28 days after the order was made, no application for an *unexplained wealth order has been made in relation to the *suspect to whom the restraining order relates.

(2) A *restraining order made under section 20A ceases to be in force if:

(a) an application for an *unexplained wealth order is made in relation to the *suspect to whom the restraining order relates; and

(b) the application is made within 28 days after the making of the restraining order; and

(c) the court refuses to make the unexplained wealth order; and

(d) one of the following applies:

(i) the time for an appeal against the refusal has expired without an appeal being lodged;

(ii) an appeal against the refusal has lapsed;

(iii) an appeal against the refusal has been dismissed and finally disposed of.

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(3) A *restraining order made under section 20A ceases to be in force if:

(a) an application for an *unexplained wealth order is made in relation to the *suspect to whom the restraining order relates; and

(b) the application is made within 28 days after the making of the restraining order; and

(c) the court makes the unexplained wealth order; and

(d) either:

(i) the unexplained wealth order is complied with; or

(ii) an appeal against the unexplained wealth order has been upheld and finally disposed of.

(4) If a *restraining order ceases under subsection (1) or (2), the court may, on application by a person with an *interest in the property covered by the restraining order, make any order as to costs it considers appropriate, including costs on an indemnity basis.

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Part 2-2—Forfeiture orders

46 Simplified outline of this Part

Forfeiture orders can be made, forfeiting property to the Commonwealth, if certain offences have been committed. (It is not always a requirement that a person has been convicted of such an offence.)

Orders are made on the application of the DPP. Other orders can be made to reduce the effect of forfeiture orders on grounds such as hardship to the person's dependants.

Note: If a person is convicted of a serious offence, forfeiture can be automatic under Part 2-3. There is no need for a forfeiture order.

Division 1—Making forfeiture orders

47 Forfeiture orders—conduct constituting serious offences

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the property to be specified in the order is covered by a *restraining order under section 18 that has been in force for at least 6 months; and

(c) the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more *serious offences.

Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.

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(2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some *serious offence or other was committed.

(3) The raising of a doubt as to whether a person engaged in conduct constituting a *serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).

Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:

(a) is an *instrument of a *serious offence other than a *terrorism offence; and

(b) is not *proceeds of an offence;

if the court is satisfied that it is not in the public interest to make the order.

48 Forfeiture orders—convictions for indictable offences

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) a person has been convicted of one or more *indictable offences; and

(c) the court is satisfied that the property to be specified in the order is *proceeds of one or more of the offences.

(2) A court with *proceeds jurisdiction may make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) a person has been convicted of one or more *indictable offences; and

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(c) subsection (1) does not apply; and

(d) the court is satisfied that the property to be specified in the order is an *instrument of one or more of the offences.

(3) In considering whether it is appropriate to make an order under subsection (2) in respect of particular property, the court may have regard to:

(a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(b) the use that is ordinarily made, or was intended to be made, of the property to be specified in the order; and

(c) the gravity of the offence or offences concerned.

Note: Section 52 limits the court's power to make a forfeiture order if one or more of the person's convictions were due to the person absconding.

49 Forfeiture orders—property suspected of being proceeds of indictable offences etc.

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the property to be specified in the order is covered by a *restraining order under section 19 that has been in force for at least 6 months; and

(c) the court is satisfied that one or more of the following applies:

(i) the property is *proceeds of one or more *indictable offences;

(ii) the property is proceeds of one or more *foreign indictable offences;

(iii) the property is proceeds of one or more *indictable offences of Commonwealth concern;

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(iv) the property is an instrument of one or more *serious offences; and

(e) the court is satisfied that the DPP has taken reasonable steps to identify and notify persons with an *interest in the property.

(2) A finding of the court for the purposes of paragraph (1)(c):

(a) need not be based on a finding that a particular person committed any offence; and

(b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.

(3) Paragraph (1)(c) does not apply if the court is satisfied that:

(a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the *restraining order; or

(b) any such application that has been made has been withdrawn.

Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:

(a) is an *instrument of a *serious offence other than a *terrorism offence; and

(b) is not *proceeds of an offence;

if the court is satisfied that it is not in the public interest to make the order.

50 Existence of other confiscation orders

The court's power to make a *forfeiture order in relation to an offence is not affected by the existence of another *confiscation order in relation to that offence.

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Note: There are restrictions on the DPP applying for forfeiture orders if previous applications for forfeiture etc. have already been made: see section 60.

51 Acquittals do not affect forfeiture orders under section 47 or 49

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a *forfeiture order under section 47 or 49 in relation to the offence.

52 Making of forfeiture order if person has absconded

If, because of paragraph 331(1)(d), a person is taken to have been convicted of an *indictable offence, a court must not make a *forfeiture order relating to the person's conviction unless:

(a) the court is satisfied, on the balance of probabilities, that the person has *absconded; and

(b) either:

(i) the person has been committed for trial for the offence; or

(ii) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

53 Jurisdictional issues concerning forfeiture orders

(1) A court cannot make a *forfeiture order in respect of property if the court does not have jurisdiction with respect to the recovery of property of that kind.

(2) A court may make a *forfeiture order in respect of property even though, apart from section 314, the court does not have jurisdiction

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with respect to property whose value equals the value of that property.

(3) A reference in subsection (1) to a court having jurisdiction with respect to the recovery of property includes a reference to the court having jurisdiction, under a *corresponding law, to make an *interstate forfeiture order in respect of property.

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Division 2—Other relevant matters when a court is considering whether to make forfeiture orders

54 Presumption in certain cases that property is an instrument of an offence

If:

(a) the *DPP applies for:

(i) a *forfeiture order under section 47 or 49 against particular property in relation to a person's commission of a *terrorism offence; or

(ii) a forfeiture order under section 48 against particular property in relation to a person's conviction of an *indictable offence; and

(b) evidence is given, at the hearing of the application, that the property was in the person's possession at the time of, or immediately after, the person committed the offence;

then:

(c) if no evidence is given that tends to show that the property was not used in, or in connection with, the commission of the offence—the court must presume that the property was used in, or in connection with, the commission of the offence; or

(d) 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.

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55 Forfeiture orders can extend to other interests in property

(1) In specifying an *interest in property in a *forfeiture order, the court may also specify other interests in the property (regardless of whose they are) if:

(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.

(2) If the court so specifies other *interests in the *forfeiture order, 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. These ancillary orders may include:

(a) an order directing the Commonwealth to pay the person a specified amount as the value of the person's interest in the property; or

(b) an order directing that specified other interests in the property be transferred to the person.

(3) In deciding whether to make an ancillary order, the court must have regard to:

(a) the nature, extent and value of the person's *interest in the property concerned; and

(b) if the court is aware that any other person claims an interest in the property—the nature, extent and value of the interest claimed; and

(c) any other matter that the court considers relevant.

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(4) For the purposes of an order described in paragraph (2)(a), an amount may be specified wholly or partly by reference to a specified proportion of the difference between:

(a) the amount received from disposing of the combined interests specified in the *forfeiture order; and

(b) the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the forfeiture order.

56 Forfeiture orders must specify the value of forfeited property

The court must specify, in any *forfeiture order it makes, the amount it considers to be the value, at the time the order is made, of the property (other than money) specified in the order.

57 A person may buy back forfeited property

A court that makes a *forfeiture order against property may, if it is satisfied that:

(a) it would not be contrary to the public interest for a person's *interest in the property to be transferred to the person; and

(b) there is no other reason why the person's interest in the property should not be transferred to that person;

by order:

(c) declare the nature, extent and value (as at the time when the order is made) of the interest; and

(d) declare that the interest may be excluded, under section 89, from the operation of the forfeiture order.

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58 The court may also make supporting directions

(1) If a court makes a *forfeiture order, the court has power to give all directions that are necessary or convenient for giving effect to the order.

(2) This includes, for a *forfeiture order specifying *registrable property, a direction to an officer of the court to do anything necessary and reasonable to obtain possession of any document necessary for the transfer of the property.

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Division 3—How forfeiture orders are obtained

59 DPP may apply for a forfeiture order

(1) The *DPP may apply for a *forfeiture order.

(2) If the application relates to a person's conviction of an *indictable offence, the application must be made before the end of the period of 6 months after the *conviction day.

60 Additional application for a forfeiture order

(1) The *DPP cannot, unless the court gives leave, apply for a *forfeiture order under a section of Division 1 in relation to an offence if:

(a) an application has previously been made:

(i) under this Division for an order under the same section of Division 1; or

(ii) under another law of the Commonwealth (other than Division 1); or

(iii) under a law of a *non-governing Territory;

for the forfeiture or condemnation of the property in relation to the offence; and

(b) the application has been finally determined on the merits.

(2) The court must not give leave unless it is satisfied that:

(a) the property to which the new application relates was identified only after the first application was determined; or

(b) necessary evidence became available only after the first application was determined; or

(c) it is in the interests of justice to grant the leave.

(3) To avoid doubt:

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(a) the *DPP may apply for a *forfeiture order under a section of Division 1 against property in relation to an offence even though an application has previously been made under a different section of Division 1 for forfeiture of that property in relation to that offence; and

(b) the DPP may apply for a forfeiture order against property in relation to an offence even though an application has previously been made for a *pecuniary penalty order or a *literary proceeds order in relation to that offence.

61 Notice of application

(1) The *DPP must give written notice of an application for a *forfeiture order to:

(a) if the order is sought relating to a person's conviction of an offence—the person; and

(b) any person who claims an *interest in property covered by the application; and

(c) any person whom the DPP reasonably believes may have an interest in that property.

(2) The court hearing the application may, at any time before finally determining the application, direct the *DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

62 Amending an application

(1) The court hearing an application for a *forfeiture order may amend the application:

(a) on application by the *DPP; or

(b) with the consent of the DPP.

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(2) However, the court must not amend the application to include additional property in the application unless:

(a) the court is satisfied that:

(i) the property was not reasonably capable of identification when the application was originally made; or

(ii) necessary evidence became available only after the application was originally made; or

(b) the *forfeiture order applied for is an order under section 47 or 49 and the court is satisfied that:

(i) including the additional property in the application for the order might have prejudiced the investigation of, or the prosecution of a person for, an offence; or

(ii) it is for any other reason appropriate to grant the application to amend.

(3) On applying for an amendment to include additional property in the application, the *DPP must give written notice of the application to amend to any person whom the DPP reasonably believes may have an *interest in that additional property.

(4) If the *forfeiture order applied for is an order under section 48, any person who claims an *interest in that additional property may appear and adduce evidence at the hearing of the application to amend.

63 Court may dispense with notice requirements if person has absconded

The court to which an application for a *forfeiture order is made in relation to an offence may, on application by the *DPP, dispense with the requirements to give notice to a person under subsections 61(1) and 62(3) if the court is satisfied that the person has *absconded in connection with the offence.

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64 Procedure on application

(1) Any person who claims an *interest in property covered by an application for a *forfeiture order may appear and adduce evidence at the hearing of the application.

(2) The court may, in determining the application, have regard to:
  (a) the transcript of any proceeding against the person for an offence that constitutes *unlawful activity; and
  (b) the evidence given in any such proceeding.

(3) The court may still make a *forfeiture order if a person entitled to be given notice of the relevant application fails to appear at the hearing of the application.

65 Applications to courts before which persons are convicted

If an application for a *forfeiture order is made to a court before which a person was convicted of an *indictable offence:
  (a) the application may be dealt with by the court; and
  (b) any power in relation to the relevant order may be exercised by the court;

whether or not the court is constituted in the same way in which it was constituted when the person was convicted of the indictable offence.

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Division 4—Effect of forfeiture orders

66 What property is forfeited and when—general rule

Property specified in a *forfeiture order vests absolutely in the Commonwealth at the time the order is made.

67 First exception—registrable property

(1) Despite section 66, if property specified in the *forfeiture order is *registrable property:

(a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and

(b) the *DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable interest in that property; and

(c) the Commonwealth is entitled to be registered as the owner of that property; and

(d) the *Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.

(2) Any action by the *DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 69(1).

(3) The *Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an *interest in property of that kind.

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68 Second exception—if a joint owner dies before the order was made

(1) Despite section 66, if a person:

(a) was, immediately before his or her death, the joint owner of property specified in the *forfeiture order; but

(b) died before the order was made, but:

(i) after the *DPP applied for the order; or

(ii) while a *restraining order covering the property was in force;

that property is taken to have vested in the Commonwealth immediately before the person's death.

(2) Any such *restraining order is also taken to have continued to apply to the property as if the person had not died.

69 When can the Commonwealth begin dealing with forfeited property?

(1) The Commonwealth, and persons acting on its behalf, can only dispose of, or otherwise deal with, property specified in a *forfeiture order after, and only if the order is still in force at, the later of the following times:

(a) when:

(i) if the period provided for lodging an appeal against the order has ended without such an appeal having been lodged—that period ends; or

(ii) if an appeal against the order has been lodged—the appeal lapses or is finally determined;

(b) if the order was made in relation to a person's conviction of an offence—when:

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(i) if the period provided for lodging an appeal against the conviction has ended without such an appeal having been lodged—that period ends; or

(ii) if an appeal against the conviction has been lodged—the appeal lapses or is finally determined.

(2) However, such disposals and dealings may occur earlier with the leave of the court and in accordance with any directions of the court.

(3) For the purposes of paragraph (1)(b):

(a) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(b)—an appeal against the finding of the person guilty of the offence is taken to be an appeal against the conviction; and

(b) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(c)—an appeal against the person's conviction of the other offence referred to in that paragraph is taken to be an appeal against the conviction.

70 How must the Commonwealth deal with forfeited property?

(1) If the *forfeiture order is still in force at the later time mentioned in subsection 69(1), the *Official Trustee must, on the Commonwealth's behalf and as soon as practicable:

(a) dispose of any property specified in the order that is not money; and

(b) apply:

(i) any amounts received from that disposal; and

(ii) any property specified in the order that is money;

to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the *restraining order that covered the property; and

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(c) credit the remainder of the money and amounts received to the *Confiscated Assets Account as required by section 296.

(2) However, if the *Official Trustee is required to deal with property specified in a *forfeiture order but has not yet begun:

(a) the Minister; or

(b) a *senior Departmental officer authorised by the Minister for the purposes of this subsection;

may direct that the property be alternatively disposed of, or otherwise dealt with, as specified in the direction.

(3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.

Note: The quashing of a conviction of an offence relating to a forfeiture may prevent things being done under this section: see section 86.

71 Dealings with forfeited property

A person is guilty of an offence if:

(a) the person knows that a *forfeiture order has been made in respect of *registrable property; and

(b) the person disposes of, or otherwise deals with, the property before the Commonwealth's interest has been registered on the appropriate register; and

(c) the forfeiture order has not been discharged.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

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Division 5—Reducing the effect of forfeiture orders

Subdivision A—Relieving hardship

72 Relieving certain dependants from hardship

(1) The court making a *forfeiture order specifying a *person's property must make another order directing the Commonwealth to pay a specified amount to a *dependant of the person if:

(a) the forfeiture order is not to be made under section 48; and

(b) the court is satisfied that:

(i) the forfeiture order would cause hardship to the dependant; and

(ii) the specified amount would relieve that hardship; and

(iii) if the dependant is aged at least 18 years—the dependant had no knowledge of the person's conduct that is the subject of the forfeiture order.

(2) The specified amount must not exceed the difference between:

(a) what the court considers is likely to be the amount received from disposing of the *person's property under the *forfeiture order; and

(b) what the court considers is likely to be the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the forfeiture order.

(3) An order under this section may relate to more than one of the person's *dependants.

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Subdivision B—Excluding property from a forfeiture order

73 Making exclusion orders

(1) A court that made a *forfeiture order, or that is hearing, or is to hear, an application (a ***forfeiture application***) for a forfeiture order, must make an order excluding a specified *interest in property from forfeiture (an ***exclusion order***) if:

(a) a person applies for the exclusion order; and

(b) the forfeiture order, or the forfeiture application, specifies property in which the applicant has an interest; and

(c) if the forfeiture order was (or the forfeiture order applied for would be) made under section 47 or 49—the court is satisfied that the applicant's interest in the property is neither of the following:

(i) *proceeds of *unlawful activity;

(ii) if an offence on which the order was (or would be) based is a *serious offence—an instrument of any serious offence; and

(d) if the forfeiture order was (or the forfeiture order applied for would be) made under section 48—the court is satisfied that the applicant's interest in the property is neither proceeds nor an instrument of any of the offences to which the forfeiture order or forfeiture application relates.

(2) An *exclusion order must:

(a) specify the nature, extent and value (at the time of making the order) of the *interest concerned; and

(b) direct that the interest be excluded from the operation of the relevant *forfeiture order; and

(c) if the interest has vested (in law or equity) in the Commonwealth under this Part and is yet to be disposed of—

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direct the Commonwealth to transfer the interest to the applicant; and

(d) if the interest has vested (in law or equity) in the Commonwealth under this Part and has been disposed of—direct the Commonwealth to pay the applicant an amount equal to the value specified under paragraph (a).

74 Applying for exclusion orders

Before a forfeiture order has been made

(1) A person may apply for an *exclusion order if a *forfeiture order that could specify property in which the person claims an *interest has been applied for, but is yet to be made.

After a forfeiture order has been made

(2) A person who claims an *interest in property specified in a *forfeiture order may, at any time after the forfeiture order is made, apply to the court that made the forfeiture order for an *exclusion order.

(3) However, unless the court gives leave, the person cannot apply for an *exclusion order if he or she:

(a) was notified of the application for the *forfeiture order, but did not appear at the hearing of that application; or

(b) appeared at the hearing of that application.

(4) The court may give the person leave to apply if the court is satisfied that:

(a) if paragraph (3)(a) applies—the person had a good reason for not appearing; or

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(b) if paragraph (3)(b) applies—the person now has evidence relevant to the person's application that was not available to the person at the time of the hearing; or

(c) in either case—there are other special grounds for granting the leave.

75 Giving notice of matters relevant to an application

(1) An applicant for an *exclusion order must give written notice to the *DPP of both the application and the grounds on which the order is sought.

(2) The *DPP may appear and adduce evidence at the hearing of the application.

(3) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

76 When an application can be heard

An application for an *exclusion order must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

Subdivision C—Compensating for proportion of property not derived or realised from commission of any offence

77 Making compensation orders

(1) A court that made a *forfeiture order, or that is hearing, or is to hear, an application for a forfeiture order, must make an order under subsection (2) (a ***compensation order***) if:

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(a) a person (the ***applicant***) has applied for a compensation order; and

(b) the court is satisfied that the applicant has an *interest in property specified in the forfeiture order or in the application for the forfeiture order; and

(c) the court is satisfied that a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and

(d) the court is satisfied that the applicant's interest is not an instrument of any offence; and

(e) in the case of a court that is hearing or is to hear an application for a forfeiture order—the court makes the forfeiture order.

(2) A *compensation order must:

(a) specify the proportion found by the court under paragraph (1)(c); and

(b) direct the Commonwealth, once the property has vested absolutely in it, to:

(i) if the property has not been disposed of—dispose of the property; and

(ii) pay the applicant an amount equal to that proportion of the difference between the amount received from disposing of the property and the sum of any payments of the kind referred to in paragraph 70(1)(b) in connection with the *forfeiture order.

78 Application for compensation orders

Before a forfeiture order has been made

(1) A person may apply to a court for a *compensation order if an application for a *forfeiture order that could specify property in

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which the person claims an *interest has been made to the court, but the forfeiture order is yet to be made.

After a forfeiture order has been made

(2) A person who claims an *interest in property specified in a *forfeiture order may, at any time after the forfeiture order is made, apply to the court that made the forfeiture order for a *compensation order.

(3) However, unless the court gives leave, the person cannot apply under subsection (2) if he or she:

(a) was notified of the application for the *forfeiture order, but did not make an application under subsection (1) before the forfeiture order was made; or

(b) appeared at the hearing of the application for the forfeiture order.

(4) The court may give the person leave to apply under subsection (2) if the court is satisfied that:

(a) if paragraph (3)(a) applies—the person had a good reason for not making an application under subsection (1) before the *forfeiture order was made; or

(b) in either case:

(i) the person now has evidence relevant to the making of the *compensation order that was not available to the person at the time the forfeiture order was made; or

(ii) there are other special grounds for granting the leave.

79 Giving notice of matters relevant to an application

(1) An applicant for a *compensation order must give written notice to the *DPP of both the application and the grounds on which the order is sought.

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(2) The *DPP may appear and adduce evidence at the hearing of the application.

(3) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

79A When an application can be heard

An application for a *compensation order must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

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Division 6—The effect on forfeiture orders of acquittals and quashing of convictions

80 Forfeiture order made under section 47 or 49 unaffected by acquittal or quashing of conviction

A *forfeiture order made under section 47 or 49 against a person in relation to an offence is not affected if:

(a) having been charged with the offence, the person is acquitted; or

(b) the person is convicted of the offence and the conviction is subsequently *quashed.

81 Discharge of forfeiture order made under section 48 on quashing of conviction

(1) A *forfeiture order made under section 48 in relation to a person's conviction of an offence is discharged if:

(a) the person's conviction of the offence is subsequently *quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and

(b) the *DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.

(2) However, unless and until a court decides otherwise on such an application, the *quashing of the conviction does not affect the *forfeiture order:

(a) for 14 days after the conviction is quashed; and

(b) if the *DPP makes such an application.

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82 Notice of application for confirmation of forfeiture order

(1) The *DPP must give written notice of an application for confirmation of the *forfeiture order to:

(a) the person whose conviction was *quashed; and

(b) any person who claims, or prior to the forfeiture claimed, an *interest in property covered by the order; and

(c) any person whom the DPP reasonably believes may have had an interest in that property before the forfeiture.

Note: If the DPP applies for confirmation of a forfeiture order, it can also apply for an examination order under Part 3-1.

(2) The court hearing the application may, at any time before finally determining the application, direct the *DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

83 Procedure on application for confirmation of forfeiture order

(1) Any person who claims an *interest in property covered by the *forfeiture order may appear and adduce evidence at the hearing of the application for confirmation of the order.

(2) The court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) the offence of which the person was convicted; or

(ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;

including any appeals relating to the conviction; and

(b) the evidence given in any such proceeding.

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84 Court may confirm forfeiture order

(1) The court may confirm the *forfeiture order if the court is satisfied that:

(a) it could have made a forfeiture order under section 47 in relation to the offence in relation to which the person's conviction was *quashed if, when the *DPP applied for an order under section 48, it had instead applied for an order under section 47; or

(b) it could have made a forfeiture order under section 49 in relation to the offence in relation to which the person's conviction was quashed if, when the DPP applied for an order under section 48, it had instead applied for an order under section 49.

(2) For the purposes of paragraphs (1)(a) and (b), the requirement in paragraph 47(1)(b) or 49(1)(b) (as the case requires) is taken to be satisfied.

85 Effect of court's decision on confirmation of forfeiture order

(1) If the court confirms the *forfeiture order under paragraph 84(1)(a), the order is taken not to be affected by the *quashing of the person's conviction of the offence.

(2) If the court confirms the *forfeiture order under paragraph 84(1)(b):

(a) to the extent that the order covers property that is:

(i) in any case—*proceeds of the offence; or

(ii) if the offence is a *serious offence—an *instrument of the offence;

the order is taken not to be affected by the *quashing of the person's conviction of the offence; but

(b) to the extent that the order covers property that is:

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(i) in any case—not proceeds of the offence; and

(ii) if the offence is a serious offence—not an instrument of the offence;

the order is discharged.

(3) If the court decides not to confirm the *forfeiture order, the order is discharged.

86 Official Trustee must not deal with forfeited property before the court decides on confirmation of forfeiture order

During the period:

(a) starting on the day after the person's conviction of the offence was *quashed; and

(b) ending when the court decides whether to confirm the *forfeiture order;

the *Official Trustee must not do any of the things required under section 70 in relation to property covered by the order or amounts received from disposing of such property.

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Division 7—Miscellaneous

87 Giving notice if a forfeiture order is discharged on appeal or by quashing of a conviction

(1) This section applies in relation to particular property if:
  (a) a *forfeiture order that covered that property is discharged by a court hearing an appeal against the making of the order; or
  (b) a forfeiture order that covered that property is discharged under section 81 or subsection 85(3); or
  (c) a forfeiture order that covered the property is discharged under subsection 85(2) in relation to that property.

(2) The *DPP must, as soon as practicable, give written notice of the discharge to any person the DPP reasonably believes may have had an *interest in that property immediately before the order was made.

(3) The *DPP must, if required by a court, give or publish notice of the discharge to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

(4) A notice given under this section must include a statement to the effect that a person claiming to have had an *interest in that property may apply under section 88 for the transfer of the interest, or its value, to the person.

88 Returning property etc. following the discharge of a forfeiture order

(1) The Minister must arrange for:
  (a) if property specified in a *forfeiture order is vested in the Commonwealth—an *interest in the property to be

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transferred to a person claiming to have had the interest in the property immediately before the order was made; or

(b) if property specified in a forfeiture order is no longer vested in the Commonwealth—an amount equal to the value of the interest in the property to be paid to the person;

if:

(c) the forfeiture order has been discharged in relation to the property:

(i) by a court hearing an appeal against the making of the order; or

(ii) under section 81 or 85; and

(d) the person applies to the Minister, in writing, for the transfer of the interest to the person; and

(e) the person had that interest in the property immediately before the order was made.

(2) If the Minister must arrange for the property to be transferred, the Minister may also, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to give effect to the transfer.

(3) Without limiting subsection (2), things that may be done or authorised under that subsection include:

(a) executing any instrument; and

(b) applying for registration of an *interest in the property on any appropriate register.

89 Person with interest in forfeited property may buy back the interest

(1) If a court:

(a) makes a *forfeiture order against property; and

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(b) makes an order under section 57 in respect of an *interest in the property;

then:

(c) the payment to the Commonwealth, while the interest is still vested in the Commonwealth, of the amount specified in the order under section 57 as the value of the interest discharges the forfeiture order to the extent to which it relates to the interest; and

(d) the Minister:

(i) must arrange for the interest to be transferred to the person in whom it was vested immediately before the property was forfeited to the Commonwealth; and

(ii) may, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to effect the transfer.

(2) Without limiting subparagraph (1)(d)(ii), things that may be done or authorised under that subparagraph include:

(a) executing any instrument; and

(b) making an application for registration of an *interest in the property on any appropriate register.

90 Buying out other interests in forfeited property

The Minister must arrange for an *interest in property to be transferred to a person (the ***purchaser***) if:

(a) the property is forfeited to the Commonwealth under this Part; and

(b) the interest is required to be transferred to the purchaser under subsection 88(1) or 89(1), or under a direction under paragraph 73(2)(c); and

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(c) the purchaser's interest in the property, immediately before the forfeiture took place, was not the only interest in the property; and

(d) the purchaser gives written notice to each other person who had an interest in the property immediately before the forfeiture took place that:

(i) the purchaser intends to purchase that other interest from the Commonwealth; and

(ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that interest with the Minister; and

(e) no person served with notice under paragraph (d) in relation to that interest lodges a written objection to the purchase of that interest with the Minister within the period referred to in that paragraph; and

(f) the purchaser pays to the Commonwealth, while that interest is still vested in the Commonwealth, an amount equal to the value of that interest.

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Part 2-3—Forfeiture on conviction of a serious offence

91 Simplified outline of this Part

If a person is convicted of a serious offence, property that is subject to a restraining order relating to the offence is forfeited to the Commonwealth unless the property is excluded from forfeiture.

There are cases in which compensation is payable by the Commonwealth.

There are cases in which forfeited property can be recovered from the Commonwealth.

Note: Property can be forfeited in relation to a serious offence, without a conviction, under a forfeiture order under Part 2-2.

Division 1—Forfeiture on conviction of a serious offence

92 Forfeiting restrained property without a forfeiture order if a person has been convicted of a serious offence

(1) Property is forfeited to the Commonwealth at the end of the period applying under subsection (3) if:

(a) a person is convicted of a *serious offence; and

(b) either:

(i) at the end of that period, the property is covered by a *restraining order under section 17 or 18 against the person that relates to the offence; or

(ii) the property was covered by such a restraining order against the person, but the order was revoked under

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section 44 or the property was excluded from the order under that section; and

(c) the property is not subject to an order under section 94 excluding the property from forfeiture under this Part.

(2) It does not matter whether:

(a) the *restraining order was made before or after the person's conviction of the *serious offence; or

(b) immediately before forfeiture, the property is the *person's property or another person's property.

(3) The period at the end of which the property is forfeited is:

(a) the 6 month period starting on the *conviction day; or

(b) if an *extension order is in force at the end of that period—the extended period relating to that extension order.

(4) This section does not apply if the person is taken to have been convicted of the offence because the person *absconded in connection with the offence.

(5) A *restraining order in relation to a *related offence with which the person has been charged, or is proposed to be charged, is taken, for the purposes of this section, to be a restraining order in relation to the offence of which the person was convicted.

(6) If:

(a) under section 44, a *restraining order that covered particular property is revoked, or particular property is excluded from a restraining order; and

(b) the security referred to in paragraph 44(1)(e), or the undertaking referred to in paragraph 44(2)(e), in connection with the revocation or exclusion is still in force;

the property is taken, for the purposes of this section, to be covered by the restraining order.

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92A Notice of date of forfeiture under this Part, etc.

(1) The *DPP must, before property is forfeited under this Part, take reasonable steps to give any person who has or claims, or whom the DPP reasonably believes may have, an *interest in the property a written notice stating:

(a) the date on which the property will be forfeited under this Part unless it is excluded from forfeiture; and

(b) the effect of section 93 (which deals with *extension orders); and

(c) that the person may be able to apply for an order under one of the following sections in relation to the property:

(i) section 29 (which deals with the exclusion of property from *restraining orders);

(ii) section 94 (which deals with the exclusion of property from forfeiture);

(iii) section 94A (which deals with compensation).

(2) However, the *DPP need not give a notice to a person under subsection (1) if the person has made:

(a) an application for an *extension order in relation to the property; and

(b) an application under section 30, 31 or 94 in relation to the property.

93 Making an extension order extending the period before property is forfeited

(1) The court that made the *restraining order referred to in paragraph 92(1)(b) may make an order (an ***extension order***) specifying an extended period for the purposes of subsection 92(3) if:

(a) an application for the order is made within 6 months after the start of the *conviction day for the relevant conviction; and

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(b) the applicant has also applied to the court under:
  (i) section 30 or 31 to exclude property from the restraining order; or
  (ii) section 94 to exclude the property that is covered by the restraining order from forfeiture under this Part; and
(c) the court is satisfied that the applicant made the application under section 30, 31 or 94 without undue delay, and has since diligently followed up that application.

The extended period specified must end no later than 15 months from the start of the conviction day for the relevant conviction.

(2) The *extension order stops being in force if the application under section 30, 31 or 94 is finally determined before the end of the 6 month period starting on the *conviction day for the relevant conviction.

(3) The extended period ends if the application under section 30, 31 or 94 is finally determined before the end of that period.

(4) If the court makes the *extension order, the *DPP must take reasonable steps to give any person who has or claims, or whom the DPP reasonably believes may have, an *interest in the property to which the order relates a written notice stating:
(a) the date on which the property will be forfeited under this Part, in accordance with the extension order, unless it is excluded from forfeiture; and
(b) the effect of subsections (2) and (3).

94 Excluding property from forfeiture under this Part

(1) The court that made a *restraining order referred to in paragraph 92(1)(b) must make an order excluding particular property from forfeiture under this Part if:

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(a) a person (the ***applicant***) has applied for an order under this section; and

(b) the court is satisfied that the applicant has an *interest in property covered by the restraining order; and

(d) a person has been convicted of a *serious offence to which the restraining order relates; and

(e) the court is satisfied that the applicant's interest in the property is neither *proceeds of *unlawful activity nor an *instrument of unlawful activity; and

(f) the court is satisfied that the applicant's interest in the property was lawfully acquired.

(2) To avoid doubt, an order under this section cannot be made in relation to property if the property has already been forfeited under this Part.

(3) The person must give written notice to the *DPP of both the application and the grounds on which the order is sought.

(4) The *DPP may appear and adduce evidence at the hearing of the application.

(5) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

(6) The application must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

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94A Compensating for proportion of property not derived or realised from commission of any offence

(1) The court that made a *restraining order referred to in paragraph 92(1)(b) must make an order that complies with subsection (2) if:

(a) a person (the ***applicant***) has applied for an order under this section; and

(b) the court is satisfied that the applicant has an *interest in property covered, or that was at any time covered, by the restraining order; and

(c) a person has been convicted of a *serious offence to which the restraining order relates; and

(d) the court is satisfied that a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and

(e) the court is satisfied that the applicant's interest is not an *instrument of any offence.

(2) An order under this section must:

(a) specify the proportion found by the court under paragraph (1)(d); and

(b) direct the Commonwealth, once the property has vested absolutely in it, to:

(i) if the property has not been disposed of—dispose of the property; and

(ii) pay the applicant an amount equal to that proportion of the difference between the amount received from disposing of the property and the sum of any payments of the kind referred to in paragraph 100(1)(b) in connection with the forfeiture.

(3) A person who claims an *interest in property covered by a *restraining order referred to in paragraph 92(1)(b) may apply to

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the court that made the restraining order for an order under this section at any time.

(4) However, if the property has already been forfeited under this Part, the person cannot, unless the court gives leave, apply under subsection (3) if he or she:

(a) either:

(i) was given a notice under subsection 92A(1) in relation to the property; or

(ii) was not given such a notice because of subsection 92A(2); and

(b) did not make the application under subsection (3) before that forfeiture.

(5) The court may give the person leave to apply if the court is satisfied that:

(a) the person had a good reason for not making the application before the forfeiture; or

(b) the person now has evidence relevant to the application that was not available before the forfeiture; or

(c) there are special grounds for granting the leave.

(6) The person must give written notice to the *DPP of both the application and the grounds on which the order is sought.

(7) The *DPP may appear and adduce evidence at the hearing of the application.

(8) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

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(9) The application must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

95 Court may declare that property has been forfeited under this Part

The court that made the *restraining order referred to in paragraph 92(1)(b) may declare that particular property has been forfeited under this Part if:

(a) the *DPP applies to the court for the declaration; and

(b) the court is satisfied that that property is forfeited under this Part.

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Division 2—Effect of forfeiture on conviction of a serious offence

96 When is property forfeited—general rule

Property forfeited under section 92 vests absolutely in the Commonwealth at the time of the forfeiture.

97 First exception—registrable property

(1) Despite section 96, if property forfeited under section 92 is *registrable property:

(a) that property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with; and

(b) the *DPP has power, on behalf of the Commonwealth, to do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable interest in that property; and

(c) the Commonwealth is entitled to be registered as the owner of that property; and

(d) the *Official Trustee has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.

(2) Any action by the *DPP under paragraph (1)(b) is not a dealing for the purposes of subsection 99(1).

(3) The *Official Trustee's powers under paragraph (1)(d) include executing any instrument required to be executed by a person transferring an *interest in property of that kind.

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98 Second exception—if a joint owner dies

Despite section 96, if:

(a) a person who is convicted of a *serious offence was, immediately before his or her death, the joint owner of property; and

(b) the period that would apply under subsection 92(3) if the property were subject to forfeiture under section 92 in relation to the conviction had not ended before his or her death; and

(c) if that period had ended immediately before his or her death—the property would have been forfeited under section 92;

the property is taken to have vested in the Commonwealth immediately before his or her death.

99 When can the Commonwealth begin dealing with forfeited property?

(1) The Commonwealth, and persons acting on its behalf, can dispose of, or otherwise deal with, property forfeited under section 92 in relation to a person's conviction of a *serious offence if and only if:

(a) the period applying under subsection (3) has come to an end; and

(b) the conviction has not been *quashed by that time.

(2) However, such disposals and dealings may occur earlier with the leave of the court and in accordance with any directions of the court.

(3) The period at the end of which the Commonwealth, and persons acting on its behalf, can dispose of or otherwise deal with the property is:

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(a) if the conviction is one in relation to which neither paragraph 331(1)(b) nor (c) applies, the period ending:
  (i) if the period provided for lodging an appeal against the conviction has ended without such an appeal having been lodged—at the end of that period; or
  (ii) if an appeal against the conviction has been lodged—when the appeal lapses or is finally determined; or

(b) if the person is taken to have been convicted because of paragraph 331(1)(b), the period ending:
  (i) if the period provided for lodging an appeal against the finding of the person guilty of the offence has ended without such an appeal having been lodged—at the end of that period; or
  (ii) if an appeal against the finding of the person guilty of the offence has been lodged—when the appeal lapses or is finally determined; or

(c) if the person is taken to have been convicted because of paragraph 331(1)(c), the period ending:
  (i) if the period provided for lodging an appeal against the person's conviction of the other offence referred to in that paragraph has ended without such an appeal having been lodged—at the end of that period; or
  (ii) if an appeal against the person's conviction of the other offence referred to in that paragraph has been lodged—when the appeal lapses or is finally determined.

100 How must forfeited property be dealt with?

(1) If subsection 99(1) no longer prevents disposal of or dealing with particular property forfeited under section 92, the *Official Trustee must, on the Commonwealth's behalf and as soon as practicable:
  (a) dispose of any of the forfeited property that is not money; and

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(b) apply:
(i) any amounts received from that disposal; and
(ii) any of the forfeited property that is money;
to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the *restraining order that covered the property; and

(c) credit the remainder of the money and amounts received to the *Confiscated Assets Account as required by section 296.

(2) However, if the *Official Trustee has not yet begun to deal with property forfeited under section 92, as required by this section:
(a) the Minister; or
(b) a *senior Departmental officer authorised by the Minister for the purposes of this subsection;
may direct that the property be disposed of, or otherwise dealt with, as specified in the direction.

(3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.

Note: The quashing of a conviction of an offence relating to the forfeiture will prevent things being done under this section: see section 112.

101 Minister may give supporting directions

(1) The Minister may give all directions that are necessary or convenient to realise the Commonwealth's *interest in property forfeited under section 92.

(2) This includes, for *registrable property forfeited under section 92, directing an officer of the Department or a *police officer to do anything necessary and reasonable to obtain possession of any document necessary for the transfer of the property.

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Division 3—Recovery of forfeited property

102 Court may make orders relating to transfer of forfeited property etc.

If property is forfeited to the Commonwealth under section 92, the court that made the *restraining order referred to in paragraph 92(1)(b) must, if:

(a) a person who claims an *interest in the property applies under section 104 for an order under this section; and

(b) the court is satisfied that:

(i) the applicant had an interest in the property before the forfeiture of the property; and

(ii) the applicant's interest in the property is neither *proceeds of unlawful activity nor an *instrument of unlawful activity; and

(iii) the applicant's interest in the property was lawfully acquired;

make an order:

(c) declaring the nature, extent and value of the applicant's interest in the property; and

(d) either:

(i) if the interest is still vested in the Commonwealth—directing the Commonwealth to transfer the interest to the applicant; or

(ii) directing the Commonwealth to pay to the applicant an amount equal to the value declared under paragraph (c).

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103 Court may make orders relating to buying back forfeited property

If property is forfeited to the Commonwealth under section 92, the court that made the *restraining order referred to in paragraph 92(1)(b) may, if:

(a) a person who claims an *interest in the property applies under section 104 for an order under this section; and

(b) the court is satisfied that:

(i) it would not be contrary to the public interest for the interest to be transferred to the person; and

(ii) there is no other reason why the interest should not be transferred to the person;

make an order:

(c) declaring the nature, extent and value (as at the time when the order is made) of the interest; and

(d) declaring that the forfeiture ceases to operate in relation to the interest if payment is made under section 105.

104 Applying for orders under section 102 or 103

(1) A person who claims an *interest in property that has been forfeited to the Commonwealth under section 92 may, at any time after the forfeiture, apply to the court that made the *restraining order referred to in paragraph 92(1)(b) for an order under section 102 or 103.

(2) However, unless the court gives leave, the person cannot make an application for an order under section 102 if he or she:

(a) either:

(i) was given a notice under subsection 92A(1) in relation to the property; or

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(ii) was not given such a notice because of subsection 92A(2); and

(b) either:

(i) did not make an application under section 29 or 94 in relation to the property; or

(ii) made such an application and appeared at the hearing of the application.

(3) The court may give the person leave to apply if the court is satisfied that:

(a) if subparagraph (2)(b)(i) applies—the person had a good reason for not making an application under section 29 or 94; or

(b) if subparagraph (2)(b)(ii) applies—the person now has evidence relevant to the person's application under this section that was not available at the time of the hearing; or

(c) in either case—there are other special grounds for granting the leave.

(4) The applicant must give written notice to the *DPP of both the application and the grounds on which the order is sought.

(5) The *DPP may appear and adduce evidence at the hearing of the application.

(6) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

(7) The application must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

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105 Person with interest in forfeited property may buy back the interest

(1) If:

(a) property is forfeited to the Commonwealth under section 92; and

(b) a court makes an order under section 103 in respect of an *interest in the property; and

(c) the amount specified in the order as the value of the interest is paid to the Commonwealth, while the interest is still vested in the Commonwealth;

section 92 ceases to apply in relation to the interest, and the Minister:

(d) must arrange for the interest to be transferred to the person in whom it was vested immediately before the property was forfeited to the Commonwealth; and

(e) may, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to effect the transfer.

(2) Without limiting paragraph (1)(e), things that may be done or authorised under that paragraph include:

(a) executing any instrument; and

(b) applying for registration of an *interest in the property on any appropriate register.

106 Buying out other interests in forfeited property

The Minister must arrange for an *interest in property to be transferred to a person (the ***purchaser***) if:

(a) the property is forfeited to the Commonwealth under section 92; and

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(b) the interest is required to be transferred to the purchaser under section 105, or under a direction under subparagraph 102(d)(i); and

(c) the purchaser's interest in the property, immediately before the forfeiture took place, was not the only interest in the property; and

(d) the purchaser gives written notice to each other person who had an interest in the property immediately before the forfeiture took place that:

(i) the purchaser intends to purchase that other interest from the Commonwealth; and

(ii) the person served with the notice may, within 21 days after receiving the notice, lodge a written objection to the purchase of that interest with the Minister; and

(e) no person served with the notice under paragraph (d) in relation to that interest lodges a written objection to the purchase of that interest with the Minister within the period referred to in that paragraph; and

(f) the purchaser pays to the Commonwealth, while that interest is still vested in the Commonwealth, an amount equal to the value of that interest.

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Division 4—The effect on forfeiture of convictions being quashed

107 The effect on forfeiture of convictions being quashed

(1) A forfeiture of property to the Commonwealth under section 92 in relation to a person's conviction of an offence ceases to have effect if:

(a) the person's conviction of the offence is subsequently *quashed; and

(b) the forfeiture does not also relate to the person's conviction of other offences that have not been quashed; and

(c) the *DPP does not, within 14 days after the conviction is quashed, apply to the court that made the *restraining order referred to in paragraph 92(1)(b) for the forfeiture to be confirmed.

(2) However, unless and until a court decides otherwise on such an application, the *quashing of the conviction does not affect the forfeiture:

(a) for 14 days after the conviction is quashed; and

(b) if the *DPP makes such an application.

108 Notice of application for confirmation of forfeiture

(1) The *DPP must give written notice of an application for confirmation of the forfeiture to:

(a) the person whose conviction was *quashed; and

(b) any person who claims, or prior to the forfeiture claimed, an *interest in property covered by the forfeiture; and

(c) any person whom the DPP reasonably believes may have had an interest in that property before the forfeiture.

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Note: If the DPP applies for confirmation of a forfeiture, it can also apply for an examination order under Part 3-1.

(2) The court hearing the application may, at any time before finally determining the application, direct the *DPP to give or publish notice of the application to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

109 Procedure on application for confirmation of forfeiture

(1) Any person who claims an *interest in property covered by the forfeiture may appear and adduce evidence at the hearing of the application for confirmation of the forfeiture.

(2) The court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) the offence of which the person was convicted; or

(ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;

including any appeals relating to the conviction; and

(b) the evidence given in any such proceeding.

110 Court may confirm forfeiture

(1) The court may confirm the forfeiture if the court is satisfied that:

(a) it could make a *forfeiture order under section 47 in relation to the offence in relation to which the person's conviction was *quashed if the *DPP were to apply for an order under that section; or

(b) it could make a forfeiture order under section 49 in relation to the offence in relation to which the person's conviction

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was quashed if the DPP were to apply for an order under that section.

(2) For the purposes of paragraphs (1)(a) and (b), the requirement in paragraph 47(1)(b) or 49(1)(b) (as the case requires) is taken to be satisfied.

111 Effect of court's decision on confirmation of forfeiture

(1) If the court confirms the forfeiture under paragraph 110(1)(a), the forfeiture is taken not to be affected by the *quashing of the person's conviction of the offence.

(2) If the court confirms the forfeiture under paragraph 110(1)(b):

(a) to the extent that the property covered by the forfeiture is:

(i) in any case—*proceeds of the offence; or

(ii) if the offence is a *serious offence—an *instrument of the offence;

the forfeiture is taken not to be affected by the *quashing of the person's conviction of the offence; but

(b) to the extent that the property covered by the forfeiture is:

(i) in any case—not proceeds of the offence; and

(ii) if the offence is a serious offence—not an instrument of the offence;

the forfeiture ceases to have effect.

(3) If the court decides not to confirm the forfeiture, the forfeiture ceases to have effect.

112 Official Trustee must not deal with forfeited property before the court decides on confirmation of forfeiture

During the period:

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(a) starting on the day after the person's conviction of the offence was *quashed; and

(b) ending when the court decides whether to confirm the forfeiture;

the *Official Trustee must not do any of the things required under section 100 in relation to property covered by the forfeiture or amounts received from disposing of such property.

113 Giving notice if forfeiture ceases to have effect on quashing of a conviction

(1) This section applies in relation to particular property if:

(a) the property was forfeited to the Commonwealth under section 92 but the forfeiture ceases to have effect under section 107 or subsection 111(3); or

(b) the property was forfeited to the Commonwealth under section 92 but the forfeiture ceases to have effect in relation to that property under subsection 111(2).

(2) The *DPP must, as soon as practicable after the forfeiture ceases to have effect, give written notice of the cessation to any person the DPP reasonably believes may have had an *interest in that property immediately before the forfeiture.

(3) The *DPP must, if required by a court, give or publish notice of the cessation to a specified person or class of persons. The court may also specify the time and manner in which the notice is to be given or published.

(4) A notice given under this section must include a statement to the effect that a person claiming to have had an *interest in that property may apply under section 114 for the transfer of the interest, or its value, to the person.

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114 Returning property etc. following forfeiture ceasing to have effect

(1) The Minister must arrange for:

(a) if property forfeited to the Commonwealth under section 92 is vested in the Commonwealth—an *interest in the property to be transferred to a person claiming to have had the interest in the property immediately before the forfeiture; or

(b) if property forfeited to the Commonwealth under section 92 is no longer vested in the Commonwealth—an amount equal to the value of the interest in the property to be paid to the person;

if:

(c) the forfeiture has ceased to have effect under section 107 or 111; and

(d) the person applies to the Minister, in writing, for the transfer of the interest to the person; and

(e) the person had that interest in the property at that time.

(2) If the Minister must arrange for the property to be transferred, the Minister may also, on behalf of the Commonwealth, do or authorise the doing of anything necessary or convenient to give effect to the transfer.

(3) Without limiting subsection (2), things that may be done or authorised under that subsection include:

(a) executing any instrument; and

(b) applying for registration of an *interest in the property on any appropriate register.

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Part 2-4—Pecuniary penalty orders

115 Simplified outline of this Part

If certain offences have been committed, pecuniary penalty orders can be made, ordering payments to the Commonwealth of amounts based on:

(a) the benefits that a person has derived from such an offence; and

(b) (in some cases) the benefits that the person has derived from other unlawful activity.

(It is not always a requirement that a person has been convicted of the offence.)

Division 1—Making pecuniary penalty orders

116 Making pecuniary penalty orders

(1) A court with *proceeds jurisdiction must make an order requiring a person to pay an amount to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the court is satisfied of either or both of the following:

(i) the person has been convicted of an *indictable offence, and has derived *benefits from the commission of the offence;

(ii) the person has committed a *serious offence.

Note: The conviction for, or reasonable grounds for suspecting commission of, an indictable offence could be used as grounds for a restraining order under Part 2-1 covering all or some of the person's property.

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(3) In determining whether a person has derived a *benefit, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's *effective control.

(4) The court's power to make a *pecuniary penalty order in relation to an offence is not affected by the existence of another *confiscation order in relation to that offence.

Note: There are restrictions on the DPP applying for pecuniary penalty orders if previous applications for pecuniary penalty orders have already been made: see section 135.

117 Pecuniary penalty orders made in relation to serious offence convictions

(1) A court must not make a *pecuniary penalty order in relation to a person's conviction of a *serious offence until after the end of the period of 6 months commencing on the *conviction day.

(2) However, if the court before which the person was convicted has *proceeds jurisdiction, the court may make a *pecuniary penalty order in relation to the person's conviction when it passes sentence on the person.

Note: Pecuniary penalty orders made under this subsection cannot be enforced within 6 months: see subsection 140(3).

(3) Subsection (1) does not apply if the person is taken to have been convicted of the *serious offence because of paragraph 331(1)(d).

118 Making of pecuniary penalty order if person has absconded

If, because of paragraph 331(1)(d), a person is taken to have been convicted of an *indictable offence, a court must not make a *pecuniary penalty order in relation to the person's conviction unless:

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(a) the court is satisfied, on the balance of probabilities, that the person has *absconded; and

(b) either:

(i) the person has been committed for trial for the offence; or

(ii) the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, could lawfully find the person guilty of the offence.

119 Ancillary orders

The court that made a *pecuniary penalty order, or any other court that could have made the pecuniary penalty order, may make orders ancillary to the pecuniary penalty order, either when it makes the pecuniary penalty order or at a later time.

120 Acquittals do not affect pecuniary penalty orders

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a *pecuniary penalty order in relation to the offence.

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Division 2—Penalty amounts

Subdivision A—General

121 Determining penalty amounts

(1) The amount that a person is ordered to pay to the Commonwealth under a *pecuniary penalty order (the ***penalty amount***) is the amount the court determines under this Division.

(2) If the offence to which the order relates is not a *serious offence, the *penalty amount is determined by:
  (a) assessing under Subdivision B the value of the *benefits the person derived from the commission of the offence; and
  (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.

(3) If the offence to which the order relates is a *serious offence, the *penalty amount is determined by:
  (a) assessing under Subdivision B the value of the *benefits the person derived from:
    (i) the commission of that offence; and
    (ii) subject to subsection (4), the commission of any other offence that constitutes *unlawful activity; and
  (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.

Note: Pecuniary penalty orders can be varied under Subdivision D to increase penalty amounts in some cases.

(4) Subparagraph (3)(a)(ii) does not apply in relation to an offence that is not a *terrorism offence unless the offence was committed:
  (a) within:

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(i) if some or all of the person's property, or property 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; or

(ii) otherwise—the period of 6 years preceding the application for the *pecuniary penalty order; or

(b) during the period since that application for the restraining order or the pecuniary penalty order was made

Subdivision B—The value of benefits derived from the commission of an offence

122 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;

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(e) the person's income and expenditure before, during and after the illegal activity.

(2) At the hearing of an application for a *pecuniary penalty order, a *police officer, or a *Customs officer, who is experienced in the investigation of narcotics offences may testify, to the best of the officer's information, knowledge and belief:

(a) with respect to the amount that was the market value of a *narcotic substance at a particular time or during a particular period; or

(b) with respect to the amount, or the range of amounts, ordinarily paid at a particular time, or during a particular period, for the doing of an act or thing in relation to a narcotic substance.

(3) The officer's testimony under subsection (2):

(a) is admissible at the hearing despite any rule of law or practice relating to hearsay evidence; and

(b) is prima facie evidence of the matters testified.

123 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;

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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.

124 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:

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(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.

125 Value of benefits may be as at time of assessment

(1) In quantifying the value of a *benefit for the purposes of this Subdivision, the court may treat as the value of the benefit the value that the benefit would have had if derived at the time the court makes its assessment of the value of benefits.

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(2) Without limiting subsection (1), the court may have regard to any decline in the purchasing power of money between the time when the *benefit was derived and the time the court makes its assessment.

126 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;

(b) the value of any benefits that the person derives as *agent for, or otherwise on behalf of, another person (whether or not the other person receives any of the benefits).

127 Benefits already the subject of pecuniary penalty

(1) A *benefit is not to be taken into account for the purposes of this Subdivision if a pecuniary penalty has been imposed in respect of the benefit under:

(a) this Act; or

(b) Division 3 of Part XIII of the *Customs Act 1901*; or

(c) a law of a Territory; or

(d) a law of a State.

(2) To avoid doubt, an amount payable under a *literary proceeds order is a pecuniary penalty for the purposes of this section.

128 Property under a person's effective control

In assessing the value of *benefits that a person has derived, the court may treat as property of the person any property that, in the court's opinion, is subject to the person's *effective control.

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129 Effect of property vesting in an insolvency trustee

In assessing the value of *benefits that a person has derived, the *person's property is taken to continue to be the person's property if it vests in any of the following:

(a) in relation to a bankruptcy—the trustee of the estate of the bankrupt; or

(b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement; or

(c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement; or

(d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.

Subdivision C—Reducing penalty amounts

130 Reducing penalty amounts to take account of forfeiture and proposed forfeiture

The *penalty amount under a *pecuniary penalty order against a person is reduced by an amount equal to the value, as at the time of the making of the order, of any property that is *proceeds of the *unlawful activity to which the order relates if:

(a) the property has been forfeited, under this Act or another law of the Commonwealth or under a law of a *non-governing Territory, in relation to the unlawful activity to which the order relates; or

(b) an application has been made for a *forfeiture order that would cover the property.

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131 Reducing penalty amounts to take account of tax paid

(1) The court must reduce the *penalty amount under a *pecuniary penalty order against a person by an amount that, in the court's opinion, represents the extent to which tax that the person has paid is attributable to the *benefits to which the order relates.

(2) The tax may be tax payable under a law of the Commonwealth, a State, a Territory or a foreign country.

132 Reducing penalty amounts to take account of fines etc.

The court may, if it considers it appropriate to do so, reduce the *penalty amount under a *pecuniary penalty order against a person by an amount equal to the amount payable by the person by way of fine, restitution, compensation or damages in relation to an offence to which the order relates.

Subdivision D—Varying pecuniary penalty orders to increase penalty amounts

133 Varying pecuniary penalty orders to increase penalty amounts

(1) The court may, on the application of the *DPP, vary a *pecuniary penalty order against a person by increasing the *penalty amount if one or more of subsections (2), (2A) or (3) apply. The amount of each increase is as specified in the relevant subsection.

(2) The *penalty amount may be increased if:

(a) the penalty amount was reduced under section 130 to take account of a forfeiture of property or a proposed *forfeiture order against property; and

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(b) an appeal against the forfeiture or forfeiture order is allowed, or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made.

The amount of the increase is equal to the value of the property.

(2A) The *penalty amount may be increased if:

(a) the penalty amount was reduced under section 130 to take account of a forfeiture of property or a proposed *forfeiture order against property; and

(b) one of the following orders has been made:

(i) an order under section 73 or 94 excluding an *interest in the property from forfeiture;

(ii) an order under section 77 or 94A (which deal with compensation) directing the Commonwealth to pay an amount to a person in relation to a proportion of an interest in the property that was not derived or realised from the commission of any offence;

(iii) an order under section 102 (which deals with the recovery of property) in relation to an interest in the property.

The amount of the increase is such amount as the court considers appropriate.

(2B) In determining the amount of the increase for the purposes of subsection (2A), the court may have regard to:

(a) if subparagraph (2A)(b)(i) or (iii) applies—the value of the interest, as at the time the order was made; and

(b) if subparagraph (2A)(b)(ii) applies—the amount that the Commonwealth was required to pay; and

(c) any other matter the court considers relevant.

(3) The *penalty amount may be increased if:

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(a) the penalty amount was reduced under section 131 to take account of an amount of tax the person paid; and

(b) an amount is repaid or refunded to the person in respect of that tax.

The amount of the increase is equal to the amount repaid or refunded.

(4) The *DPP's application may deal with more than one increase to the same *penalty amount.

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Division 3—How pecuniary penalty orders are obtained

134 DPP may apply for a pecuniary penalty order

(1) The *DPP may apply for a *pecuniary penalty order.

(2) If the application relates to a person's conviction of a *serious offence, the application must be made before:
  (a) the end of the period of 9 months after the *conviction day; or
  (b) if an *extension order is in force at the end of that period—the end of the period of 3 months after the end of the extended period relating to that extension order.

(3) If the application relates to a person's conviction of an *indictable offence that is not a *serious offence, the application must be made before the end of the period of 6 months after the *conviction day.

(4) An application may be made in relation to one or more offences.

(5) An application may be made for a *pecuniary penalty order in relation to an offence even if:
  (a) a *forfeiture order in relation to the offence, or an application for such a forfeiture order, has been made; or
  (b) Part 2-3 (forfeiture on conviction of a serious offence) applies to the offence.

(6) Despite subsections (2) and (3), the court hearing the application may give leave for the application to be made after the time before which an application would otherwise need to be made under those subsections if it is satisfied that it would be in the interests of justice to allow the application.

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135 Additional application for a pecuniary penalty order

(1) The *DPP cannot, unless the court gives leave, apply for a *pecuniary penalty order against a person in respect of *benefits the person derived from the commission of an offence if:

(a) an application has previously been made:

(i) under this Division; or

(ii) under another law of the Commonwealth; or

(iii) under a law of a *non-governing Territory;

for a pecuniary penalty in respect of those benefits the person derived from the commission of the offence; and

(b) the application has been finally determined on the merits.

(2) The court must not give leave unless it is satisfied that:

(a) the *benefit to which the new application relates was identified only after the first application was determined; or

(b) necessary evidence became available only after the first application was determined; or

(c) it is in the interests of justice to give the leave.

(3) An application for a *literary proceeds order is not, for the purposes of this section, an application for a pecuniary penalty.

136 Notice of application

(1) The *DPP must give written notice of the application to a person who would be subject to the *pecuniary penalty order if it were made.

(2) The *DPP must include a copy of the application with the notice.

(3) The *DPP must give a copy of any affidavit supporting the application to a person who would be subject to the *pecuniary

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penalty order (if it were made) within a reasonable time before the hearing of the application.

137 Amendment of application

(1) The court hearing the application may amend the application:
  (a) on application by the *DPP; or
  (b) with the consent of the DPP.

(2) However, the court must not amend the application so as to include an additional *benefit in the application unless the court is satisfied that:
  (a) the benefit was not reasonably capable of identification when the application was originally made; or
  (b) necessary evidence became available only after the application was originally made.

(3) On applying for an amendment to include an additional *benefit in the application, the *DPP must give to the person against whom the *pecuniary penalty order would be made a written notice of the application to amend.

138 Procedure on application

(1) The person who would be subject to the *pecuniary penalty order if it were made may appear and adduce evidence at the hearing of the application.

(2) The court may, in determining the application, have regard to:
  (a) the transcript of any proceeding against the person for an offence that constitutes *unlawful activity; and
  (b) the evidence given in any such proceeding.

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139 Applications to courts before which persons are convicted

If an application for a *pecuniary penalty order is made to a court before which a person was convicted of an *indictable offence:

(a) the application may be dealt with by the court; and

(b) any power in relation to the relevant order may be exercised by the court;

whether or not the court is constituted in the same way in which it was constituted when the person was convicted of the indictable offence.

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Division 4—Enforcement of pecuniary penalty orders

140 Enforcement of pecuniary penalty orders

(1) An amount payable by a person to the Commonwealth under a *pecuniary penalty order is a civil debt due by the person to the Commonwealth.

(2) A *pecuniary penalty order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.

(3) However, if the order was made under subsection 117(2) when sentence was being passed on the person for the offence to which the order relates, the order cannot be enforced against the person within the period of 6 months after the order was made.

(4) The debt arising from the order is taken to be a judgment debt.

(5) If a *pecuniary penalty order is made against a person after the person's death, this section has effect as if the person had died on the day after the order was made.

141 Property subject to a person's effective control

(1) If:

(a) a person is subject to a *pecuniary penalty order; and

(b) the *DPP applies to the court for an order under this section; and

(c) the court is satisfied that particular property is subject to the *effective control of the person;

the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.

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(2) The order under subsection (1) may be enforced against the property as if the property were the *person's property.

(3) A *restraining order may be made in respect of the property as if:
  (a) the property were the *person's property; and
  (b) the person had committed a *serious offence.

(4) If the *DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:
  (a) the person who is subject to the *pecuniary penalty order; and
  (b) any person whom the DPP has reason to believe may have an *interest in the property.

(5) The person who is subject to the *pecuniary penalty order, and any person who claims an *interest in the property, may appear and adduce evidence at the hearing of the application.

142 Charge on property subject to restraining order

(1) If:
  (a) a *pecuniary penalty order is made against a person in relation to an *indictable offence; and
  (b) a *restraining order is, or has been, made against:
    (i) the *person's property; or
    (ii) another person's property in relation to which an order under subsection 141(1) is, or has been, made; and
  (c) the restraining order relates to that offence or a *related offence;

  then, upon the making of the later of the orders, there is created, by force of this section, a charge on the property to secure the payment to the Commonwealth of the *penalty amount.

(2) The charge ceases to have effect in respect of the property:

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(a) if the *pecuniary penalty order was made in relation to the person's conviction of the *indictable offence and that conviction is *quashed—upon the order being discharged under Division 5; or

(b) upon the discharge of the pecuniary penalty order or the *restraining order by a court hearing an appeal against the making of the order; or

(c) upon payment to the Commonwealth of the *penalty amount in satisfaction of the pecuniary penalty order; or

(d) upon the sale or other disposition of the property:

(i) under an order under Division 4 of Part 4-1; or

(ii) by the owner of the property with the consent of the court that made the pecuniary penalty order; or

(iii) if the restraining order directed the *Official Trustee to take custody and control of the property—by the owner of the property with the consent of the Official Trustee; or

(e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

(3) The charge:

(a) is subject to every *encumbrance on the property (other than an encumbrance in which the person referred to paragraph (1)(a) has an *interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and

(b) has priority over all other encumbrances; and

(c) subject to subsection (2), is not affected by any change of ownership of the property.

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143 Charges may be registered

(1) If:

(a) a charge is created by section 142 on property of a particular kind; and

(b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind;

the *Official Trustee or the *DPP may cause the charge so created to be registered under the provisions of that law.

(2) A person who purchases or otherwise acquires an *interest in the property after the registration of the charge is, for the purposes of paragraph 142(2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

144 Penalty amounts exceeding the court's jurisdiction

(1) If:

(a) a court makes a *pecuniary penalty order of a particular amount; and

(b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount;

the registrar of the court must issue a certificate containing the particulars specified in the regulations.

(2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.

(3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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Division 5—The effect on pecuniary penalty orders of convictions being quashed

145 Pecuniary penalty order unaffected if not made in relation to a conviction

A *pecuniary penalty order made in relation to an offence but not made in relation to a person's conviction of the offence is not affected if the person is convicted of the offence and the conviction is subsequently *quashed.

146 Discharge of pecuniary penalty order if made in relation to a conviction

(1) Subject to subsections (2) and (3), a *pecuniary penalty order made in relation to a person's conviction of an offence is discharged if:

(a) the person's conviction of any of the offences to which the order relates is subsequently *quashed; and

(b) the *DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed or varied.

(2) Unless and until a court decides otherwise on such an application, the *quashing of the conviction does not affect the *pecuniary penalty order:

(a) for 14 days after the conviction is quashed; and

(b) if the *DPP makes such an application.

(2A) To avoid doubt, the *DPP may make an application to confirm the order and an application to vary the order, and the court may hear both applications at the same time.

(3) A *pecuniary penalty order made in relation to a person's conviction of an offence is discharged if:

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(a) the person's conviction of the offence is subsequently *quashed; and
(b) the order does not relate to any other offence; and
(c) the offence is not a *serious offence.

147 Notice of application for confirmation or variation of pecuniary penalty order

The *DPP must give to the person written notice of an application for confirmation or variation of the *pecuniary penalty order.

Note: If the DPP applies for confirmation or variation of a pecuniary penalty order, it can also apply for an examination order under Part 3-1.

148 Procedure on application for confirmation or variation of pecuniary penalty order

(1) The person may appear and adduce evidence at the hearing of the application for confirmation or variation of the order.

(2) The court may, in determining the application, have regard to:
(a) the transcript of any proceeding against the person for:
(i) any of the offences to which the order relates of which the person was convicted; or
(ii) if the person was taken to be convicted of any of those offences because of paragraph 331(1)(c)—the other offence referred to in that paragraph;
including any appeals relating to such a conviction; and
(b) the evidence given in any such proceeding.

149 Court may confirm pecuniary penalty order

The court may confirm the *pecuniary penalty order if the court is satisfied that, when the *DPP applied for the order, the court could

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have made the order without relying on the person's conviction that was *quashed.

149A Court may vary pecuniary penalty order

(1) The court may vary the *pecuniary penalty order by reducing the *penalty amount by an amount worked out under subsection (2) if the court is satisfied that:

(a) the order relates to more than one offence; and

(b) when the *DPP applied for the order, the court could have made the order in relation to at least one of the offences that has not been *quashed.

(2) The amount is an amount equal to so much of the *penalty amount as the court reasonably believes to be attributable to a person's conviction of an offence:

(a) to which the *pecuniary penalty order relates; and

(b) that was *quashed.

(3) In determining the amount by which the *penalty amount should be reduced under subsection (2), the court may have regard to:

(a) the transcripts and evidence referred to in subsection 148(2); and

(b) the transcript of, and the evidence given in, any proceedings relating to the application for the *pecuniary penalty order or any application to vary the order; and

(c) any other matter that the court considers relevant.

150 Effect of court's decision on confirmation or variation of pecuniary penalty order

(1) If the court confirms the *pecuniary penalty order under section 149, or varies the order under section 149A, the order is

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taken not to be affected by the *quashing of the person's conviction of the offence.

(2) If the court decides not to confirm or vary the *pecuniary penalty order, the order is discharged.

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Part 2-5—Literary proceeds orders

151 Simplified outline of this Part

If certain offences have been committed, literary proceeds orders can be made, ordering payments to the Commonwealth of amounts based on the literary proceeds that a person has derived in relation to such an offence. (There is no requirement that a person has been convicted of the offence.)

Division 1—Making literary proceeds orders

152 Making literary proceeds orders

(1) A court with *proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
  (a) the *DPP applies for the order; and
  (b) the court is satisfied that the person has committed an *indictable offence (whether or not the person has been convicted of the offence); and
  (c) the court is satisfied that the person has derived *literary proceeds in relation to the offence.

(2) A court with *proceeds jurisdiction may make an order requiring a person to pay an amount to the Commonwealth if:
  (a) the *DPP applies for the order; and
  (b) the court is satisfied that the person has committed a *foreign indictable offence (whether or not the person has been convicted of the offence); and
  (c) the court is satisfied that the person has derived *literary proceeds in relation to the offence.

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(3) However, the *literary proceeds must have been derived after the commencement of this Act.

Note: Because of section 14, it does not matter whether the offence to which the order relates was committed before or after the commencement of this Act.

(4) The court's power to make a *literary proceeds order in relation to an offence is not affected by the existence of another *confiscation order in relation to that offence.

153 Meaning of *literary proceeds*

(1) ***Literary proceeds*** are any *benefit that a person derives from the commercial exploitation of:

(a) the person's notoriety resulting, directly or indirectly, from the person committing an *indictable offence or a *foreign indictable offence; or

(b) the notoriety of another person, involved in the commission of that offence, resulting from the first-mentioned person committing that offence.

(2) The commercial exploitation may be by any means, including:

(a) publishing any material in written or electronic form; or

(b) any use of media from which visual images, words or sounds can be produced; or

(c) any live entertainment, representation or interview.

(3) If the offence is an *indictable offence, it does not matter whether the *benefits are derived within or outside *Australia.

(3A) If the offence is a *foreign indictable offence, then a *benefit is not treated as *literary proceeds unless the benefit is derived in *Australia or transferred to Australia.

(4) In determining:

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(a) whether a person has derived *literary proceeds; or

(b) the value of literary proceeds that a person has derived;

the court may treat as property of the person any property that, in the court's opinion:

(c) is subject to the person's *effective control; or

(d) was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person's direction.

154 Matters taken into account in deciding whether to make literary proceeds orders

In deciding whether to make a *literary proceeds order, the court:

(a) must take into account:

(i) the nature and purpose of the product or activity from which the *literary proceeds were derived; and

(ii) whether supplying the product or carrying out the activity was in the public interest; and

(iii) the social, cultural or educational value of the product or activity; and

(iv) the seriousness of the offence to which the product or activity relates; and

(v) how long ago the offence was committed; and

(b) may take into account such other matters as it thinks fit.

155 Additional literary proceeds orders

More than one *literary proceeds order may be made against a person in relation to the same offence.

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156 Ancillary orders

The court that made a *literary proceeds order, or any other court that could have made the literary proceeds order, may make orders ancillary to the literary proceeds order, either when it makes the literary proceeds order or at a later time.

157 Acquittals do not affect literary proceeds orders

The fact that a person has been acquitted of an offence with which the person has been charged does not affect the court's power to make a *literary proceeds order in relation to the offence.

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Division 2—Literary proceeds amounts

158 Determining literary proceeds amounts

(1) The amount that a person is ordered to pay to the Commonwealth under a *literary proceeds order (the ***literary proceeds amount***) is the amount that the court thinks appropriate.

(2) However, the amount:

(a) must not exceed the amount of the *literary proceeds relating to the offence to which the order relates, less any deductions arising under section 159; and

(b) may be further reduced under section 160.

(3) In determining the *literary proceeds amount, the court is to have regard to such matters as it thinks fit, including any of the following:

(a) the amount of the *literary proceeds relating to the offence;

(b) if the person stood trial for the offence—the evidence adduced in the proceedings for the offence;

(c) if the person was convicted of the offence—the transcript of the sentencing proceedings.

159 Deductions from literary proceeds amounts

In determining the *literary proceeds amount under a *literary proceeds order against a person, the court must deduct the following:

(a) any expenses and outgoings that the person incurred in deriving the *literary proceeds;

(b) the value of any property of the person forfeited under:

(i) a *forfeiture order; or

(ii) an *interstate forfeiture order; or

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(iii) a *foreign forfeiture order;

relating to the offence to which the literary proceeds order relates, to the extent that the property is literary proceeds;

(c) any amount payable by the person under:

(i) a *pecuniary penalty order; or

(ii) an order under section 243B of the *Customs Act 1901*; or

(iii) an *interstate pecuniary penalty order; or

(iv) a *foreign pecuniary penalty order;

relating to the offence to which the literary proceeds order relates, to the extent that the amount is literary proceeds;

(d) the amount of any previous literary proceeds order made against the person in relation to the same exploitation of the person's notoriety resulting from the person committing the offence in question.

160 Reducing literary proceeds amounts to take account of tax paid

(1) The court may reduce the *literary proceeds amount under a *literary proceeds order against a person by an amount that, in the court's opinion, represents the extent to which tax that the person has paid is attributable to the *literary proceeds to which the order relates.

(2) The tax may be tax payable under a law of the Commonwealth, a State, a Territory or a foreign country.

161 Varying literary proceeds orders to increase literary proceeds amounts

(1) The court may, on the application of the *DPP, vary a *literary proceeds order against a person by increasing the *literary proceeds

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amount if one or more of subsections (2), (3) and (4) apply. The amount of each increase is as specified in the relevant subsection.

(2) The *literary proceeds amount may be increased if:

(a) the value of property of the person forfeited under a *forfeiture order, an *interstate forfeiture order or a *foreign forfeiture order was deducted from the literary proceeds amount under paragraph 159(b); and

(b) an appeal against the forfeiture, or against the order, is allowed.

The amount of the increase is equal to the value of the property.

(3) The *literary proceeds amount may be increased if:

(a) an amount payable under a *pecuniary penalty order, an order under section 243B of the *Customs Act 1901*, an *interstate pecuniary penalty order or a *foreign pecuniary penalty order was deducted from the *literary proceeds amount under paragraph 159(c); and

(b) an appeal against the amount payable, or against the order, is allowed.

The amount of the increase is equal to the amount that was payable.

(4) The *literary proceeds amount may be increased if:

(a) in determining a *literary proceeds amount, the court took into account, under section 160, an amount of tax paid by the person who is the subject of the order; and

(b) an amount is repaid or refunded to the person in respect of that tax.

The amount of the increase is equal to the amount repaid or refunded.

(5) The *DPP's application may deal with more than one increase to the same *literary proceeds amount.

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Division 3—How literary proceeds orders are obtained

162 DPP may apply for a literary proceeds order

(1) The *DPP may apply for a *literary proceeds order.

(2) An application may be made in relation to one or more offences.

163 Notice of application

(1) The *DPP must give written notice of the application to the person who would be subject to the *literary proceeds order if it were made.

(2) The *DPP must include a copy of the application, and any affidavit supporting the application, with the notice.

164 Amendment of application

(1) The court hearing the application may amend the application:
  (a) on application by the *DPP; or
  (b) with the consent of the DPP.

(2) However, the court must not amend the application so as to include additional *literary proceeds in the application unless the court is satisfied that:
  (a) the literary proceeds were not reasonably capable of identification when the application was originally made; or
  (b) necessary evidence became available only after the application was originally made.

(3) If:
  (a) the *DPP applies to amend the application for a *literary proceeds order against a person; and

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(b) the effect of the amendment would be to include additional *literary proceeds in the application;

the DPP must give the person written notice of the application to amend.

165 Procedure on application

The person who would be subject to the *literary proceeds order if it were made may appear and adduce evidence at the hearing of the application.

166 Applications to courts before which persons are convicted

If an application for a *literary proceeds order is made to a court before which a person was convicted of an *indictable offence:

(a) the application may be dealt with by the court; and

(b) any power in relation to the relevant order may be exercised by the court;

whether or not the court is constituted in the same way in which it was constituted when the person was convicted of the indictable offence.

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Division 4—Enforcement of literary proceeds orders

167 Enforcement of literary proceeds orders

(1) An amount payable by a person to the Commonwealth under a *literary proceeds order is a civil debt due by the person to the Commonwealth.

(2) A *literary proceeds order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.

(3) The debt arising from the order is taken to be a judgment debt.

168 Property subject to a person's effective control

(1) If:

(a) a person is subject to a *literary proceeds order; and

(b) the *DPP applies to the court for an order under this section; and

(c) the court is satisfied that particular property is subject to the *effective control of the person;

the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the literary proceeds order.

(2) The order under subsection (1) may be enforced against the property as if the property were the *person's property.

(3) A *restraining order may be made in respect of the property as if:

(a) the property were the *person's property; and

(b) the person had committed a *serious offence.

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(4) If the *DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:

(a) the person who is subject to the *literary proceeds order; and

(b) any person whom the DPP reasonably believes may have an *interest in the property.

(5) The person who is subject to the *literary proceeds order, and any person who claims an *interest in the property, may appear and adduce evidence at the hearing of the application.

169 Charge on property subject to restraining order

(1) If:

(a) a *literary proceeds order is made against a person in relation to an *indictable offence; and

(b) a *restraining order is, or has been, made against:

(i) the *person's property; or

(ii) another person's property in relation to which an order under subsection 168(1) is, or has been, made; and

(c) the restraining order relates to that offence or a *related offence;

then, upon the making of the later of the orders, there is created, by force of this section, a charge on the property to secure the payment to the Commonwealth of the *literary proceeds amount.

(2) The charge ceases to have effect in respect of the property:

(a) if the *literary proceeds order was made in relation to the person's conviction of the *indictable offence and that conviction is *quashed—upon the order being discharged under Division 5; or

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(b) upon the discharge of the literary proceeds order or the *restraining order by a court hearing an appeal against the making of the order; or

(c) upon payment to the Commonwealth of the *literary proceeds amount in satisfaction of the literary proceeds order; or

(d) upon the sale or other disposition of the property:

(i) under an order under Division 4 of Part 4-1; or

(ii) by the owner of the property with the consent of the court that made the literary proceeds order; or

(iii) where the restraining order directed the *Official Trustee to take custody and control of the property—by the owner of the property with the consent of the Official Trustee; or

(e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

(3) The charge:

(a) is subject to every *encumbrance on the property (other than an encumbrance in which the person referred to in paragraph (1)(a) has an *interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and

(b) has priority over all other encumbrances; and

(c) subject to subsection (2), is not affected by any change of ownership of the property.

170 Charges may be registered

(1) If:

(a) a charge is created by section 169 on property of a particular kind; and

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(b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind;

the *Official Trustee or the *DPP may cause the charge so created to be registered under the provisions of that law.

(2) A person who purchases or otherwise acquires an *interest in the property after the registration of the charge is, for the purposes of paragraph 169(2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

171 Literary proceeds amounts exceeding the court's jurisdiction

(1) If:

(a) a court makes a *literary proceeds order; and

(b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to the *literary proceeds amount under the order;

the registrar of the court must issue a certificate containing the particulars specified in the regulations.

(2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the *literary proceeds amount.

(3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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Division 5—The effect on literary proceeds orders of convictions being quashed

172 Literary proceeds order unaffected if not made in relation to a conviction

A *literary proceeds order made in relation to an offence but not made in relation to a person's conviction of the offence is not affected if the person is convicted of the offence and the conviction is subsequently *quashed.

173 Discharge of literary proceeds order if made in relation to a conviction

(1) A *literary proceeds order made in relation to a person's conviction of an offence is discharged if:

(a) the person's conviction of the offence is subsequently *quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and

(b) the *DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.

(2) However, unless and until a court decides otherwise on such an application, the *quashing of the conviction does not affect the *literary proceeds order:

(a) for 14 days after the conviction is quashed; and

(b) if the *DPP makes such an application.

174 Notice of application for confirmation of literary proceeds order

The *DPP must give to the person written notice of an application for confirmation of the *literary proceeds order.

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Note: If the DPP applies for confirmation of a forfeiture order, it can also apply for an examination order under Part 3-1.

175 Procedure on application for confirmation of literary proceeds order

(1) The person may appear and adduce evidence at the hearing of the application for confirmation of the order.

(2) The court may, in determining the application, have regard to:

(a) the transcript of any proceeding against the person for:

(i) the offence of which the person was convicted; or

(ii) if the person was taken to be convicted of that offence because of paragraph 331(1)(c)—the other offence referred to in that paragraph;

including any appeals relating to the conviction; and

(b) the evidence given in any such proceeding.

176 Court may confirm literary proceeds order

The court may confirm the *literary proceeds order if the court is satisfied that, when the *DPP applied for the order, the court could have made the order:

(a) on the ground that the person had committed the offence in relation to which the person's conviction was *quashed; and

(b) without relying on the person's conviction of the offence.

177 Effect of court's decision on confirmation of literary proceeds order

(1) If the court confirms the *literary proceeds order under section 176, the order is taken not to be affected by the *quashing of the person's conviction of the offence.

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(2) If the court decides not to confirm the *literary proceeds order, the order is discharged.

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Division 6—Literary proceeds orders covering future literary proceeds

178 Literary proceeds orders can cover future literary proceeds

(1) The court may include in a *literary proceeds order one or more amounts in relation to *benefits that the person who is the subject of the order may derive in the future if the court is satisfied that:

(a) the person will derive the benefits; and

(b) if the person derives the benefits, they will be *literary proceeds in relation to the offence to which the order relates.

(2) However, the court must not include an amount in the order unless the *DPP, in its application for the order, requested the inclusion in the order of one or more amounts in relation to *benefits that the person who would be the subject of the order may derive in the future.

(3) Each amount included in the order is to be an amount that the court considers would be a *literary proceeds amount in relation to a *benefit that the person may derive in the future, if the court were to make a *literary proceeds order after the person derived the benefit.

Note: Division 2 describes how literary proceeds amounts are determined.

179 Enforcement of literary proceeds orders in relation to future literary proceeds

If:

(a) an amount is included in a *literary proceeds order in relation to *benefits that the person who is the subject of the order may derive in the future; and

(b) the person subsequently derives those benefits;

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immediately the benefits are derived, Division 4 applies to the amount as if it were a *literary proceeds amount under a literary proceeds order.

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Part 2-6—Unexplained wealth orders

179A Simplified outline of this Part

This Part provides for the making of certain orders relating to unexplained wealth.

A preliminary unexplained wealth order requires a person to attend court for the purpose of enabling the court to decide whether to make an unexplained wealth order against the person.

An unexplained wealth order is an order requiring the person to pay an amount equal to so much of the person's total wealth as the person cannot satisfy the court is not derived from certain offences.

Division 1—Making unexplained wealth orders

179B Making an order requiring a person to appear

(1) A court with *proceeds jurisdiction may make an order (a ***preliminary unexplained wealth order***) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an *unexplained wealth order in relation to the person if:

(a) the *DPP applies for an unexplained wealth order in relation to the person; and

(b) the court is satisfied that an *authorised officer has reasonable grounds to suspect that the person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and

(c) any affidavit requirements in subsection (2) for the application have been met.

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Affidavit requirements

(2) An application for an *unexplained wealth order in relation to a person must be supported by an affidavit of an *authorised officer stating:

(a) the identity of the person; and

(b) that the authorised officer suspects that the person's *total wealth exceeds the value of the person's *wealth that was *lawfully acquired; and

(c) the following:

(i) the property the authorised officer knows or reasonably suspects was lawfully acquired by the person;

(ii) the property the authorised officer knows or reasonably suspects is owned by the person or is under the *effective control of the person.

The affidavit must include the grounds on which the authorised officer holds the suspicions referred to in paragraphs (b) and (c).

(3) The court must make the order under subsection (1) without notice having been given to any person if the *DPP requests the court to do so.

179C Application to revoke a preliminary unexplained wealth order

(1) If a court makes a *preliminary unexplained wealth order requiring a person to appear before the court, the person may apply to the court to revoke the order.

(2) The application must be made:

(a) within 28 days after the person is notified of the *preliminary unexplained wealth order; or

(b) if the person applies to the court, within that period of 28 days, for an extension of the time for applying for

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revocation—within such longer period, not exceeding 3 months, as the court allows.

(4) However, the *preliminary unexplained wealth order remains in force until the court revokes the order.

(5) The court may revoke the *preliminary unexplained wealth order on application under subsection (1) if satisfied that:
  (a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
  (b) it is in the public interest to do so; or
  (c) it is otherwise in the interests of justice to do so.

179CA Notice and procedure on application to revoke preliminary unexplained wealth order

(1) This section applies if a person applies under section 179C for revocation of a *preliminary unexplained wealth order.

(2) The applicant may appear and adduce material at the hearing of the application.

(3) The applicant must give the *DPP:
  (a) written notice of the application; and
  (b) a copy of any affidavit supporting the application.

(4) The *DPP may appear and adduce additional material at the hearing of the application.

(5) The *DPP must give the applicant a copy of any affidavit it proposes to rely on to contest the application.

(6) The notice and copies of affidavits must be given under subsections (3) and (5) within a reasonable time before the hearing of the application.

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179D Notice of revocation of a preliminary unexplained wealth order

If a *preliminary unexplained wealth order is revoked under section 179C, the *DPP must give written notice of the revocation to the applicant for the revocation.

179E Making an unexplained wealth order

(1) A court with *proceeds jurisdiction may make an order (an ***unexplained wealth order***) requiring a person to pay an amount to the Commonwealth if:

(a) the court has made a *preliminary unexplained wealth order in relation to the person; and

(b) the court is not satisfied that the whole or any part of the person's *wealth was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;

(ii) a *foreign indictable offence;

(iii) a *State offence that has a federal aspect.

(2) The court must specify in the order that the person is liable to pay to the Commonwealth an amount (the person's ***unexplained wealth amount***) equal to the amount that, in the opinion of the court, is the difference between:

(a) the person's *total wealth; and

(b) the sum of the values of the property that the court is satisfied was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;

(ii) a *foreign indictable offence;

(iii) a *State offence that has a federal aspect;

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reduced by any amount deducted under section 179J (reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.).

(3) In proceedings under this section, the burden of proving that a person's *wealth is not derived from one or more of the offences referred to in paragraph (1)(b) lies on the person.

(4) To avoid doubt, when considering whether to make an order under subsection (1), the court may have regard to information not included in the application.

(5) To avoid doubt, subsection (3) has effect despite section 317.

(6) Despite subsection (1), the court may refuse to make an order under that subsection if the court is satisfied that it is not in the public interest to make the order.

179EA Refusal to make an order for failure to give undertaking

(1) The court may refuse to make a *preliminary unexplained wealth order or an *unexplained wealth order if the Commonwealth refuses or fails to give the court an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order.

(2) The *DPP may give such an undertaking on behalf of the Commonwealth.

179EB Costs

If the court refuses to make a *preliminary unexplained wealth order or an *unexplained wealth order, it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

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179F Ancillary orders

(1) A court that makes an *unexplained wealth order, or any other court that could have made the unexplained wealth order, may make orders ancillary to the order, either when the order is made or at a later time.

(2) A court that makes a *preliminary unexplained wealth order, or any other court that could have made the order, may make orders ancillary to the order, either when the order is made or at a later time.

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Division 2—Unexplained wealth amounts

179G Determining unexplained wealth amounts

Meaning of wealth

(1) The property of a person that, taken together, constitutes the ***wealth*** of a person for the purposes of this Part is:

(a) property owned by the person at any time;

(b) property that has been under the *effective control of the person at any time;

(c) property that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time;

including property owned, effectively controlled, disposed of or consumed before the commencement of this Part.

Meaning of total wealth

(2) The ***total wealth*** of a person is the sum of all of the values of the property that constitutes the person's wealth.

Value of property

(3) The value of any property that has been disposed of or consumed, or that is for any other reason no longer available, is the greater of:

(a) the value of the property at the time it was acquired; and

(b) the value of the property immediately before it was disposed of, consumed or stopped being available.

(4) The value of any other property is the greater of:

(a) the value of the property at the time it was acquired; and

(b) the value of the property on the day that the application for the *unexplained wealth order was made.

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179H Effect of property vesting in an insolvency trustee

In assessing the value of property of a person, property is taken to continue to be the *person's property if it vests in any of the following:

(a) in relation to a bankruptcy—the trustee of the estate of the bankrupt;

(b) in relation to a composition or scheme of arrangement under Division 6 of Part IV of the *Bankruptcy Act 1966*—the trustee of the composition or scheme of arrangement;

(c) in relation to a personal insolvency agreement under Part X of the *Bankruptcy Act 1966*—the trustee of the agreement;

(d) in relation to the estate of a deceased person in respect of which an order has been made under Part XI of the *Bankruptcy Act 1966*—the trustee of the estate.

179J Reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.

In determining the *unexplained wealth amount specified in an *unexplained wealth order in relation to a person, the court must deduct an amount equal to the following:

(a) the value, at the time of making the order, of any property of the person forfeited under:

(i) a *forfeiture order; or

(ii) an *interstate forfeiture order; or

(iii) a *foreign forfeiture order;

(b) the sum of any amounts payable by the person under:

(i) a *pecuniary penalty order; or

(ii) a *literary proceeds order; or

(iii) an order under section 243B of the *Customs Act 1901*; or

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(iv) an *interstate pecuniary penalty order; or

(v) a *foreign pecuniary penalty order.

179K Varying unexplained wealth orders to increase amounts

(1) The court may, on the application of the *DPP, vary an *unexplained wealth order against a person by increasing the *unexplained wealth amount if subsection (2) or (3) applies. The amount of the increase is as specified in subsection (2) or (3).

(2) The *unexplained wealth amount may be increased if:

(a) the value of property of the person forfeited under a *forfeiture order, an *interstate forfeiture order or a *foreign forfeiture order was deducted from the unexplained wealth amount under paragraph 179J(a); and

(b) an appeal against the forfeiture, or against the order, is allowed.

The amount of the increase is equal to the value of the property.

(3) The *unexplained wealth amount may be increased if:

(a) an amount payable under a *pecuniary penalty order, a *literary proceeds order, an order under section 243B of the *Customs Act 1901*, an *interstate pecuniary penalty order or a *foreign pecuniary penalty order was deducted from the *unexplained wealth amount under paragraph 179J(b); and

(b) an appeal against the amount payable, or against the order, is allowed.

The amount of the increase is equal to the amount that was payable.

(4) The *DPP's application may deal with more than one increase to the same *unexplained wealth amount.

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179L Relieving certain dependants from hardship

(1) The court making an *unexplained wealth order in relation to a person must make another order directing the Commonwealth, once the unexplained wealth order is satisfied, to pay a specified amount to a *dependant of the person if the court is satisfied that:

(a) the unexplained wealth order would cause hardship to the dependant; and

(b) the specified amount would relieve that hardship; and

(c) if the dependant is aged at least 18 years—the dependant had no knowledge of the person's conduct that is the subject of the unexplained wealth order.

(2) The specified amount must not exceed the person's *unexplained wealth amount.

(3) An order under this section may relate to more than one of the person's *dependants.

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Division 3—How unexplained wealth orders are obtained

179M DPP may apply for an unexplained wealth order

The *DPP may apply for an *unexplained wealth order.

179N Notice of application

(1) This section sets out the notice requirements if the *DPP has made an application for an *unexplained wealth order.

(2) If a court with *proceeds jurisdiction makes a *preliminary unexplained wealth order in relation to the person, the *DPP must, within 7 days of the making of the order:

(a) give written notice of the order to the person who would be subject to the *unexplained wealth order if it were made; and

(b) provide to the person a copy of the application for the unexplained wealth order, and the affidavit referred to in subsection 179B(2).

(3) The *DPP must also give a copy of any other affidavit supporting the application to the person who would be subject to the *unexplained wealth order if it were made.

(4) The copies must be given under subsection (3) within a reasonable time before the hearing in relation to whether the order is to be made.

179P Additional application for an unexplained wealth order

(1) The *DPP cannot, unless the court gives leave, apply for an *unexplained wealth order against a person if:

(a) an application has previously been made for an unexplained wealth order in relation to the person; and

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(b) the application has been finally determined on the merits.

(2) The court must not give leave unless it is satisfied that:

(a) the *wealth to which the new application relates was identified only after the first application was determined; or

(b) necessary evidence became available only after the first application was determined; or

(c) it is in the interests of justice to give the leave.

179Q Procedure on application and other notice requirements

(1) The person who would be subject to an *unexplained wealth order if it were made may appear and adduce evidence at the hearing in relation to whether the order is to be made.

(2) The person must give the *DPP written notice of any grounds on which he or she proposes to contest the making of the order.

(3) The *DPP may appear and adduce evidence at the hearing in relation to whether an *unexplained wealth order is to be made.

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Division 4—Enforcement of unexplained wealth orders

179R Enforcement of an unexplained wealth order

(1) An amount payable by a person to the Commonwealth under an *unexplained wealth order is a civil debt due by the person to the Commonwealth.

(2) An *unexplained wealth order against a person may be enforced as if it were an order made in civil proceedings instituted by the Commonwealth against the person to recover a debt due by the person to the Commonwealth.

(3) The debt arising from the order is taken to be a judgment debt.

(4) If an *unexplained wealth order is made against a person after the person's death, this section has effect as if the person had died on the day after the order was made.

179S Property subject to a person's effective control

(1) If:

(a) a person is subject to an *unexplained wealth order; and

(b) the *DPP applies to the court for an order under this section; and

(c) the court is satisfied that particular property is subject to the *effective control of the person;

the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the unexplained wealth order.

(2) The order under subsection (1) may be enforced against the property as if the property were the *person's property.

(3) A *restraining order may be made in respect of the property as if:

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(a) the property were the *person's property; and
(b) there were reasonable grounds to suspect that:
(i) the person had committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;
(ii) the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

(4) If the *DPP applies for an order under subsection (1) relating to particular property, the DPP must give written notice of the application to:
(a) the person who is subject to the *unexplained wealth order; and
(b) any person whom the DPP has reason to believe may have an *interest in the property.

(5) The person who is subject to the *unexplained wealth order, and any person who claims an *interest in the property, may appear and adduce evidence at the hearing of the application.

179SA Legal expenses

(1) If the court considers that it is appropriate to do so, it may order that the whole, or a specified part, of specified property covered by an order under subsection 179S(1) is not available to satisfy the *unexplained wealth order and may instead be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.

(2) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the

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payment of expenses from the disposal of any property covered by an order under subsection (1) and may make any further or ancillary orders it considers appropriate.

179T Amounts exceeding the court's jurisdiction

(1) If:

(a) a court makes an *unexplained wealth order of a particular amount; and

(b) the court does not have jurisdiction with respect to the recovery of debts of an amount equal to that amount;

the registrar of the court must issue a certificate containing the particulars specified in the regulations.

(2) The certificate may be registered, in accordance with the regulations, in a court having jurisdiction with respect to the recovery of debts of an amount equal to the amount of the relevant order.

(3) Upon registration in a court, the certificate is enforceable in all respects as a final judgment of the court in favour of the Commonwealth.

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Division 5—Oversight

179U Parliamentary supervision

(1) The operation of this Part and section 20A is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement (the ***Committee***).

(2) The Committee may require the Australian Crime Commission, the Australian Federal Police, the *DPP or any other federal agency or authority that is the recipient of any material disclosed as the result of the operation of this Part to appear before it from time to time to give evidence.

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Chapter 3—Information gathering

Part 3-1—Examinations

Division 1—Examination orders

180 Examination orders relating to restraining orders

(1) If a *restraining order is in force, the court that made the restraining order, or any other court that could have made the restraining order, may make an order (an ***examination order***) for the *examination of any person, including:

(a) a person whose property is, or a person who has or claims an *interest in property that is, the subject of the restraining order; or

(b) a person who is a *suspect in relation to the restraining order; or

(c) the spouse or *de facto partner of a person referred to in paragraph (a) or (b);

about the *affairs of a person referred to in paragraph (a), (b) or (c).

(2) The *examination order ceases to have effect if the *restraining order to which it relates ceases to have effect.

180A Examination orders relating to applications for exclusion from forfeiture

(1) If an application for an order under section 73 or 94 for an *interest in property to be excluded from forfeiture is made, the court to which the application is made may make an order (an ***examination order***) for the *examination of any person including:

(a) a person who has or claims an interest in the property; or

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(b) the spouse or *de facto partner of a person referred to in paragraph (a);

about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:

(a) the application is withdrawn; or

(b) the court makes a decision on the application.

180B Examination orders relating to applications for compensation

(1) If an application for an order under section 77 or 94A (which deal with compensation) is made in relation to an *interest in property that has been or may be forfeited, the court to which the application is made may make an order (an ***examination order***) for the *examination of any person including:

(a) a person who has or claims an *interest in the property; or

(b) the spouse or *de facto partner of a person referred to in paragraph (a);

about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:

(a) the application is withdrawn; or

(b) the court makes a decision on the application.

180C Examination orders relating to applications under section 102

(1) If an application for an order under section 102 (which deals with the recovery of property) is made under section 104 in relation to forfeited property, the court to which the application is made may make an order (an ***examination order***) for the *examination of any person including:

(a) a person who has or claims an *interest in the property; or

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(b) the spouse or *de facto partner of a person referred to in paragraph (a);

about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:

(a) the application is withdrawn; or

(b) the court makes a decision on the application.

180D Examination orders relating to enforcement of confiscation orders

(1) If a *confiscation order has been made but not satisfied, the court that made the confiscation order may make an order (an ***examination order***) for the *examination of any person including:

(a) a person against whom the confiscation order was made; or

(b) the spouse or *de facto partner of a person referred to in paragraph (a);

about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when proceedings relating to the enforcement of the *confiscation order are finally determined, withdrawn or otherwise disposed of.

180E Examination orders relating to restraining orders revoked under section 44

(1) If a *restraining order is revoked under section 44 (which deals with giving security to revoke etc. a restraining order), the court that revoked the restraining order may make an order (an ***examination order***) for the *examination of any person including:

(a) a person whose property was, or a person who had an *interest in property that was, the subject of the restraining order; or

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(b) the spouse or *de facto partner of a person referred to in paragraph (a);

about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when the *restraining order would have ceased to have effect, assuming it had not been revoked under section 44.

181 Examination orders relating to applications relating to quashing of convictions

(1) If an application relating to the *quashing of a person's conviction of an offence is made, as mentioned in section 81, 107, 146 or 173, the court to which the application is made may make an order (an ***examination order***) for the *examination of any person, including:

(a) the person whose conviction is quashed; or

(b) a person whose property is, or a person who has an *interest in property that is, the subject of the forfeiture, *pecuniary penalty order or *literary proceeds order to which the application relates; or

(c) the spouse or *de facto partner of a person referred to in paragraph (a) or (b);

about the *affairs of a person referred to in paragraph (a), (b) or (c).

(2) The *examination order ceases to have effect:

(a) if the application is withdrawn; or

(b) when the court makes a decision on the application.

182 Applications for examination orders

(1) An *examination order can only be made on application by the *DPP.

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(2) The court must consider an application for an *examination order without notice having been given to any person if the *DPP requests the court to do so.

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Division 2—Examination notices

183 Examination notices

(1) An *approved examiner may, on application by the *DPP, give to a person who is the subject of an *examination order a written notice (an ***examination notice***) for the *examination of the person.

(2) However, the *approved examiner must not give the *examination notice if:

(a) an application has been made under section 42 for the *restraining order to which the notice relates to be revoked; and

(b) the court to which the application is made orders that *examinations are not to proceed.

(3) The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the *approved examiner giving the *examination notice.

(4) An ***approved examiner*** is a person who:

(a) holds an office, or is included in a class of people, specified in the regulations; or

(b) is appointed by the Minister under this section.

184 Additional examination notices

A person who is the subject of an *examination order may be given more than one *examination notice.

185 Form and content of examination notices

(1) The *examination notice:

(a) must be in the prescribed form; and

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(b) must require the person to attend the *examination; and

(c) must specify the time and place of the examination; and

(d) must specify such further information as the regulations require.

(2) The *examination notice may require the person to produce at the *examination the documents specified in the notice.

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Division 3—Conducting examinations

186 Time and place of examination

(1) The *examination of a person must be conducted:

(a) at the time and place specified in the *examination notice; or

(b) at such other time and place as the *approved examiner decides on the request of a person referred to in paragraph 188(3)(b), (c) or (d).

(2) However, the *approved examiner must:

(a) give the person a written notice withdrawing the *examination notice; and

(b) if the *examination of the person has started (but not finished)—stop the examination;

if, after the examination notice is given:

(c) an application has been made under section 42 for the *restraining order to which the notice relates to be revoked; and

(d) the court to which the application is made orders that examinations are not to proceed.

(3) This section does not prevent the *approved examiner giving the person a further *examination notice if the application for revocation of the *restraining order is unsuccessful.

(4) The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) does not prevent the *examination of a person.

187 Requirements made of person examined

(1) The person may be examined on oath or affirmation by:

(a) the *approved examiner; and

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(b) the *DPP.

(2) The *approved examiner may, for that purpose:

(a) require the person either to take an oath or to make an affirmation; and

(b) administer an oath or affirmation to the person.

(3) The oath or affirmation to be taken or made by the person for the purposes of the *examination is an oath or affirmation that the statements that the person will make will be true.

(4) The *examination must not relate to a person's *affairs:

(a) if the *examination relates to a *restraining order and the person is no longer a person whose affairs can, under section 180, be subject to the examination; or

(aa) if the examination relates to an application for exclusion from forfeiture and the person is no longer a person whose affairs can, under section 180A, be subject to the examination; or

(ab) if the examination relates to an application for an order under section 77 or 94A and the person is no longer a person whose affairs can, under section 180B, be subject to the examination; or

(ac) if the examination relates to an application for an order under section 102 and the person is no longer a person whose affairs can, under section 180C, be subject to the examination; or

(ad) if the examination relates to a *confiscation order that has not been satisfied and the person is no longer a person whose affairs can, under section 180D, be subject to the examination; or

(ae) if the examination relates to a *restraining order that has been revoked and the person is no longer a person whose affairs can, under section 180E, be subject to the examination; or

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(b) if the examination relates to the *quashing of a conviction for an offence and the person is no longer a person whose affairs can, under section 181, be subject to the examination.

(5) The *approved examiner may require the person to answer a question that:

(a) is put to the person at the *examination; and

(b) is relevant to the *affairs of a person whose affairs can, under section 180, 180A, 180B, 180C, 180D, 180E or 181, be subject to the examination.

188 Examination to take place in private

(1) The *examination is to take place in private.

(2) The *approved examiner may give directions about who may be present during the *examination, or during a part of it.

(3) These people are entitled to be present at the *examination:

(a) the *approved examiner;

(b) the person being examined, and the person's *lawyer;

(c) the *DPP;

(d) any person who is entitled to be present because of a direction under subsection (2).

189 Role of the examinee's lawyer

(1) The *lawyer of the person being examined may, at such times during the *examination as the *approved examiner determines:

(a) address the approved examiner; and

(b) examine the person;

about matters about which the approved examiner, or the *DPP, has examined the person.

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(2) The *approved examiner may require a *lawyer who, in the approved examiner's opinion, is trying to obstruct the *examination by exercising rights under subsection (1), to stop addressing the approved examiner, or stop his or her examination, as the case requires.

190 Examination by video link or telephone

(1) The *approved examiner may, on the request of a person referred to in paragraph 188(3)(b), (c) or (d), direct that a person be examined by video link if:

(a) the facilities required by subsection (2) are available or can reasonably be made available; and

(b) the approved examiner is satisfied that attendance of the person at the place of the *examination would cause unreasonable expense or inconvenience; and

(c) the approved examiner is satisfied that it is consistent with the interests of justice that the person be examined by video link.

(2) The person can be examined under the direction only if the place where the person is to attend for the purposes of the *examination is equipped with video facilities that enable the people referred to in subsection 188(3) to see and hear the person be examined.

(3) An oath or affirmation to be sworn or made by a person who is to be examined under such a direction may be administered either:

(a) by means of video link, in as nearly as practicable the same way as if the person were to be examined at the place of the *examination; or

(b) on behalf of the *approved examiner, by a person authorised by the approved examiner, at the place where the person to be examined attends for the purposes of the examination.

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(4) The *approved examiner may, on the request of a person referred to in paragraph 188(3)(b), (c) or (d), direct that a person be examined by telephone if:

(a) the approved examiner is satisfied that attendance of the person at the place of the *examination would cause unreasonable expense or inconvenience; and

(b) the approved examiner is satisfied that it is consistent with the interests of justice that the person be examined by telephone.

191 Record of examination

(1) The *approved examiner:

(a) may cause a record to be made of statements made at the *examination; and

(b) must make such a record if the person being examined, or the *DPP, so requests; and

(c) if the record is not a written record—must cause the record to be reduced to writing if the person being examined, or the DPP, so requests.

(2) If a record made under subsection (1) is in writing or is reduced to writing:

(a) the *approved examiner may require the person being examined to read it, or to have it read to him or her, and may require him or her to sign it; and

(b) if the person being examined requests in writing that the approved examiner give to the person a copy of the written record—the approved examiner must comply with the request without charge.

(3) The *approved examiner may, in complying with the request under paragraph (2)(b), impose on the person being examined such

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conditions (if any) as the approved examiner reasonably considers to be necessary to prevent improper disclosure of the record.

(4) The fact that a person being *examined signs a record as required under paragraph (2)(a) does not of itself constitute an acknowledgment that the record is accurate.

192 Questions of law

The *approved examiner may:

(a) on his or her own initiative; or

(b) at the request of the person being examined, or the *DPP;

refer a question of law arising at the *examination to the court that made the *examination order.

193 Approved examiner may restrict publication of certain material

(1) The *approved examiner may:

(a) on his or her own initiative; or

(b) at the request of the person being examined, or the *DPP;

give directions preventing or restricting disclosure to the public of matters contained in answers given or documents produced in the course of the *examination.

(2) In deciding whether or not to give a direction, the *approved examiner is to have regard to:

(a) whether:

(i) an answer that has been or may be given; or

(ii) a document that has been or may be produced; or

(iii) a matter that has arisen or may arise;

during the *examination is of a confidential nature or relates to the commission, or to the alleged or suspected

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commission, of an offence against a law of the Commonwealth or a State or Territory; and

(b) any unfair prejudice to a person's reputation that would be likely to be caused unless the approved examiner gives the direction; and

(c) whether giving the direction is in the public interest; and

(d) any other relevant matter.

194 Protection of approved examiner etc.

(1) The *approved examiner has, in the performance of his or her duties as an approved examiner, the same protection and immunity as a Justice of the High Court.

(2) A *lawyer appearing at the *examination:

(a) on behalf of the person being examined; or

(b) as or on behalf of the *DPP;

has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

(3) Subject to this Act, the person being *examined:

(a) has the same protection; and

(b) in addition to the penalties provided by this Act, is subject to the same liabilities;

as a witness in proceedings in the High Court.

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Division 4—Offences

Note: In addition to the offences in this Division, there are other offences that may be relevant to examinations, such as sections 137.1 (false or misleading information) and 137.2 (false or misleading documents) of the *Criminal Code*.

195 Failing to attend an examination

A person is guilty of an offence if the person:

(a) is required by an *examination notice to attend an *examination; and

(b) refuses or fails to attend the examination at the time and place specified in the notice.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

196 Offences relating to appearance at an examination

(1) A person attending an *examination to answer questions or produce documents must not:

(a) refuse or fail to be sworn or to make an affirmation; or

(b) refuse or fail to answer a question that the *approved examiner requires the person to answer; or

(c) refuse or fail to produce at the examination a document specified in the *examination notice that required the person's attendance; or

(d) leave the examination before being excused by the approved examiner.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) Paragraph (1)(c) does not apply if the person complied with the notice in relation to production of the document to the extent that it was practicable to do so.

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Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

197 Privileged information

(1) Paragraph 196(1)(b) or (c) does not apply if, under:

(a) a law of the Commonwealth; or

(b) a law of the State or Territory in which the *examination takes place;

the person could not, in proceedings before a court, be compelled to answer the question or produce the document.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

(2) However, paragraph 196(1)(b) or (c) applies if the only reason or reasons why the person could not be so compelled are one or more of the following:

(a) answering the question or producing the document would tend to incriminate the person or to expose the person to a penalty;

(b) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of *legal professional privilege;

(ba) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of *professional confidential relationship privilege;

(c) the answer or document would, under a law of the Commonwealth, a State or a Territory relating to the law of evidence, be inadmissible in legal proceedings for a reason other than because:

(i) the answer would be privileged from being disclosed; or

(ii) the document would be privileged from being produced.

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(3) To avoid doubt, the following are not reasons why a person cannot, in proceedings before a court, be compelled to answer a question or produce a document:

(a) the person is contractually obliged not to disclose information, and answering the question or producing the document would disclose that information;

(b) the person is obliged under a law of a foreign country not to disclose information, and answering the question or producing the document would disclose that information.

197A Giving false or misleading answers or documents

A person commits an offence if:

(a) the person is attending an *examination; and

(b) the person gives an answer or produces a document in the examination; and

(c) the answer or document:

(i) is false or misleading; or

(ii) omits any matter or thing without which it is misleading.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

198 Admissibility of answers and documents

An answer given or document produced in an *examination is not admissible in evidence in civil or criminal proceedings against the person who gave the answer or produced the document except:

(a) in criminal proceedings for giving false or misleading information; or

(b) in proceedings on an application under this Act; or

(c) in proceedings ancillary to an application under this Act; or

(d) in proceedings for enforcement of a *confiscation order; or

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(e) in the case of a document—in civil proceedings for or in respect of a right or liability it confers or imposes.

199 Unauthorised presence at an examination

A person is guilty of an offence if the person:

(a) is present at an *examination; and

(b) is not entitled under subsection 188(3) to be present.

Penalty: 30 penalty units.

200 Breaching conditions on which records of statements are provided

A person is guilty of an offence if the person breaches a condition imposed under subsection 191(3) relating to a record given to the person under that subsection.

Penalty: 30 penalty units.

201 Breaching directions preventing or restricting publication

(1) A person is guilty of an offence if:

(a) the person publishes a matter contained in answers given or documents produced in the course of an *examination; and

(b) the publication is in contravention of a direction given under section 193 by the *approved examiner who conducted the examination.

Penalty: 30 penalty units.

(2) This section does not apply to disclosure of a matter:

(a) to obtain legal advice or legal representation in relation to the order; or

(b) for the purposes of, or in the course of, legal proceedings.

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Note: A defendant bears an evidential burden in relation to the matters in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

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Section 202

Part 3-2—Production orders

202 Making production orders

(1) A magistrate may make an order (a ***production order***) requiring a person to:

(a) produce one or more *property-tracking documents to an *authorised officer; or

(b) make one or more property-tracking documents available to an authorised officer for inspection.

(2) However:

(a) the magistrate must not make a *production order unless the magistrate is satisfied by information on oath that the person is reasonably suspected of having possession or control of such documents; and

(b) a production order cannot require documents that are not:

(i) in the possession or under the control of a body corporate; or

(ii) used or intended to be used in the carrying on of a business;

to be produced or made available to an *authorised officer; and

(c) a production order cannot require any accounting records used in the ordinary business of a *financial institution (including ledgers, day-books, cash-books and account books) to be produced to an *authorised officer.

(3) The *production order can only be made on application by an *authorised officer of an *enforcement agency.

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(4) The *authorised officer need not give notice of the application to any person.

(5) Each of the following is a ***property-tracking document***:

(a) a document relevant to identifying, locating or quantifying property of any person:

(i) who has been convicted of, charged with, or whom it is proposed to charge with, an *indictable offence; or

(ii) whom there are reasonable grounds to suspect of having engaged in conduct constituting a *serious offence;

(b) a document relevant to identifying or locating any document necessary for the transfer of property of such a person;

(c) a document relevant to identifying, locating or quantifying:

(i) *proceeds of an indictable offence, or an *instrument of an indictable offence, of which a person has been convicted or with which a person has been charged or is proposed to be charged; or

(ii) proceeds of a serious offence, or an instrument of a serious offence, that a person is reasonably suspected of having committed;

(ca) a document relevant to identifying, locating or quantifying property suspected of being:

(i) proceeds of an indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; or

(ii) an instrument of a serious offence;

whether or not the identity of the person who committed the offence is known;

(d) a document relevant to identifying or locating any document necessary for the transfer of property referred to in paragraph (c) or (ca);

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(e) a document relevant to identifying, locating or quantifying *literary proceeds in relation to an indictable offence or a *foreign indictable offence of which a person has been convicted or which a person is reasonably suspected of having committed;

(ea) a document relevant to identifying, locating or quantifying the property of a person, if it is reasonable to suspect that the total value of the person's *wealth exceeds the value of the person's wealth that was *lawfully acquired;

(eb) a document relevant to identifying or locating any document necessary for the transfer of property of such a person;

(f) a document that would assist in the reading or interpretation of a document referred to in paragraph (a), (b), (c), (ca), (d) (e), (ea) or (eb).

(6) It is sufficient for the purposes of subparagraph (5)(c)(ii) or paragraph (5)(ca) that the document is relevant to identifying, locating or quantifying *proceeds of some offence or other of a kind referred to in that provision. It does not need to be relevant to identifying, locating or quantifying proceeds of a particular offence.

203 Contents of production orders

(1) A *production order must:

(a) specify the nature of the documents required; and

(b) specify the place at which the person must produce the documents or make the documents available; and

(c) specify the time at which, or the times between which, this must be done; and

(ca) specify the form and manner in which those documents are to be produced; and

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(d) specify the name of the *authorised officer who, unless he or she inserts the name of another authorised officer in the order, is to be responsible for giving the order to the person; and

(e) if the order specifies that information about the order must not be disclosed—set out the effect of section 210 (disclosing existence or nature of production orders); and

(f) set out the effect of section 211 (failing to comply with an order).

(2) The time or times specified under paragraph (1)(c) must be:

(a) at least 14 days after the day on which the *production order is made; or

(b) if the magistrate who makes the production order is satisfied that it is appropriate, having regard to the matters specified in subsection (3), to specify an earlier time—at least 3 days after the day on which the production order is made.

(3) The matters to which the magistrate must have regard for the purposes of deciding whether an earlier time is appropriate under paragraph (2)(b) are:

(a) the urgency of the situation; and

(b) any hardship that may be caused to the person required by the *production order to produce documents or make documents available.

204 Powers under production orders

The *authorised officer may inspect, take extracts from, or make copies of, a document produced or made available under a *production order.

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Section 205

205 Retaining produced documents

(1) The *authorised officer may also retain a document produced under a *production order for as long as is necessary for the purposes of this Act.

(2) The person to whom a *production order is given may require the *authorised officer to:

(a) certify in writing a copy of the document retained to be a true copy and give the person the copy; or

(b) allow the person to do one or more of the following:

(i) inspect the document;

(ii) take extracts from the document;

(iii) make copies of the document.

206 Privilege against self-incrimination etc. does not apply

(1) A person is not excused from producing a document or making a document available under a *production order on the ground that:

(a) to do so would tend to incriminate the person or expose the person to a penalty; or

(b) producing the document or making it available would breach an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document; or

(c) producing the document or making it available would disclose information that is the subject of *legal professional privilege.

(2) However, in the case of a natural person, the document is not admissible in evidence in a *criminal proceeding against the person, except in proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false or misleading

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information or documents) in relation to producing the document or making it available.

207 Varying production orders

(1) A person who is required to produce a document to an *authorised officer under a *production order may apply to:

(a) the magistrate who made the order; or

(b) if that magistrate is unavailable—any other magistrate;

to vary the order so that it instead requires the person to make the document available for inspection.

(2) The magistrate may vary the *production order if satisfied that the document is essential to the person's business activities.

208 Jurisdiction of magistrates

A magistrate in a State or a *self-governing Territory may issue a *production order relating to one or more documents that are located in:

(a) that State or Territory; or

(b) another State or self-governing Territory if he or she is satisfied that there are special circumstances that make the issue of the order appropriate; or

(c) a *non-governing Territory.

209 Making false statements in applications

A person is guilty of an offence if:

(a) the person makes a statement (whether orally, in a document or in any other way); and

(b) the statement:

(i) is false or misleading; or

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(ii) omits any matter or thing without which the statement is misleading; and

(c) the statement is made in, or in connection with, an application for a *production order.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

210 Disclosing existence or nature of production orders

(1) A person is guilty of an offence if:

(a) the person is given a *production order; and

(b) the order specifies that information about the order must not be disclosed; and

(c) the person discloses the existence or nature of the order to another person.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) A person is guilty of an offence if:

(a) the person is given a *production order; and

(b) the order specifies that information about the order must not be disclosed; and

(c) the person discloses information to another person; and

(d) that other person could infer the existence or nature of the order from that information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(3) Subsections (1) and (2) do not apply if:

(a) the person discloses the information to an employee, *agent or other person in order to obtain a document that is required by the order in order to comply with it, and that other person is directed not to inform the person to whom the document relates about the matter; or

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(b) the disclosure is made to obtain legal advice or legal representation in relation to the order; or

(c) the disclosure is made for the purposes of, or in the course of, legal proceedings.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3): see subsection 13.3(3) of the *Criminal Code*.

211 Failing to comply with a production order

(1) A person is guilty of an offence if:

(a) the person is given a *production order in relation to a *property-tracking document; and

(b) the person fails to comply with the order; and

(c) the person has not been notified of sufficient compliance under subsection (2).

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

(2) A person is notified of sufficient compliance under this subsection if:

(a) the person gives an *authorised officer a statutory declaration stating that the person does not have possession or control of the document; and

(b) the officer notifies the person in writing that the statutory declaration is sufficient compliance with the *production order.

(3) It is a defence to an offence against subsection (1) if:

(a) the person fails to comply with the *production order only because the person does not produce one or more documents specified in the order within the time specified in the order; and

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(b) the person took all reasonable steps to produce the document or documents within that time; and

(c) the person produces the document or documents as soon as practicable after that time.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

212 Destroying etc. a document subject to a production order

A person is guilty of an offence if:

(a) the person destroys, defaces or otherwise interferes with a *property-tracking document; and

(b) a *production order is in force requiring the document to be produced or made available.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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Part 3-3—Notices to financial institutions

213 Giving notices to financial institutions

(1) An officer specified in subsection (3) may give a written notice to a *financial institution requiring the institution to provide to an *authorised officer any information or documents relevant to any one or more of the following:

(a) determining whether an *account is or was held by a specified person with the financial institution;

(b) determining whether a particular person is or was a signatory to an account;

(c) if a person holds an account with the institution, the current balance of the account;

(d) details of transactions on an account over a specified period of up to 6 months;

(e) details of any related accounts (including names of those who hold or held those accounts);

(ea) determining whether a *stored value card was issued to a specified person by a financial institution;

(eb) details of transactions made using such a card over a specified period of up to 6 months;

(f) a transaction conducted by the financial institution on behalf of a specified person.

(2) The officer must not issue the notice unless the officer reasonably believes that giving the notice is required:

(a) to determine whether to take any action under this Act; or

(b) in relation to proceedings under this Act.

(3) The officers who may give a notice to a *financial institution are:

(a) the Commissioner of the Australian Federal Police; or

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(b) a Deputy Commissioner of the Australian Federal Police; or

(c) a senior executive AFP employee (within the meaning of the *Australian Federal Police Act 1979*) who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this section; or

(ca) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*); or

(d) the Chief Executive Officer of the Australian Crime Commission; or

(e) an examiner (within the meaning of the *Australian Crime Commission Act 2002*); or

(f) the Commissioner of Taxation; or

(g) the Chief Executive Officer of Customs; or

(h) the Chairperson of the Australian Securities and Investments Commission.

214 Contents of notices to financial institutions

(1) The notice must:

(a) state that the officer giving the notice believes that the notice is required:

(i) to determine whether to take any action under this Act; or

(ii) in relation to proceedings under this Act;

(as the case requires); and

(b) specify the name of the *financial institution; and

(c) specify the kind of information or documents required to be provided; and

(d) specify the form and manner in which that information or those documents are to be provided, having regard to the record-keeping capabilities of the financial institution (to the extent known to the officer); and

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(e) specify that the information or documents must be provided no later than:

(i) 14 days after the giving of the notice; or

(ii) if the officer giving the notice believes that it is appropriate, having regard to the matters specified in subsection (2), to specify an earlier day that is at least 3 days after the giving of the notice—that earlier day; and

(f) if the notice specifies that information about the notice must not be disclosed—set out the effect of section 217 (disclosing existence or nature of a notice); and

(g) set out the effect of section 218 (failing to comply with a notice).

(2) The matters to which the officer giving the notice must have regard in deciding whether to specify an earlier day under subparagraph (1)(e)(ii) are:

(a) the urgency of the situation; and

(b) any hardship that may be caused to the *financial institution required by the notice to provide the information or documents.

215 Protection from suits etc. for those complying with notices

(1) No action, suit or proceeding lies against:

(a) a *financial institution; or

(b) an *officer, employee or *agent of the institution acting in the course of that person's employment or agency;

in relation to any action taken by the institution or person under a notice under section 213 or in the mistaken belief that action was required under the notice.

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(2) A *financial institution, or person who is an *officer, employee or *agent of a financial institution, who provides information under a notice under section 213 is taken, for the purposes of Part 10.2 of the *Criminal Code* (offences relating to money-laundering), not to have been in possession of that information at any time.

216 Making false statements in notices

A person is guilty of an offence if:

(a) the person makes a statement (whether orally, in a document or in any other way); and

(b) the statement:

(i) is false or misleading; or

(ii) omits any matter or thing without which the statement is misleading; and

(c) the statement is made in, or in connection with, a notice under section 213.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

217 Disclosing existence or nature of notice

A person is guilty of an offence if:

(a) the person is given a notice under section 213; and

(b) the notice specifies that information about the notice must not be disclosed; and

(c) the person discloses the existence or nature of the notice.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

218 Failing to comply with a notice

(1) A person is guilty of an offence if:

(a) the person is given a notice under section 213; and

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(b) the person fails to comply with the notice:

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

(2) It is a defence to an offence against subsection (1) if:

(a) the person fails to comply with the notice only because the person does not provide the information or a document within the period specified in the notice; and

(b) the person took all reasonable steps to provide the information or document within that period; and

(c) the person provides the information or document as soon as practicable after the end of that period.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

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Section 219

Part 3-4—Monitoring orders

219 Making monitoring orders

(1) A judge of a court of a State or Territory that has jurisdiction to deal with criminal matters on indictment may make an order (a ***monitoring order***) that a *financial institution provide information about transactions:

(a) conducted during a particular period through an *account held by a particular person with the institution; or

(b) made using a *stored value card issued to a particular person by a financial institution.

(2) The judge must not make a *monitoring order unless the judge is satisfied that there are reasonable grounds for suspecting that:

(a) the person who holds the *account or to whom the *stored value card was issued:

(i) has committed, or is about to commit, a *serious offence; or

(ii) was involved in the commission, or is about to be involved in the commission, of a serious offence; or

(iii) has *benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious offence; or

(b) the account or card is being used to commit an offence against Part 10.2 of the *Criminal Code* (money laundering).

(3) It does not matter, for the purposes of paragraph (2)(b), whether the person holding the account or to whom the card was issued commits or is involved in the offence against Part 10.2 of the *Criminal Code*.

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(4) The *monitoring order can only be made on application by an *authorised officer of an *enforcement agency.

220 Contents of monitoring orders

(1) A *monitoring order must:

(a) specify the name or names:

(i) in which the *account is believed to be held; or

(ii) of the person to whom the *stored value card was issued; and

(b) specify the kind of information that the *financial institution is required to provide; and

(c) specify the period during which the transactions must have occurred; and

(d) specify to which *enforcement agency the information is to be provided; and

(e) specify the form and manner in which the information is to be given; and

(f) if the order specifies that information about the order must not be disclosed—set out the effect of section 223 (disclosing existence or operation of an order); and

(g) set out the effect of section 224 (failing to comply with an order).

(2) The period mentioned in paragraph (1)(c) must:

(a) begin no earlier than the day on which notice of the *monitoring order is given to the *financial institution; and

(b) end no later than 3 months after the date of the order.

221 Protection from suits etc. for those complying with orders

(1) No action, suit or proceeding lies against:

(a) a *financial institution; or

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(b) an *officer, employee or *agent of the institution acting in the course of that person's employment or agency;

in relation to any action taken by the institution or person in complying with a *monitoring order or in the mistaken belief that action was required under the order.

(2) A *financial institution, or person who is an *officer, employee or *agent of a financial institution, who provides information under a *monitoring order is taken, for the purposes of Part 10.2 of the *Criminal Code* (offences relating to money-laundering), not to have been in possession of that information at any time.

222 Making false statements in applications

A person is guilty of an offence if:

(a) the person makes a statement (whether orally, in a document or in any other way); and

(b) the statement:

(i) is false or misleading; or

(ii) omits any matter or thing without which the statement is misleading; and

(c) the statement is made in, or in connection with, an application for a *monitoring order.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

223 Disclosing existence or operation of monitoring order

(1) A person is guilty of an offence if:

(a) the person discloses the existence or the operation of a *monitoring order to another person; and

(b) the disclosure is not to a person specified in subsection (4); and

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(c) the disclosure is not for a purpose specified in subsection (4).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(2) A person is guilty of an offence if:

(a) the person discloses information to another person; and

(b) the other person could infer the existence or operation of a *monitoring order from that information; and

(c) the disclosure is not to a person specified in subsection (4); and

(d) the disclosure is not for a purpose specified in subsection (4).

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(3) A person is guilty of an offence if:

(a) the person receives information relating to a *monitoring order in accordance with subsection (4); and

(b) the person ceases to be a person to whom information could be disclosed in accordance with subsection (4); and

(c) the person makes a record of, or discloses, the existence or the operation of the order.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

(4) A person may disclose the existence or the operation of a *monitoring order to the following persons for the following purposes:

(a) the head of the *enforcement agency specified under paragraph 220(1)(d) or an *authorised officer of that agency:

(i) for the purpose of performing that person's duties; or

(ii) for the purpose of, or for purposes connected with, legal proceedings; or

(iii) for purposes arising in the course of proceedings before a court;

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(b) the Chief Executive Officer of *AUSTRAC, or a member of the staff of AUSTRAC who is authorised by the Chief Executive Officer of AUSTRAC as a person who may be advised of the existence of a monitoring order:
  (i) for the purpose of performing that person's duties; or
  (ii) for the purpose of, or for purposes connected with, legal proceedings; or
  (iii) for purposes arising in the course of proceedings before a court;

(c) an *officer or *agent of the *financial institution for the purpose of ensuring that the order is complied with;

(d) a barrister or solicitor for the purpose of obtaining legal advice or representation in relation to the order;

(e) a person who is or forms part of an authority with one or more functions under this Act for the purpose of facilitating the authority's performance of its functions under this Act;

(f) a person who is or forms part of an authority of the Commonwealth, or of a State, Territory or foreign country, that has a function of investigating or prosecuting crimes against a law of the Commonwealth, State, Territory or country for the purpose of assisting in the prevention, investigation or prosecution of a crime against that law;

(g) a person in the Australian Taxation Office for the purpose of protecting public revenue.

224 Failing to comply with monitoring order

A person is guilty of an offence if:

(a) the person is given a *monitoring order; and

(b) the person fails to comply with the order.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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Section 224

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

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Part 3-5—Search and seizure

Division 1—Search warrants

Subdivision A—Issuing search warrants

225 Issuing a search warrant

(1) A magistrate may issue a warrant to search *premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, *tainted property or *evidential material.

(2) If an application for a *search warrant is made under section 229 (applying for warrants by telephone or other electronic means), this section applies as if subsection (1) referred to 48 hours rather than 72 hours.

(3) The *search warrant can only be issued on application by an *authorised officer of an *enforcement agency.

226 Additional contents of the information

(1) If the person applying for a warrant to search *premises suspects that it will be necessary to use firearms in executing the warrant, the person must state that suspicion, and the grounds for that suspicion, in the information.

(2) A person applying for a warrant to search *premises who has previously applied for a warrant relating to the same premises, must include particulars of the application and its outcome in the information.

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227 Contents of warrants

(1) A *search warrant must state:

(a) the nature of the property in respect of which action has been or could be taken under this Act; and

(b) the nature of that action; and

(c) a description of the *premises to which the warrant relates; and

(d) the kinds of *tainted property or *evidential material that is to be searched for under the warrant; and

(e) the name of the *authorised officer who is responsible for executing the warrant, unless he or she inserts the name of another authorised officer in the warrant; and

(f) the time at which the warrant expires (see subsection (2)); and

(g) whether the warrant may be executed at any time or only during particular hours; and

(h) that the warrant authorises the seizure of other things found at the premises in the course of the search that the *executing officer or a *person assisting believes on reasonable grounds to be:

(i) tainted property to which the warrant relates; or

(ii) evidential material in relation to property to which the warrant relates; or

(iii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an *indictable offence;

if he or she believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and

(i) whether the warrant authorises an *ordinary search or a *frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or a person

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assisting reasonably suspects that the person has any tainted property or evidential material in his or her possession.

(2) The time stated in the *search warrant under paragraph (1)(f) as the time at which the warrant expires must be a time that is not later than:

(a) if the application for the warrant is made under section 229 (telephone warrants)—48 hours after the warrant is issued; or

(b) otherwise, a time that is not later than the end of the seventh day after the day on which the warrant is issued.

Example: If a warrant is issued at 3 pm on a Monday, the expiry time specified must not be later than midnight on Monday in the following week.

(3) Paragraph (1)(f) does not prevent the issue of successive *search warrants in relation to the same *premises.

228 The things that are authorised by a search warrant

(1) A *search warrant authorises the *executing officer or a *person assisting:

(a) to enter the *premises and, if the premises are a *conveyance, to enter the conveyance, wherever it is; and

(b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and

(c) to search the premises for the kinds of *tainted property or *evidential material specified in the warrant, and to seize things of that kind found at the premises; and

(d) to seize other things found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be:

(i) tainted property to which the warrant relates; or

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(ii) evidential material in relation to property to which the warrant relates; or

(iii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an *indictable offence;

if he or she believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing an offence; and

(e) if the warrant so allows—to conduct an *ordinary search or a *frisk search of a person at or near the premises if the executing officer or a person assisting suspects on reasonable grounds that the person has any tainted property or evidential material in his or her possession.

(2) A *search warrant authorises the *executing officer to make things seized under the warrant available to officers of other *enforcement agencies if it is necessary to do so for the purpose of:

(a) investigating or prosecuting an offence to which the things relate; or

(b) recovering *proceeds of an offence or an *instrument of an offence.

Subdivision B—Applying for search warrants by telephone or other electronic means

229 Applying for search warrants by telephone or other electronic means

(1) An *authorised officer may apply to a magistrate for a *search warrant by telephone, fax or other electronic means:

(a) in an urgent case; or

(b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

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(2) An application under subsection (1):
(a) must include all information that would be required in an ordinary application for a *search warrant; and
(b) if necessary, may be made before the information is sworn.

(3) The magistrate may require:
(a) communication by voice to the extent that it is practicable in the circumstances; and
(b) any further information.

230 Issuing warrants by telephone etc.

(1) The magistrate may complete and sign the same form of *search warrant that would be issued under section 225 if satisfied that:
(a) a search warrant in the terms of the application should be issued urgently; or
(b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

(2) If the magistrate issues the *search warrant, he or she must inform the applicant, by telephone, fax or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.

(3) The applicant must then:
(a) complete a form of *search warrant in terms substantially corresponding to those given by the magistrate; and
(b) state on the form:
(i) the name of the magistrate; and
(ii) the day on which the warrant was signed; and
(iii) the time at which the warrant was signed.

(4) The applicant must give the magistrate:

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(a) the form of *search warrant completed by the applicant; and
(b) if the information was unsworn under paragraph 229(2)(b)—the sworn information;

by the end of the day after whichever first occurs:

(c) the warrant expires; or
(d) the warrant is executed.

(5) The magistrate must attach the form of *search warrant completed by the magistrate to the documents provided under subsection (4).

231 Unsigned telephone warrants in court proceedings

If:

(a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a *search warrant issued under this Subdivision was duly authorised; and
(b) the form of search warrant signed by the magistrate is not produced in evidence;

the court must assume that the exercise of the power was not duly authorised unless the contrary is proved.

232 Offence for stating incorrect names in telephone warrants

A person is guilty of an offence if:

(a) the person states a name of a magistrate in a document; and
(b) the document purports to be a form of *search warrant under section 230; and
(c) the name is not the name of the magistrate that issued the warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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233 Offence for unauthorised form of warrant

A person is guilty of an offence if:

(a) the person states a matter in a form of *search warrant under section 230; and

(b) the matter departs in a material particular from the form authorised by the magistrate.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

234 Offence for execution etc. of unauthorised form of warrant

A person is guilty of an offence if:

(a) the person executes a document or presents a document to a person; and

(b) the document purports to be a form of *search warrant under section 230; and

(c) the document:

(i) has not been approved by a magistrate under that section; or

(ii) departs in a material particular from the terms authorised by the magistrate under that section.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

235 Offence for giving unexecuted form of warrant

A person is guilty of an offence if:

(a) the person gives a magistrate a form of *search warrant under section 230; and

(b) the document is not the form of *search warrant that the person executed.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Subdivision C—Executing search warrants

236 Warrants that must be executed only during particular hours

A *search warrant that states that it may be executed only during particular hours must not be executed outside those hours.

237 Restrictions on personal searches

(1) A *search warrant cannot authorise a *strip search or a search of a person's body cavities.

(2) If a *search warrant authorises an *ordinary search or a *frisk search of a person:

(a) a different search from the one authorised must not be done under the warrant; and

(b) the search must, if practicable, be conducted by a person of the same sex as the person being searched.

(3) A person who is not an *authorised officer but who has been authorised by the relevant *executing officer to assist in executing a *search warrant must not take part in searching a person.

238 Availability of assistance and use of force in executing a warrant

Executing officers

(1) In executing a *search warrant, an *executing officer may obtain such assistance and use such force against persons and things as is necessary and reasonable in the circumstances.

Authorised officers

(2) In executing a *search warrant, an *authorised officer who is assisting in executing the warrant may use such force against

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persons and things as is necessary and reasonable in the circumstances.

Persons who are not authorised officers

(3) In executing a *search warrant, a person who is not an *authorised officer but who has been authorised to assist in executing the warrant may use such force against things as is necessary and reasonable in the circumstances.

239 Announcement before entry

(1) An *executing officer must, before any person enters *premises under a *search warrant:

(a) announce that he or she is authorised to enter the premises; and

(b) give any person at the premises an opportunity to allow entry to the premises; and

(c) if the occupier of the premises, or another person who apparently represents the occupier, is present at the premises—identify himself or herself to that person.

(2) The *executing officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the *premises is required to ensure:

(a) the safety of a person (including an *authorised officer); or

(b) that the effective execution of the warrant is not frustrated.

240 Details of warrant to be given to occupier etc.

(1) If the occupier of the *premises, or another person who apparently represents the occupier, is present at premises when a *search warrant is being executed, the *executing officer or a *person assisting must make available to the person:

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(a) a copy of the warrant; and
(b) a document setting out the rights and obligations of the person.

(2) If a person is searched under a *search warrant, the *executing officer or a *person assisting must show the person a copy of the warrant.

(3) The copy of the warrant need not include the signature of the magistrate or the seal of the relevant court.

241 Occupier entitled to be present during search

(1) If an occupier of *premises, or another person who apparently represents the occupier, is present at the premises while a *search warrant is being executed, the occupier or person has the right to observe the search being conducted.

(2) However, the right ceases if:
(a) the person impedes the search; or
(b) the person is under arrest, and allowing the person to observe the search being conducted would interfere with the objectives of the search.

(3) This section does not prevent 2 or more areas of the *premises being searched at the same time.

242 Specific powers available to officers executing the warrant

(1) In executing a *search warrant, the *executing officer or a *person assisting may take photographs (including video recordings) of the *premises or of things at the premises:
(a) for a purpose incidental to the execution of the warrant; or
(b) if the occupier of the premises consents in writing.

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(2) The *executing officer and a *person assisting may complete the execution of a *search warrant, provided that the warrant is still in force, after all of them temporarily leave the *premises:
  (a) for not more than one hour; or
  (b) for a longer period if the occupier of the premises consents in writing.

(3) The execution of a *search warrant may be completed if:
  (a) the execution is stopped by an order of a court; and
  (b) the order is later revoked or reversed on appeal; and
  (c) the warrant is still in force.

243 Use of equipment to examine or process things

(1) The *executing officer or *person assisting may bring to the *premises any equipment reasonably necessary to examine or process a thing found at the premises in order to determine whether it may be seized under the *search warrant in question.

(2) The *executing officer or a *person assisting may operate equipment already at the *premises to carry out such an examination or processing if he or she believes on reasonable grounds that:
  (a) the equipment is suitable for this purpose; and
  (b) the examination or processing can be carried out without damaging the equipment or thing.

244 Moving things to another place for examination or processing

(1) A thing found at the *premises may be moved to another place for examination or processing in order to determine whether it may be seized under a *search warrant if:
  (a) both of the following apply:

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(i) there are reasonable grounds to believe that the thing contains or constitutes *tainted property or *evidential material;

(ii) it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance; or

(b) the occupier of the premises consents in writing.

(2) The thing may be moved to another place for examination or processing for no longer than 72 hours.

(3) An *executing officer may apply to a magistrate for an extension of that time if the officer believes on reasonable grounds that the thing cannot be examined or processed within 72 hours.

(4) The *executing officer must give notice of the application to the occupier of *premises, and the occupier is entitled to be heard in relation to the application.

(5) If a thing is moved to another place under subsection (1), the *executing officer must, if it is practicable to do so:

(a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and

(b) allow the occupier or his or her representative to be present during the examination or processing.

245 Use of electronic equipment at premises

(1) The *executing officer or a *person assisting may operate electronic equipment at the *premises to access *data (including data not held at the premises) if he or she believes on reasonable grounds that:

(a) the data might constitute *evidential material; and

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(b) the equipment can be operated without damaging it.

Note: An executing officer can obtain an order requiring a person with knowledge of a computer or computer system to provide assistance: see section 246.

(2) If the *executing officer or *person assisting believes that any *data accessed by operating the electronic equipment might constitute *evidential material, he or she may:

(a) copy the data to a disk, tape or other similar device brought to the *premises; or

(b) if the occupier of the premises agrees in writing—copy the data to a disk, tape or other similar device at the premises;

and take the device from the premises.

(3) The *executing officer or a *person assisting may do the following things if he or she finds that any *evidential material is accessible using the equipment:

(a) seize the equipment and any disk, tape or other similar device;

(b) if the material can, by using facilities at the *premises, be put in documentary form—operate the facilities to put the material in that form and seize the documents so produced.

(4) An *authorised officer may seize equipment under paragraph (3)(a) only if:

(a) it is not practicable to copy the *data as mentioned in subsection (2) or to put the material in documentary form as mentioned in paragraph (3)(b); or

(b) possession of the equipment by the occupier could constitute an offence.

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246 Person with knowledge of a computer or a computer system to assist access etc.

(1) An *executing officer may apply to a magistrate for an order requiring a specified person to provide any information or assistance that is reasonable or necessary to allow the officer to do one or more of the following:

(a) access *data held in or accessible from a computer that is on the *premises;

(b) copy the data to a *data storage device;

(c) convert the data into documentary form.

(2) The magistrate may make an order if satisfied that:

(a) there are reasonable grounds for suspecting that *evidential material is accessible from the computer; and

(b) the specified person is:

(i) reasonably suspected of possessing, or having under his or her control, *tainted property or evidential material; or

(ii) the owner or lessee of the computer; or

(iii) an employee of the owner or lessee of the computer; and

(c) the specified person has knowledge of:

(i) the computer or a computer network of which the computer forms a part; or

(ii) measures applied to protect *data held in or accessible from the computer.

(3) A person is guilty of an offence if the person fails to comply with the order.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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247 Securing electronic equipment

(1) If the *executing officer or a *person assisting believes on reasonable grounds that:

(a) *evidential material may be accessible by operating electronic equipment at the *premises; and

(b) expert assistance is required to operate the equipment; and

(c) if he or she does not take action, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise.

(2) The *executing officer or a *person assisting must give notice to the occupier of the *premises of:

(a) his or her intention to secure equipment; and

(b) the fact that the equipment may be secured for up to 24 hours.

(3) The equipment may be secured:

(a) for a period not exceeding 24 hours; or

(b) until the equipment has been operated by the expert;

whichever happens first.

(4) If the *executing officer or a *person assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to the magistrate to extend the period.

(5) The *executing officer or a *person assisting must notify the occupier of the *premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

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(6) The provisions of this Division relating to the issue of *search warrants apply, with such modifications as are necessary, to the issuing of an extension.

248 Compensation for damage to electronic equipment

(1) This section applies if:

(a) damage is caused to equipment as a result of it being operated as mentioned in section 243 or 245; or

(b) the *data recorded on the equipment is damaged or programs associated with its use are damaged or corrupted;

because:

(c) insufficient care was exercised in selecting the person who was to operate the equipment; or

(d) insufficient care was exercised by the person operating the equipment.

(2) The Commonwealth must pay the owner of the equipment, or the user of the *data or programs, such reasonable compensation for the damage or corruption as they agree on.

(3) However, if the owner or user and the Commonwealth fail to agree, the owner or user may institute proceedings in the Federal Court of Australia for such reasonable amount of compensation as the Court determines.

(4) In determining the amount of compensation payable, regard is to be had to whether the occupier of the *premises and his or her employees and *agents, if they were available at the time, provided any appropriate warning or guidance on the operation of the equipment.

(5) Compensation is payable out of money appropriated by the Parliament.

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(6) For the purposes of subsection (1), damage to *data includes damage by erasure of data or addition of other data.

249 Copies of seized things to be provided

(1) The occupier of the *premises, or another person who apparently represents the occupier and who is present when a *search warrant is executed, may request an *authorised officer who seizes:

(a) a document, film, computer file or other thing that can be readily copied; or

(b) a storage device the information in which can be readily copied;

to give the occupier or other person a copy of the thing or the information.

(2) The officer must do so as soon as practicable after the seizure.

(3) However, the officer is not required to do so if:

(a) the thing was seized under subsection 245(2) or paragraph 245(3)(b) (use of electronic equipment at premises); or

(b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence.

250 Providing documents after execution of a search warrant

If:

(a) documents were on, or accessible from, the *premises of a *financial institution at the time when a *search warrant relating to those premises was executed; and

(b) those documents were not able to be located at that time; and

(c) the financial institution provides them to the *executing officer as soon as practicable after the execution of the warrant;

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then the documents are taken to have been seized under the warrant.

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Division 2—Stopping and searching conveyances

251 Searches without warrant in emergency situations

(1) This section applies if an *authorised officer suspects, on reasonable grounds, that:

(a) a thing constituting *tainted property or *evidential material is in or on a *conveyance; and

(b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being concealed, lost or destroyed; and

(c) it is necessary to exercise the power without the authority of a *search warrant because the circumstances are serious and urgent.

(2) The officer may:

(a) stop and detain the *conveyance; and

(b) search the conveyance and any container in or on the conveyance, for the thing; and

(c) seize the thing if he or she finds it there.

(3) If, in the course of searching for the thing, the officer finds another thing constituting *tainted property or *evidential material, the officer may seize that thing if he or she suspects, on reasonable grounds, that:

(a) it is necessary to seize it in order to prevent its concealment, loss or destruction; and

(b) it is necessary to seize it without the authority of a *search warrant because the circumstances are serious and urgent.

(4) The officer must exercise his or her powers subject to section 252.

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252 How an authorised officer exercises a power under section 251

When an *authorised officer exercises a power under section 251 in relation to a *conveyance, he or she:

(a) may use such assistance as is necessary; and

(b) must search the conveyance in a public place or in some other place to which members of the public have ready access; and

(c) must not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and

(d) may use such force as is necessary and reasonable in the circumstances, but must not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless:

(i) the person (if any) apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or

(ii) it is not possible to give that person such an opportunity.

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Division 3—Dealing with things seized

Subdivision A—General requirements

253 Receipts for things seized under warrant

(1) The *executing officer or a *person assisting must provide a receipt for:

(a) a thing seized under a warrant; or

(b) a thing moved under subsection 244(1) (moving things to another place for examination or processing); or

(c) a thing seized under section 251 (searches without warrant in emergency situations).

(2) One receipt may cover 2 or more things.

254 Responsibility for things seized

(1) If a thing is seized under a *search warrant or under section 251, the *responsible custodian of the thing must:

(a) arrange for the thing to be kept until it is dealt with in accordance with another provision of this Act; and

(b) ensure that all reasonable steps are taken to preserve the thing while it is so kept.

(2) The ***responsible custodian*** of a thing that is seized under a *search warrant or under section 251 is the head of the *enforcement agency of the *authorised officer who is responsible for executing the warrant, or who seized the thing under section 251.

255 Effect of obtaining forfeiture orders

If:

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(a) a thing is seized under a *search warrant or under section 251; and

(b) while the thing is in the possession of the responsible custodian, a *forfeiture order is made covering the thing;

the *responsible custodian must deal with the thing as required by the order.

Subdivision B—Things seized as evidence

256 Returning seized things

(1) If:

(a) a thing is seized under a *search warrant or under section 251; and

(b) it is seized on the ground that a person believes on reasonable grounds that it is:

(i) *evidential material; or

(ii) evidential material (within the meaning of the *Crimes Act 1914*) relating to an *indictable offence; and

(c) either:

(i) the reason for the thing's seizure no longer exists or it is decided that the thing is not to be used in evidence; or

(ii) if the thing was seized under section 251—the period of 60 days after the thing's seizure ends;

the *authorised officer responsible for executing the warrant, or who seized the thing under section 251, must take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it.

(2) However, the *authorised officer does not have to take those steps if:

(a) in a subparagraph (1)(c)(ii) case:

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(i) proceedings in respect of which the thing might afford evidence have been instituted before the end of the 60 days and have not been completed (including an appeal to a court in relation to those proceedings); or

(ii) there is an order in force under section 258 (retaining things for a further period); or

(b) in any case—the authorised officer is otherwise authorised (by a law, or an order of a court, of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory) to retain, destroy or dispose of the thing; or

(c) in any case—the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership.

257 Authorised officer may apply for a thing to be retained for a further period

(1) This section applies if an *authorised officer has seized a thing under this Part and proceedings in respect of which the thing might afford evidence have not commenced before the end of:

(a) 60 days after the seizure; or

(b) a period previously specified in an order of a magistrate under this section.

(2) The *authorised officer may apply to a magistrate for an order that the officer may retain the thing for a further period.

(3) Before making the application, the *authorised officer must:

(a) take reasonable steps to discover whose interests would be affected by the retention of the thing; and

(b) if it is practicable to do so, notify each person whom the officer believes to be such a person of the proposed application.

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258 Magistrate may order that the thing be retained

(1) The magistrate may order that the *authorised officer who made an application under section 257 may retain the thing if the magistrate is satisfied that it is necessary for the officer to do so for the purpose of initiating or conducting proceedings under this Act.

(2) The order must specify the period for which the officer may retain the thing.

Subdivision C—Things seized on other grounds

259 Return of seized property to third parties

(1) A person who claims an *interest in a thing that has been seized under a *search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is *tainted property may apply to a court for an order that the thing be returned to the person.

(2) The court must be:

(a) if the thing was seized under a *search warrant—a court of the State or Territory in which the warrant was issued that has *proceeds jurisdiction; or

(b) if the thing was seized under section 251—a court of the State or Territory in which the thing was seized that has proceeds jurisdiction.

(3) The court must order the *responsible custodian of the thing to return the thing to the applicant if the court is satisfied that:

(a) the applicant is entitled to possession of the thing; and

(b) the thing is not *tainted property in relation to the relevant offence; and

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(c) the person in respect of whose suspected commission of, or conviction for, an offence the thing was seized has no *interest in the thing.

(4) If the court makes such an order, the *responsible custodian of the thing must arrange for the thing to be returned to the applicant.

260 Return of seized property if applications are not made for restraining orders or forfeiture orders

(1) If:

(a) a thing has been seized under a *search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is *tainted property; and

(b) at the time when the thing was seized, an application had not been made for a *restraining order or a *forfeiture order that would cover the thing; and

(c) such an application is not made during the period of 14 days after the day on which the thing was seized;

the *responsible custodian of the thing must arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after the end of that period.

(2) However, this section does not apply to a thing to which section 261 applies.

261 Effect of obtaining restraining orders

(1) If:

(a) a thing has been seized under a *search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is *tainted property; and

(b) but for this subsection, the *responsible custodian of the thing would be required to arrange for the thing to be returned to a

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person as soon as practicable after the end of a particular period; and

(c) before the end of that period, a *restraining order is made covering the thing;

then:

(d) if the restraining order directs the *Official Trustee to take custody and control of the thing—the responsible custodian must arrange for the thing to be given to the Official Trustee in accordance with the restraining order; or

(e) if the court that made the restraining order has made an order under subsection (3) in relation to the thing—the responsible custodian must arrange for the thing to be kept until it is dealt with in accordance with another provision of this Act.

(2) If:

(a) a thing has been seized under a *search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is *tainted property; and

(b) a *restraining order is made in relation to the thing; and

(c) at the time when the restraining order is made, the thing is in the possession of the responsible custodian;

the *responsible custodian of the thing may apply to the court that made the restraining order for an order that the responsible custodian retain possession of the property.

(3) The court may, if satisfied that there are reasonable grounds for believing that the property may afford evidence as to the commission of an offence, make an order that the responsible custodian may retain the property for so long as the property is required as evidence as to the commission of that offence.

(4) A witness who is giving evidence relating to an application for an order under subsection (2) is not required to answer a question or produce a document if the court is satisfied that the answer or

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document may prejudice the investigation of, or the prosecution of a person for, an offence.

262 Effect of refusing applications for restraining orders or forfeiture orders

If:

(a) a thing has been seized under a *search warrant, or under section 251, on the ground that a person believes on reasonable grounds that it is *tainted property; and

(b) an application is made for a *restraining order or a *forfeiture order that would cover the thing; and

(c) the application is refused; and

(d) at the time when the application is refused, the thing is in the possession of the *responsible custodian;

the *responsible custodian must arrange for the thing to be returned to the person from whose possession it was seized as soon as practicable after the refusal.

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Division 4—General

263 Application of Part

This Part is not intended to limit or exclude the operation of another law of the Commonwealth, a State or a Territory relating to:

(a) the search of persons or *premises; or

(b) the stopping, detaining or searching of *conveyances; or

(c) the seizure of things.

264 Law relating to legal professional privilege not affected

This Part does not affect the law relating to *legal professional privilege.

265 Jurisdiction of magistrates

A magistrate in a State or a *self-governing Territory may issue a *search warrant in:

(a) that State or Territory; or

(b) another State or self-governing Territory if he or she is satisfied that there are special circumstances that make the issue of the warrant appropriate; or

(c) a *non-governing Territory.

266 Offence for making false statements in applications

A person is guilty of an offence if:

(a) the person makes a statement (whether orally, in a document or in any other way); and

(b) the statement:

(i) is false or misleading; or

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(ii) omits any matter or thing without which the statement is misleading; and

(c) the statement is made in, or in connection with, an application for a *search warrant.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

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Part 3-6—Disclosure of information

266A Disclosure

(1) This section applies if a person obtains information:

(a) as a direct result of:

(i) the person being given a sworn statement under an order made under paragraph 39(1)(ca), (d) or (da); or

(ii) the exercise of a power (by the person or someone else), or performance (by the person) of a function, under Part 3-1, 3-2, 3-3, 3-4 or 3-5; or

(b) as a result of a disclosure, or a series of disclosures, under this section.

(2) The person may disclose the information to an authority described in an item of the following table for a purpose described in that item if the person believes on reasonable grounds that the disclosure will serve that purpose:

Recipients and purposes of disclosure

Item	Authority to which disclosure may be made	Purpose for which disclosure may be made
1	Authority with one or more functions under this Act	Facilitating the authority's performance of its functions under this Act
2	Authority of the Commonwealth, or of a State or Territory, that has a function of investigating or prosecuting offences against a law of the Commonwealth, State or Territory	Assisting in the prevention, investigation or prosecution of an offence against that law that is punishable on conviction by imprisonment for at least 3 years or for life

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Recipients and purposes of disclosure		
Item	**Authority to which disclosure may be made**	**Purpose for which disclosure may be made**
2A	Authority of a foreign country that has a function of investigating or prosecuting offences against a law of the country	Assisting in the prevention, investigation or prosecution of an offence against that law constituted by conduct that, if it occurred in Australia, would constitute an offence against a law of the Commonwealth, or of a State or Territory, punishable on conviction by imprisonment for at least 3 years or for life
3	Australian Taxation Office	Protecting public revenue

Limits on use of information disclosed

(3) In civil or *criminal proceedings against a person who gave an answer or produced a document in an *examination, none of the following that is disclosed under this section is admissible in evidence against the person:

(a) the answer or document;

(b) information contained in the answer or document.

(4) Subsection (3) does not apply in:

(a) *criminal proceedings for giving false or misleading information; or

(b) proceedings on an application under this Act; or

(c) proceedings ancillary to an application under this Act; or

(d) proceedings for enforcement of a *confiscation order; or

(e) civil proceedings for or in respect of a right or liability the document confers or imposes.

Note: Subsections (3) and (4) reflect section 198.

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(5) In a *criminal proceeding against a person who produced or made available a document under a *production order, none of the following that is disclosed under this section is admissible in evidence against the person:

(a) the document;

(b) information contained in the document.

(6) Subsection (5) does not apply in a proceeding under, or arising out of, section 137.1 or 137.2 of the *Criminal Code* (false or misleading information or documents) in relation to producing the document or making it available.

Note: Subsections (5) and (6) reflect subsection 206(2).

(7) To avoid doubt, this section does not affect the admissibility in evidence of any information, document or thing obtained as an indirect consequence of a disclosure under this section.

Relationship with subsection 228(2)

(8) To avoid doubt:

(a) this section does not limit subsection 228(2) (about a *search warrant authorising the *executing officer to make things seized under the warrant available to officers of other *enforcement agencies); and

(b) subsection 228(2) does not limit this section.

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Chapter 4—Administration

Part 4-1—Powers and duties of the Official Trustee

Division 1—Preliminary

267 Property to which the Official Trustee's powers and duties under this Part apply

(1) The powers conferred on the *Official Trustee under this Part may be exercised, and the duties imposed on the Official Trustee under this Part are to be performed, in relation to property if a court orders the Official Trustee to take custody and control of the property under section 38.

(2) This property is ***controlled property***.

(3) However, powers conferred on the *Official Trustee under Division 4 may be exercised, and the duties imposed on the Official Trustee under Division 4 are to be performed, in relation to any property that is the subject of a *restraining order, whether or not the property is *controlled property.

267A Additional property to which the Official Trustee's powers and duties under Division 3 apply

(1) The powers conferred on the *Official Trustee under Division 3 may be exercised, and the duties imposed on the Official Trustee under Division 3 are to be performed, in relation to property that, under paragraph 278(2)(d), may be disposed of to pay, under Part 4-2, a *legal aid commission's costs.

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(2) Without limiting the definition of ***controlled property*** in section 267, for the purposes of Division 3 this property is ***controlled property***.

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Division 2—Obtaining information about controlled property

268 Access to books

(1) The *Official Trustee, or another person authorised in writing by the Official Trustee to exercise powers under this section, may, for the purpose of:

(a) ensuring that all the *controlled property is under the Official Trustee's custody and control; or

(b) ensuring the effective exercise of the Official Trustee's powers or the performance of the Official Trustee's duties, under this Part in relation to the controlled property;

require:

(c) the *suspect in relation to the *restraining order covering the controlled property; or

(d) any other person entitled to, or claiming an *interest in, the controlled property;

to produce specified *books in accordance with this section.

(2) The requirement must be by written notice.

(3) The requirement must be to produce the *books:

(a) to a specified person; and

(b) at a specified place, and within a specified period or at a specified time on a specified day, being a place, and a period or a time and day, that are reasonable in the circumstances.

(4) The *books must be:

(a) in the possession of the person of whom the requirement is made; and

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(b) in the opinion of the *Official Trustee or other person making the requirement, relevant for the purpose for which they are required.

(5) If the *books are so produced, the *Official Trustee or other person making the requirement, or the specified person:

(a) may make copies of, or take extracts from, the books; and

(b) may require:

(i) the person required under this section to produce the books; or

(ii) any other person who was a party to the compilation of the books;

to explain to the best of his or her knowledge and belief any matter about the compilation of the books or to which the books relate.

(6) If the *books are not so produced, the *Official Trustee or other person making the requirement, or the specified person, may require the person required under this section to produce the books to state, to the best of his or her knowledge or belief:

(a) where the books may be found; and

(b) who last had possession, custody or control of the books and where that person may be found.

(7) The production of *books under this section does not prejudice a lien that a person has on the books.

269 Suspect to assist Official Trustee

The *suspect in relation to the *restraining order covering the *controlled property must, unless excused by the *Official Trustee or prevented by illness or other sufficient cause:

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(a) give to the Official Trustee such *books (including books of an associated entity (within the meaning of the *Bankruptcy Act 1966*) of the person) that:
  (i) are in the person's possession; and
  (ii) relate to any of the person's *affairs;
  as the Official Trustee requires; and
(b) attend the Official Trustee whenever the Official Trustee reasonably requires; and
(c) give to the Official Trustee such information about any of the person's conduct and examinable affairs as the Official Trustee requires; and
(d) give to the Official Trustee such assistance as the Official Trustee reasonably requires, in connection with the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part in relation to the controlled property.

270 Power to obtain information and evidence

(1) The *Official Trustee, by written notice given to any person, may require the person:
  (a) to give to the Official Trustee such information as the Official Trustee requires for the purposes of the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part; and
  (b) to attend before the Official Trustee, or person authorised in writing by the Official Trustee to exercise powers under this paragraph, and:
    (i) give evidence; and
    (ii) produce all *books in the possession of the person notified;

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relating to any matters connected with the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part.

(2) The *Official Trustee or person authorised under paragraph (1)(b):

(a) may require the information or evidence to be given on oath, and either orally or in writing; and

(b) for that purpose may administer an oath.

271 Privilege against self-incrimination

(1) A person is not excused from giving information or producing a document under this Part on the ground that to do so would tend to incriminate the person or expose the person to a penalty.

(2) However, in the case of a natural person:

(a) the information given; or

(b) the giving of the document; or

(c) any information, document or thing obtained as a direct or indirect consequence of giving the information or document;

is not admissible in evidence in *criminal proceedings against the natural person, except proceedings under, or arising out of, section 137.1 or 137.2 of the *Criminal Code 1995* (false and misleading information and documents) in relation to giving the information or document.

272 Offences relating to exercise of powers under section 268 or 269

(1) A person is guilty of an offence if the person refuses or fails to comply with a requirement under section 268 or 269.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

(2) A person is guilty of an offence if the person obstructs or hinders a person in the exercise of a power under section 268 or 269.

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Penalty: Imprisonment for 6 months or 30 penalty units, or both.

273 Failure to provide information

A person is guilty of an offence if the person refuses or fails to comply with a notice given to the person under paragraph 270(1)(a).

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

274 Failure of person to attend

A person is guilty of an offence if:

(a) the person is required by a notice under paragraph 270(1)(b) to attend before the *Official Trustee or a person authorised under that paragraph; and

(b) the person:

(i) fails to attend as required by the notice; or

(ii) fails to appear and report from day to day, without being excused or released from further attendance by the Official Trustee or person authorised under that paragraph, as the case may be.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

275 Refusal to be sworn or give evidence etc.

A person is guilty of an offence if:

(a) the person attends before the *Official Trustee, or a person authorised under paragraph 270(1)(b), as required by a notice under that paragraph; and

(b) the person refuses or fails:

(i) to be sworn or to make an affirmation; or

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(ii) to answer a question that the person is required to answer by the Official Trustee or a person authorised under that paragraph, as the case may be; or

(iii) to produce any books that the person is required by the notice to produce.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

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Division 3—Dealings relating to controlled property

276 Preserving controlled property

The *Official Trustee may do anything that is reasonably necessary for the purpose of preserving the *controlled property, including the following:

(a) becoming a party to any civil proceedings affecting the property;

(b) ensuring that the property is insured;

(c) realising or otherwise dealing with any of the property that is securities or investments;

(d) if any of the property is a business:

(i) employing, or terminating the employment of, persons in the business; or

(ii) doing anything necessary or convenient to carry on the business on a sound commercial basis.

277 Rights attaching to shares

The *Official Trustee may exercise the rights attaching to any of the *controlled property that is shares as if the Official Trustee were the registered holder of the shares, to the exclusion of the registered holder.

278 Destroying or disposing of property

(1) The *Official Trustee may destroy the *controlled property if:

(a) it is in the public interest to do so; or

(b) it is required for the health or safety of the public.

(2) The *Official Trustee may dispose of the *controlled property, by sale or other means:

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(a) with the agreement of all parties with an *interest in the property; or

(b) if the property is likely to lose value in the opinion of the Official Trustee; or

(c) if, in the Official Trustee's opinion, the cost of controlling the property until the Official Trustee finally deals with it is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with; or

(d) if, in the opinion of the Official Trustee, the disposal of the property or part of the property is necessary to pay, under Part 4-2, a *legal aid commission's costs.

279 Notice of proposed destruction or disposal

(1) The *Official Trustee must give written notice of the proposed destruction or disposal to:

(a) the owner of the *controlled property; and

(b) any other person whom the Official Trustee has reason to believe may have an *interest in the property.

(2) A person who has been so notified may object in writing to the *Official Trustee within 14 days of receiving the notice.

(3) However, the person may object to the disposal of the *controlled property for the reason set out in paragraph 278(2)(d) only if:

(a) the value of the controlled property exceeds the total amount of the money payable to the *legal aid commission in question; and

(b) the person and the *Official Trustee have failed to agree on which item or items of, or which portion of, the controlled property should be disposed of.

(4) An objection to which subsection (3) applies must:

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(a) relate only to which item or items of, or which portion of, the *controlled property should be disposed of; and

(b) specify the item or items of, or the portion of, the controlled property that the person does not object to the *Official Trustee disposing of.

280 Procedure if person objects to proposed destruction or disposal

(1) If the *Official Trustee wishes to continue with a proposed destruction or disposal that has been objected to, the Official Trustee must apply to the court that made the *restraining order covering the *controlled property for an order that the Official Trustee may destroy or dispose of the property.

(2) The court must make an order to destroy the *controlled property if:

(a) it is in the public interest to do so; or

(b) it is required for the health or safety of the public.

(3) The court may take into account any matters it sees fit in determining whether it is in the public interest to destroy the *controlled property, including:

(a) the use to which the property would be put if it were sold; and

(b) whether the cost of restoring the property to a saleable condition would exceed its realisable value; and

(c) whether the cost of sale would exceed its realisable value; and

(d) whether the sale of the property would otherwise be legal.

(4) The court may make an order to dispose of the *controlled property if, in the court's opinion:

(a) the property is likely to lose value; or

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(b) the cost of controlling the property until it is finally dealt with by the *Official Trustee is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with.

(4A) The court must make an order to dispose of the *controlled property, or a specified item or items of or a specified portion of the property, if in the court's opinion the disposal is necessary to pay, under Part 4-2, a *legal aid commission's costs.

(5) The court may also:

(a) order that a specified person bear the costs of controlling the *controlled property until it is finally dealt with by the *Official Trustee; or

(b) order that a specified person bear the costs of an objection to a proposed destruction or disposal of the property.

281 Proceeds from sale of property

Amounts realised from any sale of the *controlled property under section 278:

(a) are taken to be covered by the *restraining order that covered the property; and

(b) if the restraining order covered the property on the basis that the property was *proceeds of an offence or an *instrument of an offence to which the order relates—continue to be proceeds of that offence or an instrument of that offence.

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Division 4—Discharging pecuniary penalty orders and literary proceeds orders

282 Direction by a court to the Official Trustee in relation to certain restraining orders

(1) A court may, if subsection (2), (3) or (4) applies, direct the *Official Trustee to pay the Commonwealth, out of property that is subject to a *restraining order, an amount equal to:
  (a) the *penalty amount under a *pecuniary penalty order; or
  (b) the *literary proceeds amount under a *literary proceeds order.

(2) The court that makes the *pecuniary penalty order or *literary proceeds order may include such a direction in the order if:
  (a) the order is made against a person in relation to one or more offences; and
  (b) the *restraining order has already been made against that person in relation to that offence or one or more of those offences, or in relation to one or more *related offences.

(3) The court that makes the *restraining order may include such a direction in the order if:
  (a) the *pecuniary penalty order or *literary proceeds order has been made against a person in relation to one or more offences; and
  (b) the restraining order is subsequently made:
    (i) against that person in relation to that offence or one or more of those offences; or
    (ii) against property of another person in relation to which an order is in force under subsection 141(1) in relation to the pecuniary penalty order, or under subsection 168(1) in relation to the literary proceeds order.

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(4) The court that made the *pecuniary penalty order, the *literary proceeds order or the *restraining order may, on application by the *DPP, make the direction if:

(a) the pecuniary penalty order or literary proceeds order has been made against a person in relation to one or more offences; and

(b) the restraining order has been made:

(i) against that person in relation to that offence or one or more of those offences; or

(ii) against property of another person in relation to which an order is in force under subsection 141(1) in relation to the pecuniary penalty order, or under subsection 168(1) in relation to the literary proceeds order.

282A Direction by a court to the Official Trustee in relation to unexplained wealth orders

(1) A court may, if subsection (2), (3) or (4) applies, direct the *Official Trustee to pay the Commonwealth, out of property that is subject to a *restraining order under section 20A, an amount equal to the *unexplained wealth amount made under an *unexplained wealth order in relation to a person.

(2) The court that makes the *unexplained wealth order may include such a direction in the order if the *restraining order:

(a) has already been made against the person; and

(b) relates to property that constitutes part of the person's *total wealth.

(3) The court that makes the *restraining order may include such a direction in the order if:

(a) the *unexplained wealth order has been made against the person; and

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(b) the restraining order is subsequently made:
(i) against the person under section 20A; or
(ii) against property of another person in relation to which an order is in force under section 179S in relation to the unexplained wealth order.

(4) The court that made the *unexplained wealth order or the *restraining order may, on application by the *DPP, make the direction if:
(a) the unexplained wealth order has been made against the person; and
(b) the restraining order has been made:
(i) against the person under section 20A; or
(ii) against property of another person in relation to which an order is in force under section 179S in relation to the unexplained wealth order.

283 Court may include further directions etc.

(1) For the purposes of enabling the *Official Trustee to comply with a direction given by a court under section 282 or 282A, the court may, in the order in which the direction is given or by a subsequent order:
(a) direct the Official Trustee to sell or otherwise dispose of such of the property that is subject to the *restraining order as the court specifies; and
(b) appoint an officer of the court or any other person:
(i) to execute any deed or instrument in the name of a person who owns or has an *interest in the property; and
(ii) to do any act or thing necessary to give validity and operation to the deed or instrument.

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(2) The execution of the deed or instrument by the person appointed by an order under this section has the same force and validity as if the deed or instrument had been executed by the person who owned or had the *interest in the property.

284 Official Trustee to carry out directions

(1) If the *Official Trustee is given a direction under section 282 or 282A in relation to property, the Official Trustee must, as soon as practicable after the end of the appeal period under section 285:

(a) to the extent that the property is not money—sell or otherwise dispose of the property; and

(b) apply:

(i) to the extent that the property is money—that money; and

(ii) the amounts received from the sale or disposition of the other property;

in payment of the costs, charges, expenses and remuneration, of the kind referred to in subsection 288(1), incurred or payable in connection with the *restraining order and payable to the Official Trustee under the regulations; and

(c) credit the remainder of the money and amounts received to the *Confiscated Assets Account as required by section 296.

(2) However, if the remainder referred to in paragraph (1)(c) exceeds the *penalty amount, *literary proceeds amount or *unexplained wealth amount (as the case requires), the *Official Trustee must:

(a) credit to the *Confiscated Assets Account as required by section 296 an amount equal to the penalty amount, literary proceeds amount or unexplained wealth amount; and

(b) pay the balance to the person whose property was subject to the *restraining order.

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285 Official Trustee not to carry out directions during appeal periods

(1) If the *Official Trustee is given a direction under section 282 or 282A in relation to property, the Official Trustee must not:

(a) if the property is money—apply the money under section 284 until the end of the appeal period under this section; and

(b) if the property is not money—sell or otherwise dispose of the property until the end of that period.

(2) The appeal period under this section is the period ending:

(a) if the period provided for lodging an appeal against the *pecuniary penalty order, *literary proceeds order or *unexplained wealth order to which the direction relates has ended without such an appeal having been lodged—at the end of that period; or

(b) if an appeal against the pecuniary penalty order, literary proceeds order or unexplained wealth order has been lodged—when the appeal lapses or is finally determined.

(3) However, if the person is convicted of the offence, or any of the offences, to which the *pecuniary penalty order or *literary proceeds order relates, the appeal period is:

(a) the period ending:

(i) if the period provided for lodging an appeal against the conviction or convictions to which the direction relates has ended without such an appeal having been lodged—at the end of that period; or

(ii) if an appeal against the conviction or convictions has been lodged—when the appeal lapses or is finally determined; or

(b) the appeal period under subsection (2);

whichever ends last.

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(4) For the purposes of subsection (3):

(a) if the person is to be taken to have been convicted of an offence because of paragraph 331(1)(b)—references in that subsection to lodging of an appeal against the conviction are references to lodging of an appeal against the finding that the person is guilty of the offence; and

(b) if the person is to be taken to have been convicted of an offence because of paragraph 331(1)(c)—references in that subsection to lodging of an appeal against the conviction are references to lodging of an appeal against the person's conviction of the other offence referred to in that paragraph.

286 Discharge of pecuniary penalty orders and literary proceeds orders by credits to the Confiscated Assets Account

(1) If the *Official Trustee credits, under this Division, money to the *Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under a *pecuniary penalty order, the person's liability under the pecuniary penalty order is, to the extent of the credit, discharged.

(2) If the *Official Trustee credits, under this Division, money to the *Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under a *literary proceeds order, the person's liability under the literary proceeds order is, to the extent of the credit, discharged.

(3) If the *Official Trustee credits, under this Division, money to the *Confiscated Assets Account as required by section 296 in satisfaction of a person's liability under an *unexplained wealth order, the person's liability under the unexplained wealth order is, to the extent of the credit, discharged.

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Division 5—Miscellaneous

287 Money not to be paid into the Common Investment Fund

Money that is in the custody or control of the *Official Trustee because of a *restraining order must not be paid into the Common Investment Fund under section 20B of the *Bankruptcy Act 1966* (despite anything in that Act).

288 Official Trustee's costs etc.

(1) The regulations may make provision relating to:

(a) the costs, charges and expenses incurred in connection with the *Official Trustee's exercise of powers and performance of functions or duties under this Act or under Part VI of the *Mutual Assistance Act; and

(b) the Official Trustee's remuneration in respect of those activities.

(2) An amount equal to each amount of remuneration that the *Official Trustee receives under the regulations is to be paid to the Commonwealth.

289 Income generated from controlled property

(1) The *Official Trustee may apply any income generated from *controlled property to the payment of amounts payable to the Official Trustee, in relation to the property, under regulations made for the purposes of section 288.

(2) However, if the *restraining order relating to the *controlled property ceases to be in force and the property is returned to its owner, the *Official Trustee must arrange for an amount to be paid to the owner that is equal to the difference between:

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(a) the sum of all the amounts applied under this section in relation to the property; and

(b) the sum of all the amounts of expenditure by the *Official Trustee that were necessary for maintaining the property or generating the income from property.

(3) This section does not affect other ways in which the *Official Trustee may recover amounts payable to the Official Trustee under regulations made for the purposes of section 288.

290 Official Trustee is not personally liable

(1) The *Official Trustee is not personally liable for:

(a) any loss or damage, sustained by a person claiming an *interest in all or part of the *controlled property, arising from the Official Trustee taking custody and control of the property; or

(b) the cost of proceedings taken to establish an interest in the property;

unless the court is satisfied that the Official Trustee is guilty of negligence in respect of taking custody and control of the property.

(2) The *Official Trustee is not personally liable for:

(a) any rates, land tax or municipal or statutory charges imposed under a law of the Commonwealth, a State or a Territory in respect of the *controlled property, except out of any rents or profits that the Official Trustee receives from the property; and

(b) if, in taking custody and control of the property, the Official Trustee carries on a business—any payment in respect of long service leave or extended leave:

(i) for which the person who carried on the business before the Official Trustee was liable; or

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(ii) to which an employee of the Official Trustee in its capacity as custodian and controller of the business, or a legal representative of such an employee, becomes entitled after the *restraining order covering the property was made; and

(c) any other expenses in respect of the property.

291 Indemnification of Official Trustee

(1) The Commonwealth must indemnify the *Official Trustee against any personal liability (including any personal liability as to costs) incurred by it for any act done, or omitted to be done, by it in the exercise, or purported exercise, of its powers and duties under this Act.

(2) The Commonwealth has the same right of reimbursement in respect of a payment made under this indemnity as the *Official Trustee would have if the Official Trustee had made the payment.

(3) This same right of reimbursement includes reimbursement under another indemnity given to the *Official Trustee.

(4) Nothing in subsection (1) affects:

(a) any other right the *Official Trustee has to be indemnified in respect of any personal liability referred to in that subsection; or

(b) any other indemnity given to the Official Trustee in respect of any such personal liability.

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Section 293

Part 4-2—Legal assistance

293 Payments to legal aid commissions for representing suspects and other persons

(1) This section applies if:

(a) a *legal aid commission incurred (before, on or after the commencement of this subsection) legal costs for:

(i) representing a person whose property was, at the time of the representation, covered by a *restraining order in proceedings under this Act; or

(ii) representing a person, who was a *suspect at the time of the representation and whose property was at that time covered by a restraining order, in proceedings for defending any criminal charge against the person; and

(b) the commission has given (before, on or after the commencement of this subsection) the *Official Trustee a bill for the costs; and

(c) the Official Trustee is satisfied that the bill is true and correct.

(2) The *Official Trustee must pay the legal costs (according to the bill) to the *legal aid commission out of the *Confiscated Assets Account, subject to subsection (2A).

(2A) If the *Official Trustee is satisfied that:

(a) the balance of the *Confiscated Assets Account is insufficient to pay the legal costs; and

(b) property of the person is covered by the *restraining order;

the Official Trustee must pay the legal costs (according to the bill) to the *legal aid commission out of that property covered by the order, to the extent possible.

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(3) If the *Official Trustee pays an amount to the *legal aid commission under this section and property of the person is covered by a *restraining order, the person must pay the Commonwealth an amount equal to the lesser of the following (or either of them if they are the same):

(a) the amount paid to the legal aid commission;

(b) the value of the person's property covered by the restraining order.

(4) The person's obligation to pay the amount is discharged if there is forfeited to the Commonwealth under this Act:

(a) all of the property that is covered by the *restraining order; or

(b) some of the property that is so covered, being property of a value that equals or exceeds the amount.

294 Disclosure of information to legal aid commissions

The *DPP or the *Official Trustee may, for the purpose of a *legal aid commission determining whether a person should receive legal assistance under this Part, disclose to the commission information obtained under this Act that is relevant to making that determination.

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Section 295

Part 4-3—Confiscated Assets Account

295 Establishment of Account

(1) There is hereby established the Confiscated Assets Account.

(2) The Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

296 Credits to the Account

(1) There must be credited to the *Confiscated Assets Account amounts equal to:

(a) *proceeds of confiscated assets; and

(b) money paid to the Commonwealth by a foreign country, within the meaning of the *Mutual Assistance Act, under a treaty or arrangement providing for mutual assistance in criminal matters; and

(c) money paid to the Commonwealth under a *foreign pecuniary penalty order registered under section 34 of the Mutual Assistance Act; and

(d) money deriving from the enforcement of an *interstate forfeiture order registered in a *non-governing Territory, other than money covered by a direction under subsection 70(2) or 100(2); and

(e) the Commonwealth's share, under the *equitable sharing program, of proceeds resulting from a breach of the criminal law of a State or a *self-governing Territory; and

(f) money, other than money referred to in paragraph (b), paid to the Commonwealth by a foreign country in connection with assistance provided by the Commonwealth in relation to the

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recovery by that country of the proceeds of *unlawful activity or the investigation or prosecution of unlawful activity; and

(g) money paid to the Commonwealth under subsection 293(3), and any amounts recovered by the Commonwealth as a result of executing a charge created under section 302A; and

(h) amounts paid to the Commonwealth in settlement of proceedings connected with this Act.

(3) The following are ***proceeds of confiscated assets***:

(a) the remainder of the money and amounts referred to in paragraph 70(1)(c);

(b) the amount referred to in paragraph 89(1)(c) or 90(f);

(c) the remainder of the money and amounts referred to in paragraph 100(1)(c);

(d) the amount referred to in paragraph 105(1)(c) or 106(f);

(e) the amount referred to in subsection 140(1);

(f) the amount referred to in subsection 167(1);

(fa) the amount referred to in subsection 179R(1);

(g) the remainder of the money and amounts referred to in paragraph 284(1)(c);

(h) the amount referred to in paragraph 284(2)(a);

(i) the remainder of the money referred to in paragraph 35G(1)(b) of the *Mutual Assistance Act;

(j) the remainder of the proceeds referred to in paragraph 35G(2)(c) of the *Mutual Assistance Act;

(k) the remainder of the proceeds referred to in paragraph 9A(c) of the *Crimes Act 1914*;

(l) the money referred to in paragraph 208DA(3)(a) of the *Customs Act 1901*;

(m) the remainder of the proceeds referred to in paragraph 208DA(3)(b) of the *Customs Act 1901*;

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(n) the amount referred to in subsection 243B(4) of the *Customs Act 1901*;

(o) the remainder of the money referred to in paragraph 243G(6)(a) of the *Customs Act 1901*;

(p) the remainder of the proceeds referred to in paragraph 243G(6)(b) of the *Customs Act 1901*.

(4) The ***equitable sharing program*** is an arrangement under which any or all of the following happen:

(a) the Commonwealth shares with a participating State or *self-governing Territory a proportion of any *proceeds of any *unlawful activity recovered under a Commonwealth law, if, in the Minister's opinion, that State or Territory has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the relevant unlawful activity;

(b) each participating State or Territory shares with the Commonwealth any proceeds resulting from a breach of the criminal law of that State or Territory if, in the opinion of the appropriate Minister of that State or Territory, officers of an *enforcement agency have made a significant contribution to the recovery of those proceeds;

(c) the Commonwealth shares with a foreign country a proportion of any proceeds of any unlawful activity recovered under a Commonwealth law if, in the Minister's opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

297 Payments out of the Account

The following are purposes of the *Confiscated Assets Account:

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Section 298

(a) making any payments to the States, to *self-governing Territories or to foreign countries that the Minister considers are appropriate under the *equitable sharing program;

(b) making any payments under a program approved by the Minister under section 298;

(c) making any payments that the Minister considers necessary to satisfy the Commonwealth's obligations in respect of:

(i) a registered *foreign forfeiture order; or

(ii) an order registered under section 45 of the *International War Crimes Tribunals Act 1995*; or

(iii) a registered *foreign pecuniary penalty order;

(d) making any payments to a State or to a self-governing Territory that the Attorney-General considers necessary following a crediting to the Account under paragraph 296(1)(b) of money received from a foreign country;

(e) paying the *Official Trustee amounts that were payable to the Official Trustee under regulations made for the purposes of paragraph 288(1)(a) but that the Official Trustee has been unable to recover;

(f) paying the annual management fee for the Official Trustee as specified in the regulations;

(fa) making any payments the Commonwealth is directed to make by an order under paragraph 55(2)(a), section 72, paragraph 73(2)(d), section 77 or 94A, subparagraph 102(d)(ii) or section 179L;

(g) making any payments under an arrangement under paragraph 88(1)(b) or subsection 289(2);

(ga) making any payments in relation to the conduct of an *examination, so long as the payments have been approved by the *DPP;

(h) making any payments to a *legal aid commission under Part 4-2.

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Section 298

298 Programs for expenditure on law enforcement, drug treatment etc.

(1) The Minister may, in writing, approve a program for the expenditure of money standing to the credit of the *Confiscated Assets Account.

(2) The expenditure is to be approved for one or more of the following purposes:

(a) crime prevention measures;

(b) law enforcement measures;

(c) measures relating to treatment of drug addiction;

(d) diversionary measures relating to illegal use of drugs.

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Part 4-4—Charges over restrained property to secure certain amounts payable to the Commonwealth

302A Charges to secure amounts payable under subsection 293(3)

If:

(a) a person whose property is covered by a *restraining order is liable to pay an amount to the Commonwealth under subsection 293(3); and

(b) either:

(i) the court revokes the restraining order; or

(ii) the order ceases to be in force under section 45;

there is created by force of this section a charge on the property to secure the payment of the amount to the Commonwealth.

302B When the charge ceases to have effect

A charge created under section 302A ceases to have effect on a *person's property on the earliest of the following events:

(a) the amount owing under subsection 293(3) is paid to the Commonwealth;

(b) there is forfeited to the Commonwealth under this Act:

(i) all of the property that is covered by the charge; or

(ii) some of the property that is so covered, being property of a value that equals or exceeds the amount owing under subsection 293(3);

(c) the person sells or disposes of the property with the consent of the *Official Trustee.

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302C Priority of charge

If a charge is created under section 302A in favour of the Commonwealth, the Commonwealth's charge:

(a) is subject to every *encumbrance on the property (other than an encumbrance in which the person who is liable to pay the amount owing under subsection 293(3) has an *interest) that came into existence before it and that would otherwise have priority; and

(b) has priority over all other encumbrances; and

(c) subject to section 302B, is not affected by any change of ownership of the property.

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Part 4-5—Enforcement of interstate orders in certain Territories

Division 1—Interstate restraining orders

303 Registration of interstate restraining orders

(1) If an *interstate restraining order expressly applies to:

(a) specified property in a *non-governing Territory; or

(b) all property in such a Territory of a specified person; or

(c) all property (other than specified property) in such a Territory of a specified person;

a copy of the order, sealed by the court making the order, may be registered in the Supreme Court of the Territory by:

(d) the person on whose application the order was made; or

(e) an *appropriate officer.

(2) A copy of any amendments made to an *interstate restraining order (before or after registration), sealed by the court making the amendments, may be registered in the same way. The amendments do not, for the purposes of this Act, have effect until they are registered.

(3) Registration of an *interstate restraining order may be refused to the extent that the order would not, on registration, be capable of enforcement in the Territory.

(4) Registration is to be effected in accordance with the rules of the Supreme Court of the Territory.

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304 Effect of registration

(1) An *interstate restraining order registered in the Supreme Court of a Territory under this Division may be enforced in the Territory as if it were a *restraining order made at the time of registration.

(2) This Act (other than sections 33, 42 to 45, 142 and 169, Division 5 of Part 2-1, Part 2-3 and Division 4 of Part 4-1) applies in relation to an *interstate restraining order registered in the Supreme Court of a Territory under this Division as it applies in relation to a *restraining order.

305 Duration of registration

An *interstate restraining order ceases to be registered under this Act if:

(a) the court in which it is registered receives notice that it has ceased to be in force in the jurisdiction in which it was made; or

(b) the registration is cancelled under section 306.

306 Cancellation of registration

(1) The registration of an *interstate restraining order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court or a prescribed officer of the Supreme Court if:

(a) the registration was improperly obtained; or

(b) particulars of any amendments made to:

(i) the interstate restraining order; or

(ii) any ancillary orders or directions made by a court;

are not communicated to the Supreme Court in accordance with the requirements of the rules of the Supreme Court.

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(2) The registration of an *interstate restraining order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court to the extent that the order is not capable of enforcement in the Territory.

307 Charge on property subject to registered interstate restraining order

(1) If:

(a) an *interstate restraining order is made against property in relation to a person's conviction of an *interstate indictable offence or in relation to the charging, or proposed charging, of a person with an interstate indictable offence; and

(b) an *interstate pecuniary penalty order is made against the person in relation to the person's conviction of that offence or an interstate indictable offence that is a *related offence; and

(c) the interstate restraining order is registered under this Division in the Supreme Court of a Territory; and

(d) the interstate pecuniary penalty order is registered in a court of the Territory under the *Service and Execution of Process Act 1992*;

then, upon the registration referred to in paragraph (c) or the registration referred to in paragraph (d) (whichever last occurs), a charge is created on the property to secure payment of the amount due under the interstate pecuniary penalty order.

(2) If a charge is created by subsection (1) on property of a person to secure payment of the amount due under an *interstate pecuniary penalty order, the charge ceases to have effect in respect of the property:

(a) upon the *quashing of the conviction in relation to which the interstate pecuniary penalty order was made; or

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(b) upon the discharge of the interstate pecuniary penalty order by a court hearing an appeal against the making of the order; or

(c) upon payment of the amount due under the interstate pecuniary penalty order; or

(d) upon the sale or other disposition of the property:

(i) under an order made by a court under the *corresponding law of the State or Territory in which the interstate pecuniary penalty order was made; or

(ii) by the owner of the property with the consent of the court that made the interstate pecuniary penalty order; or

(iii) where the *interstate restraining order directed a person to take control of the property—by the owner of the property with the consent of that person; or

(e) upon the sale of the property to a purchaser in good faith for value who, at the time of purchase, has no notice of the charge;

whichever first occurs.

(3) A charge created on property by subsection (1):

(a) is subject to every *encumbrance on the property (other than an encumbrance in which the person convicted of the offence has an *interest) that came into existence before the charge and that would, apart from this subsection, have priority over the charge; and

(b) has priority over all other encumbrances; and

(c) subject to subsection (2), is not affected by any change of ownership of the property.

(4) If:

(a) a charge is created by subsection (1) on property of a particular kind; and

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(b) the provisions of any law of the Commonwealth or of a State or Territory provide for the registration of title to, or charges over, property of that kind:

then:

(c) the *Official Trustee or the *DPP may cause the charge so created to be registered under the provisions of that law; and

(d) if the charge is so registered—a person who purchases or otherwise acquires an *interest in the property after the registration of the charge is, for the purposes of paragraph (2)(e), taken to have notice of the charge at the time of the purchase or acquisition.

308 Powers of Official Trustee in relation to interstate restraining orders

If:

(a) an *interstate restraining order is registered in the Supreme Court of a Territory under this Division; and

(b) the interstate restraining order directs an official of a State or a *self-governing Territory to take control of property;

the *Official Trustee may, with the agreement of the official, exercise the same powers in relation to the property that the official would have been able to exercise if the property were located in that State or self-governing Territory.

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Division 2—Interstate forfeiture orders

309 Registration of interstate forfeiture orders

(1) If an *interstate forfeiture order expressly applies to property in a *non-governing Territory, a copy of the order, sealed by the court making the order, may be registered in the Supreme Court of the Territory by:

(a) the person on whose application the order was made; or

(b) an *appropriate officer.

(2) A copy of any amendments made to an *interstate forfeiture order (before or after registration), sealed by the court making the amendments, may be registered in the same way. The amendments do not, for the purposes of this Act, have effect until they are registered.

(3) Registration of an *interstate forfeiture order may be refused to the extent that the order would not, on registration, be capable of enforcement in the Territory.

(4) Registration is to be effected in accordance with the rules of the Supreme Court of the Territory.

310 Effect of registration

(1) An *interstate forfeiture order registered in the Supreme Court of a Territory under this Division may be enforced in the Territory as if it were a *forfeiture order made at the time of registration.

(2) This Act (other than Divisions 5 and 6 of Part 2-2 and section 322) applies to an *interstate forfeiture order registered in the Supreme Court of a Territory under this Division as it applies to a *forfeiture order.

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311 Duration of registration

An *interstate forfeiture order ceases to be registered under this Act if:

(a) the order ceases to be in force in the jurisdiction in which it was made; or

(b) the registration is cancelled under section 312.

312 Cancellation of registration

(1) The registration of an *interstate forfeiture order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court or a prescribed officer of the Supreme Court if:

(a) the registration was improperly obtained; or

(b) particulars of any amendments made to:

(i) the interstate forfeiture order; or

(ii) any ancillary orders or directions made by a court;

are not communicated to the Supreme Court in accordance with the requirements of the rules of the Supreme Court.

(2) The registration of an *interstate forfeiture order in the Supreme Court of a Territory under this Division may be cancelled by the Supreme Court to the extent that the order is not capable of enforcement in the Territory.

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Division 3—Miscellaneous

313 Interim registration of faxed copies

(1) A faxed copy of a sealed copy of:

(a) an *interstate restraining order; or

(b) an *interstate forfeiture order; or

(c) any amendments made to such an order;

is, for the purposes of this Act, taken to be the same as the sealed copy if the faxed copy is itself certified in accordance with the rules of the Supreme Court.

(2) Registration effected by means of a faxed copy ceases to have effect at the end of the period of 5 days commencing on the day of registration unless a sealed copy that is not a faxed copy has been filed in the Supreme Court by that time.

(3) Filing of the sealed copy before the end of the period referred to in subsection (2) has effect, as if it were registration of the sealed copy, from the day of registration of the faxed copy.

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Chapter 5—Miscellaneous

314 State and Territory courts to have jurisdiction

(1) Jurisdiction is vested in the several courts of the States and Territories with respect to matters arising under this Act.

(2) Subject to section 53, the jurisdiction vested in a court by virtue of subsection (1) is not limited by any limits to which any other jurisdiction of the court may be subject.

(3) Jurisdiction is vested in a court of a Territory by virtue of subsection (1) so far only as the Constitution permits.

315 Proceedings are civil, not criminal

(1) Proceedings on an application for a *restraining order or a *confiscation order are not criminal proceedings.

(2) Except in relation to an offence under this Act:
  (a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and
  (b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

315A Court may hear multiple applications at same time

A court may hear and determine 2 or more applications under this Act at the same time.

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316 Consent orders

(1) A court may make an order in a proceeding under Chapter 2 with the consent of:

(a) the applicant in the proceeding; and

(b) everyone whom the court has reason to believe would be affected by the order.

(2) The order may be made:

(a) without consideration of the matters that the court would otherwise consider in the proceeding; and

(b) if the order is an order under section 47 (forfeiture orders relating to conduct constituting serious offences) or 49 (forfeiture orders relating to property suspected of proceeds of indictable offences etc.)—before the end of the period of 6 months referred to in paragraph 47(1)(b) or 49(1)(b) (as the case requires).

317 Onus and standard of proof

(1) The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.

(2) Subject to sections 52 and 118, any question of fact to be decided by a court on an application under this Act is to be decided on the balance of probabilities.

318 Proof of certain matters

(1) A certificate of conviction of an offence, that is a certificate of a kind referred to in section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*:

(a) is admissible in any civil proceedings under this Act; and

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(b) is evidence of the commission of the offence by the person to whom it relates.

(2) In any proceedings:

(a) on an application for an order under this Act; or

(b) ancillary to such an application; or

(c) for the enforcement of an order made under this Act;

the transcript of any *examination is evidence of the answers given by a person to a question put to the person in the course of the examination.

318A Admissibility in proceedings of statements made at examination by absent witness

Scope

(1) This section applies if direct evidence by a person (the ***absent witness***) of a matter would be admissible in a proceeding before a court:

(a) on an application for an order under this Act; or

(b) ancillary to such an application; or

(c) for the enforcement of an order made under this Act.

Admissibility of statements made at examination

(2) A statement that the absent witness made at an *examination of the absent witness and that tends to establish the matter is admissible in the proceeding as evidence of the matter:

(a) if it appears to the court that:

(i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or

(ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not

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Section 318A

reasonably practicable to secure his or her attendance; or

(iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or

(b) if it does not so appear to the court—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

Rules that apply if statement admitted

(3) The rules in subsections (4) to (6) apply if evidence of a statement is admitted under subsection (2).

(4) In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:

(a) how long after the matters to which it related occurred the statement was made; and

(b) any reason the absent witness may have had for concealing or misrepresenting a material matter; and

(c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is.

(5) If the absent witness is not called as a witness in the proceeding:

(a) evidence that would, if the absent witness had been so called, have been admissible in the proceeding for the purpose of destroying or supporting his or her credibility is so admissible; and

(b) evidence is admissible to show that the statement is inconsistent with another statement that the absent witness has made at any time.

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(6) However, evidence of a matter is not admissible under this section if, had the absent witness been called as a witness in the proceeding and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

318B Objection to admission of statements made at examination

Adducing party to give notice

(1) A party (the ***adducing party***) to a proceeding referred to in subsection 318A(1) may, not less than 14 days before the first day of the hearing of the proceeding, give another party to the proceeding written notice that the adducing party:

(a) will apply to have admitted in evidence in the proceeding specified statements made at an *examination; and

(b) for that purpose, will apply to have evidence of those statements admitted in the proceeding.

(2) The notice must set out, or be accompanied by a written record of, the specified statements.

Other party may object to admission of specified statements

(3) The other party may, within 14 days after a notice is given under subsection (1), give the adducing party a written notice (an ***objection notice***):

(a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and

(b) specifying, in relation to each of those statements, the grounds of objection.

(4) The period referred to in subsection (3) may be extended by the court before which the proceeding is to be heard or by agreement between the parties concerned.

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Effect of giving objection notice

(5) On receiving an objection notice, the adducing party must give to the court a copy of:

(a) the notice under subsection (1) and any record under subsection (2); and

(b) the objection notice.

(6) If subsection (5) is complied with, the court may either:

(a) determine the objections as a preliminary point before the hearing of the proceeding begins; or

(b) defer determination of the objections until the hearing.

Effect of not giving objection notice

(7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceeding, unless:

(a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or

(b) the court gives the other party leave to object to the statement being so admitted.

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319 Stay of proceedings

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings.

320 Effect of the confiscation scheme on sentencing

A court passing sentence on a person in respect of the person's conviction of an *indictable offence:

(a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and

(b) must not have regard to any *forfeiture order that relates to the offence, to the extent that the order forfeits *proceeds of the offence; and

(c) must have regard to the forfeiture order to the extent that the order forfeits any other property; and

(d) must not have regard to any *pecuniary penalty order, or any *literary proceeds order, that relates to the offence.

321 Deferral of sentencing pending determination of confiscation order

If:

(a) an application is made for a *confiscation order in respect of a person's conviction of an *indictable offence; and

(b) the application is made to the court before which the person was convicted; and

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(c) the court has not, when the application is made, passed sentence on the person for the offence;

the court may, if satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined the application for the confiscation order.

322 Appeals

(1) A person:

(a) against whom a *confiscation order is made; or

(b) who has an *interest in property against which a *forfeiture order is made; or

(c) who has an interest in property that is declared in an order under section 141, 168 or 179S to satisfy a *pecuniary penalty order, a *literary proceeds order or an *unexplained wealth order;

may appeal against the confiscation order, forfeiture order or order under section 141, 168 or 179S (the ***targeted order***) in the manner set out in this section.

(2) If:

(a) the *confiscation order; or

(b) the *forfeiture order; or

(c) the *pecuniary penalty order or *literary proceeds order to which the order under section 141 or 168 relates;

(the ***primary order***) was made in relation to a conviction of an offence, the person may appeal against the targeted order in the same manner as if the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.

(3) In any other case, the person may appeal against the targeted order in the same manner as if:

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(a) the person had been convicted of the offence to which the primary order relates; and

(b) the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.

(4) However, despite subsection (2) or (3), if the primary order related to a *foreign indictable offence, the person may appeal against the targeted order in the same manner as if:

(a) the person had been convicted of the offence in the State or Territory in which the targeted order was made; and

(b) the targeted order were, or were part of, a sentence imposed on the person in respect of the offence.

(4A) Despite subsections (2) and (3), in the case of an *unexplained wealth order, or an order under section 179S that relates to an unexplained wealth order, the person may appeal against the targeted order in the same manner as if:

(a) the person had been convicted of one of the following:

(i) an offence against a law of the Commonwealth;

(ii) a *foreign indictable offence;

(iii) a *State offence that has a federal aspect; and

(b) the targeted order were, or were part of, the sentence imposed on the person in respect of the offence.

(5) The *DPP:

(a) has the same right of appeal against a targeted order as the person referred to in subsection (1) has under this section; and

(b) may appeal against a refusal by a court to make a targeted order in the same manner as if such an order were made and the DPP were appealing against that order.

(6) On an appeal against a targeted order, the order may be confirmed, discharged or varied.

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(7) This section does not affect any other right of appeal.

323 Costs

(1) If:

(a) a person brings, or appears at, proceedings under this Act before a court in order:

(i) to prevent a *forfeiture order or *restraining order from being made against property of the person; or

(ii) to have property of the person excluded from a forfeiture order or restraining order; and

(b) the person is successful in those proceedings; and

(c) the court is satisfied that the person was not involved in any way in the commission of the offence in respect of which the forfeiture order or restraining order was sought or made;

the court may order the Commonwealth to pay all costs incurred by the person in connection with the proceedings or such part of those costs as is determined by the court.

(2) The costs referred to in subsection (1) are not limited to costs of a kind that are normally recoverable by the successful party to civil proceedings.

324 Powers conferred on judicial officers in their personal capacity

(1) A power:

(a) that is conferred by this Act on a State or Territory judge or on a magistrate; and

(b) that is neither judicial nor incidental to a judicial function or power;

is conferred on that person in a personal capacity and not as a court or a member of a court.

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Note: ***Magistrate*** is defined in section 16C of the *Acts Interpretation Act 1901*.

(2) The State or Territory judge, or the magistrate, need not accept the power conferred.

(3) A State or Territory judge, or magistrate, exercising a conferred power has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the judge or magistrate is a member.

325 Effect of a person's death

(1) Any notice authorised or required to be given to a person under this Act is, if the person has died, sufficiently given if given to the person's legal personal representative.

(2) A reference in this Act to a person's *interest in property or a thing is, if the person has died, a reference to an interest in the property or thing that the person had immediately before his or her death.

(3) An order can be applied for and made under this Act:
(a) in respect of a person's *interest in property or a thing even if the person has died, and
(b) on the basis of the activities of a person who has died.

326 Operation of other laws not affected

Nothing in this Act limits or restricts:
(a) the operation of any other law of the Commonwealth or of a *non-governing Territory providing for the forfeiture of property or the imposition of pecuniary penalties; or
(b) the remedies available to the Commonwealth, apart from this Act, for the enforcement of its rights and the protection of its interests.

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327 Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after the third anniversary of the commencement of this Act.

(2) The persons who undertake such a review must give the Minister a written report of the review.

(3) The Minister must cause a copy of each report to be tabled in each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.

(4) However, this section does not apply if a committee of one or both Houses of the Parliament has reviewed the operation of this Act, or started such a review, before the third anniversary of the commencement of this Act.

328 Regulations

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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Chapter 6—Interpreting this Act

Part 6-1—Meaning of some important concepts

Division 1—Proceeds and instrument of an offence

329 Meaning of *proceeds* and *instrument*

(1) Property is ***proceeds*** of an offence if:

(a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;

whether the property is situated within or outside *Australia.

(2) Property is an ***instrument*** of an offence if:

(a) the property is used in, or in connection with, the commission of an offence; or

(b) the property is intended to be used in, or in connection with, the commission of an offence;

whether the property is situated within or outside *Australia.

(3) Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.

(4) ***Proceeds*** or an ***instrument*** of an *unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

330 When property becomes, remains and ceases to be proceeds or an instrument

(1) Property becomes *proceeds of an offence if it is:

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(a) wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence; or

(b) wholly or partly acquired using proceeds of the offence;

including because of a previous application of this section.

(2) Property becomes an *instrument of an offence if it is:

(a) wholly or partly derived or realised from the disposal or other dealing with an instrument of the offence; or

(b) wholly or partly acquired using an instrument of the offence;

including because of a previous application of this section.

(3) Property remains *proceeds of an offence or an *instrument of an offence even if:

(a) it is credited to an *account; or

(b) it is disposed of or otherwise dealt with.

(4) Property only ceases to be *proceeds of an offence or an *instrument of an offence:

(a) if it is acquired by a third party for *sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires); or

(b) if the property vests in a person from the distribution of the estate of a deceased person, having been previously vested in a person from the distribution of the estate of another deceased person while the property was still proceeds of an offence or an instrument of an offence (as the case requires); or

(ba) if the property has been distributed in accordance with:

(i) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a marriage or either of them; or

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(ia) an order in proceedings under the *Family Law Act 1975* with respect to the property of the parties to a de facto relationship (within the meaning of that Act) or either of them; or

(ii) a financial agreement, or Part VIIIAB financial agreement, within the meaning of that Act;

and 6 years have elapsed since that distribution; or

(c) if the property is acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal *charge; or

(d) if a *forfeiture order in respect of the property is satisfied; or

(e) if an *interstate restraining order or an *interstate forfeiture order is satisfied in respect of the property; or

(f) if the property is otherwise sold or disposed of under this Act; or

(g) in any other circumstances specified in the regulations.

(5) However, if:

(a) a person once owned property that was *proceeds of an offence or an *instrument of an offence; and

(b) the person ceased to be the owner of the property and (at that time or a later time) the property stopped being proceeds of an offence or an instrument of the offence under subsection (4) (other than under paragraph (4)(d)); and

(c) the person acquires the property again;

then the property becomes proceeds of an offence or an instrument of the offence again (as the case requires).

(5A) Paragraph (4)(ba) does not apply if, despite the distribution referred to in that paragraph, the property is still subject to the *effective control of a person who:

(a) has been convicted of; or

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(b) has been charged with, or who is proposed to be charged with; or

(c) has committed, or is suspected of having committed;

the offence in question.

(6) Property becomes, remains or ceases to be *proceeds of an *unlawful activity, or an *instrument of an unlawful activity, if the property becomes, remains or ceases to be proceeds of the offence, or an instrument of the offence, constituted by the act or omission that constitutes the unlawful activity.

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Division 2—Convicted and related concepts

331 Meaning of *convicted* of an offence

(1) For the purposes of this Act, a person is taken to be ***convicted*** of an offence if:

(a) the person is convicted, whether summarily or on indictment, of the offence; or

(b) the person is charged with, and found guilty of, the offence but is discharged without conviction; or

(c) a court, with the consent of the person, takes the offence, of which the person has not been found guilty, into account in passing sentence on the person for another offence; or

(d) the person *absconds in connection with the offence.

(2) Such a person is taken to have been convicted of the offence in the following State or Territory:

(a) if paragraph (1)(a) applies—the State or Territory in which the person was convicted;

(b) if paragraph (1)(b) applies—the State or Territory in which the person was discharged without conviction;

(c) if paragraph (1)(c) applies—the State or Territory in which the court took the offence into account in passing sentence on the person for the other offence;

(d) if paragraph (1)(d) applies—the State or Territory in which the information was laid alleging the person's commission of the offence.

(3) If paragraph (2)(d) applies to a person:

(a) the person is taken to have been convicted of the offence before the Supreme Court of that State or Territory; and

(b) the person is taken to have committed the offence.

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(4) This section does not apply to a *foreign serious offence.

332 Meaning of *quashing* a conviction of an offence

(1) For the purposes of this Act, a person's conviction of an offence is taken to be ***quashed*** if:

(a) if the person is taken to have been convicted of the offence because of paragraph 331(1)(a)—the conviction is quashed or set aside; or

(b) if the person is taken to have been convicted of the offence because of paragraph 331(1)(b)—the finding of guilt is quashed or set aside; or

(c) if the person is taken to have been convicted of the offence because of paragraph 331(1)(c)—either of the following events occur:

(i) the person's conviction of the other offence referred to in that paragraph is quashed or set aside;

(ii) the decision of the court to take the offence into account in passing sentence for that other offence is quashed or set aside; or

(d) if the person is taken to have been convicted of the offence because of paragraph 331(1)(d)—after the person is brought before a court in respect of the offence, the person is discharged in respect of the offence or a conviction of the person for the offence is quashed or set aside.

(2) This section does not apply to a *foreign serious offence.

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333 Meaning of *conviction day*

(1) For the purposes of this Act, the ***conviction day***, in relation to a person's conviction of an *indictable offence, is:

(a) if the person is taken to have been convicted of the offence because of paragraph 331(1)(a)—the day on which a court passes sentence for the offence; or

(b) if the person is taken to have been convicted of the offence because of paragraph 331(1)(b)—the day on which the person was discharged without conviction; or

(c) if the person is taken to have been convicted of the offence because of paragraph 331(1)(c)—the day on which the court took the offence into account in passing sentence for the other offence referred to in that paragraph; or

(d) if the person is taken to have been convicted of the offence because of paragraph 331(1)(d)—the day on which the person is taken to have *absconded in connection with the offence.

(2) For the purposes of paragraph (1)(a), the day on which the person was convicted of the offence is taken to be the first day on which the court acted on the finding that the offence was proved against the person (whether or not the court passed sentence on that day in relation to the offence).

334 Meaning of *abscond*

(1) For the purposes of this Act, a person is taken to ***abscond*** in connection with an offence if and only if:

(a) an information is laid alleging the person committed the offence; and

(b) a warrant for the person's arrest is issued in relation to that information; and

(c) subsection (2) applies to the person and the warrant.

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(2) This subsection applies to a person and a warrant if either of the following occurs:

(a) at the end of the period of 6 months commencing on the day on which the warrant is issued:

(i) the person cannot be found; or

(ii) the person is, for any other reason, not amenable to justice and, if the person is outside *Australia, extradition proceedings are not on foot;

(b) at the end of the period of 6 months commencing on the day on which the warrant is issued:

(i) the person is, because he or she is outside Australia, not amenable to justice; and

(ii) extradition proceedings are on foot;

and subsequently those proceedings terminate without an order for the person's extradition being made.

(3) Extradition proceedings taking place in a jurisdiction in relation to a person are not taken, for the purposes of subsection (2), to be on foot unless the person is in custody, or is on bail, in that jurisdiction.

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Division 3—Other concepts

335 Proceeds jurisdiction

(1) Whether a court has ***proceeds jurisdiction*** for an order, other than a *preliminary unexplained wealth order or an *unexplained wealth order, depends on the circumstances of the offence or offences to which the order would relate.

General rules

(2) If all or part of the conduct constituting an offence to which the order would relate:
  (a) occurred in a particular State or Territory; or
  (b) is reasonably suspected of having occurred in that State or Territory;

the courts that have ***proceeds jurisdiction*** for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory.

(3) If all of the conduct constituting an offence to which the order would relate:
  (a) occurred outside *Australia; or
  (b) is reasonably suspected of having occurred outside *Australia;

the courts that have ***proceeds jurisdiction*** for the order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

Offender not identified

(4) If:
  (a) the order would, if made, be:

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(i) a *restraining order under section 19 that relates to an offence committed by a person whose identity is not known and that is not based on a finding as to the commission of a particular offence; or

(ii) a *forfeiture order under section 49 that is not based on a finding that a particular person committed any offence and that is not based on a finding as to the commission of a particular offence; and

(b) the property to which the order would relate is located in a particular State or Territory;

despite subsections (2) and (3), the courts that have ***proceeds jurisdiction*** for the order are those with jurisdiction to deal with criminal matters on indictment in that State or Territory.

(5) If:

(a) the order would, if made, be:

(i) a *restraining order under section 19 that relates to an offence committed by a person whose identity is not known and that is not based on a finding as to the commission of a particular offence; or

(ii) a *forfeiture order under section 49 that is not based on a finding that a particular person committed any offence and that is not based on a finding as to the commission of a particular offence; and

(b) the property to which the order would relate is located outside *Australia;

despite subsections (2) and (3), the courts that have ***proceeds jurisdiction*** for the order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

Magistrates may have proceeds jurisdiction in some cases

(6) If:

*To find definitions of asterisked terms, see the Dictionary, at section 338.

Appendix B

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(a) the order would, if made, be one of the following orders relating to an offence of which a person has been convicted:
  (i) a *restraining order under section 17;
  (ii) a *forfeiture order under section 48;
  (iii) a *pecuniary penalty order under subparagraph 116(1)(b)(i); and
(b) the person was convicted before a magistrate (the ***convicting magistrate***);

a magistrate of the same court as the convicting magistrate has ***proceeds jurisdiction*** for the order. However, this does not prevent other courts having proceeds jurisdiction for the order under subsection (2) or (3) (whichever is applicable).

Note: Although this Act is only concerned with indictable offences, these offences can often be tried summarily. For example, see section 4J of the *Crimes Act 1914*.

Proceeds jurisdiction of Federal Court of Australia

(7) If the Federal Court of Australia has jurisdiction to try a person (whether on indictment or summarily) for an *indictable offence, the Court has ***proceeds jurisdiction*** for an order if the order would, if made, be an order made on the basis of:
  (a) a proposal that the person be charged with the offence; or
  (b) the person having been charged with the offence; or
  (c) the person's conviction of the offence.

(8) Subsection (7):
  (a) has effect despite subsections (2) and (3); and
  (b) does not prevent other courts having *proceeds jurisdiction for the order under another subsection of this section.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Preliminary unexplained wealth orders and unexplained wealth orders

(7) The courts that have ***proceeds jurisdiction*** for a *preliminary unexplained wealth order or an *unexplained wealth order are those of any State or Territory with jurisdiction to deal with criminal matters on indictment.

336 Meaning of *derived*

A reference to a person having ***derived*** *proceeds, a *benefit, *literary proceeds or *wealth includes a reference to:

(a) the person; or

(b) another person at the request or direction of the first person;

having derived the proceeds, benefit, literary proceeds or wealth directly or indirectly.

336A Meaning of property or wealth being *lawfully acquired*

For the purposes of this Act, property or *wealth is ***lawfully acquired*** only if:

(a) the property or wealth was lawfully acquired; and

(b) the consideration given for the property or wealth was lawfully acquired.

337 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.

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(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.

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337A Meaning of *foreign indictable offence*

(1) If:

(a) an application (the ***current application***) is made for a *freezing order, *production order, *search warrant, *restraining order or *confiscation order in relation to conduct that constituted an offence against a law of a foreign country; and

(b) if the conduct had occurred in Australia at the testing time referred to in subsection (2), the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment;

then, for the purposes of the current application, the conduct is treated as having constituted a ***foreign indictable offence*** at all relevant times.

Example: X commits an offence against a law of a foreign country at a time when the conduct is not an offence against Australian law. X then derives literary proceeds in relation to the offence and transfers the proceeds to Australia. After the proceeds are transferred, a new Commonwealth offence is created that applies to the type of conduct concerned. An application is then made for a literary proceeds order. For the purposes of the proceedings for that order, the original conduct is treated as having constituted a foreign indictable offence at all relevant times and accordingly an order can be made in respect of those proceeds.

(2) The ***testing time*** for the current application is:

(a) if the current application is an application for a *freezing order, *production order, *search warrant or *restraining order—the time when the current application was made; or

(b) if the current application is an application for a *confiscation order (other than a *literary proceeds order) in relation to a restraining order—the time when the application for the restraining order was made; or

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(c) if:

(i) the current application is an application for a literary proceeds order; and

(ii) an earlier restraining order has been made in respect of the same offence;

the time when the application was made for that earlier restraining order; or

(d) if the current application is an application for a literary proceeds order but paragraph (c) does not apply—the time when the current application was made.

337B Definition of *serious offence*—valuation rules

In determining the value of a transaction or transactions for the purposes of paragraph (ea), (eb) or (ec) of the definition of ***serious offence*** in section 338 of this Act, apply the following provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006:*

(a) the definition of ***value*** in section 5;

(b) section 18;

(c) section 19.

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Part 6-2—Dictionary

338 Dictionary [*see* Note 2]

In this Act, unless the contrary intention appears:

abscond has the meaning given by section 334.

account means any facility or arrangement through which a *financial institution accepts deposits or allows withdrawals and includes:

(a) a facility or arrangement for:
  (i) a *fixed term deposit; or
  (ii) a safety deposit box; and
(b) a credit card account; and
(c) a loan account (other than a credit card account); and
(d) an account held in the form of units in:
  (i) a cash management trust; or
  (ii) a trust of a kind prescribed by the regulations; and
(e) a closed account.

To avoid doubt, it is immaterial whether:

(f) an account has a nil balance; or
(g) any transactions have been allowed in relation to an account.

affairs of a person includes, but is not limited to:

(a) the nature and location of property of the person or property in which the person has an interest; and
(b) any activities of the person that are, or may be, relevant to whether or not the person has engaged in unlawful activity of a kind relevant to the making of an order under this Act.

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AFP member means a member, or special member, (within the meaning of the *Australian Federal Police Act 1979*) of the Australian Federal Police.

agent includes, if the agent is a corporation, the *officers and agents of the corporation.

appropriate officer means the *DPP or a person included in a class of persons declared by the regulations to be within this definition.

approved examiner has the meaning given by subsection 183(4).

AUSTRAC means the Australian Transaction Reports and Analysis Centre continued in existence by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Australia, when used in a geographical sense, includes the external Territories.

authorised officer means:

(a) an *AFP member who is authorised by the Commissioner of the Australian Federal Police; or

(aa) any of the following:

(i) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*);

(ii) an Assistant Integrity Commissioner (within the meaning of that Act);

(iii) a staff member of ACLEI (within the meaning of that Act) who is authorised in writing by the Integrity Commissioner for the purposes of this paragraph; or

(b) any of the following:

(i) the Chief Executive Officer of the Australian Crime Commission;

(ii) an examiner (within the meaning of the *Australian Crime Commission Act 2002*) who is authorised by the

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Chief Executive Officer of the Australian Crime Commission;

(iii) a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*) who is authorised by the Chief Executive Officer of the Australian Crime Commission; or

(c) an officer of Customs (within the meaning of the *Customs Act 1901*) who is authorised by the CEO of Customs; or

(d) a member, or staff member, (within the meaning of the *Australian Securities and Investments Commission Act 2001*) of the Australian Securities and Investments Commission who is authorised by the Chairperson of the Australian Securities and Investments Commission; or

(e) a member, officer or employee of any other agency specified in the regulations who is authorised by the head of that agency.

bankruptcy court means a court having jurisdiction in bankruptcy under the *Bankruptcy Act 1966*.

bankruptcy property of a person means property that:

(a) is vested in another person under subsection 58(1) of the *Bankruptcy Act 1966* but immediately before being so vested was:

(i) property of the person; or

(ii) subject to the *effective control of the person; or

(b) is vested in another person under subsection 249(1) of the *Bankruptcy Act 1966* but immediately before being so vested was:

(i) property of the person's estate; or

(ii) subject to the effective control of the executors of the person's estate.

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benefit includes service or advantage.

books includes any account, deed, paper, writing or document and any record of information however compiled, recorded or stored, whether in writing, on microfilm, by electronic process or otherwise.

charged: a person is charged with an offence if an information is laid against the person for the offence whether or not:

(a) a summons to require the attendance of the person to answer the information has been issued; or

(b) a warrant for the arrest of the person has been issued.

child: without limiting who is a child of a person for the purposes of this Act, someone is the ***child*** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

compensation order means an order made under subsection 77(1).

Confiscated Assets Account means the account established under section 295.

confiscation order means a *forfeiture order, a *pecuniary penalty order, a *literary proceeds order or an *unexplained wealth order.

controlled property has the meaning given by section 267.

Note: Section 267A alters the meaning of this term for the purposes of Division 3 of Part 4-1.

conveyance includes an aircraft, vehicle or vessel.

convicted has the meaning given by section 331.

conviction day has the meaning given by section 333.

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corresponding law means a law of a State or of a *self-governing Territory that is declared by the regulations to be a law that corresponds to this Act.

criminal proceeding, in relation to a *foreign serious offence, has the same meaning as in the *Mutual Assistance Act.

Customs officer means an officer of Customs within the meaning of the *Customs Act 1901*.

data includes:

(a) information in any form; or

(b) any program (or part of a program).

data held in a computer includes:

(a) *data held in any removable *data storage device for the time being held in a computer; or

(b) data held in a data storage device on a computer network of which the computer forms a part.

data storage device means a thing containing, or designed to contain, *data for use by a computer.

deal: dealing with a person's property includes:

(a) if a debt is owed to that person—making a payment to any person in reduction of the amount of the debt; and

(b) removing the property from *Australia; and

(c) receiving or making a gift of the property; and

(d) if the property is covered by a *restraining order—engaging in a transaction that has the direct or indirect effect of reducing the value of the person's interest in the property.

de facto partner has the meaning given by the *Acts Interpretation Act 1901*.

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dependant: each of the following is a dependant of a person:

(a) the person's spouse or *de facto partner;

(b) the person's *child, or member of the person's household, who depends on the person for support.

derived has the meaning given by section 336.

director, in relation to a *financial institution or a corporation, means:

(a) if the institution or corporation is a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory—a constituent member of the body corporate; and

(b) any person occupying or acting in the position of director of the institution or corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(c) any person in accordance with whose directions or instructions the directors of the institution or corporation are accustomed to act, other than when those directors only do so:

(i) in the proper performance of the functions attaching to the person's professional capacity; or

(ii) in their business relationship with the person.

DPP means the Director of Public Prosecutions.

effective control has a meaning affected by section 337.

encumbrance, in relation to property, includes any *interest, mortgage, charge, right, claim or demand in respect of the property.

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enforcement agency means:

(a) an agency mentioned in paragraphs (a) to (d) of the definition of *authorised officer; or

(b) an agency specified in the regulations to be a law enforcement, revenue or regulatory agency for the purposes of this Act.

equitable sharing program has the meaning given by subsection 296(4).

evidential material means evidence relating to:

(a) property in respect of which action has been or could be taken under this Act; or

(b) *benefits derived from the commission of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; or

(c) *literary proceeds.

examination means an examination under Part 3-1.

examination notice means a notice given under section 183.

examination order means an order made under section 180, 180A, 180B, 180C, 180D, 180E or 181 that is in force.

exclusion order means an order made under subsection 73(1).

executing officer, in relation to a warrant, means:

(a) the *authorised officer named in the warrant by the magistrate as being responsible for executing the warrant; or

(b) if that authorised officer does not intend to be present at the execution of the warrant—another authorised officer whose name has been written in the warrant by the first authorised officer; or

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(c) another authorised officer whose name has been written in the warrant by the officer last named in the warrant.

executive officer, in relation to a *financial institution or a corporation, means any person, by whatever name called and whether or not he or she is a *director of the institution or corporation, who is concerned, or takes part, in the management of the institution or corporation.

extension order means an order made under section 93.

financial institution means:

(a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or

(b) the Reserve Bank of Australia; or

(c) a society registered or incorporated as a co-operative housing society or similar society under a law of a State or Territory; or

(d) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution; or

(e) a body corporate that is a financial corporation within the meaning of paragraph 51(xx) of the Constitution; or

(f) a body corporate that, if it had been incorporated in *Australia, would be a financial corporation within the meaning of paragraph 51(xx) of the Constitution; or

(g) a trading corporation (within the meaning of paragraph 51(xx) of the Constitution) that carries on a business of operating a casino; or

(h) a trading corporation (within the meaning of paragraph 51(xx) of the Constitution) that is a *totalisator agency board.

fixed term deposit means an interest bearing deposit lodged for a fixed period.

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foreign forfeiture order has the same meaning as in the *Mutual Assistance Act.

foreign indictable offence has the meaning given by section 337A.

foreign pecuniary penalty order has the same meaning as in the *Mutual Assistance Act.

foreign restraining order has the same meaning as in the *Mutual Assistance Act.

foreign serious offence has the same meaning as in the *Mutual Assistance Act.

forfeiture order means an order made under Division 1 of Part 2-2 that is in force.

freezing order means an order under section 15B, with any variations under section 15Q.

frisk search means:

(a) a search of a person conducted by quickly running the hands over the person's outer garments; and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

indictable offence means an offence against a law of the Commonwealth, or a *non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances).

indictable offence of Commonwealth concern means an offence against a law of a State or a *self-governing Territory:

(a) that may be dealt on indictment (even if it may also be dealt with as a summary offence in some circumstances); and

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(b) the *proceeds of which were (or were attempted to have been) dealt with in contravention of a law of the Commonwealth on:

(i) importation of goods into, or exportation of goods from, *Australia; or

(ii) a communication using a postal, telegraphic or telephonic service within the meaning of paragraph 51(xx) of the Constitution; or

(iii) a transaction in the course of banking (other than State banking that does not extend beyond the limits of the State concerned).

instrument has the meaning given by sections 329 and 330.

interest, in relation to property or a thing, means:

(a) a legal or equitable estate or interest in the property or thing; or

(b) a right, power or privilege in connection with the property or thing;

whether present or future and whether vested or contingent.

Note: For references to an ***interest*** in property of a person who has died, see subsection 325(2).

interstate forfeiture order means an order that is made under a *corresponding law and is of a kind declared by the regulations to be within this definition.

interstate indictable offence means an offence against a law of a State or a *self-governing Territory, being an offence in relation to which an *interstate forfeiture order or an *interstate pecuniary penalty order may be made under a *corresponding law of that State or Territory.

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interstate pecuniary penalty order means an order that is made under a *corresponding law and is of a kind declared by the regulations to be within this definition.

interstate restraining order means an order that is made under a *corresponding law and is of a kind declared by the regulations to be within this definition.

lawfully acquired has a meaning affected by section 336A.

lawyer means a duly qualified legal practitioner.

legal aid commission means an authority established by or under a law of a State or a *self-governing Territory for the purpose of providing legal assistance.

legal professional privilege includes privilege under Division 1 of Part 3.10 of the *Evidence Act 1995*.

literary proceeds has the meaning given by section 153.

literary proceeds amount has the meaning given by subsection 158(1).

literary proceeds order means an order made under section 152 that is in force.

monitoring order means an order made under section 219 that is in force.

Mutual Assistance Act means the *Mutual Assistance in Criminal Matters Act 1987*.

narcotic substance means:

(a) a narcotic substance within the meaning of the *Customs Act 1901*; or

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(b) a substance specified in the regulations for the purposes of this definition.

non-governing Territory means a Territory that is not a *self-governing Territory.

officer, in relation to a *financial institution or a corporation, means a *director, secretary, *executive officer or employee.

Official Trustee means the Official Trustee in Bankruptcy.

ordinary search means a search of a person or of articles in the possession of a person that may include:

(a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and

(b) an examination of those items.

parent: without limiting who is a parent of a person for the purposes of this Act, someone is the ***parent*** of a person if the person is his or her child because of the definition of ***child*** in this section.

pecuniary penalty order means an order made under section 116 that is in force.

penalty amount has the meaning given by subsection 121(1).

person assisting, in relation to a *search warrant, means:

(a) a person who is an *authorised officer and who is assisting in executing the warrant; or

(b) a person who is not an authorised officer and who has been authorised by the relevant *executing officer to assist in executing the warrant.

person's property: a person's property includes property in respect of which the person has the beneficial interest.

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petition means a petition under the *Bankruptcy Act 1966*.

police officer means:

(a) an *AFP member; or

(b) a member of the police force of a State or Territory.

preliminary unexplained wealth order, in relation to a person, means an order under section 179B requiring the person to appear before a court.

premises includes:

(a) any land; and

(b) any structure, building, aircraft, vehicle, vessel or place (whether built on or not); and

(c) any part of such a structure, building, aircraft, vehicle, vessel or place.

proceeds has the meaning given by sections 329 and 330.

proceeds jurisdiction has the meaning given by section 335.

proceeds of confiscated assets has the meaning given by subsection 296(3).

production order means an order made under subsection 202(1) that is in force.

professional confidential relationship privilege means privilege under:

(a) Division 1A of Part 3.10 of the *Evidence Act 1995*; or

(b) Division 1A of Part 3.10 of the *Evidence Act 1995* of New South Wales or a similar law of a State or Territory.

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property means real or personal property of every description, whether situated in *Australia or elsewhere and whether tangible or intangible, and includes an *interest in any such real or personal property.

property-tracking document has the meaning given in subsection 202(5).

quashed has the meaning given by section 332.

registrable property means property title to which is passed by registration on a register kept pursuant to a provision of any law of the Commonwealth or of a State or Territory.

registration authority means an authority responsible for administering a law of the Commonwealth, a State or a Territory providing for registration of title to, or charges over, property of a particular kind.

related offence: an offence is related to another offence if the physical elements of the 2 offences are substantially the same acts or omissions.

responsible custodian has the meaning given by subsection 254(2).

restraining order means an order under section 17, 18, 19 20 or 20A that is in force.

search warrant means a warrant issued under section 225 that is in force.

self-governing Territory means:

(a) the Australian Capital Territory; or

(b) the Northern Territory; or

(c) Norfolk Island.

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senior Departmental officer means an SES employee or acting SES employee in the Attorney-General's Department.

serious offence means:

(a) an *indictable offence punishable by imprisonment for 3 or more years, involving:

(i) unlawful conduct relating to a *narcotic substance; or

(ia) unlawful conduct constituted by or relating to a breach of Part 9.1 of the *Criminal Code* (serious drug offences); or

(ii) unlawful conduct constituted by or relating to a breach of section 81 of the *Proceeds of Crime Act 1987* or Part 10.2 of the *Criminal Code* (money-laundering); or

(iii) unlawful conduct by a person that causes, or is intended to cause, a *benefit to the value of at least $10,000 for that person or another person; or

(iv) unlawful conduct by a person that causes, or is intended to cause, a loss to the Commonwealth or another person of at least $10,000; or

(aa) unlawful conduct by a person that consists of an indictable offence (the ***3 year offence***) punishable by imprisonment for 3 or more years and one or more other indictable offences that, taken together with the 3 year offence, constitute a series of offences:

(i) that are founded on the same facts or are of a similar character; and

(ii) that cause, or are intended to cause, a benefit to the value of at least $10,000 for that person or another person, or a loss to the Commonwealth or another person of at least $10,000; or

(b) an offence against any of the following provisions of the *Migration Act 1958*:

(i) section 233A (offence of people smuggling);

*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(ii) section 233B (people smuggling involving exploitation, or danger of death or serious harm etc.);

(iii) section 233C (people smuggling at least 5 people);

(iv) section 233D (supporting the offence of people smuggling);

(v) subsection 233E(1) or (2) (concealing non-citizens etc.);

(vi) section 234A (false documents etc. relating to at least 5 non-citizens);

(c) an offence against any of the following provisions of the *Financial Transaction Reports Act 1988* involving a transaction of at least $50,000 in value:

(i) section 15 (reports about transfers of currency into or out of Australia); or

(ii) section 29 (false or misleading information); or

(d) an offence against section 24 (opening accounts etc. in false names) of the *Financial Transaction Reports Act 1988* if transactions on the relevant account total at least $50,000 in value during any 6 month period; or

(e) an offence against section 31 (conducting transactions to avoid reporting requirements) of the *Financial Transaction Reports Act 1988* if transactions in breach of that section by the person committing the offence total at least $50,000 in value during any 6 month period; or

(ea) an offence against any of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* involving a transaction of at least $50,000 in value:

(i) section 53 (reports about movements of physical currency into or out of Australia);

(ii) section 59 (reports about movements of bearer negotiable instruments into or out of Australia);

(iii) section 136 (false or misleading information);

(iv) section 137 (false or misleading documents); or

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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(eb) an offence against any of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:

(i) section 139 (providing a designated service using a false customer name or customer anonymity);

(ii) section 140 (receiving a designated service using a false customer name or customer anonymity);

(iii) section 141 (non-disclosure of other name by which customer is commonly known);

if:

(iv) the customer concerned had an account in relation to the provision of the designated service concerned; and

(v) transactions on the account total at least $50,000 in value during any 6 month period beginning after the commencement of Part 12 of that Act; or

(ec) an offence against either of the following sections of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:

(i) section 142 (conducting transactions so as to avoid reporting requirements relating to threshold transactions);

(ii) section 143 (conducting transfers so as to avoid reporting requirements relating to cross-border movements of physical currency);

if transactions in breach of that section by the person committing the offence total at least $50,000 in value during any 6 month period; or

(ed) an offence against either of the following sections of the *Trade Practices Act 1974*:

(i) section 44ZZRF (making a contract etc. containing a cartel provision);

(ii) section 44ZZRG (giving effect to a cartel provision); or

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(f) a *terrorism offence; or

(g) an offence against section 11.1, 11.2, 11.2A, 11.4 or 11.5 of the *Criminal Code* or former section 5, 7, 7A or 86 of the *Crimes Act 1914* (extensions of criminal responsibility) in relation to an offence referred to in this definition; or

(h) an indictable offence specified in the regulations.

State indictable offence means an offence against a law of a State or a *self-governing Territory that may be dealt with on indictment (even if it may also be dealt with as a summary offence in some circumstances).

State offence that has a federal aspect has the same meaning as in the *Crimes Act 1914*.

Note: Section 3AA of the *Crimes Act 1914* sets out when a State offence has a federal aspect.

stored value card means a portable device that is capable of storing monetary value in a form other than physical currency, or as otherwise prescribed by the regulations.

strip search means a search of a person or of articles in the possession of a person that may include:

(a) requiring the person to remove all of his or her garments; and

(b) an examination of the person's body (but not of the person's body cavities) and of those garments.

sufficient consideration: an acquisition or disposal of property is for sufficient consideration if it is for a consideration that is sufficient and that reflects the value of the property, having regard solely to commercial considerations.

suspect, in relation to a *restraining order or a *confiscation order, means the person who:

(a) has been convicted of; or

*To find definitions of asterisked terms, see the Dictionary, at section 338.

Appendix B

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(b) has been *charged with, or is proposed to be charged with; or

(c) if the order is a restraining order—is suspected of having committed; or

(d) if the order is a confiscation order—committed;

the offence or offences to which the order relates.

suspect means:

(a) in relation to a *restraining order (other than a restraining order made under section 20A) or a *confiscation order (other than an *unexplained wealth order)—the person who:

(i) has been convicted of; or

(ii) has been *charged with, or is proposed to be charged with; or

(iii) if the order is a restraining order—is suspected of having committed; or

(iv) if the order is a confiscation order—committed;

the offence or offences to which the order relates; or

(b) in relation to a restraining order made under section 20A or an unexplained wealth order—the person whose *total wealth is suspected of exceeding the value of *wealth that was *lawfully acquired.

tainted property means:

(a) *proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; or

(b) an *instrument of an indictable offence.

terrorism offence means an offence against Part 5-3 of the *Criminal Code*.

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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totalisator agency board means a board or authority established by or under a law of a State or Territory for purposes that include the purpose of operating a betting service.

total wealth, of a person, has the meaning given by subsection 179G(2).

unexplained wealth amount, of a person, has the meaning given by subsection 179E(2).

unexplained wealth order means an order made under subsection 179E(1) that is in force.

unlawful activity means an act or omission that constitutes:

(a) an offence against a law of the Commonwealth; or

(b) an offence against a law of a State or Territory that may be dealt with on indictment (even if it may also be dealt with as a summary offence in some circumstances); or

(c) an offence against a law of a foreign country.

wealth, of a person, has the meaning given by subsection 179G(1).

working day means a day that is not a Saturday, Sunday, public holiday or bank holiday in the place concerned.

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*To find definitions of asterisked terms, see the Dictionary, at section 338.

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Table of Acts

Notes to the *Proceeds of Crime Act 2002*

Note 1

The *Proceeds of Crime Act 2002* as shown in this compilation comprises Act No. 85, 2002 amended as indicated in the Tables below.

For all relevant information pertaining to application, saving or transitional provisions *see* Table A.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Proceeds of Crime Act 2002	85, 2002	11 Oct 2002	Ss. 3–338: 1 Jan 2003 (*see Gazette* 2002, No. GN44) Remainder: Royal Assent	
Australian Crime Commission Establishment Act 2002	125, 2002	10 Dec 2002	Schedule 2 (items 116, 117): *(a)*	—
Crimes Legislation Enhancement Act 2003	41, 2003	3 June 2003	Schedule 2 (items 16A–16E): 1 Jan 2003	—
Bankruptcy Legislation Amendment Act 2004	80, 2004	23 June 2004	Schedule 1 (items 200, 212, 213, 215): 1 Dec 2004 (*see Gazette* 2004, No. GN34)	Sch. 1 (items 212, 213, 215)
Anti-terrorism Act 2004	104, 2004	30 June 2004	1 July 2004	S. 4(1)
Financial Framework Legislation Amendment Act 2005	8, 2005	22 Feb 2005	S. 4 and Schedule 1 (items 309–312, 496): Royal Assent	S. 4 and Sch. 1 (item 496)
Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005	129, 2005	8 Nov 2005	Schedule 1 (items 67, 75, 76): 6 Dec 2005 Schedule 3: Royal Assent	Sch. 1 (items 75, 76) and Sch. 3 (Item 11)
Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005	136, 2005	15 Nov 2005	16 Nov 2005	Sch. 1 (item 28)

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Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Anti-Terrorism Act (No. 2) 2005	144, 2005	14 Dec 2005	Schedule 9 (items 22, 23): *(b)*	S. 2(1) (item 19) (am. by 170, 2006, Sch. 1 [item 11])
as amended by				
Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006	170, 2006	12 Dec 2006	Schedule 1 (item 11): *(c)*	—
Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006	86, 2006	30 June 2006	Schedule 1: (items 54, 55): 30 Dec 2006 (*see* s. 2(1))	—
Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006	170, 2006	12 Dec 2006	Schedule 1 (items 153–157): 13 Dec 2006 (*see* s. 2(1))	—
Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007	57, 2007	15 Apr 2007	Schedule 2 (items 11–19): 16 Apr 2007	Sch. 2 (item 19)
Evidence Amendment (Journalists' Privilege) Act 2007	116, 2007	28 June 2007	Schedule 1: 26 July 2007 Remainder: Royal Assent	—
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008	115, 2008	21 Nov 2008	Schedule 2 (items 42, 43): 1 Mar 2009 Schedule 4 (item 2): *(d)*	—
Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008	144, 2008	9 Dec 2008	Schedule 2 (items 65–72): 10 Dec 2008	Sch. 2 (item 72)
Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009	59, 2009	26 June 2009	Schedule 1 (item 1): 24 July 2009	—

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Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009	106, 2009	6 Nov 2009	Schedule 1 (item 111): 4 Dec 2009	—
Crimes Legislation Amendment (Serious and Organised Crime) Act 2010	3, 2010	19 Feb 2010	Schedule 1 (items 1–42): Royal Assent Schedule 2 (items 1–8, 11–67, 72–107): 20 Feb 2010 Schedule 2 (items 68–71): 19 May 2010	Sch. 2 (items 8, 15, 18, 29, 31, 35, 42, 48, 50, 52, 54, 60, 63, 71, 107)
Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010	4, 2010	19 Feb 2010	Schedule 1 (items 1–209, 212, 213, 215, 217–221) and Schedule 10 (item 24): 20 Feb 2010 Schedule 1 (items 214, 216): *(e)*	Sch. 1 (items 19, 35, 65, 67, 77, 81, 94, 98, 102, 104, 107, 113, 128, 140, 146, 158, 161, 164, 166, 168, 175, 178, 181, 184, 187, 192, 197, 205, 209, 219, 221)
Anti-People Smuggling and Other Measures Act 2010	50, 2010	31 May 2010	Schedule 1 (item 13): 1 June 2010	—
Personal Property Securities (Corporations and Other Amendments) Act 2010	96, 2010	6 July 2010	Schedule 3 (items 18–21, 24–28): [*see* Note 3] Schedule 3 (items 22, 23): *(f)*	—
Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010	103, 2010	13 July 2010	Schedule 6 (items 1, 86): [*see* Note 4]	—
National Security Legislation Amendment Act 2010	127, 2010	24 Nov 2010	Schedule 10 (item 10): 25 Nov 2010	—

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Act Notes

(a) Subsection 2(1) (item 4) of the *Australian Crime Commission Establishment Act 2002* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
4. Schedule 2, items 116 and 117	The later of: (a) the start of the day on which Schedule 1 to this Act commences; and (b) immediately after the commencement of section 213 of the *Proceeds of Crime Act 2002*	1 January 2003 (paragraph (b) applies)

(b) Subsection 2(1) (item 19) of the *Anti-Terrorism Act (No. 2) 2005* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
19. Schedule 9, items 18 to 24	14 December 2006. However, if section 3 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* commences before 14 December 2006, the provision(s) do not commence at all.	Do not commence

(c) Subsection 2(1) (item 3) of the *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
3. Schedule 1, items 2 to 11	Immediately after the commencement of section 2 of the *Anti-Terrorism Act (No. 2) 2005*.	14 December 2005

(d) Subsection 2(1) (item 8) of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

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Act Notes

Provision(s)	Commencement	Date/Details
8. Schedule 4, item 2	Immediately after the commencement of section 330 of the *Proceeds of Crime Act 2002*.	1 January 2003

(e) Subsection 2(1) (items 3 and 5) of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Provision(s)	Commencement	Date/Details
3. Schedule 1, item 214	The later of: (a) the day after this Act receives the Royal Assent; and (b) immediately after the commencement of Part 5 of Schedule 2 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	19 May 2010 (paragraph (b) applies)
5. Schedule 1, item 216	The later of: (a) the day after this Act receives the Royal Assent; and (b) immediately after the commencement of Part 5 of Schedule 2 to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	19 May 2010 (paragraph (b) applies)

(f) Subsection 2(1) (item 16) of the *Personal Property Securities (Corporations and Other Amendments) Act 2010* provides as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

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Act Notes

Provision(s)	Commencement	Date/Details
16. Schedule 3, items 22 and 23	The registration commencement time within the meaning of section 306 of the *Personal Property Securities Act 2009*. However, if the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* receives the Royal Assent before the registration commencement time within the meaning of section 306 of the *Personal Property Securities Act 2009*, the provision(s) do not commence at all.	Do not commence

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Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Chapter 1	
Part 1-2	
S. 5	am. No. 3, 2010
Part 1-3	
Note to s. 6	ad. No. 136, 2005
Ss. 7, 8	am. No. 3, 2010
Chapter 2	
Part 2-1A	
Part 2-1A	ad. No. 3, 2010
S. 15A	ad. No. 3, 2010
Division 1	
S. 15B	ad. No. 3, 2010
Division 2	
Ss. 15C–15H	ad. No. 3, 2010
Division 3	
Ss. 15J–15M	ad. No. 3, 2010
Division 4	
S. 15N	ad. No. 3, 2010
S. 15P	ad. No. 3, 2010
Division 5	
S. 15Q	ad. No. 3, 2010
Division 6	
Ss. 15R, 15S	ad. No. 3, 2010
Part 2-1	
Division 1	
S. 17	am. No. 129, 2005
S. 18	am. No. 129, 2005; No. 3, 2010
Heading to s. 19	am. No. 4, 2010
S. 19	am. Nos. 3 and 4, 2010
S. 20	am. No. 104, 2004; No. 129, 2005
S. 20A	ad. No. 3, 2010
Division 3	
Heading to s. 29	am. Nos. 3 and 4, 2010
S. 29	am. No. 170, 2006; Nos. 3 and 4, 2010

Appendix B

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Table of Amendments

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Provision affected	How affected
Note to s. 29(1)	am. No. 3, 2010
Heading to s. 29A	am. No. 4, 2010
S. 29A	ad. No. 3, 2010 am. No. 4, 2010
Note to s. 29A	am. No. 4, 2010
Heading to s. 30	am. No. 4, 2010
S. 30	am. No. 4, 2010
Heading to s. 31	am. No. 4, 2010
Ss. 31, 32	am. No. 4, 2010
Division 4	
S. 35	am. No. 3, 2010
S. 37	am. No. 3, 2010
Division 5	
S. 39	am. No. 4, 2010
Note to s. 39(1) Renumbered Note 1	No. 3, 2010
Note 2 to s. 39(1)	ad. No. 3, 2010
Ss. 39A, 39B	ad. No. 4, 2010
S. 40	am. No. 3, 2010
Note to s. 40	am. No. 4, 2010
Division 6	
S. 42	am. No. 3, 2010
Heading to s. 45	am. No. 3, 2010
S. 45	am. Nos. 3 and 4, 2010
S. 45A	ad. No. 3, 2010
Part 2-2	
Division 1	
S. 47	am. No. 3, 2010
Heading to s. 49	am. No. 4, 2010
S. 49	am. No. 3, 2010
Division 2	
S. 55	am. No. 4, 2010
Division 3	
S. 64	am. No. 4, 2010
Division 4	
S. 71	am. No. 3, 2010

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Table of Amendments

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Provision affected	How affected
Division 5	
Subdivision B	
S. 73	am. Nos. 3 and 4, 2010
Ss. 74–76	am. No. 4, 2010
Subdivision C	
Heading to Subdiv. C of Div. 5 of Part 2-2	rs. No. 4, 2010
S. 77	am. No. 4, 2010
S. 78	rs. No. 4, 2010
S. 79	am. No. 4, 2010
S. 79A	ad. No. 4, 2010
Division 6	
Ss. 84, 85	am. Nos. 3 and 4, 2010
Part 2-3	
S. 91	am. No. 4, 2010
Division 1	
S. 92	am. No. 4, 2010
S. 92A	ad. No. 4, 2010
Ss. 93, 94	am. No. 4, 2010
S. 94A	ad. No. 4, 2010
Division 3	
S. 102	am. No. 4, 2010
S. 104	rs. No. 4, 2010
S. 106	am. No. 4, 2010
Division 4	
Ss. 110, 111	am. Nos. 3 and 4, 2010
Part 2-4	
Division 1	
S. 116	am. No. 3, 2010
Division 2	
Subdivision A	
S. 121	am. No. 4, 2010
Subdivision B	
S. 122	am. No. 4, 2010
S. 124	am. No. 4, 2010

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Table of Amendments

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Provision affected	How affected
S. 129	am. No. 80, 2004
Subdivision C	
S. 130	am. No. 4, 2010
Subdivision D	
S. 133	am. No. 4, 2010
Division 3	
S. 134	am. No. 4, 2010
S. 136	am. No. 4, 2010
S. 138	am. No. 4, 2010
Division 4	
S. 142	am. No. 4, 2010
Division 5	
S. 146	am. No. 4, 2010
Heading to s. 147	am. No. 4, 2010
S. 147	am. No. 4, 2010
Note to s. 147	am. No. 4, 2010
Heading to s. 148	am. No. 4, 2010
S. 148	am. No. 4, 2010
S. 149	rs. No. 3, 2010
S. 149A	ad. No. 4, 2010
Heading to s. 150	am. No. 4, 2010
S. 150	am. No. 4, 2010
Part 2-5	
Division 1	
Ss. 152, 153	am. No. 104, 2004
Division 4	
S. 169	am. No. 4, 2010
Part 2-6	
Part 2-6	ad. No. 3, 2010
S. 179A	ad. No. 3, 2010
Division 1	
Ss. 179B, 179C	ad. No. 3, 2010
S. 179CA	ad. No. 3, 2010
Ss. 179D, 179E	ad. No. 3, 2010
Ss. 179EA, 179EB	ad. No. 3, 2010

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Provision affected	How affected
S. 179F	ad. No. 3, 2010
Division 2	
Ss. 179G, 179H	ad. No. 3, 2010
Ss. 179J–179L	ad. No. 3, 2010
Division 3	
Ss. 179M, 179N	ad. No. 3, 2010
Ss. 179P, 179Q	ad. No. 3, 2010
Division 4	
Ss. 179R, 179S	ad. No. 3, 2010
S. 179SA	ad. No. 3, 2010
S. 179T	ad. No. 3, 2010
Division 5	
S. 179U	ad. No. 3, 2010 am. No. 127, 2010
Chapter 3	
Part 3-1	
Division 1	
S. 180	am. No. 144, 2008; No. 4, 2010
Ss. 180A–180E	ad. No. 4, 2010
Heading to s. 181	am. No. 4, 2010
S. 181	am. No. 144, 2008; No. 4, 2010
S. 182	am. No. 4, 2010
Division 3	
S. 187	am. No. 4, 2010
Division 4	
Ss. 195, 196	am. Nos. 3 and 4, 2010
S. 197	am. No. 116, 2007
S. 197A	ad. No. 4, 2010
Ss. 199–201	am. No. 3, 2010
Part 3-2	
S. 202	am. Nos. 3 and 4, 2010
S. 203	am. No. 4, 2010
Ss. 209, 210	am. No. 3, 2010
S. 211	am. Nos. 3 and 4, 2010
S. 212	am. No. 3, 2010

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Table of Amendments

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Provision affected	How affected
Part 3-3	
S. 213	am. No. 125, 2002; No. 86, 2006; No. 4, 2010
S. 214	am. No. 4, 2010
Ss. 216, 217	am. No. 3, 2010
S. 218	am. Nos. 3 and 4, 2010
Part 3-4	
Ss. 219, 220	am. No. 4, 2010
S. 222	am. No. 3, 2010
S. 223	am. No. 170, 2006; No. 3, 2010
S. 224	am. No. 3, 2010
Part 3-5	
Division 1	
Subdivision B	
Ss. 232–235	am. No. 3, 2010
Subdivision C	
S. 246	am. No. 3, 2010
Division 4	
S. 266	am. No. 3, 2010
Part 3-6	
Part 3-6	ad. No. 3, 2010
S. 266A	ad. No. 3, 2010 am. No. 4, 2010
Chapter 4	
Part 4-1	
Division 1	
S. 267A	ad. No. 41, 2003
Division 2	
S. 269	am. No. 4, 2010
Ss. 272–275	am. No. 3, 2010
Division 3	
Ss. 278–280	am. No. 41, 2003
Division 4	
Heading to s. 282	am. No. 3, 2010
S. 282A	ad. No. 3, 2010
Ss. 283–286	am. No. 3, 2010

Appendix B

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Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 5	
S. 288	am. No. 8, 2005
Part 4-2	
S. 292	rep. No. 3, 2010
Heading to s. 293	rs. No. 3, 2010
S. 293	am. No. 3, 2010
Part 4-3	
S. 296	am. Nos. 3 and 4, 2010
S. 297	am. Nos. 8 and 136, 2005; No. 4, 2010
S. 298	am. No. 4, 2010
Heading to s. 299	am. No. 57, 2007 rep. No. 4, 2010
S. 299	am. No. 8, 2005; No. 57, 2007 rep. No. 4, 2010
Part 4-4	
Heading to Part 4-4	rs. No. 4, 2010
Div. 1 of Part 4-4	rep. No. 3, 2010
Ss. 300, 301	rep. No. 3, 2010
S. 302	am. No. 4, 2010 rep. No. 3, 2010
Heading to Div. 2 of Part 4-4	rep. No. 4, 2010
S. 302C	am. No. 4, 2010
Part 4-5	
Division 1	
S. 307	am. No. 4, 2010
Chapter 5	
S. 315A	ad. No. 4, 2010
S. 316	am. No. 4, 2010
Ss. 318A, 318B	ad. No. 4, 2010
S. 322	am. No. 3, 2010
Chapter 6	
Part 6-1	
Division 1	
S. 330	am. No. 115, 2008
Division 2	
S. 333	am. No. 4, 2010

Appendix B

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Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Division 3	
S. 335	am. No. 106, 2009; Nos. 3 and 4, 2010
S. 336	am. No. 3, 2010
S. 336A	ad. No. 3, 2010
S. 337	am. No. 144, 2008; No. 4, 2010
S. 337A	ad. No. 104, 2004 am. Nos. 3 and 4, 2010
S. 337B	ad. No. 170, 2006
Part 6-2	
S. 338	am. No. 125, 2002; No. 41, 2003; No. 104, 2004; No. 129, 2005; Nos. 86 and 170, 2006; No. 116, 2007; No. 144, 2008; No. 59, 2009; Nos. 3, 4 and 50, 2010

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Note 2

Section 338—Schedule 1 (item 182) of the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (No. 4, 2010) provides as follows:

Schedule 1

182 Section 338 (paragraph (b) of the definition of *unlawful activity*)

Omit "that may be dealt with on indictment (even if it may be dealt with as a summary offence in some circumstances)".

The proposed amendment was misdescribed and is not incorporated in this compilation.

Note 3

Personal Property Securities (Corporations and Other Amendments) Act 2010 (No. 96, 2010)

The following amendments commence on 1 February 2012 or an earlier time determined by the Minister (*see* section 306 of the *Personal Property Securities Act 2009*):

Schedule 3

18 At the end of section 142

Add:

(4) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

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Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by this section after the commencement of subsection (4) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

19 At the end of section 143

Add:

(3) In this section:

registration of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data only if regulations are made for the purposes of paragraph 148(c) of that Act.

20 At the end of section 169

Add:

(4) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by this section after the commencement of subsection (4) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

21 At the end of section 170

Add:

(3) In this section:

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registration of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data only if regulations are made for the purposes of paragraph 148(c) of that Act.

24 Section 302C

Before "If a charge", insert "(1)".

25 At the end of section 302C

Add:

(2) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to the Commonwealth's charge (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the Commonwealth's charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to Commonwealth charges created by section 302A after the commencement of subsection (2) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

26 After subsection 307(3)

Insert:

(3A) Subsection 73(2) of the *Personal Property Securities Act 2009* applies to a charge created by subsection (1) (to the extent, if any, to which that Act applies in relation to the property charged).

Note 1: The effect of this subsection is that the priority between the charge and a security interest in the property to which the *Personal Property Securities Act 2009* applies is to be determined in accordance with this Act rather than the *Personal Property Securities Act 2009*.

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Note 2: Subsection 73(2) of the *Personal Property Securities Act 2009* applies to charges created by subsection (1) after the commencement of subsection (3A) (which is at the registration commencement time within the meaning of the *Personal Property Securities Act 2009*).

27 At the end of section 307

Add:

(5) In this section:

registration of a charge on a particular kind of personal property within the meaning of the *Personal Property Securities Act 2009* includes the registration of data in relation to that kind of property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data if regulations are made for the purposes of paragraph 148(c) of that Act.

28 Section 338 (definition of *registration authority*)

Repeal the definition, substitute:

registration authority, in relation to property of a particular kind, means:

(a) an authority responsible for administering a law of the Commonwealth, a State or a Territory providing for registration of title to, or charges over, property of that kind; or

(b) the Registrar of Personal Property Securities, if the *Personal Property Securities Act 2009* provides for the registration of data in relation to that kind of personal property for the purposes of paragraph 148(c) of that Act.

Note: The *Personal Property Securities Act 2009* provides for the registration of such data if regulations are made for the purposes of paragraph 148(c) of that Act.

As at 26 November 2010 the amendments are not incorporated in this compilation.

Appendix B

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Note 4

Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (No. 103, 2010)

The following amendment commences on the start of 1 January 2011:

Schedule 6

1 Amendment of Acts

The specified provisions of the Acts listed in this Part are amended by omitting "*Trade Practices Act 1974*" and substituting "*Competition and Consumer Act 2010*".

Proceeds of Crime Act 2002

86 Section 338 (paragraph (ed) of the definition of *serious offence*)

As at 26 November 2010 the amendment is not incorporated in the compilation.

Appendix B

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Table A

Application, saving or transitional provisions

Bankruptcy Legislation Amendment Act 2004 (No. 80, 2004)

Schedule 1

212 Transitional—pre-commencement deeds and compositions

(1) For the purposes of this item, if a deed of assignment or a deed of arrangement was executed by a debtor and a trustee under Part X of the *Bankruptcy Act 1966* before the commencement of this item, the deed is a ***pre-commencement deed***.

(2) For the purposes of this item, if a composition was accepted before the commencement of this item by a special resolution of a meeting of creditors under section 204 of the *Bankruptcy Act 1966*, the composition is a ***pre-commencement composition***.

(3) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:

(a) the *Bankruptcy Act 1966* and regulations under that Act; and

(b) the Acts amended by Part 2 of this Schedule;

continue to apply, in relation to:

(c) a pre-commencement deed; and

(d) a pre-commencement composition; and

(e) any matter connected with, or arising out of:

(i) a pre-commencement deed; or

(ii) a pre-commencement composition;

as if those repeals had not happened and those amendments had not been made.

Appendix B

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Table A

213 Transitional—pre-commencement authorities

(1) For the purposes of this item, if:

(a) an authority given by a debtor under section 188 of the *Bankruptcy Act 1966* became effective before the commencement of this item; and

(b) as at the commencement of this item, none of the following had happened:

(i) the execution by the debtor and the trustee of a deed of assignment under Part X of the *Bankruptcy Act 1966*;

(ii) the execution by the debtor and the trustee of a deed of arrangement under Part X of the *Bankruptcy Act 1966*;

(iii) the acceptance of a composition by a special resolution of a meeting of the debtor's creditors under section 204 of the *Bankruptcy Act 1966*;

the authority is a ***pre-commencement authority***.

(2) Despite the repeals and amendments made by Parts 1 and 2 of this Schedule:

(a) the *Bankruptcy Act 1966* and regulations under that Act; and

(b) the Acts amended by Part 2 of this Schedule;

continue to apply, in relation to:

(c) a pre-commencement authority; and

(d) the control of the debtor's property following a pre-commencement authority becoming effective; and

(e) a meeting of the debtor's creditors called under a pre-commencement authority; and

(f) whichever of the following is applicable:

(i) a deed of assignment executed after the commencement of this item by the debtor and the trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;

(ii) a deed of arrangement executed after the commencement of this item by the debtor and the

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trustee under Part X of the *Bankruptcy Act 1966* in accordance with a special resolution of such a meeting;

(iii) a composition accepted after the commencement of this item by a special resolution of such a meeting; and

(g) any other matter connected with, or arising out of:

(i) a pre-commencement authority; or

(ii) a deed of assignment mentioned in subparagraph (f)(i); or

(iii) a deed of arrangement mentioned in subparagraph (f)(ii); or

(iv) a composition mentioned in subparagraph (f)(iii);

as if those repeals had not happened and those amendments had not been made.

215 Transitional—regulations

(1) The regulations may make provision for matters of a transitional nature arising from the amendments made by Parts 1 and 2 of this Schedule.

(2) The Governor-General may make regulations for the purposes of subitem (1).

Anti-terrorism Act 2004 (No. 104, 2004)

4 Application of amendments

(1) The amendments of the *Proceeds of Crime Act 2002* apply to any application made under that Act after the commencement of this Act, including an application in relation to:

(a) conduct that occurred before the commencement of this Act; or

(b) proceeds derived or realised before the commencement of this Act; or

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Table A

(c) literary proceeds derived or transferred to Australia before the commencement of this Act.

Financial Framework Legislation Amendment Act 2005 (No. 8, 2005)

4 Saving of matters in Part 2 of Schedule 1

(1) If:

(a) a decision or action is taken or another thing is made, given or done; and

(b) the thing is taken, made, given or done under a provision of a Part 2 Act that had effect immediately before the commencement of this Act;

then the thing has the corresponding effect, for the purposes of the Part 2 Act as amended by this Act, as if it had been taken, made, given or done under the Part 2 Act as so amended.

(2) In this section:

Part 2 Act means an Act that is amended by an item in Part 2 of Schedule 1.

Schedule 1

496 Saving provision—Finance Minister's determinations

If a determination under subsection 20(1) of the *Financial Management and Accountability Act 1997* is in force immediately before the commencement of this item, the determination continues in force as if it were made under subsection 20(1) of that Act as amended by this Act.

Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005 (No. 129, 2005)

Schedule 1

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Table A

75 Application of amendments to conduct before and after commencement

(1) In this item:

earlier conduct means conduct engaged in before the commencement of this Schedule.

engage in conduct has the same meaning as in the *Criminal Code*.

later conduct means conduct engaged in after the commencement of this Schedule.

new law means Part 9.1 of the *Criminal Code* as in force from time to time.

old law means:

(a) the provisions of Division 2 of Part XIII of the *Customs Act 1901* as in force from time to time before the commencement of this Schedule to the extent to which those provisions related to narcotic substances; and

(b) any law related to those provisions.

(2) The amendments made by this Schedule do not apply in relation to earlier conduct.

(3) Despite the amendments made by this Schedule, the old law continues to apply in relation to later conduct if:

(a) the later conduct is related to earlier conduct; and

(b) because of that relationship, the later conduct would have constituted a physical element (or a part of a physical element) of an offence against the old law, had the old law remained in force.

(4) If later conduct is alleged against a person in a prosecution for an offence against the old law, that conduct must not be alleged against the person in a prosecution for:

(a) an offence against the new law; or

(b) an offence related to an offence against the new law.

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Table A

76 Transitional regulations

(1) The regulations may make provision for matters of a transitional nature (including any saving or application provisions) arising from the amendments or repeals made by this Schedule.

(2) The Governor-General may make regulations for the purposes of subitem (1).

Schedule 3

11 Application

The amendments made by this Part apply in relation to bankruptcy property whether vested in a person under the *Bankruptcy Act 1966* before, on or after the commencement of this item.

Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (No. 136, 2005)

Schedule 1

28 Transitional—validation of certain examinations etc.

(1) This item applies to each of the following:

(a) a purported examination conducted under the *Proceeds of Crime Act 2002* during the interim period by a designated AAT member in the purported capacity of approved examiner;

(b) the purported giving of a notice or direction under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner;

(c) the purported doing of any other act or thing under Part 3-1 of that Act during the interim period by a designated AAT member in the purported capacity of approved examiner.

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Table A

(2) The examination, notice, direction, act or thing is as valid, and is taken always to have been as valid, as it would have been if the designated AAT member had been an eligible legal practitioner during the interim period.

(3) The designated AAT member has, and is taken always to have had, the same protection and immunity under section 194 of the *Proceeds of Crime Act 2002* that the member would have, or would have had, if the member had been an eligible legal practitioner during the interim period.

(4) In this item:

designated AAT member means a non-presidential member of the Administrative Appeals Tribunal who is not an eligible legal practitioner.

eligible legal practitioner means person who is enrolled as a legal practitioner of:

(a) the High Court; or

(b) another federal court; or

(c) the Supreme Court of a State or Territory;

and has been so enrolled for at least 5 years.

interim period means the period:

(a) beginning at the start of 7 September 2004; and

(b) ending at the end of 19 August 2005.

Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007 (No. 57, 2007)

Schedule 2

19 Transitional—section 299 of the *Proceeds of Crime Act 2002*

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Table A

(1) This item applies to anything done by the Official Trustee under section 299 of the *Proceeds of Crime Act 2002* before the commencement of this item.

(2) The thing has effect, after the commencement of this item, as if it had been done under that section by the Inspector-General in Bankruptcy.

Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (No. 144, 2008)

Schedule 2

72 Application

The amendments of the *Proceeds of Crime Act 2002* made by this Part apply in relation to a proceeding under that Act instituted on or after the commencement of this item.

Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (No. 3, 2010)

Schedule 2

8 Application

Part 2-1A of the *Proceeds of Crime Act 2002* applies in relation to an account if there are reasonable grounds to suspect that the balance of the account:

(a) is proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern; or

(b) is wholly or partly an instrument of a serious offence;

whether the conduct constituting the offence occurs before, on or after the commencement of that Part.

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Table A

15 Application of amendments of sections 18 and 19

The amendments of sections 18 and 19 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a restraining order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

18 Application of amendments of sections 47 and 49

The amendments of sections 47 and 49 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a forfeiture order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

29 Application of amendments of section 116

The amendments of section 116 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a pecuniary penalty order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

31 Application of new section 149

Section 149 of the *Proceeds of Crime Act 2002* as amended by this Part applies in relation to pecuniary penalty orders applied for after the commencement of that section, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

35 Application of amendments of section 202

The amendments of section 202 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to production orders applied for on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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Table A

42 Application of amendments of sections 18 and 19

The amendments of sections 18 and 19 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to applications made on or after the commencement of the amendments for a restraining order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

48 Application of amendments of sections 29 and 45

The amendments of sections 29 and 45 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to restraining orders made as a result of an application made on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

50 Application of new subsection 47(4)

Subsection 47(4) of the *Proceeds of Crime Act 2002* applies in relation to the making of an order on or after the commencement of that subsection, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

52 Application of amendment of subparagraph 49(1)(c)(iv)

The amendment of subparagraph 49(1)(c)(iv) of the *Proceeds of Crime Act 2002* made by this Part applies in relation to applications made on or after the commencement of the amendment for a forfeiture order, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

54 Application of new subsection 49(4)

Subsection 49(4) of the *Proceeds of Crime Act 2002* applies in relation to the making of an order on or after the commencement of that subsection, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

60 Application of amendments of sections 73 and 85

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Table A

The amendments of sections 73 and 85 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to forfeiture orders applied for on or after the commencement of the amendments, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

63 Application of amendments of section 111

The amendments of section 111 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to the quashing, on or after the commencement of the amendments, of a conviction of an offence, whether the conviction occurred before, on or after that commencement.

71 Application of amendments of Chapter 4

The amendments of Chapter 4 of the *Proceeds of Crime Act 2002* made by this Part apply in relation to costs that:

(a) were incurred by legal aid commissions before, on or after the commencement of the amendments; and

(b) if they were incurred before that commencement, had not been paid to the commissions before that commencement.

107 Application and transitional

(1) The amendment of section 42 of the *Proceeds of Crime Act 2002* made by this Part applies in relation to the revocation of a restraining order on or after commencement, whether the application for that revocation was made before, on or after commencement.

(2) If an application under section 42 of the *Proceeds of Crime Act 2002* for the revocation of a restraining order has been made but not determined as at commencement:

(a) the applicant may vary the application to take account of paragraph 42(5)(b) of the *Proceeds of Crime Act 2002* as in force at commencement; and

(b) if the application is varied under paragraph (a) of this subitem—the applicant must give a copy of the application as varied, and written notice of any additional grounds that he

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or she proposes to rely on in seeking that revocation, to the DPP and the Official Trustee; and

(c) the DPP may adduce additional material to the court relating to those additional grounds.

(3) In this item:

commencement means the commencement of this item.

Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 (No. 4, 2010)

Schedule 1

19 Application

Division 3 of Part 2-1 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

35 Application

(1) Subdivisions B and C of Division 5 of Part 2-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to forfeiture orders under section 47 or 49 of that Act that relate to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

(2) Subdivisions B and C of Division 5 of Part 2-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to forfeiture orders under section 48 of that Act applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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Table A

65 Application

Part 2-3 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to property covered by restraining orders made on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

67 Application

Paragraph 333(1)(a) of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to a person in relation to whom a court passes sentence on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

77 Application

Division 2 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to pecuniary penalty orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

81 Application

Division 3 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made on or after the commencement of this item for pecuniary penalty orders, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

94 Application

Division 5 of Part 2-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to convictions quashed on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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Table A

98 Application

Subsection 335(6) of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to persons convicted before a magistrate on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

102 Application

Section 180 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

104 Application

(1) Sections 180A and 180B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to applications for orders under section 73 or 77 of that Act:

(a) if the forfeiture order to which the application relates was or would be made under section 47 or 49 of that Act—that relate to restraining orders applied for on or after the commencement of this item; and

(b) if the forfeiture order to which the application relates was or would be made under section 48 of that Act—that relate to forfeiture orders applied for on or after the commencement of this item;

whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

(2) Sections 180A and 180B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to applications for orders under section 94 or 94A of that Act that relate to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

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Table A

(3) Sections 180C and 180E of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

(4) Section 180D of the *Proceeds of Crime Act 2002*, as inserted by this Part, applies in relation to confiscation orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

107 Application

Section 181 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to convictions quashed on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

113 Application

Sections 182 and 187 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to examination orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

128 Application

Part 3-2 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to production orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

140 Application

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Table A

Part 3-3 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to notices given under section 213 of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

146 Application

Part 3-4 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to monitoring orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

158 Application

Division 5 of Part 2-1 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

161 Application

Section 64 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to forfeiture orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

164 Application

Section 138 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to pecuniary penalty orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

166 Application

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Sections 318A and 318B of the *Proceeds of Crime Act 2002*, as inserted by this Part, apply in relation to statements made at an examination on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

168 Application

Section 19 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

175 Application

Section 337A of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications referred to in paragraph 337A(1)(a) of that Act made on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

178 Application

The amendment made by item 177 applies in relation to search warrants applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

181 Application

The amendment made by item 180 applies in relation to search warrants applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

184 Application

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Table A

Section 45 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to restraining orders applied for on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

187 Application

Section 84 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made as referred to in paragraph 81(1)(b) of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

192 Application

Section 110 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to applications made as referred to in paragraph 107(1)(c) of that Act on or after the commencement of this item, whether the conduct constituting the offence concerned occurred or occurs before, on or after that commencement.

197 Application

Section 316 of the *Proceeds of Crime Act 2002*, as amended by this Part, applies in relation to proceedings under Chapter 2 of that Act, whether commenced before, on or after the commencement of this item.

205 Application

Paragraph 296(1)(h) of the *Proceeds of Crime Act 2002* (as amended by this Division) applies to amounts paid to the Commonwealth on or after the commencement of this Division in settlement of proceedings connected with this Act, whether the settlements occurred before, on or after that commencement.

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Table A

209 Application

Paragraphs 297(1)(fa) and (g) of the *Proceeds of Crime Act 2002* (as amended by this Division) apply in relation to orders and arrangements made on or after the commencement of this Division.

219 Application

Sections 142, 169, 302, 302C and 307 of the *Proceeds of Crime Act 2002*, as amended by this Part, apply in relation to charges created on or after the commencement of this item.

221 Application

Section 315A of the *Proceeds of Crime Act 2002*, as inserted by this Part, applies in relation to applications made on or after the commencement of this item.

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Appendix B(iii)

Proceeds of Crime Act 1996
Australia

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Proceeds of Crime Act, 1996

Number 30 *of* 1996

PROCEEDS OF CRIME ACT, 1996

ARRANGEMENT OF SECTIONS

Section

Appendix B

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Number 30 *of* 1996

PROCEEDS OF CRIME ACT, 1996

AN ACT TO ENABLE THE HIGH COURT, AS RESPECTS THE PROCEEDS OF CRIME, TO MAKE ORDERS FOR THE PRESERVATION AND, WHERE APPROPRIATE, THE DISPOSAL OF THE PROPERTY CONCERNED AND TO PROVIDE FOR RELATED MATTERS. [4*th August*, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation.

1.—(1) In this Act, save where the context otherwise requires—

"*the applicant*" means a member or an authorised officer who has applied to the Court for the making of an interim order or an interlocutory order and, in relation to such an order that is in force, means any member or, as appropriate, any authorised officer;

"*authorised officer*" means an officer of the Revenue Commissioners authorised in writing by the Revenue Commissioners to perform the functions conferred by this Act on authorised officers;

"*the Court*" means the High Court;

"*dealing*", in relation to property in the possession or control of a person, includes—

(*a*) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt,

(*b*) removing the property from the State, and

(*c*) in the case of money or other property held for the person by another person, paying or releasing or transferring it to the person or to any other person;

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"*disposal order*" means an order under *section 4* ;

"*interest*", in relation to property, includes right;

"*interim order*" means an order under *section 2* ;

"*interlocutory order*" means an order under *section 3* ;

"*member*" means a member of the Garda Síochána not below the rank of Chief Superintendent;

"*the Minister*" means the Minister for Finance;

"*proceeds of crime*" means any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the commission of an offence;

"*property*" includes money and all other property, real or personal, heritable or moveable, including choses in action and other intangible or incorporeal property and references to property shall be construed as including references to any interest in property;

"*the respondent*" means a person in respect of whom an application for an interim order or an interlocutory order has been made or in respect of whom such an order has been made and includes any person who, but for this Act, would become entitled, on the death of the first-mentioned person, to any property to which such an order relates (being an order that is in force and is in respect of that person).

(2) In this Act—

(*a*) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other provision is intended, and

(*b*) a reference to a subsection, paragraph or subparagraph is a reference to a subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and

(*c*) a reference to any enactment shall be construed as a reference to that enactment as amended, adapted or extended by or under any subsequent enactment.

Interim order.

2.—(1) Where it is shown to the satisfaction of the Court on application to it *ex parte* in that behalf by a member or an authorised officer—

(*a*) that a person is in possession or control of—

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(i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(*b*) that the value of the property or, as the case may be, the total value of the property referred to in both *subparagraphs (i)* and *(ii)*, of *paragraph (a)* is not less than £10,000,

the Court may make an order ("an interim order") prohibiting the person or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value during the period of 21 days from the date of the making of the order.

(2) An interim order—

(*a*) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(*b*) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interim order is in force, the Court, on application to it in that behalf by the respondent or any other person claiming ownership of any of the property concerned may, if it is shown to the satisfaction of the Court that—

(*a*) the property concerned or a part of it is not property to which *subparagraph (i)* or *(ii)* of *subsection (1)(a)* applies, or

(*b*) the value of the property to which those subparagraphs apply is less than £10,000,

discharge or, as may be appropriate, vary the order.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interim order.

(5) Subject to *subsections (3)* and *(4)*, an interim order shall continue in force until the expiration of the period of 21 days from the date of its making and shall then lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period and, if such an application is

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brought, the interim order shall lapse upon—

(*a*) the determination of the application,

(*b*) the expiration of the ordinary time for bringing an appeal from the determination,

(*c*) if such an appeal is brought, the determination or abandonment of it or of any further appeal or the expiration of the ordinary time for bringing any further appeal,

whichever is the latest.

(6) Notice of an application under this section shall be given—

(*a*) in case the application is under *subsection (3)*, by the respondent or other person making the application to the applicant,

(*b*) in case the application is under *subsection (4)*, by the applicant to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,

and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

Interlocutory order.

3.—(1) Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of *section 8* —

(*a*) that a person is in possession or control of—

(i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or

(ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(*b*) that the value of the property or, as the case may be, the total value of the property referred to in both *subparagraphs (i)* and *(ii)* of *paragraph (a)* is not less than £10,000,

the Court shall make an order ("an interlocutory order") prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing

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with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person—

(I) that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, or

(II) that the value of all the property to which the order would relate is less than £10,000:

Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice.

(2) An interlocutory order—

(*a*) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and

(*b*) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming ownership of any of the property concerned, may, if it is shown to the satisfaction of the Court that the property or a specified part of it is property to which *paragraph (I)* of *subsection (1)* applies, or that the order causes any other injustice, discharge or, as may be appropriate, vary the order.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interlocutory order.

(5) Subject to *subsections (3)* and *(4)*, an interlocutory order shall continue in force until—

(*a*) the determination of an application for a disposal order in relation to the property concerned,

(*b*) the expiration of the ordinary time for bringing an appeal from that determination,

(*c*) if such an appeal is brought, it or any further appeal is determined or abandoned or the ordinary time for bringing any further appeal has expired,

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whichever is the latest, and shall then lapse.

(6) Notice of an application under this section shall be given—

(*a*) in case the application is under *subsection (1)* or *(4)*, by the applicant to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts,

(*b*) in case the application is under *subsection (3)*, by the respondent or other person making the application to the applicant,

and, in either case, to any other person in relation to whom the Court directs that notice of the application be given to him or her.

(7) Where a forfeiture order, or a confiscation order, under the Criminal Justice Act, 1994 , or a forfeiture order under the Misuse of Drugs Act, 1977 , relates to any property that is the subject of an interim order, or an interlocutory order, that is in force, ("the specified property"), the interim order or, as the case may be, the interlocutory order shall—

(*a*) if it relates only to the specified property, stand discharged, and

(*b*) if it relates also to other property, stand varied by the exclusion from it of the specified property.

Disposal order.

4.—(1) Subject to *subsection (2)*, where an interlocutory order has been in force for not less than 7 years in relation to specified property, the Court, on application to it in that behalf by the applicant, may make an order ("a disposal order") directing that the whole or, if appropriate, a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Minister or to such other person as the Court may determine.

(2) Subject to *subsections (6)* and *(8)*, the Court shall make a disposal order in relation to any property the subject of an application under *subsection (1)* unless it is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.

(3) The applicant shall give notice to the respondent (unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts), and to such other (if any) persons as the Court may

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direct of an application under this section.

(4) A disposal order shall operate to deprive the respondent of his or her rights (if any) in or to the property to which it relates and, upon the making of the order, the property shall stand transferred to the Minister or other person to whom it relates.

(5) The Minister may sell or otherwise dispose of any property transferred to him or her under this section, and any proceeds of such a disposition and any moneys transferred to him or her under this section shall be paid into or disposed of for the benefit of the Exchequer by the Minister.

(6) In proceedings under *subsection (1)*, before deciding whether to make a disposal order, the Court shall give an opportunity to be heard by the Court and to show cause why the order should not be made to any person claiming ownership of any of the property concerned.

(7) The Court, if it considers it appropriate to do so in the interests of justice, on the application of the respondent or, if the whereabouts of the respondent cannot be ascertained, on its own initiative, may adjourn the hearing of an application under *subsection (1)* for such period not exceeding 2 years as it considers reasonable.

(8) The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice.

Ancillary orders and provision in relation to certain profits or gains, etc.

5.—(1) At any time while an interim order or an interlocutory order is in force, the Court may, on application to it in that behalf by the applicant, make such orders as it considers necessary or expedient to enable the order aforesaid to have full effect.

(2) Notice of an application under this section shall be given by the applicant to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts and to any other person in relation to whom the Court directs that notice of the application be given to him or her.

(3) An interim order, an interlocutory order or a disposal order may be expressed to apply to any profit or gain or interest, dividend or other payment or any other property payable or arising, after the making of the order, in connection with any other property to which the order relates.

Order in relation to property the subject of interim order or interlocutory order.

6.—(1) At any time while an interim order or an interlocutory order is in force, the Court may, on application to it in that behalf by the respondent or any other person affected by the order, make such orders as it considers appropriate in relation to any of the property

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concerned if it considers it essential to do so for the purpose of enabling—

(*a*) the respondent to discharge the reasonable living and other necessary expenses (including legal expenses in or in relation to proceedings under this Act) incurred or to be incurred by or in respect of the respondent and his or her dependants, or

(*b*) the respondent or that other person to carry on a business, trade, profession or other occupation to which any of that property relates.

(2) An order under this section may contain such conditions and restrictions as the Court considers necessary or expedient for the purpose of protecting the value of the property concerned and avoiding any unnecessary diminution thereof.

(3) Notice of an application under this section shall be given by the person making the application to the applicant and any other person in relation to whom the Court directs that notice of the application be given to him or her.

Receiver.

7.—(1) Where an interim order or an interlocutory order is in force, the Court may at any time appoint a receiver—

(*a*) to take possession of any property to which the order relates,

(*b*) in accordance with the Court's directions, to manage, keep possession or dispose of or otherwise deal with any property in respect of which he or she is appointed,

subject to such exceptions and conditions (if any) as may be specified by the Court, and may require any person having possession or control of property in respect of which the receiver is appointed to give possession of it to the receiver.

(2) Where a receiver takes any action under this section—

(*a*) in relation to property which is not property the subject of an interim order or an interlocutory order, being action which he or she would be entitled to take if it were such property, and

(*b*) believing, and having reasonable grounds for believing, that he or she is entitled to take that action in relation to that property,

he or she shall not be liable to any person in respect of any loss or damage resulting from such action except in so far as the loss or

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damage is caused by his or her negligence.

Provisions in relation to evidence and proceedings under Act.

8.—(1) Where a member or an authorised officer states—

(*a*) in proceedings under *section 2* , on affidavit or, if the Court so directs, in oral evidence, or

(*b*) in proceedings under *section 3* , in oral evidence,

that he or she believes either or both of the following, that is to say:

(i) that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime,

(ii) that the respondent is in possession of or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and that the value of the property or, as the case may be, the total value of the property referred to in both *paragraphs (i)* and *(ii)* is not less than £10,000, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matter referred to in *paragraph (i)* or in *paragraph (ii)* or in both, as may be appropriate, and of the value of the property.

(2) The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings.

(3) Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this Act may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the Court considers it proper, be heard otherwise than in public.

(4) The Court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this Act, including information in relation to applications for, the making or refusal of and the contents of orders under this Act and the persons to whom they relate.

(5) Production to the Court in proceedings under this Act of a document purporting to authorise a person, who is described therein as an officer of the Revenue Commissioners, to perform the functions conferred on authorised officers by this Act and to be signed by a Revenue Commissioner shall be evidence that the person is an

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authorised officer.

Affidavit specifying property and income of respondent.

9.—At any time during proceedings under *section 2* or *3* or while an interim order or an interlocutory order is in force, the Court or, as appropriate, in the case of an appeal in such proceedings, the Supreme Court may by order direct the respondent to file an affidavit in the Central Office of the High Court specifying—

(*a*) the property of which the respondent is in possession or control, or

(*b*) the income, and the sources of the income, of the respondent during such period (not exceeding 10 years) ending on the date of the application for the order as the court concerned may specify,

or both.

Registration of interim orders and interlocutory orders.

10.—(1) Where an interim order or an interlocutory order is made, the registrar of the Court shall, in the case of registered land, furnish the Registrar of Titles with notice of the order and the Registrar of Titles shall thereupon cause an entry to be made in the appropriate register under the Registration of Title Act, 1964 , inhibiting, until such time as the order lapses, is discharged or is varied so as to exclude the registered land or any charge thereon from the application of the order, any dealing with any registered land or charge which appears to be affected by the order.

(2) Where notice of an order has been given under *subsection (1)* and the order is varied in relation to registered land, the registrar of the Court shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall thereupon cause the entry made under *subsection (1)* of this section to be varied to that effect.

(3) Where notice of an order has been given under *subsection (1)* and the order is discharged or lapses, the registrar of the High Court shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall cancel the entry made under *subsection (1)*.

(4) Where an interim order or an interlocutory order is made, the registrar of the Court shall, in the case of unregistered land, furnish the Registrar of Deeds with notice of the order and the Registrar of Deeds shall thereupon cause the notice to be registered in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707.

(5) Where notice of an order has been given under *subsection (4)* and the order is varied, the registrar of the Court shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cause the notice registered under *subsection*

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(4) to be varied to that effect.

(6) Where notice of an order has been given under *subsection (4)* and the order is discharged or lapses, the registrar of the Court shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cancel the registration made under *subsection (4)*.

(7) Where an interim order or an interlocutory order is made which applies to an interest in a company or to the property of a company, the registrar of the Court shall furnish the Registrar of Companies with notice of the order and the Registrar of Companies shall thereupon cause the notice to be entered in the Register of Companies maintained under the Companies Acts, 1963 to 1990.

(8) Where notice of an order has been given under *subsection (7)* and the order is varied, the registrar of the Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cause the notice entered under *subsection (7)* to be varied to that effect.

(9) Where notice of an order has been given under *subsection (7)* and the order is discharged or lapses, the registrar of the Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cancel the entry made under *subsection (7)*.

Bankruptcy of respondent, etc.

11.—(1) Where a person who is in possession or control of property is adjudicated bankrupt, property subject to an interim order, an interlocutory order, or a disposal order, made before the order adjudicating the person bankrupt, is excluded from the property of the bankrupt for the purposes of the Bankruptcy Act, 1988 .

(2) Where a person has been adjudicated bankrupt, the powers conferred on the Court by *section 2* or *3* shall not be exercised in relation to property of the bankrupt for the purposes of the said Act of 1988.

(3) In any case in which a petition in bankruptcy was presented, or an adjudication in bankruptcy was made, before the 1st day of January, 1989, this section shall have effect with the modification that, for the references in *subsections (1)* and *(2)* to the property of the bankrupt for the purposes of the Act aforesaid, there shall be substituted references to the property of the bankrupt vesting in the assignees for the purposes of the law of bankruptcy existing before that date.

Property subject to interim order, interlocutory order or disposal order dealt with by

12.—(1) Without prejudice to the generality of any provision of any other enactment, where—

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Official Assignee.

(*a*) the Official Assignee or a trustee appointed under the provisions of Part V of the Bankruptcy Act, 1988 , seizes or disposes of any property in relation to which his or her functions are not exercisable because it is subject to an interim order, an interlocutory order or a disposal order, and

(*b*) at the time of the seizure or disposal he or she believes, and has reasonable grounds for believing, that he or she is entitled (whether in pursuance of an order of a court or otherwise) to seize or dispose of that property,

he or she shall not be liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by his or her negligence in so acting, and he or she shall have a lien on the property, or the proceeds of its sale, for such of his or her expenses as were incurred in connection with the bankruptcy or other proceedings in relation to which the seizure or disposal purported to take place and for so much of his or her remuneration as may reasonably be assigned for his or her acting in connection with those proceedings.

(2) Where the Official Assignee or a trustee appointed as aforesaid incurs expenses in respect of such property as is mentioned in *subsection (1)(a)* and in so doing does not know and has no reasonable grounds to believe that the property is for the time being subject to an order under this Act, he or she shall be entitled (whether or not he or she has seized or disposed of that property so as to have a lien) to payment of those expenses.

Winding up of company in possession or control of property the subject of interim order, interlocutory order or disposal order.

13.—(1) Where property the subject of an interim order, an interlocutory order or a disposal order made before the relevant time is in the possession or control of a company and an order for the winding up of the company has been made or a resolution has been passed by the company for a voluntary winding up, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to the property.

(2) Where, in the case of a company, an order for its winding up has been made or such a resolution has been passed, the powers conferred by *section 2* or 3 on the Court shall not be exercised in relation to any property held by the company in relation to which the functions of the liquidator are exercisable—

(*a*) so as to inhibit him or her from exercising those functions for the purpose of distributing any property held by the company to the company's creditors, or

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(*b*) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) In this section—

"*company*" means any company which may be wound up under the Companies Acts, 1963 to 1990;

"*relevant time*" means—

(*a*) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up,

(*b*) where such an order has been made and, before the presentation of the petition for the winding up of the company by the court, such a resolution had been passed by the company, the time of the passing of the resolution, and

(*c*) in any other case where such an order has been made, the time of the making of the order.

Immunity from proceedings.

14.—No action or proceedings of any kind shall lie against a bank, building society or other financial institution or any other person in any court in respect of any act or omission done or made in compliance with an order under this Act.

Seizure of certain property.

15.—(1) Where an order under this Act is in force, a member of the Garda Síochána or an officer of customs and excise may, for the purpose of preventing any property the subject of the order being removed from the State, seize the property.

(2) Property seized under this section shall be dealt with in accordance with the directions of the Court.

Compensation.

16.—(1) Where—

(*a*) an interim order is discharged or lapses and an interlocutory order in relation to the matter is not made or, if made, is discharged (otherwise than pursuant to *section 3 (7)*),

(*b*) an interlocutory order is discharged (otherwise than pursuant to *section 3 (7)*) or lapses and a disposal order in relation to the matter is not made or, if made, is discharged,

(*c*) an interim order or an interlocutory order is varied (otherwise than pursuant to *section 3 (7)*) or a disposal

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order is varied on appeal,

the Court may, on application to it in that behalf by a person who shows to the satisfaction of the Court that—

(i) he or she is the owner of any property to which—

(I) an order referred to in *paragraph (a)* or *(b)* related, or

(II) an order referred to in *paragraph (c)* had related but, by reason of its being varied by a court, has ceased to relate,

and

(ii) the property does not constitute, directly or indirectly, proceeds of crime or was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime, award to the person such (if any) compensation payable by the Minister as it considers just in the circumstances in respect of any loss incurred by the person by reason of the order concerned.

(2) The Minister shall be given notice of, and be entitled to be heard in, any proceedings under this section.

Expenses.

17.—The expenses incurred by the Minister and (to such extent as may be sanctioned by the Minister) by the Garda Síochána and the Revenue Commissioners in the administration of this Act shall be paid out of moneys provided by the Oireachtas.

Short title.

18.—This Act may be cited as the Proceeds of Crime Act, 1996.

Acts Referred to

Bankruptcy Act, 1988	1988, No. 27
Companies Acts, 1963 to 1990	
Criminal Justice Act, 1994	1994, No. 15
Misuse of Drugs Act, 1977	1977, No. 12
Registration of Deeds Act, 1707	6. Anne c. 2
Registration of Title Act, 1964	1964, No. 16

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Appendix B(iv)

Criminal Assets Bureau Act 1996
Ireland

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Criminal Assets Bureau Act, 1996

Number 31 *of* 1996

CRIMINAL ASSETS BUREAU ACT, 1996

ARRANGEMENT OF SECTIONS

Section

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Number 31 *of* 1996

CRIMINAL ASSETS BUREAU ACT, 1996

AN ACT TO MAKE PROVISION FOR THE ESTABLISHMENT OF A BODY TO BE KNOWN AS THE CRIMINAL ASSETS BUREAU AND TO DEFINE ITS FUNCTIONS AND TO AMEND THE FINANCE ACT, 1983 , AND THE WAIVER OF CERTAIN TAX, INTEREST AND PENALTIES ACT, 1993 , AND TO PROVIDE FOR RELATED MATTERS. [11*th October*, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation.

1.—(1) In this Act—

"*the Bureau*" means the Criminal Assets Bureau established by *section 3* ;

"*the bureau legal officer*" means the legal officer of the Bureau;

"*bureau officer*" means a person appointed as a bureau officer under *section 8* ;

"*the Chief Bureau Officer*" means the chief officer of the Bureau;

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"*the Commissioner*" means the Commissioner of the Garda Síochána;

"*the establishment day*" means the day appointed by the Minister under *section 2* ;

"*Garda functions*" means any power or duty conferred on any member of the Garda Síochána by or under any enactment (including an enactment passed after the passing of this Act) or the common law;

"*member of the family*", in relation to an individual who is a bureau officer or a member of the staff of the Bureau, means the spouse, parent, grandparent, step-parent, child (including a step-child or an adopted child), grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the individual or of the individual's spouse, or any person who is cohabiting or residing with the individual;

"*the Minister*" means the Minister for Justice;

"*proceedings*" includes any hearing before the Appeal Commissioners (within the meaning of the Revenue Acts) or before an appeals officer or the Social Welfare Tribunal under the Social Welfare Acts or a hearing before any committee of the Houses of the Oireachtas;

"*Revenue Acts*" means—

(*a*) the Customs Acts,

(*b*) the statutes relating to the duties of excise and to the management of those duties,

(*c*) the Tax Acts,

(*d*) the Capital Gains Tax Acts,

(*e*) the Value-Added Tax Act, 1972 ,

(*f*) the Capital Acquisitions Tax Act, 1976 ,

(*g*) the statutes relating to stamp duty and to the management of that duty,

(*h*) Part VI of the Finance Act, 1983 ,

(*i*) Chapter IV of Part II of the Finance Act, 1992 ,

and any instruments made thereunder and any instruments made under any other enactment and relating to tax;

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"*tax*" means any tax, duty, levy or charge under the care and management of the Revenue Commissioners.

(2) In this Act—

(*a*) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended,

(*b*) a reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended, and

(*c*) a reference to an enactment shall be construed as a reference to that enactment as amended or extended by any other enactment.

Establishment day.

2.—The Minister may, after consultation with the Minister for Finance, by order appoint a day to be the establishment day for the purposes of this Act.

Establishment of Bureau.

3.—(1) On the establishment day there shall stand established a body to be known as the Criminal Assets Bureau, and in this Act referred to as "*the Bureau*", to perform the functions conferred on it by or under this Act.

(2) The Bureau shall be a body corporate with perpetual succession and an official seal and power to sue and be sued in its corporate name and to acquire, hold and dispose of land or an interest in land and to acquire, hold and dispose of any other property.

Objectives of Bureau.

4.—Subject to the provisions of this Act, the objectives of the Bureau shall be—

(*a*) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

(*b*) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(*c*) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *paragraphs (a)* and *(b)*.

Functions of Bureau.

5.—(1) Without prejudice to the generality of *section 4* , the

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functions of the Bureau, operating through its bureau officers, shall be the taking of all necessary actions—

(*a*) in accordance with Garda functions, for the purposes of, the confiscation, restraint of use, freezing, preservation or seizure of assets identified as deriving, or suspected to derive, directly or indirectly, from criminal activity,

(*b*) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be,

(*c*) under the Social Welfare Acts for the investigation and determination, as appropriate, of any claim for or in respect of benefit (within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993) by any person engaged in criminal activity, and

(*d*) at the request of the Minister for Social Welfare, to investigate and determine, as appropriate, any claim for or in respect of a benefit, within the meaning of section 204 of the Social Welfare (Consolidation) Act, 1993 , where the Minister for Social Welfare certifies that there are reasonable grounds for believing that, in the case of a particular investigation, officers of the Minister for Social Welfare may be subject to threats or other forms of intimidation,

and such actions include, where appropriate, subject to any international agreement, cooperation with any police force, or any authority, being a tax authority or social security authority, of a territory or state other than the State.

(2) In relation to the matters referred to in *subsection (1)*, nothing in this Act shall be construed as affecting or restricting in any way—

(*a*) the powers or duties of the Garda Síochána, the Revenue Commissioners or the Minister for Social Welfare, or

(*b*) the functions of the Attorney General, the Director of Public Prosecutions or the Chief State Solicitor.

Conferral of additional functions on Bureau.

6.—(1) The Minister may, if the Minister so thinks fit, and after consultation with the Minister for Finance, by order—

(*a*) confer on the Bureau or its bureau officers such additional

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functions connected with the objectives and functions for the time being of the Bureau, and

(*b*) make such provision as the Minister considers necessary or expedient in relation to matters ancillary to or arising out of the conferral on the Bureau or its bureau officers of functions under this section or the performance by the Bureau or its bureau officers of functions so conferred.

(2) The Minister may by order amend or revoke an order under this section (including an order under this subsection).

(3) Every order made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(4) In this section "*functions*" includes powers and duties.

Chief Bureau Officer.

7.—(1) There shall be a chief officer of the Bureau who shall be known, and is referred to in this Act, as the Chief Bureau Officer.

(2) The Commissioner shall, from time to time, appoint to the Bureau the Chief Bureau Officer and may, at any time, remove the Chief Bureau Officer from his or her appointment with the Bureau.

(3) The Chief Bureau Officer shall carry on and manage and control generally the administration and business of the Bureau.

(4) The Chief Bureau Officer shall be responsible to the Commissioner for the performance of the functions of the Bureau.

(5) (*a*) In the event of incapacity through illness, or absence otherwise, of the Chief Bureau Officer, the Commissioner may appoint to the Bureau a person, who shall be known, and is referred to in this section, as the Acting Chief Bureau Officer, to perform the functions of the Chief Bureau Officer.

(*b*) The Commissioner may, at any time, remove the Acting Chief Bureau Officer from his or her appointment with the Bureau and shall, in any event, remove the Acting Chief Bureau Officer from that appointment upon being satisfied that the incapacity or absence of the Chief Bureau Officer has ceased and that the Chief Bureau Officer has resumed the performance of the functions of

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Chief Bureau Officer.

(*c*) *Subsections (3)* and *(4)* and *paragraph (a)* shall apply to the Acting Chief Bureau Officer as they apply to the Chief Bureau Officer.

(6) The Chief Bureau Officer shall be appointed from amongst the members of the Garda Síochána of the rank of Chief Superintendent.

(7) For the purposes of this Act other than *subsections (1), (3)* and *(9)* of *section 8* , the Chief Bureau Officer or Acting Chief Bureau Officer, as the case may be, shall be a bureau officer.

Bureau officers.

(1) (*a*) The Minister may appoint, with the consent of the Minister for Finance, such and so many—

(i) members of the Garda Síochána nominated for the purposes of this Act by the Commissioner,

(ii) officers of the Revenue Commissioners nominated for the purposes of this Act by the Revenue Commissioners, and

(iii) officers of the Minister for Social Welfare nominated for the purposes of this Act by that Minister,

to be bureau officers for the purposes of this Act.

(*b*) An appointment under this subsection shall be confirmed in writing, at the time of the appointment or as soon as may be thereafter, specifying the date of the appointment.

(2) The powers and duties vested in a bureau officer for the purposes of this Act, shall, subject to *subsections (5), (6)* and *(7),* be the powers and duties vested in the bureau officer, as the case may be, by virtue of—

(*a*) being a member of the Garda Síochána,

(*b*) the Revenue Acts or, any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, including any authorisation or nomination made thereunder, or

(*c*) the Social Welfare Acts, including any appointment made thereunder,

and such exercise or performance of any power or duty for the purposes of this Act shall be exercised or performed in the name of the Bureau.

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(3) A bureau officer, when exercising or performing any powers or duties for the purposes of this Act, shall be under the direction and control of the Chief Bureau Officer.

(4) Where in any case a bureau officer (other than the Chief Bureau Officer) who, prior to being appointed a bureau officer, was required to exercise or perform any power or duty on the direction of any other person, it shall be lawful for the bureau officer to exercise or perform such power or duty for the purposes of this Act on the direction of the Chief Bureau Officer.

(5) A bureau officer may exercise or perform his or her powers or duties on foot of any information received by him or her from another bureau officer or on foot of any action taken by that other bureau officer in the exercise or performance of that other bureau officer's powers or duties for the purposes of this Act, and any information, documents or other material obtained by bureau officers under this subsection shall be admitted in evidence in any subsequent proceedings.

(6) (*a*) A bureau officer may be accompanied or assisted in the exercise or performance of that bureau officer's powers or duties by such other persons (including bureau officers) as the first-mentioned bureau officer considers necessary.

(*b*) A bureau officer may take with him or her, to assist him or her in the exercise or performance of his or her powers or duties, any equipment or materials as that bureau officer considers necessary.

(*c*) A bureau officer who assists another bureau officer under *paragraph (a)* shall have and be conferred with the powers and duties of the first-mentioned bureau officer for the purposes of that assistance only.

(*d*) Information, documents or other material obtained by any bureau officer under *paragraph (a)* or *(c)* may be admitted in evidence in any subsequent proceedings.

(7) Any information or material obtained by a bureau officer for the purposes of this Act may only be disclosed by the bureau officer to—

(*a*) another bureau officer or a member of the staff of the Bureau,

(*b*) any member of the Garda Síochána for the purposes of Garda functions,

(*c*) any officer of the Revenue Commissioners for the purposes

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of the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue,

(*d*) any officer of the Minister for Social Welfare for the purposes of the Social Welfare Acts, or

(*e*) with the consent of the Chief Bureau Officer, any other officer of another Minister of the Government or of a local authority (within the meaning of the Local Government Act, 1941) for the purposes of that other officer exercising or performing his or her powers or duties,

and information, documents or other material obtained by a bureau officer or any other person under the provisions of this subsection shall be admitted in evidence in any subsequent proceedings.

(8) A member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, who is a bureau officer, notwithstanding his or her appointment as such, shall continue to be vested with and may exercise or perform the powers or duties of a member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, as the case may be, for purposes other than the purposes of this Act, as well as for the purposes of this Act.

(9) The Chief Bureau Officer may, at his or her absolute discretion, at any time, with the consent of the Commissioner, remove any bureau officer from the Bureau whereupon his or her appointment as a bureau officer shall cease.

(10) Nothing in this section shall affect the powers and duties of a member of the Garda Síochána, an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, who is not a bureau officer.

Staff of Bureau.

.—(1) (*a*) The Minister may, with the consent of the Attorney General and of the Minister for Finance, appoint a person to be the bureau legal officer, who shall be a member of the staff of the Bureau and who shall report directly to the Chief Bureau Officer, to assist the Bureau in the pursuit of its objectives and functions.

(*b*) The Minister may, with the consent of the Minister for Finance and after such consultation as may be appropriate with the Commissioner, appoint such, and such number of persons to be professional or technical members of the staff of the Bureau, other than the bureau legal officer,

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and any such member will assist the bureau officers in the exercise and performance of their powers and duties.

(2) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall perform his or her functions at the direction of the Chief Bureau Officer.

(3) The Minister may, with the consent of the Attorney General and of the Minister for Finance, at any time remove the bureau legal officer from being a member of the staff of the Bureau whereupon his or her appointment as bureau legal officer shall cease.

(4) The Commissioner may, with the consent of the Minister, at any time remove any professional or technical member of the staff of the Bureau, other than the bureau legal officer, from being a member of the staff of the Bureau whereupon his or her appointment as a member of the staff shall cease.

(5) (*a*) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall hold his or her office or employment on such terms and conditions (including terms and conditions relating to remuneration and superannuation) as the Minister may, with the consent of the Minister for Finance, and in the case of the bureau legal officer with the consent also of the Attorney General, determine.

(*b*) A professional or technical member of the staff of the Bureau, including the bureau legal officer, shall be paid, out of the moneys at the disposal of the Bureau, such remuneration and allowances for expenses incurred by him or her as the Minister may, with the consent of the Minister for Finance, determine.

Anonymity.

10.—(1) Notwithstanding any requirement made by or under any enactment or any other requirement in administrative and operational procedures, including internal procedures, all reasonable care shall be taken to ensure that the identity of a bureau officer, who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or the identity of any member of the staff of the Bureau, shall not be revealed.

(2) Where a bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare may, apart from this section, be required under the Revenue Acts or the Social Welfare Acts, as the case may be, for the purposes of exercising or performing his or her powers or duties under those Acts, to produce or show any written authority or warrant of appointment under those Acts or otherwise to identify himself or

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herself, the bureau officer shall—

(*a*) not be required to produce or show any such authority or warrant of appointment or to so identify himself or herself, for the purposes of exercising or performing his or her powers or duties under those Acts, and

(*b*) be accompanied by a bureau officer who is a member of the Garda Síochána and the bureau officer who is a member of the Garda Síochána shall on request by a person affected identify himself or herself as a member of the Garda Síochána, and shall state that he or she is accompanied by a bureau officer.

(3) Where, in pursuance of the functions of the Bureau, a member of the staff of the Bureau accompanies or assists a bureau officer in the exercise or performance of the bureau officer's powers or duties, the member of the staff shall be accompanied by a bureau officer who is a member of the Garda Síochána and the bureau officer who is a member of the Garda Síochána shall on request by a person affected identify himself or herself as a member of the Garda Síochána, and shall state that he or she is accompanied by a member of the staff of the Bureau.

(4) Where a bureau officer—

(*a*) who is an officer of the Revenue Commissioners exercises or performs any of his or her powers or duties under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, in writing, or

(*b*) who is an officer of the Minister for Social Welfare exercises or performs any of his or her powers or duties under the Social Welfare Acts in writing,

such exercise or performance of his or her powers or duties shall be done in the name of the Bureau and not in the name of the individual bureau officer involved, notwithstanding any provision to the contrary in any of those enactments.

(5) Any document relating to proceedings arising out of the exercise or performance by a bureau officer of his or her powers or duties shall not reveal the identity of any bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or of any member of the staff of the Bureau, provided that where such document is adduced in evidence, *subsection (7)* shall apply.

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(6) In any proceedings the identity of any bureau officer who is an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare or of any member of the staff of the Bureau other than that he or she is a bureau officer or the member of such staff, shall not be revealed other than, in the case of a hearing before a court, to the judge hearing the case, or in any other case the person in charge of the hearing, provided that, where the identity of such a bureau officer or member of the staff of the Bureau is relevant to the evidence adduced in the proceedings, *subsection (7)* shall apply.

(7) In any proceedings where a bureau officer or a member of the staff of the Bureau may be required to give evidence, whether by affidavit or certificate, or oral evidence—

(*a*) the judge, in the case of proceedings before a court, or

(*b*) the person in charge of the proceedings, in any other case,

may, on the application of the Chief Bureau Officer, if satisfied that there are reasonable grounds in the public interest to do so, give such directions for the preservation of the anonymity of the bureau officer or member of the staff of the Bureau as he or she thinks fit, including directions as to—

(i) the restriction of the circulation of affidavits or certificates,

(ii) the deletion from affidavits or certificates of the name and address of any bureau officer or member of the staff of the Bureau, including the deponent and certifier, or

(iii) the giving of evidence in the hearing but not the sight of any person.

(8) In this section "*member of the staff of the Bureau*" means a member of the staff of the Bureau appointed under *section 9* .

Identification.

11.—(1) A person who publishes or causes to be published—

(*a*) the fact that an individual—

(i) being or having been an officer of the Revenue Commissioners or an officer of the Minister for Social Welfare, is or was a bureau officer, or

(ii) is or was a member of the staff of the Bureau,

(*b*) the fact that an individual is a member of the family of—

(i) a bureau officer,

(ii) a former bureau officer,

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(iii) a member of the staff of the Bureau, or

(iv) a former member of the staff of the Bureau,

or

(*c*) the address of any place as being the address where any—

(i) bureau officer,

(ii) former bureau officer,

(iii) member of the staff of the Bureau,

(iv) former member of the staff of the Bureau, or

(v) member of the family of any bureau officer, former bureau officer, member of the staff of the Bureau or former member of the staff of the Bureau,

resides,

shall be guilty of an offence under this section.

(2) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or

(*b*) on conviction on indictment, to a fine not exceeding £50,000, or to imprisonment for a term not exceeding 3 years, or to both.

(3) In this section references to bureau officer, former bureau officer, member of the staff of the Bureau and former member of the staff of the Bureau do not include references to the Chief Bureau Officer, the Acting Chief Bureau Officer or the bureau legal officer.

Obstruction.

12.—(1) A person who delays, obstructs, impedes, interferes with or resists a bureau officer in the exercise or performance of his or her powers or duties under Garda functions, the Revenue Acts or the Social Welfare Acts or a member of the staff of the Bureau in accompanying or assisting a bureau officer shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to

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both, or

(*b*) on conviction on indictment, to a fine not exceeding £10,000, or to imprisonment for a term not exceeding 3 years, or to both.

Intimidation.

13.—(1) A person who utters or sends threats to or, in any way, intimidates or menaces a bureau officer or a member of the staff of the Bureau or any member of the family of a bureau officer or of a member of the staff of the Bureau shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or

(*b*) on conviction on indictment, to a fine not exceeding £100,000, or to imprisonment for a term not exceeding 10 years, or to both.

Search warrants.

14.—(1) A judge of the District Court, on hearing evidence on oath given by a bureau officer who is a member of the Garda Síochána, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place, issue a warrant for the search of that place and any person found at that place.

(2) A bureau officer who is a member of the Garda Síochána not below the rank of superintendent may, subject to *subsection (3)*, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place, issue a warrant for the search of that place and any person found at that place.

(3) A bureau officer who is a member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under this section unless he or she is satisfied that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for a search warrant.

(4) Subject to *subsection (5)*, a warrant under this section shall be expressed to and shall operate to authorise a named bureau officer who is a member of the Garda Síochána, accompanied by such other persons as the bureau officer thinks necessary, to enter, within one

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week of the date of issuing of the warrant (if necessary by the use of reasonable force), the place named in the warrant, and to search it and any person found at that place and seize and retain any material found at that place, or any material found in the possession of a person found present at that place at the time of the search, which the officer believes to be evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts.

(5) Notwithstanding *subsection (4)*, a search warrant issued under *subsection (3)* shall cease to have effect after a period of 24 hours has elapsed from the time of the issue of the warrant.

(6) A bureau officer who is a member of the Garda Síochána acting under the authority of a warrant under this section may—

(*a*) require any person present at the place where the search is carried out to give to the officer the person's name and address, and

(*b*) arrest without warrant any person who—

(i) obstructs or attempts to obstruct that officer or any person accompanying that officer in the carrying out of his or her duties,

(ii) fails to comply with a requirement under *paragraph (a)*, or

(iii) gives a name or address which the officer has reasonable cause for believing is false or misleading.

(7) A person who obstructs or attempts to obstruct a person acting under the authority of a warrant under this section, who fails to comply with a requirement under *subsection (6) (a)* or who gives a false or misleading name or address to a bureau officer who is a member of the Garda Síochána, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500, or to imprisonment for a period not exceeding 6 months, or to both.

(8) The power to issue a warrant under this section is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.

(9) In this section, "*place*" includes a dwelling.

Assault.

15.—(1) A person who assaults or attempts to assault a bureau officer or a member of the staff of the Bureau or any member of the family of a bureau officer or of a member of the staff of the Bureau shall be guilty of an offence.

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(2) A person guilty of an offence under this section shall be liable—

(*a*) on summary conviction, to a fine not exceeding £1,500, or to imprisonment for a term not exceeding 12 months, or to both, or

(*b*) on conviction on indictment, to a fine not exceeding £100,000, or to imprisonment for a term not exceeding 10 years, or to both.

Arrest.

16.—(1) Where a bureau officer who is a member of the Garda Síochána has reasonable cause to suspect that a person is committing or has committed an offence under *section 12* , *13* or *15* or under section 94 of the Finance Act, 1983 , the bureau officer may—

(*a*) arrest that person without warrant, or

(*b*) require the person to give his or her name and address, and if the person fails or refuses to do so or gives a name or address which the bureau officer reasonably suspects to be false or misleading, the bureau officer may arrest that person without warrant.

(2) A person who fails or refuses to give his or her name or address when required under this section or gives a name or address which is false or misleading, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500.

Prosecution of offences under *section 13* or *15.*

17.—Where a person is charged with an offence under *section 13* or *15* , no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.

Special leave and compensation, etc.

18.—(1) Any person appointed to the Bureau as a bureau officer or appointed under *section 9* or seconded to the Bureau as a member of the staff of the Bureau from the civil service (within the meaning of the Civil Service Regulation Act, 1956) shall, on being so appointed or seconded, be granted special leave with pay from any office or employment exercised by the person at the time.

(2) The Bureau shall, out of the moneys at its disposal, reimburse any Minister of the Government, the Revenue Commissioners or other person paid out of moneys provided by the Oireachtas for the full cost of the expenditure incurred by such Minister of the Government, the Revenue Commissioners or other person paid out of moneys provided by the Oireachtas, in respect of any person appointed or seconded to the Bureau for the full duration of that appointment.

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(3) The provisions of the Garda Síochána (Compensation) Act, 1941 , and the Garda Síochána (Compensation) (Amendment) Act, 1945 , shall, with any necessary modifications, apply to—

(*a*) bureau officers and members of the staff of the Bureau, and

(*b*) the Chief State Solicitor and solicitors employed in the Office of the Chief State Solicitor, in respect of injuries maliciously inflicted on them because of anything done or to be done by any of them in a professional capacity for or on behalf of the Bureau,

as they apply to members of the Garda Síochána.

Advances by Minister to Bureau and audit of accounts of Bureau by Comptroller and Auditor General.

19.—(1) The Minister may, from time to time, with the consent of the Minister for Finance, make advances to the Bureau, out of moneys provided by the Oireachtas, in such manner and such sums as the Minister may determine for the purposes of expenditure by the Bureau in the performance of its functions.

(2) The First Schedule to the Comptroller and Auditor General (Amendment) Act, 1993 , is hereby amended by the insertion before "Criminal Injuries Compensation Tribunal" of "Criminal Assets Bureau".

(3) The person who from time to time has been appointed by the Minister for Finance under the Exchequer and Audit Departments Act, 1866, as the Accounting Officer for the Vote for the Office of the Minister shall prepare in a format prescribed by the Minister for Finance an account of the moneys provided to the Bureau by the Oireachtas in any financial year and submit it for examination to the Comptroller and Auditor General not later than 90 days after the end of that financial year.

(4) All of the duties specified in section 19 of the Comptroller and Auditor General (Amendment) Act, 1993 , shall apply to the Accounting Officer for the Vote for the Office of the Minister in regard to the income, expenditure and assets of the Bureau.

Accounting for tax.

20.—On payment to the Bureau of tax in accordance with the provisions of *section 5 (1) (b)*, the Bureau shall forthwith—

(*a*) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and

(*b*) transmit to the Collector-General particulars of the tax assessed and payment received in respect thereof.

Reports and information to Minister.

21.—(1) As soon as may be, but not later than 6 months, after the end of each year, the Bureau shall through the Commissioner present

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a report to the Minister of its activities during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.

(2) Each report under *subsection (1)* shall include information in such form and regarding such matters as the Minister may direct.

(3) The Bureau shall, whenever so requested by the Minister through the Commissioner, furnish to the Minister through the Commissioner information as to the general operations of the Bureau.

Expenses.

22.—The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Amendment of section 19A (anonymity) of Finance Act, 1983.

23.—Section 19A (inserted by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of the Finance Act, 1983 , is hereby amended in subsection (3), by the substitution of the following for paragraph (*a*):

"(*a*) where, for the purposes of exercising or performing his or her powers or duties under the Revenue Acts in pursuance of the functions of the body, an authorised officer may, apart from this section, be required to produce or show any written authority or warrant of appointment under those Acts or otherwise to identify himself or herself, the authorised officer shall—

(i) not be required to produce or show any such authority or warrant of appointment or to so identify himself or herself, for the purposes of exercising or performing his or her powers or duties under those Acts, and

(ii) be accompanied by a member of the Garda Síochána who shall, on request, by a person affected identify himself or herself as a member of the Garda Síochána and shall state that he or she is accompanied by an authorised officer,".

Amendment of certain taxation provisions.

24.—(1) Section 184 of the Income Tax Act, 1967 , is hereby amended by the substitution of the following subsection for subsection (3) (inserted by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of that section:

"(3) In this section, '*information*' includes information received from a member of the Garda Síochána.".

(2) Subsection (4) (as amended by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of section

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144 of the Corporation Tax Act, 1976 , is hereby amended by the substitution of the following paragraph for paragraph (*b*) of that subsection:

"(*b*) In this section, '*information*' includes information received from a member of the Garda Síochána.".

(3) Paragraph (*d*) (inserted by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of subsection (6) of section 12 of the Stamp Act, 1891, is hereby deleted.

(4) The proviso to subsection (7) (as amended by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of section 39 of the Capital Acquisitions Tax Act, 1976 , is hereby deleted.

(5) Subsection (2) (as amended by the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996) of section 104 of the Finance Act, 1983 , is hereby amended by the substitution of the following proviso for the proviso to that subsection:

"Provided that the Commissioners may withdraw an assessment made under this subsection and make an assessment of the amount of tax payable on the basis of a return which, in their opinion, represents reasonable compliance with their requirements and which is delivered to the Commissioners within 30 days after the date of the assessment made by the Commissioners pursuant to this subsection.".

Amendment of section 5 (enquiries or action by inspector or other officer) of the Waiver of Certain Tax, Interest and Penalties Act, 1993.

25.— Section 5 of the Waiver of Certain Tax, Interest and Penalties Act, 1993 , is hereby amended in subsection (1), by the substitution for "arrears of tax, as the case may be" of "arrears of tax, as the case may be, or that the declaration made by the individual under section 2 (3) (*a*) (iv) is false".

Short title.

26.—This Act may be cited as the Criminal Assets Bureau Act, 1996.

Acts Referred to

Capital Acquisitions Tax Act, 1976	1976, No. 8
Civil Service Regulation Act, 1956	1956, No. 46
Comptroller and Auditor General (Amendment) Act, 1993	1993, No. 8
Corporation Tax Act, 1976	1976, No. 7

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Disclosure of Certain Information for Taxation and Other Purposes Act, 1996	1996, No. 25
Exchequer and Audit Departments Acts, 1866 and 1921	
Finance Act, 1983	1983, No. 15
Finance Act, 1992	1992, No. 9
Garda Síochána (Compensation) Act, 1941	1941, No. 19
Garda Síochána (Compensation) (Amendment) Act, 1945	1945, No. 1
Income Tax Act, 1967	1967, No. 6
Local Government Act, 1941	1941, No. 23
Social Welfare (Consolidation) Act, 1993	1993, No. 27
Stamp Act, 1891	1891, c. 39
Value-Added Tax Act, 1972	1972, No. 22
Waiver of Certain Tax, Interest and Penalties Act, 1993	1993, No. 24

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Appendix B(v)

Proceeds of Crime (Amendment) Act 2005
Ireland

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Proceeds of Crime (Amendment) Act 2005

Number 1 *of* 2005

PROCEEDS OF CRIME (AMENDMENT) ACT 2005

ARRANGEMENT OF SECTIONS

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Acts Referred to

Criminal Assets Bureau Act 1996	1996, No. 31
Criminal Justice Act 1994	1994, No. 15
Ethics in Public Office Act 1995	1995, No. 22
Local Government Act 2001	2001, No. 37
Official Secrets Act 1963	1963, No. 1
Prevention of Corruption Act 1906	6 Edw. 7. c. 34
Prevention of Corruption Acts 1889 to 2001	
Prevention of Corruption (Amendment) Act 2001	2001, No. 27
Proceeds of Crime Act 1996	1996, No. 30
Statute of Limitations 1957	1957, No. 6
Taxes Consolidation Act 1997	1997, No. 39

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Number 1 *of* 2005

PROCEEDS OF CRIME (AMENDMENT) ACT 2005

AN ACT TO MAKE FURTHER PROVISION IN RELATION TO THE RECOVERY AND DISPOSAL OF PROCEEDS OF CRIME AND FOR THAT PURPOSE TO AMEND THE PROCEEDS OF CRIME ACT 1996, THE CRIMINAL ASSETS BUREAU ACT 1996, THE CRIMINAL JUSTICE ACT 1994 AND THE PREVENTION OF CORRUPTION (AMENDMENT) ACT 2001. [12*th February*, 2005]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY AND GENERAL

Short title, collective citation and construction.

1.—(1) This Act may be cited as the Proceeds of Crime (Amendment) Act 2005 .

(2) The Principal Act and *Part 2* of this Act may be cited together as the Proceeds of Crime Acts 1996 and 2005.

(3) The Act of 1996 and *Part 3* of this Act may be cited together as the Criminal Assets Bureau Acts 1996 and 2005.

(4) The Prevention of Corruption Acts 1889 to 2001 and *Part 5* of this Act may be cited together as the Prevention of Corruption Acts 1889 to 2005.

Interpretation.

2.—In this Act—

"Act of 1994" means the Criminal Justice Act 1994 ;

"Act of 1996" means the Criminal Assets Bureau Act 1996 ;

"Act of 2001" means the Prevention of Corruption (Amendment) Act 2001 ;

"Principal Act" means the Proceeds of Crime Act 1996 .

PART 2

Amendments to Principal Act

Amendment of section 1 (interpretation) of Principal Act.

3.—Section 1 of the Principal Act is hereby amended—

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(*a*) in subsection (1)—

(i) by the substitution of the following definitions for those of "the applicant", "proceeds of crime", "property" and "the respondent":

" 'the applicant' means a person, being a member, an authorised officer or the Criminal Assets Bureau, who has applied to the Court for the making of an interim order or an interlocutory order and, in relation to such an order that is in force, means, as appropriate, any member, any authorised officer or the Criminal Assets Bureau;

'proceeds of crime' means any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct;

'property', in relation to proceeds of crime, includes—

(*a*) money and all other property, real or personal, heritable or moveable,

(*b*) choses in action and other intangible or incorporeal property, and

(*c*) property situated outside the State where—

(i) the respondent is domiciled, resident or present in the State, and

(ii) all or any part of the criminal conduct concerned occurs therein,

and references to property shall be construed as including references to any interest in property;

'the respondent' means a person, wherever domiciled, resident or present, in respect of whom an interim order or interlocutory order, or an application for such an order, has been made and includes any person who, but for this Act, would become entitled, on the death of the first-mentioned person, to any property to which such an order relates (being an order that is in force and is in respect of that person);",

and

(ii) by the insertion of the following definitions:

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" 'consent disposal order' means an order under section 3(1A) or 4A(1);

'criminal conduct' means any conduct—

(*a*) which constitutes an offence or more than one offence, or

(*b*) which occurs outside the State and which would constitute an offence or more than one offence—

(i) if it occurred within the State,

(ii) if it constituted an offence under the law of the state or territory concerned, and

(iii) if, at the time when an application is being made for an interim order or interlocutory order, any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the conduct is situated within the State;",

and

(*b*) by the insertion, after subsection (1), of the following:

"(1A) (*a*) For the avoidance of doubt, a person shall be deemed for the purposes of this Act to be in possession or control of property notwithstanding that it (or any part of it)—

(i) is lawfully in the possession of any member of the Garda Síochána, any officer of the Revenue Commissioners or any other person, having been lawfully seized or otherwise taken by any such member, officer or person,

(ii) is subject to an interim order or interlocutory order or any other order of a court which—

(I) prohibits any person from disposing of or otherwise dealing with it or diminishing its value, or

(II) contains any conditions or restrictions in that regard,

or is to the like effect,

or

(iii) is subject to a letting agreement, the subject of a

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trust or otherwise occupied by another person or is inaccessible,

and references in this Act to the possession or control of property shall be construed accordingly.

(*b*) Paragraph (*a*)(ii) is without prejudice to sections 11(2) and 13(2).".

Amendment of section 2 (interim order) of Principal Act.

4.—Section 2 of the Principal Act is hereby amended—

(*a*) in subsection (1) by the substitution, for the opening words up to and including "officer", of the following:

"Where it is shown to the satisfaction of the Court on application to it *ex parte* in that behalf by a member, an authorised officer or the Criminal Assets Bureau",

(*b*) by the insertion, after subsection (3), of the following:

"(3A) Without prejudice to sections 3(7) and 6, where an interim order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(*a*) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(*b*) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes Consolidation Act 1997 , together with the fees and expenses provided for in that section, or

(*c*) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.',

(*c*) in subsection (6) by the substitution of the following for paragraph (*b*):

"(*b*) in case the application is under subsection (3A) or (4), by the applicant or other person making the application to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts,",

and

(*d*) by the addition of the following subsection:

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"(7) An application under subsection (1) may be made by originating motion.".

Amendment of section 3 (interlocutory order) of Principal Act.

5.—Section 3 of the Principal Act is hereby amended—

(*a*) in subsection (1)—

(i) by the substitution, for the opening words up to and including "section 8", of the following:

"Where, on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court on evidence tendered by the applicant, which may consist of or include evidence admissible by virtue of section 8",

and

(ii) by the substitution, for "the Court shall make", of "the Court shall, subject to subsection (1A), make",

(*b*) by the insertion of the following subsection after subsection (1):

"(1A) On such an application the Court, with the consent of all the parties concerned, may make a consent disposal order, and section 4A shall apply and have effect accordingly.",

(*c*) by the insertion, after subsection (3), of the following:

"(3A) Without prejudice to subsection (7) and section 6, where an interlocutory order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(*a*) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,

(*b*) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes Consolidation Act 1997 , together with the fees and expenses provided for in that section, or

(*c*) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.",

(*d*) in subsection (6) by the substitution of the following for paragraph (*a*):

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"(*a*) in case the application is under subsection (1), (3A) or (4), by the applicant or other person making the application to the respondent, unless the Court is satisfied that it is not reasonably possible to ascertain the respondent's whereabouts,",

and

(*e*) by the addition of the following subsection:

"(8) An application under subsection (1) may be made by originating motion.".

Amendment of section 4 (disposal order) of Principal Act.

6.—Section 4 of the Principal Act is hereby amended by the addition of the following subsection:

"(9) An application under subsection (1) may be made by originating motion.".

New section 4A in Principal Act.

7.—The Principal Act is hereby amended by the insertion of the following section after section 4:

"Consent disposal order.

4A.—(1) Where in relation to any property—

(*a*) an interlocutory order has been in force for a period of less than 7 years, and

(*b*) an application is made to the Court with the consent of all the parties concerned,

the Court may make an order (a 'consent disposal order') directing that the whole or a specified part of the property be transferred to the Minister or to such other person as the Court may determine, subject to such terms and conditions as it may specify.

(2) A consent disposal order operates to deprive the respondent of his or her rights (if any) in or to the property to which the order relates and, on its being made, the property stands transferred to the Minister or that other person.

(3) The Minister—

(*a*) may sell or otherwise dispose of any property transferred to him or her under this section, and

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(*b*) shall pay into or dispose of for the benefit of the Exchequer the proceeds of any such disposition as well as any moneys so transferred.

(4) Before deciding whether to make a consent disposal order, the Court shall give to any person claiming ownership of any of the property concerned an opportunity to show cause why such an order should not be made.

(5) The Court shall not make a consent disposal order if it is satisfied that there would be a serious risk of injustice if it did so.

(6) Sections 3(7) and 16 apply, with any necessary modifications, in relation to a consent disposal order as they apply in relation to an interlocutory order.

(7) This section is without prejudice to section 3(1A).".

Amendment of section 6 (order in relation to property the subject of interim order or interlocutory order) of Principal Act.

8.—Section 6 of the Principal Act is hereby amended by the substitution of the following for paragraph (*a*) of subsection (1):

"(*a*) the respondent or that other person to discharge the reasonable living and other necessary expenses (including legal expenses in or in relation to proceedings under this Act) incurred or to be incurred by or in respect of the respondent and his or her dependants or that other person, or".

Amendment of section 8 (evidence and proceedings under Act) of Principal Act.

9.—Section 8 of the Principal Act is hereby amended—

(*a*) in subsection (1) by the substitution of the following for paragraph (*b*):

"(*b*) in proceedings under section 3, on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the court so directs, in oral evidence,",

and

(*b*) by the insertion, after subsection (5), of the following:

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"(6) In any proceedings under this Act a document purporting to be a document issued by the Criminal Assets Bureau and to be signed on its behalf shall be deemed, unless the contrary is shown, to be such a document and to be so signed.".

Non-application to Principal Act of section 11(7) of Statute of Limitations 1957.

10.—For the avoidance of doubt, it is hereby declared that section 11(7) of the Statute of Limitations 1957 does not apply in relation to proceedings under the Principal Act.

Amendment of section 9 (affidavit specifying property and income of respondent) of Principal Act.

11.—Section 9 of the Principal Act is amended by renumbering it as subsection (1) and inserting the following subsection:

"(2) Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except any such proceedings for perjury arising from statements in the affidavit.".

New sections 16A and 16B in Principal Act.

12.—The Principal Act is hereby amended by the insertion of the following sections after section 16:

"Admissibility of certain documents.

16A.—(1) The following documents are admissible in any proceedings under this Act, without further proof, as evidence of any fact therein of which direct oral evidence would be admissible:

(*a*) a document constituting part of the records of a business or a copy of such a document;

(*b*) a deed;

(*c*) a document purporting to be signed by a person on behalf of a business and stating—

(i) either—

(I) that a designated document or documents constitutes or constitute part of the records of the business or is or are a copy or copies of such a document or documents, or

(II) that there is no entry or other reference in those records in

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relation to a specified matter, and

(ii) that the person has personal knowledge of the matters referred to in subparagraph (i).

(2) Evidence that is admissible by virtue of subsection (1) shall not be admitted if the Court is of the opinion that in the interests of justice it ought not to be admitted.

(3) This section is without prejudice to any other enactment or any rule of law authorising the admission of documentary evidence.

(4) In this section—

'business' includes—

(*a*) an undertaking not carried on for profit, and

(*b*) a public authority;

'deed' means any document by which an estate or interest in land is created, transferred, charged or otherwise affected and includes a contract for the sale of land;

'document' includes a reproduction in legible form of a record in non-legible form;

'public authority' has the meaning given to it by section 2 (1) of the Local Government Act 2001 and includes a local authority within the meaning of that section;

'records' includes records in non-legible form and any reproduction thereof in legible form.

Corrupt enrichment order.

16B.—(1) For the purposes of this section—

(*a*) a person is corruptly enriched if he or she derives a pecuniary or other advantage or benefit as a result of or in connection with corrupt conduct, wherever the

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conduct occurred;

(*b*) 'corrupt conduct' is any conduct which at the time it occurred was an offence under the Prevention of Corruption Acts 1889 to 2001, the Official Secrets Act 1963 or the Ethics in Public Office Act 1995 ;

(*c*) 'property' includes—

(i) money and all other property, real or personal, heritable or moveable,

(ii) choses in action and other intangible or incorporeal property, and

(iii) property situated outside the State,

and references to property shall be construed as including references to any interest in property.

(2) Where, on application to it in that behalf by the applicant, it appears to the Court, on evidence tendered by the applicant, consisting of or including evidence admissible by virtue of subsection (5), that a person (a 'defendant') has been corruptly enriched, the Court may make an order (a 'corrupt enrichment order') directing the defendant to pay to the Minister or such other person as the Court may specify an amount equivalent to the amount by which it determines that the defendant has been so enriched.

(3) Where—

(*a*) the defendant is in a position to benefit others in the exercise of his or her official functions,

(*b*) another person has benefited from the exercise, and

(*c*) the defendant does not account satisfactorily for his or her property or for the resources, income or source of

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income from which it was acquired,

it shall be presumed, until the contrary is shown, that the defendant has engaged in corrupt conduct.

(4) In any proceedings under this section the Court may, on application to it *ex parte* in that behalf by the applicant, make an order prohibiting the defendant or any other person having notice of the order from disposing of or otherwise dealing with specified property of the defendant or diminishing its value during a period specified by the Court.

(5) Where in any such proceedings a member or an authorised officer states on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the Court so directs, in oral evidence that he or she believes that the defendant—

(*a*) has derived a specified pecuniary or other advantage or benefit as a result of or in connection with corrupt conduct,

(*b*) is in possession or control of specified property and that the property or a part of it was acquired, directly or indirectly, as a result of or in connection with corrupt conduct, or

(*c*) is in possession or control of specified property and that the property or a part of it was acquired, directly or indirectly, with or in connection with the property referred to in paragraph (*b*),

then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in any or all of paragraphs (*a*) to (*c*), as may be appropriate.

(6) (*a*) In any such proceedings, on an application to it in that behalf by the applicant, the Court may make an order directing the defendant to file an affidavit specifying—

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(i) the property owned by the defendant, or

(ii) the income and sources of income of the defendant, or

(iii) both such property and such income or sources.

(*b*) Such an affidavit is not admissible in evidence in any criminal proceedings against the defendant or his or her spouse, except any such proceedings for perjury arising from statements in the affidavit.

(7) Sections 14 to 14C shall apply, with the necessary modifications, in relation to assets or proceeds deriving from unjust enrichment as they apply to assets or proceeds deriving from criminal conduct.

(8) The standard of proof required to determine any question arising in proceedings under this section as to whether a person has been corruptly enriched and, if so, as to the amount of such enrichment shall be that applicable in civil proceedings.

(9) The rules of court applicable in civil proceedings shall apply in relation to proceedings under this section.".

PART 3

Amendments to Act of 1996

Amendment of section 1 (interpretation) of Act of 1996.

13.—Section 1(1) of the Act of 1996 is hereby amended by the addition of the following definitions:

" 'criminal conduct' means any conduct which—

(*a*) constitutes an offence or more than one offence, or

(*b*) where the conduct occurs outside the State, constitutes an offence under the law of the state or territory concerned and would constitute an offence or more than one offence if it occurred within the State;

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'place' includes a dwelling;".

Amendment of section 4 (objectives of Bureau) of Act of 1996.

14.—Section 4 of the Act of 1996 is hereby amended by the substitution of references to "criminal conduct" for the references to "criminal activity".

Amendment of section 5 (functions of Bureau) of Act of 1996.

15.—Section 5(1) of the Act of 1996 is hereby amended—

(*a*) by the substitution of references to "criminal conduct" for the references to "criminal activity", and

(*b*) by the insertion of "an authority with functions related to the recovery of proceeds of crime," after "being".

Amendment of section 14 (search warrants) of Act of 1996.

16.—Section 14 of the Act of 1996 is hereby amended—

(*a*) in subsections (1), (2) and (4), by the substitution of references to "criminal conduct" for the references in those subsections to "criminal activities",

(*b*) in subsection (4)—

(i) by the deletion of "within one week of the date of issuing of the warrant" and the insertion of "within a period to be specified in the warrant", and

(ii) by the deletion of "any material found at that place, or any material" and the insertion of "any material (other than material subject to legal privilege) found at that place, or any such material",

(*c*) by the insertion of the following subsection after subsection (4):

"(4A) The period to be specified in the warrant shall be one week, unless it appears to the judge that another period, not exceeding 14 days, would be appropriate in the particular circumstances of the case.",

(*d*) in subsection (5), by substituting "subsection (2)" for "subsection (3)",

(*e*) by the insertion of the following subsection after subsection (5):

"(5A) The authority conferred by subsection (4) to seize and retain any material includes, in the case of a document or record, authority—

(*a*) to make and retain a copy of the document or record, and

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(*b*) where necessary, to seize and retain any computer or other storage medium in which any record is kept.",

(*f*) by the insertion of the following subsection after subsection (6):

"(6A) A bureau officer who is a member of the Garda Síochána acting under the authority of a warrant under this section may—

(*a*) operate any computer at the place which is being searched or cause it to be operated by a person accompanying the member for that purpose, and

(*b*) require any person at that place who appears to the member to have lawful access to the information in the computer—

(i) to give to the member any password necessary to operate it,

(ii) otherwise to enable the member to examine the information accessible by the computer in a form in which it is visible and legible, or

(iii) to produce the information to the member in a form in which it can be removed and in which it is, or can be made, visible and legible,",

and

(*g*) by the substitution of the following subsection for subsection (9):

"(9) In this section—

'computer at the place which is being searched' includes any other computer, whether at that place or at any other place, which is lawfully accessible by means of that computer, and

'material' includes a copy of the material and a document or record.".

Amendment of maximum amount of certain fines in Act of 1996.

17.—Sections 11(2)(*a*), 12(2)(*a*), 13(2)(*a*), 14(7), 15(2)(*a*) and 16(2) of the Act of 1996 are hereby amended by the substitution of "€3,000" for "£1,500" in each case.

New sections 14A, 14B and 14C in Act of 1996.

18.—The Act of 1996 is hereby amended by the insertion of the following sections after section 14:

"Order to make material available.

14A.—(1) For the purposes of an investigation into whether a person has benefited from assets or proceeds

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deriving from criminal conduct or is in receipt of or controls such assets or proceeds a bureau officer who is a member of the Garda Síochána may apply to a judge of the District Court for an order under this section in relation to making available any particular material or material of a particular description.

(2) On such an application the judge, if satisfied—

(*a*) that there are reasonable grounds for suspecting that the person has benefited from such assets or proceeds or is in receipt of or controls such assets or proceeds, and

(*b*) that the material concerned is required for the purposes of such an investigation,

may order that any person who appears to him or her to be in possession of the material shall—

(*i*) produce the material to the member so that he or she may take it away, or

(*ii*) give the member access to it within a period to be specified in the order.

(3) The period to be so specified shall be one week, unless it appears to the judge that another period would be appropriate in the particular circumstances of the case.

(4) (*a*) An order under this section in relation to material in any place may, on the application of the member concerned, require any person who appears to the judge to be entitled to grant entry to the place to allow the member to enter it to obtain access to the material.

(*b*) Where a person required under paragraph (*a*) to allow the member to enter a place does not allow him or her to do so, section 14 shall have effect, with any necessary modifications, as if a warrant had been issued under that section authorising him

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or her to search the place and any person found there.

(5) Where such material consists of information contained in a computer, the order shall have effect as an order to produce the material, or to give access to it, in a form in which it is visible and legible and in which it can be taken away.

(6) The order—

(*a*) in so far as it may empower a member of the Garda Síochána to take away a document or to be given access to it, shall authorise him or her to make a copy of it and to take the copy away,

(*b*) shall not confer any right to production of, or access to, any material subject to legal privilege, and

(*c*) shall have effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

(7) Any material taken away by a member of the Garda Síochána under this section may be retained by him or her for use as evidence in any proceedings.

(8) A judge of the District Court may vary or discharge an order under this section on the application of any person to whom an order under this section relates or a member of the Garda Síochána.

(9) A person who without reasonable excuse fails or refuses to comply with any requirement of an order under this section is guilty of an offence and liable—

(*a*) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(*b*) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5

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years or to both.

Disclosure prejudicial to making available of material under section 14A.

14B.—(1) A person who, knowing or suspecting that an application is to be made, or has been made, under section 14A for an order in relation to making available any particular material or material of a particular description, makes any disclosure which is likely to prejudice the making available of the material in accordance with the order is guilty of an offence.

(2) In proceedings against a person for an offence under this section it is a defence to prove that the person—

(*a*) did not know or suspect that the disclosure to which the proceedings relate was likely to prejudice the making available of the material concerned, or

(*b*) had lawful authority or reasonable excuse for making the disclosure.

(3) A person guilty of an offence under this section is liable—

(*a*) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(*b*) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5 years or to both.

Property held in trust.

14C.—(1) For the purposes of an investigation into whether a person has benefited from assets or proceeds deriving from criminal conduct or is in receipt of or controls such assets or proceeds the Chief Bureau Officer or an authorised officer may apply to a judge of the High Court for an order under this section in relation to obtaining information regarding any trust in which the person may have an interest or with which he or she may be otherwise connected.

(2) On such an application the judge, if satisfied—

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(*a*) that there are reasonable grounds for suspecting that a person—

(i) has benefited from assets or proceeds deriving from criminal conduct or is in receipt of or controls such assets or proceeds, and

(ii) has some interest in or other connection with the trust,

(*b*) that the information concerned is required for the purposes of such an investigation, and

(*c*) that there are reasonable grounds for believing that it is in the public interest that the information should be disclosed for the purposes of the investigation, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances,

may order the trustees of the trust and any other persons (including the suspected person) to disclose to the Chief Bureau Officer or an authorised officer such information as he or she may require in relation to the trust, including the identity of the settlor and any or all of the trustees and beneficiaries.

(3) An order under this section—

(*a*) shall not confer any right to production of, or access to, any information subject to legal privilege, and

(*b*) shall have effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

(4) A judge of the High Court may vary or discharge an order under this section on the application of any person to whom it relates or a member of the Garda Síochána.

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(5) A trustee or other person who without reasonable excuse fails or refuses to comply with an order under this section or gives information which is false or misleading is guilty of an offence and liable—

(*a*) on summary conviction, to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both, or

(*b*) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 5 years or to both.

(6) Any information given by a person in compliance with an order under this section is not admissible in evidence in any criminal proceedings against the person or his or her spouse, except in any proceedings for an offence under subsection (5).

(7) In this section 'information' includes—

(*a*) a document or record, and

(*b*) information in non-legible form.".

PART 4

AMENDMENTS TO ACT OF 1994

Amendment of Title to Part VI of Act of 1994.

19.—The Title to Part VI of the Act of 1994 is hereby amended by the substitution of "SEARCH FOR, SEIZURE AND DISPOSAL OF MONEY GAINED FROM, OR FOR USE IN, CRIMINAL CONDUCT" for "DRUG TRAFFICKING MONEY IMPORTED OR EXPORTED IN CASH".

Amendment of section 38 (seizure and detention) of Act of 1994.

20.—Section 38 of the Act of 1994 is hereby amended—

(*a*) by the substitution of the following subsections for subsection (1):

"(1) A member of the Garda Síochána or an officer of customs and excise may search a person if the member or officer has reasonable grounds for suspecting that—

(*a*) the person is importing or exporting, or intends or is

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about to import or export, an amount of cash which is not less than the prescribed sum, and

(*b*) the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.

(1A) A member of the Garda Síochána or an officer of the Revenue Commissioners may seize and in accordance with this section detain any cash (including cash found during a search under subsection (1)) if—

(*a*) its amount is not less than the prescribed sum, and

(*b*) he or she has reasonable grounds for suspecting that it directly or indirectly represents the proceeds of crime or is intended by any person for use in any criminal conduct.",

and

(*b*) by the insertion of the following subsection after subsection (3):

"(3A) Where an application is made under section 39(1) for an order for the forfeiture of cash detained under this section, the cash shall, notwithstanding subsection (3), continue to be so detained until the application is finally determined.".

Amendment of section 39 (forfeiture of seized cash) of Act of 1994.

21.—Section 39(1) of Act 1994 is hereby amended by the substitution of "the proceeds of crime or is intended by any person for use in connection with any criminal conduct" for "any person's proceeds of, or is intended by any person for use in, drug trafficking".

Amendment of section 43 (interpretation of Part VI) of Act of 1994.

22.—Section 43 of the Act of 1994 is hereby amended by the substitution of the following subsection for subsection (1):

"(1) In this Part of the Act—

'cash' includes notes and coins in any currency, postal orders, cheques of any kind (including travellers' cheques), bank drafts, bearer bonds and bearer shares;

'criminal conduct' means any conduct which—

(*a*) constitutes an offence or more than one offence, or

(*b*) where the conduct occurs outside the State, constitutes an offence under the law of the state or territory concerned and would constitute an offence or more than one offence if it occurred within the State;

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'exported', in relation to any cash, includes its being brought to any place in the State for the purpose of being exported;

'proceeds of crime' has the meaning given to that expression by section 1(1) (as amended by *section 3* of the *Proceeds of Crime (Amendment) Act 2005*) of the Proceeds of Crime Act 1996 .".

PART 5

Amendments to Act of 2001

New sections 2A, 2B and 2C in Act of 2001.

23.—The Act of 2001 is hereby amended by the insertion of the following sections after section 2:

"Seizure of suspected bribe.

2A.—(1) A member of the Garda Síochána may seize any gift or consideration which the member suspects to be a gift or consideration within the meaning of section 1 of the Prevention of Corruption Act 1906, as amended by section 2 of this Act.

(2) The seized property may not be detained for more than 48 hours unless its detention for a further period is authorised by order of a judge of the Circuit Court.

(3) Such an order—

(*a*) shall not be made unless the judge is satisfied—

(i) that there are reasonable grounds for suspecting that the seized property is a gift or consideration within the meaning of the said section 1,

(ii) that either its origin or derivation is being further investigated or consideration is being given to instituting proceedings, whether in the State or elsewhere, against a person for an offence with which the gift or consideration is connected, and

(iii) that it is accordingly necessary that the property be detained for a further period,

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and

(*b*) shall authorise the detention of the seized property for a further specified period or periods, not exceeding 3 months in any case or 2 years in aggregate.

(4) An application for an order under subsection (3) of this section may be made by a member of the Garda Síochána.

(5) Property detained under this section shall continue to be so detained until the final determination of—

(*a*) any proceedings, whether in the State or elsewhere, against any person for an offence with which the property is connected, or

(*b*) any application under section 2B for its forfeiture,

whichever later occurs.

(6) Subject to subsection (5), a judge of the Circuit Court may cancel an order under subsection (3) of this section if satisfied, on application by the person from whom the property was seized or any other person, that its further detention is no longer justified.

Forfeiture of bribe.

2B.—(1) A judge of the Circuit Court may order any gift or consideration which is detained under section 2A of this Act to be forfeited if satisfied, on application made by or on behalf of the Director of Public Prosecutions, that it is a gift or consideration referred to in section 1 of the Prevention of Corruption Act 1906, as amended by section 2 of this Act.

(2) An order may be made under this section whether or not proceedings are brought against any person for an offence with which the gift or consideration in question is connected.

(3) The standard of proof in proceedings under this

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section is that applicable in civil proceedings.

Application of sections 40, 41, 42 and 45 of Act of 1994 to certain property.

2C.—Sections 40 (appeal against forfeiture order), 41 (interest on cash detained), 42 (procedure) and 45 (disposal of forfeited cash) of the Act of 1994 shall apply in relation to cash and, as appropriate, to any other gift or consideration detained under section 2A, or forfeited under section 2B, of this Act as they apply in relation to cash detained or forfeited under section 38 or 39 of that Act.".

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Appendix B(vi)

Disclosure of Certain Information For Taxation and Other Purposes Act, 1996 Ireland

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Number 25 *of* 1996

DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION AND OTHER PURPOSES ACT, 1996

ARRANGEMENT OF SECTIONS

Section

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Number 25 *of* 1996

DISCLOSURE OF CERTAIN INFORMATION FOR TAXATION AND OTHER PURPOSES ACT, 1996

AN ACT TO PROVIDE FOR THE DISCLOSURE IN CERTAIN CIRCUMSTANCES OF INFORMATION BY THE REVENUE COMMISSIONERS TO EITHER OR BOTH THE GARDA SÍOCHÁNA AND CERTAIN OTHER PERSONS, TO PROVIDE FOR THE RECEIPT BY THE REVENUE COMMISSIONERS OF INFORMATION FROM THE GARDA SÍOCHÁNA, TO AMEND SECTIONS 32 , 57 AND 64 OF THE CRIMINAL JUSTICE ACT, 1994 , TO AMEND SECTIONS 18 AND 19 OF THE FINANCE ACT, 1983 , TO AMEND THE BANKERS' BOOKS EVIDENCE ACT, 1879, TO PROVIDE FOR THE ANONYMITY OF AN OFFICER OF THE REVENUE COMMISSIONERS IN CERTAIN CIRCUMSTANCES AND TO PROVIDE FOR CONNECTED MATTERS. [30*th July*, 1996]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Furnishing of certain information by Revenue Commissioners, etc.

1.—The Criminal Justice Act, 1994 , is hereby amended by the insertion of the following section after section 63 :

"63A.—(1) In this section—

'*relevant investigation*' means an investigation of a kind referred to in subsection (1) of section 63 of this Act;

'*relevant person*' means—

(*a*) a member of the Garda Síochána not below the rank of Chief Superintendent, or

(*b*) the head of any body, or any member of that body nominated by the head of the body, being a body established by or under statute or by the Government, the purpose or one of the principal purposes of which is—

(i) the identification of the assets of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

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(ii) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(iii) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *subparagraphs (i)* and *(ii)*.

(2) If, having regard to information obtained from a relevant person or otherwise, the Revenue Commissioners have reasonable grounds—

(*a*) for suspecting that a person may have derived profits or gains from an unlawful source or activity, and

(*b*) for forming the opinion that—

(i) information in their possession is likely to be of value to a relevant investigation which may be, or may have been, initiated, and

(ii) it is in the public interest that the information should be produced or that access to it should be given,

then, the Revenue Commissioners shall, subject to subsection (4) of this section and notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under any statute or otherwise, produce, or provide access to, such information to a relevant person.

(3) (*a*) The Revenue Commissioners may authorise any officer of the Revenue Commissioners serving in a grade not lower than that of Principal Officer or its equivalent to perform any acts and discharge any functions authorised by this section to be performed or discharged by the Revenue Commissioners and references in this section, other than in this subsection, to the Revenue Commissioners shall, with any necessary modifications, be construed as including references to an officer so authorised.

(*b*) The Revenue Commissioners may by notice in writing revoke an authorisation given by them under this section, without prejudice to the validity of anything previously done thereunder.

(*c*) In any proceedings arising out of a relevant investigation, a certificate signed by a Revenue Commissioner or an

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officer authorised under paragraph (*a*) of this subsection, as the case may be, certifying that information specified in the certificate has been produced to or access to such information has been provided to a relevant person shall, unless the contrary is proved, be evidence without further proof of the matters stated therein or of the signature thereon.

(4) Where information has been supplied to the Revenue Commissioners by or on behalf of the government of another state in accordance with an undertaking (express or implied) on the part of the Revenue Commissioners that the material will be used only for a particular purpose or purposes, no action under this section shall have the effect of requiring or permitting the production of, or the provision of access to, the information for a purpose other than one permitted in accordance with the undertaking and the information shall not, without the consent of the other state, be further disclosed or used otherwise than in accordance with the undertaking.".

Amendment of section 32 of Criminal Justice Act, 1994.

2.— Section 32 of the Criminal Justice Act, 1994 , is hereby amended—

(*a*) by the insertion, in subsection (9), after "money laundering" of "or any other offence", and

(*b*) by the insertion after subsection (10) of the following subsection:

"(10A) In any regulations made under subsection (10) (*a*) prescribing a person or body to be a designated body, the Minister may, notwithstanding any other provision of this Act, apply to that person or body such exceptions in relation to the obligations of designated bodies under this Act as the Minister considers appropriate.".

Amendment of section 57 of Criminal Justice Act, 1994.

3.— Section 57 of the Criminal Justice Act, 1994 , is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Information reported to the Garda Síochána under this section may be used in an investigation into an offence under section 31 or 32 of this Act or any other offence.".

Amendment of section 64 of Criminal Justice Act, 1994.

4.— Section 64 of the Criminal Justice Act, 1994 , is hereby amended by the substitution in subsection (2) of "persons" for "members of the Garda Síochána".

Amendment of section 184 (assessment in absence of

5.— Section 184 of the Income Tax Act, 1967 , is hereby amended by

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return) of Income Tax Act, 1967.

the insertion of the following subsection after subsection (2):

"(3) In this section, '*information*' includes information received from a member of the Garda Síochána:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.".

Amendment of section 144 (assessment of corporation tax) of Corporation Tax Act, 1976.

6.— Section 144 of the Corporation Tax Act, 1976 , is hereby amended by the substitution of the following subsection for subsection (4):

"(4) (*a*) If—

(i) a company makes default in the delivery of a statement in respect of corporation tax, or

(ii) the inspector is not satisfied with a statement which has been delivered, or has received any information as to its insufficiency,

the inspector shall make an assessment on the company concerned in such sum as, according to the best of the inspector's judgment, ought to be charged on that company.

(*b*) In this subsection, '*information*' includes information received from a member of the Garda Síochána:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.".

Amendment of section 12 (assessment of duty by Commissioners) of Stamp Act, 1891.

7.—Section 12 of the Stamp Act, 1891, is hereby amended—

(*a*) in subsection (1A) (inserted by the Finance Act, 1991), by the

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insertion of "(including information received from a member of the Garda Síochána)" after "information", and

(*b*) in subsection (6), by the insertion of the following:

"(*d*) Where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.".

Amendment of section 39 (assessment of tax) of Capital Acquisitions Tax Act, 1976.

8.— Section 39 of the Capital Acquisitions Tax Act, 1976 , is hereby amended by the substitution of the following subsection for subsection (7):

"(7) The Commissioners, in making any assessment, correcting assessment or additional assessment, otherwise than from a return or an additional return which is satisfactory to them, shall make an assessment of such amount of tax as, to the best of their knowledge, information (including information received from a member of the Garda Síochána) and belief, ought to be charged, levied and paid:

Provided that, where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.".

Amendment of section 104 (assessment and payment of tax) of Finance Act, 1983.

9.— Section 104 of the Finance Act, 1983 , is hereby amended by the substitution of the following subsection for subsection (2):

"(2) In any case in which—

(*a*) a return under section 103 (1) is not delivered by an assessable person to the Commissioners on or before the 1st day of October immediately following the relevant valuation date, or

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(*b*) a return under section 103 (2) is not delivered by a person within the time specified, or

(*c*) the Commissioners are dissatisfied with any return made under section 103 (1) or section 103 (2),

the Commissioners may make an assessment of tax payable upon the net market value of the relevant residential property, or any part thereof, of the person on the relevant valuation date of such amount or such further amount, as, to the best of their knowledge, information (including information received from a member of the Garda Síochána) and belief, ought to be charged, levied and paid and for this purpose the Commissioners may make such estimate of the market value of any property on that valuation date as they consider necessary:

Provided that:

(i) the Commissioners may withdraw an assessment made under this subsection and make an assessment of the amount of tax payable on the basis of a return which, in their opinion, represents reasonable compliance with their requirements and which is delivered to the Commissioners within 30 days after the date of the assessment made by the Commissioners pursuant to this subsection;

(ii) where an assessment raised under this section is based, in whole or in part, or directly or indirectly, on information received from a member of the Garda Síochána, the said member's source of the said information shall not, without the express permission in writing of a member of the Garda Síochána not below the rank of Chief Superintendent, be revealed in any correspondence or communication in relation to the assessment or on the hearing or rehearing of an appeal against the assessment.".

Amendment of section 18 (information to be furnished by financial institutions) of Finance Act, 1983.

10.— Section 18 of the Finance Act, 1983 , is hereby amended by the insertion of the following subsection after subsection (4):

"(4A) (*a*) Where—

(i) a copy of any affidavit and exhibits grounding an application under subsection (2) or (4) and any order made under subsection (3) or (4) are to be made available to any of the persons referred to in subsection (2) or any of those persons' solicitor, or to the financial institution, as the case

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may be, and

(ii) the judge is satisfied on the hearing of the application that there are reasonable grounds in the public interest that such copy of an affidavit, exhibits or order, as the case may be, should not include the name or address of the authorised officer,

such copy, copies or order shall not include the said name or address.

(*b*) If, upon any application to the judge to vary or discharge an order made under the provisions of this section, it is desired to cross-examine the deponent of any affidavit filed by or on behalf of the authorised officer and the judge is satisfied that there are reasonable grounds in the public interest to so order, the judge shall order either or both of the following:

(i) that the name and address of the authorised officer shall not be disclosed in court, and

(ii) that such cross-examination shall only take place in the sight and hearing of the judge and in the hearing only of all other persons present at such cross-examination.".

Amendment of section 19 (chargeability of certain profits or gains) of Finance Act, 1983.

11.— Section 19 of the Finance Act, 1983 , is hereby amended by the substitution of the following subsection for subsection (2):

"(2) Notwithstanding anything in the Tax Acts, any profits or gains which are charged to tax by virtue of subsection (1) or which are charged to tax by virtue of or following any investigation by any body (hereafter in this subsection referred to as '*the body*') established by or under statute or by the Government, the purpose or one of the principal purposes of which is—

(*a*) the identification of the assets of persons which derive or are suspected to derive, directly or indirectly, from criminal activity,

(*b*) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets, in whole or in part, as may be appropriate, and

(*c*) the pursuit of any investigation or the doing of any other preparatory work in relation to any proceedings arising from the objectives mentioned in *paragraphs (a)* and *(b)*,

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shall be charged under Case IV of Schedule D and shall be described in the assessment to tax concerned as '*miscellaneous income*', and in respect of such profits and gains so assessed—

(i) the assessment—

(I) may be made solely in the name of the body,

and

(II) shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should, apart from this section, have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity,

and

(ii) (I) the tax charged in the assessment may be demanded solely in the name of the body,

and

(II) on payment to it of the tax so demanded, the body shall issue a receipt in its name and shall forthwith—

(A) lodge the tax paid to the General Account of the Revenue Commissioners in the Central Bank of Ireland, and

(B) transmit to the Collector-General particulars of the tax assessed and payment received in respect thereof.".

Anonymity.

12.—The Finance Act, 1983 , is hereby amended by the insertion of the following section after section 19 :

"19A.—(1) In this section—

'*authorised officer*' means an officer of the Revenue Commissioners nominated by them to be a member of the staff of the body;

'*the body*' has the same meaning as in section 19;

'*proceedings*' includes any hearing before the Appeal Commissioners (within the meaning of the Revenue Acts);

'*the Revenue Acts*' means the Acts within the meaning of section 94 of this Act together with Chapter IV of Part II of the Finance Act, 1992 , and any instruments made thereunder

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and any instruments made under any other enactment and relating to tax;

'*tax*' means any tax, duty, levy or charge under the care and management of the Revenue Commissioners.

(2) Notwithstanding any requirement made by or under any enactment or any other requirement in administrative and operational procedures, including internal procedures, all reasonable care shall be taken to ensure that the identity of an authorised officer shall not be revealed.

(3) In particular and without prejudice to the generality of subsection (2)—

(*a*) when exercising or performing his or her powers or duties under the Revenue Acts in pursuance of the functions of the body, an authorised officer shall—

(i) not be required to produce or show any written authority or warrant of appointment under the Revenue Acts when exercising or performing his or her powers or duties under those Acts, notwithstanding any provision to the contrary in any of those Acts, and

(ii) be accompanied by a member of the Garda Síochána who shall, on request, by a person affected identify himself or herself as a member of the Garda Síochána and shall state that he or she is accompanied by an authorised officer,

(*b*) where, in pursuance of the functions of the body, an authorised officer exercises or performs in writing any of his or her powers or duties under the Revenue Acts or any provisions of any other enactment, whenever passed, which relate to Revenue, such exercise or performance of his or her powers or duties shall be done in the name of the body and not in the name of the individual authorised officer involved, notwithstanding any provision to the contrary in any of those enactments,

(*c*) in any proceedings arising out of the exercise or performance, in pursuance of the functions of the body, of powers or duties by an authorised officer, any documents relating to such proceedings shall not reveal the identity of any authorised officer, notwithstanding any requirements in any provision to the contrary, and in any proceedings the identity of such officer other than as an authorised officer shall not be revealed other than to the judge or the Appeal Commissioner, as the case may be, hearing the case,

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(*d*) where, in pursuance of the functions of the body, an authorised officer is required, in any proceedings, to give evidence and the judge or the Appeal Commissioner, as the case may be, is satisfied that there are reasonable grounds in the public interest to direct that evidence to be given by such authorised officer should be given in the hearing and not in the sight of any person, he or she may so direct.".

Meaning of "*bank*" and "*banker*" in Bankers' Books Evidence Act, 1879.

13.—For the purposes of the Bankers' Books Evidence Act, 1879, "bank" and "banker" in section 9 (1) (inserted by section 2 of the Bankers' Books Evidence (Amendment) Act, 1959) of the said Bankers' Books Evidence Act, 1879, shall include the following:

(*a*) any credit institution not being a credit institution authorised by the Central Bank of Ireland which provides services in the State pursuant to Council Directive 89/646/EEC[(1)]) of 15.12.1989;

(*b*) a society which is registered as a credit union under the Industrial and Provident Societies Acts, 1893 to 1978, by virtue of the Credit Union Act, 1966 ;

(*c*) a member firm for the purposes of the Stock Exchange Act, 1995 ;

(*d*) an investment business firm for the purposes of the Investment Intermediaries Act, 1995 ;

(*e*) a person authorised to carry on moneybroking business under section 110 of the Central Bank Act, 1989 ;

(*f*) a person providing foreign currency exchange services;

(*g*) a life assurance undertaking which is the holder of an authorisation under the Insurance Acts, 1909 to 1990, or under regulations made under the European Communities Act, 1972 , or which is the holder of an authorisation from another Member State of the European Communities and operating on an establishment basis in the State;

(*h*) a person providing a service in financial futures and options exchanges within the meaning of section 97 of the Central Bank Act, 1989 ; and

(*i*) any person or body prescribed by the Minister for Finance, following consultation with the Minister for Justice, by order under this section.

Amendment of section 7A of Bankers' Books Evidence Act, 1879.

14.—Section 7A (inserted by section 131 of the Central Bank Act, 1989) of the Bankers' Books Evidence Act, 1879, is hereby amended—

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(*a*) by renumbering that provision as subsection (1) of section 7A,

(*b*) in the said subsection (1), by the insertion after "banker's book" of ", or inspect and take copies of any documentation associated with or relating to an entry in such book," and

(*c*) by the insertion of the following subsection after subsection (1):

"(2) (*a*) Notwithstanding section 10, references to a judge in subsection (1) of this section shall include a reference to a judge of the Circuit Court or of the District Court.

(*b*) In subsection (1) of this section "*documentation*" includes information kept on microfilm, magnetic tape or in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form.".

Short title.

15.—This Act may be cited as the Disclosure of Certain Information for Taxation and Other Purposes Act, 1996.

Acts Referred to

Bankers' Books Evidence Act, 1879	42 & 43 Vict., c. 11
Bankers' Books Evidence (Amendment) Act, 1959	1959, No. 21
Capital Acquisitions Tax Act, 1976	1976, No. 8
Central Bank Act, 1989	1989, No. 16
Corporation Tax Act, 1976	1976, No. 7
Credit Union Act, 1966	1966, No. 19
Criminal Justice Act, 1994	1994, No. 15
European Communities Act, 1972	1972, No. 27
Finance Act, 1983	1983, No. 15
Finance Act, 1991	1991, No. 13
Finance Act, 1992	1992, No. 9
Income Tax Act, 1967	1967, No. 6
Industrial and Provident Societies Acts, 1893 to 1978	
Insurance Acts, 1909 to 1990	
Investment Intermediaries Act, 1995	1995, No. 11
Stamp Act, 1891	54 & 55 Vict., c. 39
Stock Exchange Act, 1995	1995, No. 9

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[1]OJ No. L 386 of 30.12.1989. p.1.

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Appendix C

Copies of Affidavits

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IN THE SUPREME COURT OF WESTERN AUSTRALIA

CPCA 43 of 2006

IN THE MATTER of Sections 57, 58, 41 & 43(1)(a) of the *Criminal Property Confiscation Act 2000*

and

IN THE MATTER of the Director of Public Prosecutions for Western Australia against AB and CD Pty Ltd (ACN 009 405 396)

DIRECTOR OF PUBLIC PROSECUTIONS
FOR WESTERN AUSTRALIA

Applicant

APPLICANT'S OUTLINE OF SUBMISSIONS IN SUPPORT OF
EX PARTE NOTICE OF ORIGINATING MOTION
FOR EXAMINATION ORDER, FREEZING ORDER AND RELATED ORDERS

Date of Document: 26 May 2006

Filed on behalf of: The Applicant

Date of Filing: 26 May 2006

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Our Ref.: DPP
Ref.: 05/1311

EXAMINATION ORDER

1. The Director of Public Prosecutions ("DPP") may apply *ex parte* to the Court for an order for the examination of a person.

Sections 57 and 101 Criminal Property Confiscation Act 2000 ("CPCA").

2. Section 58(1) of the CPCA sets out the matters about which the Court may order a person to submit to an examination and, by necessary inference, the basis or grounds upon which an examination order may be made.

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Section 58(1)(e) – AB/CD – reasonable suspicion of unexplained wealth

8. For the purposes of the CPCA a person has unexplained wealth if the value of the person's wealth is greater than the value of the person's lawfully acquired wealth: *Sections 12, 13(1), and 144 CPCA*

9. There is a very wide definition of what constitutes a person's wealth for the purposes of the CPCA. It includes all property acquired by the person at any time whether before or after the commencement of the CPCA and all property owned or effectively controlled by a person.
Section 143 and, particularly sections 143(1)(b) and (d) CPCA
Director of Public Prosecutions for Western Australia v Bridge & Another (2005) 152 A Crim R 226, [24]

10. Property is lawfully acquired only if:
    (a) the property was lawfully acquired; and
    (b) any consideration given for the property was lawfully acquired.
    Section 149 CPCA

11. The CPCA applies to a person's unexplained wealth whether or not his or her wealth was acquired before or after the commencement of the Act.
Section 5(1) CPCA

12. Mr Accountant, a forensic accountant with the Proceeds of Crime Squad, WA Police has prepared a preliminary report which analyses the financial affairs of AB ("AB"), CD Pty Ltd ("CD") and the business operated by CD, namely the EF Gentlemen's Club ("the EF") over the period 1 July 1997 to 30 June 2000.
Affidavit of Accountant sworn 11th May 2006 ("Accountant Affidavit")

13. The investigation of AB and CD arose out of an earlier investigation of the unexplained wealth of GH ("GH") in 2001.
Affidavit of Police sworn 10 May 2006 ("Police Affidavit"), para 3, p.4

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19. While there is some material which suggests that KL may have provided more than $86,800, the balance of the renovation funds has been treated as unexplained because:-

(a) the financial records of CD do not record any loan from KL;
Accountant Affidavit, Note 86, p60.

(b) the financial records of CD do not record any loan repayments;

(c) the material relating to the quantum of the alleged loan is contradictory and unclear.
Accountant Affidavit, pp.9-10.

20. If the cost of the renovations of the LI premises were less than assessed by Accountant, or if it were accepted that more than $86,800 of the renovation funds originated from a legitimate loan from KL, the value of unexplained wealth would be reduced commensurately

Section 5801(d) – AB – reasonable suspicion of commission confiscation offence

21. The jurisdiction under section 5801(d) of the CPCA is enlivened once there are reasonable grounds to suspect that one or more confiscation offences of a broadly defined kind or type are open on the evidence. In other words, the CPCA does not require the level of particularity required by section 85 of the *Criminal Procedure Act 2004* (WA).

New South Wales Crime Commission v Deligiannis [2002] NSWSC 1166, [2], [4], [6], [7]
New South Wales Crime Commission v Kelly and Ors (No. 2) [2005] NSWSC 154, [4], [6], [22]
The Queen on the application of the Director of Assets Recovery Agency & Ors v Green [2005] EWHC 3168 (Admin), [17], [38], [47], [50], [51]
Walsh v Director of the Assets Recovery Agency [2005] NICA 6, [26]

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(ii) monies coming into the business are recorded as sales when, in fact, the business was closed (note also the correlation between the purported sales and payment of expenses);

(iii) the accounts do not disclose any loan or advancement of funds from KL or anyone else other than AB;

(iv) repayments of the purported loan from KL are disguised as general expenses payments rather than loan repayments and those payments are made to MN;

(c) the payments from GH in purported repayment of the alleged KL loan are-

(i) disguised in the books of MN as receipts for rent and/or sales of radiators;

(ii) paid into an account into which is also paid the proceeds from drug sales;

(d) both the source of some of the renovation funds (KL) and the person to whom the loan repayments are made (GH) have very significant, high level involvement in the drug trade in Western Australia including during the period 1997 to 2000 which suggests that if funds were provided by KL and/or GH those funds were the proceeds of drug offences. In particular-

(i) KL's criminal history reveals he has drug convictions dating back to 1981 through to 1992.

Police Affidavit, para 17, p 6

(ii) In February 2000 KL was convicted of possession of 609.7 grams of amphetamine, 35.5 ecstasy tabs, 69.0 grams of heroin and 5.5 grams of cocaine and in November 2001 he was declared a drug trafficker.

Police Affidavit, paras 19 & 20, p 7

(iii) KL was arrested on 22 July 2001 for possession of 4,378 grams of MDMA, 2,015 grams of amphetamine, 7.7 grams of MDMA powder, 22 grams of cannabis and .3 grams of cocaine. In September 200. he was convicted of these charges.

Police Affidavit, para 24, p 8

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Appendix B
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30. All of the property to which reference is made in paragraph 29 above, is property that is apparently owned or effectively controlled by AB and/or CD who is/are suspected on reasonable grounds of having unexplained wealth (see paragraphs 8 to 29 above).

31. In relation to the application of section 142(e), it is submitted that there are reasonable grounds to suspect that AB has committed a confiscation offence, namely property laundering (see paragraphs 22 to 26 above).

32. Sections 16, 17, 145 and 149 of the CPCA are relevant to determining whether a person has acquired a criminal benefit.

33. The property that is a constituent of AB's wealth and which would be the property the subject of a criminal benefits declaration application, are the monies AB has apparently laundered through CD. Such monies give rise to a criminal benefit in that they are a constituent of AB's wealth and:-

(a) pursuant to section 16 of the CPCA, have been wholly or partly derived or realised, directly or indirectly, as a result of his involvement in the commission of a confiscation offence (whether or not the monies were lawfully acquired); or

(b) pursuant to section 17 of the CPCA have not been lawfully acquired: *Purdon v Dittmer* [1972] 1 NSWLR 94, 99

34. All of the property to which reference is made in paragraph 33 above, is property that is therefore owned or effectively controlled by AB, who is suspected on reasonable grounds of having committed a confiscation offence, and who has thereby acquired a criminal benefit.

Section 58(1)(g) - the nature, location and source of property-tracking documents

35. Section 155 of the CPCA sets out the definition of "property-tracking documents". Relevant to these proceedings are sections 155(c) and (d) which provide that documents that are relevant to identifying or locating any or all constituents of a person's wealth, or determining the value of any or all constituents of a person's wealth, are property-tracking documents.

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12. An application for a freezing order under the CPCA may be made *ex parte*.
Section 41(2) CPCA.

13. For the purposes of the CPCA, "property" includes "real or personal property of any description, wherever situated, whether tangible or intangible".
Dictionary to the CPCA.

14. A freezing order may be made by a court if *inter alia*, an examination order is in force in relation to the property.
Section 43(1)(a) CPCA.

15. The CPCA clearly contemplates the granting of a freezing order during the investigation phase of a matter in order to ensure that property is not disposed of prior to any eventual substantive application which could lead to confiscation of the property.

16. The Court has a discretion whether to grant a freezing order.

Barrett & Co (in liq) v Director of Public Prosecutions for Western Australia (2005) 31 WAR 217, p 8; [50]
Interpretation Act 1984 (WA), s56(1);

17. In the circumstances of this case, the following matters support the exercise of the discretion to grant the freezing order sought by the applicant:

(a) the questions raised by the affidavit material before the Court about the financial affairs of AB and CD are not of a trivial nature and have a real potential to lead to further confiscation action after the examinations have been completed;

(b) there is a risk that the property sought to be frozen could be disposed of by AB or CD prior to the hearing and determination of any substantive application;
Affidavit of Public sworn 12 May 2006

(c) the proposed freezing order does not freeze all of the property of AB or CD, nor after-acquired property, but is limited to 3 items of property only;

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15. The CPCA clearly contemplates the granting of a freezing order during the investigation phase of a matter in order to ensure that property is not disposed of prior to any eventual substantive application which could lead to confiscation of the property.

16. The Court has a discretion whether to grant a freezing order.

Barrett & Co (in liq) v Director of Public Prosecutions for Western Australia (2005) 31 WAR 217, p 8; [50]
Interpretation Act 1984 (WA), s56(1);

17. In the circumstances of this case, the following matters support the exercise of the discretion to grant the freezing order sought by the applicant:

(a) the questions raised by the affidavit material before the Court about the financial affairs of AB and CD are not of a trivial nature and have a real potential to lead to further confiscation action after the examinations have been completed;

(b) there is a risk that the property sought to be frozen could be disposed of by AB or CD prior to the hearing and determination of any substantive application;
Affidavit of Public sworn 12 May 2006

(c) the proposed freezing order does not freeze all of the property of AB or CD, nor after-acquired property, but is limited to 3 items of property only;

Appendix B
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12. An application for a freezing order under the CPCA may be made *ex parte*.
Section 41(2) CPCA.

13. For the purposes of the CPCA, "property" includes "real or personal property of any description, wherever situated, whether tangible or intangible".
Dictionary to the CPCA.

14. A freezing order may be made by a court if *inter alia*, an examination order is in force in relation to the property.
Section 43(1)(a) CPCA.

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b) The impact of corruption on civil and political rights

Corruption leads to violation of civil and political rights by causing discrimination in favour of the powerful and against the poor and the marginalized, thereby leading to impunity. Freedom of expression is threatened when corruption causes intimidation and harassment of its critics. This section should include examples on the impact of corruption on the following rights with special focus on specific groups (women, children, persons with disabilities, indigenous peoples, minorities, migrant workers, the poor):

The impact of corruption on the rights to a fair trial and to an effective remedy
The impact of corruption on the rights of political participation, and the right to vote

c) The impact of corruption on economic, social and cultural rights and the right to development

Basic human rights cannot be realized because of corruption that results in the diversion of development funds into private pockets, which impedes access to basic services by all, as well as the delivery of services of standard quality thus affecting the full enjoyment of the rights to health, education and water. Corruption includes the use of public resources for conspicuous consumption by public officers, which has implications for the progressive realization of economic, social and cultural rights since such acts divert funds from meeting population's needs. This section should include examples on the impact of corruption on human rights with special focus on specific groups (women, children, persons with disabilities, indigenous peoples, minorities, migrant workers, the poor).

d) The impact of corruption on human rights from a gender perspective

An empirical fact that cannot be omitted in any social analysis is the greater reliance of women in public services. Because of its gender role, women are assigned the role of providing health care and education of children, and usually also have to take care of elderly relatives. Women also need special care and public hospital visits during pregnancy. And more recently, women have been selected as recipients of conditional cash transfers programs. In addition, in special situations corruption, stigma and discrimination are connected and can have a devastating effect on the health and lives of women. Examples of these cases can be found in issues such as trafficking in women for prostitution, access to sexual and reproductive health, and treatment of HIV / AIDS.

3. Human rights and good governance as a framework to strengthen anti-corruption programmes:
This chapter will address the following issues:

Good governance and human rights are mutually reinforcing and share common principles, such as participation, accountability and transparency. The realization of human rights require a conducive and enabling environment, particularly appropriate legislation, institutions and procedures guiding and regulating the actions of the State. While human rights empower people and provide standards against which Governments

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Recommendations on what can and should be done to protect the human rights of anti corruption advocates, whistle blowers, victims of corruption and human rights defenders active in the fight against corruption.

6. Conclusion:
This section will wrap up issues dealt with under previous chapters, bearing in mind the outcome of the Warsaw Conference.

A glossary of terms: *The glossary will include definitions of corruption, taking into consideration the UN Convention against Corruption, a table or list of various forms of corruption such as embezzlement of funds, misappropriation of assets etc. and more specialized terminology*

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THE HIGH COURT

PROCEEDS OF CRIME

[redacted]

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996 AND IN THE MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO BE IN THE POSSESSION OR CONTROL OF [redacted]

ON THE APPLICATION OF THE CRIMINAL ASSETS BUREAU

AFFIDAVIT OF JOHN O'MAHONEY

I, **JOHN O'MAHONEY** of the Criminal Assets Bureau, Harcourt Square in the City of Dublin aged 18 years and upwards **MAKE OATH** and say as follows:

1. I am a Detective Chief Superintendent of An Garda Siochána. I am also the Chief Bureau Officer of the Criminal Assets Bureau duly appointed pursuant to Section 7 of the Criminal Assets Bureau Act, 1996. I am a "member" as that phrase is used in the Proceeds of Crime Act, 1996. I make this Affidavit from facts within my own knowledge save where otherwise appears and where so appears I believe the same to be true and accurate.

2. I also make this Affidavit on the basis of:

   (i) Information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control

   (ii) Information supplied to me by other members of An Garda Siochána;

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particular those conclusions made in relation to the financing of each of the separate properties. My belief is also based on a personal knowledge of [redacted] and his criminal activities gained from many years both as an investigating Detective and as a senior member of An Garda Síochána.

5. There is a significant body of evidence linking [redacted] to serious crime over a considerable period of time and in this regard I refer to the affidavits of Detective Garda Anthony Brady, Detective Garda Jim McGovern and Garda Karl Murray. I have read these affidavits prior to the swearing hereof and I am satisfied that the contents therein are true and adopt the averments made therein as my own.

6. In addition to what is already deposed to in the affidavit of Detective Garda Anthony Brady I say that in 1995 [redacted] and his associates began a campaign of intimidation against members of An Garda Síochána based in Cabra Garda Station Dublin 7. This intimidation began following an incident whereby a number of horses were impounded that belonged to [redacted] This intimidation involved the slashing of tyres of member's cars parked at Cabra Garda Station, the issuing of direct verbal threats, the identifying of member's houses through following them from their stations, the watching of those homes, the preparation of plans to burn down the home of a member of An Garda Siochana. My source for this knowledge is based on intelligence reports which I have examined in relation to the above incidents and I am satisfied that there are good grounds for same.

7. I believe that [redacted] was the head of a criminal gang involved in the large scale importation and distribution of cocaine and cannabis and robberies with firearms from which substantial profits were generated. I am also satisfied that [redacted] was careful not to have any assets in his own name and utilised a close family inner circle to conceal the true identity of his assets. The family circle included [redacted] who lived

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murders in the Dublin Area. I also say and believe that [redacted] forged close links with one of the families involved in the continuing Limerick feud.

10. The above agencies within An Garda Síochána were brought together as a direct result of the serious and widespread criminal activities being carried out by [redacted] and his criminal associates. As previously stated I believe that [redacted] was the head of a criminal gang involved in the illegal importation, sale and distribution of cannabis and cocaine and armed robberies using firearms. It is my belief, based on the Garda investigations that [redacted] status within his criminal gang allowed him to remain a step removed from handling the actual drugs. However I believe that he was directing and controlling the operations and making substantial profits from same. As a result of investigations carried out by Operation [redacted] since November 2005 the following has been seized from [redacted]'s gang by members from the National Bureau of Investigation - 30kg of heroin valued at 8 million euro, 35kg of cocaine valued at 2.5 million euro, 1427 kg of cannabis valued 10 million euro, 4 stolen vehicles, firearms and ammunition and €161,750.00 in cash. A total of 41 persons have been arrested and 26 are before the Courts on charges including S.15A of the Misuse of Drugs Act 1977 as amended, Attempted Robbery and the Unlawful Possession of Firearms.

11. The Criminal Assets Bureau was primarily involved in identifying any assets that were the proceeds of [redacted]'s Criminal Conduct. During the initial months of the investigation the Criminal Assets Bureau analysed a total of eighty one properties that were in some way associated with [redacted]. An examination of bank accounts belonging to [redacted] in the [redacted] branch of the Permanent TSB uncovered lodgements in excess of €800,000 between 2000 -2006. On the death of [redacted], the sum of €37,000 was the balance recorded in his account. It soon became clear to the

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without the benefit of an Order under Section 2 of the Proceeds of Crime Act 1996 - 2005. I am aware that active efforts are being made to dispose of the BMW X5 Jeep Registration Number [redacted] and may disappear with alacrity and would not be available to meet any orders which this Honourable Court may make in relation to it. I say this from experience of other occasions where easily disposable assets have been dissipated. I am also aware that steps have been taken to dispose one of the dwellings which has been advertised for sale and requests have been received in the Criminal Assets Bureau for the return of seized documents of title in respect of same.

Request for Anonymity

19. I make application to this Court for directions for the preservation of the anonymity of Officers of the Minister for Social and Family Affairs, of the Office of the Revenue Commissioners and of the Forensic Accountant who have sworn affidavits in these proceedings on the following grounds.

20. The Officers of the Minister for Social and Family Affairs, and Officers of the Revenue Commissioners are also Bureau Officers of the Criminal Assets Bureau duly appointed under Section 8 of the Criminal Assets Bureau Act 1996 and the Forensic Accountant is a member of staff of the Bureau duly appointed pursuant to Section 9 of the Criminal Assets Bureau Act 1996, accordingly are all persons for whom all reasonable care should be taken to ensure that their identity as a Bureau Officers shall not be revealed pursuant to the provisions of Section 16(1) of the Criminal Assets Bureau Act 1996.

21. I say that the Bureau Officers and member of staff of the Criminal Assets Bureau were and are engaged in assisting the investigation of serious crime within the remit of the Criminal Assets Bureau and that should the identity of the Officers be revealed in these proceedings that they could be at risk to intimidation or threat in other cases in which the Officers are involved.

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and for such further and other order as the Court may deem proper in the circumstances.

I therefore pray that the Court grants the relief's sought.

SWORN by John O'Mahoney

this 22 day of June, 2007
at 16-18 Harcourt Rd. Dublin 2
in the City of Dublin before me a Practising Solicitor/~~Commissioner for Oaths~~ and I know the Deponent

JOHN O'MAHONEY

PRACTISING SOLICITOR/

~~COMMISSIONER FOR OATHS~~

This Affidavit is filed on behalf of the Applicant this 3rd day of July, 2007 by David J. O'Hagan, Chief State Solicitor, Harcourt Square, Dublin 2.

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THE HIGH COURT

[redacted]

THE PROCEEDS OF CRIME

IN THE MATTER OF THE PROCEEDS OF CRIME ACT, 1996 AND IN THE MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO BE IN THE POSSESSION OR CONTROL OF [redacted]

ON THE APPLICATION OF THE CRIMINAL ASSETS BUREAU

AFFIDAVIT OF JOHN O'MAHONEY

I, John O'Mahoney, of the Criminal Assets Bureau, Harcourt Square in the City of Dublin aged 18 years and upwards hereby MAKE OATH and say as follows:-

1. I am a Detective Chief Superintendent of An Garda Siochána and I am also the Chief Bureau Officer of the Criminal Assets Bureau duly appointed pursuant to Section 7 of the Criminal Assets Bureau Act, 1996. I am a "Member" as that phrase is used in the Proceeds of Crime Act, 1996 as amended. I swear this affidavit on behalf of the Applicant and with it's authority and I do so from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe same to be true.

2. I make this Affidavit from information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control; other members of An Garda Siochána; on the basis of interviews carried out by me personally in relation to the investigation; my personal knowledge of the criminal activities of the First Named Respondent and also from personal knowledge of investigating criminal conduct as

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v) The first named respondent was arrested and charged with evasion of Excise Duty in Northern Ireland in relation to the smuggling of cigarettes from Northern Ireland. A Warrant for his arrest has issued and remains outstanding.

vi) The First Named Respondent was arrested and detained pursuant to Section 30 of the Offences against the State Act in respect of the murder of David McGuinness in 2003.

vii) The First Named Respondent was arrested for breach of bail. At the time of his arrest members of An Garda Siochana searched his car and seized one cheque, later identified to be one of 400 drafts stolen from the ACC Bank in Cavan Town in September 2005.

viii) The First Named Respondent was arrested in relation to a robbery at the Value Centre in Dundalk involving the use of firearms. An estimated €389,000 in cash and cigarettes was stolen.

ix) Two handguns were found in a vehicle belonging to and in which the First Named Respondent was travelling when it was searched in relation to a threat of extortion, intimidation and aggravated burglary.

x) The First Named Respondent was arrested in relation to the theft of €4,000 worth of power tools in November 2005.

xi) The Respondents have no legitimate source of income which would explain the level of assets acquired by them and their general level of expenditure.

xii) A number of the mortgages obtained by the Respondents contain factual mis-statements.

xiii) Repayments made on the several mortgages exceed both Respondents' declared level of income. This cannot be explained. This clearly indicates that there are other significant, unexplained funds available to the Respondents. I believe these monies were, in part, sourced from the proceeds of crime.

xiv) The pattern of lodgements and withdrawals on their bank accounts is consistent with involvement in criminal conduct.

xv) The various transactions (namely purchases, remortgages, sale) entered into by the Respondents represent money laundering exercises.

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9. Accordingly, for the preservation of the anonymity of the said Bureau Officers of the Criminal Assets Bureau, I request:

   a) a direction that the names of the said Bureau Officers of the Criminal Assets Bureau not be revealed in these proceedings, and,

   b) a direction that the Affidavits if any sworn by the Bureau Officers of the Criminal Assets Bureau be filed and furnished, in a redacted format,

   c) a direction that any evidence to be given by the said Bureau Officers of the Criminal Assets Bureau, shall be given in a manner which does not reveal his or her identity, and

   d) such other directions as shall be necessary for the preservation of the anonymity of the said Bureau Officers of the Criminal Assets Bureau.

10. I respectfully submit that the foregoing are reasonable grounds in the public interest, having regard to the statutory provisions referred to above, that the directions sought be given, pursuant to Section 10(7) of the Criminal Assets Bureau Act 1996

11. The property in the Schedule to the Originating Notice of Motion is at risk of being dissipated by the Respondents without the benefit of an Order under Section 2 of the Proceeds of Crime Act 1996 – 2005.

12. Although I do not believe that the Second Named Respondent has made any material contribution to the acquisition of the properties in respect of which orders under Section 2 of the Proceeds of Crime Act are sought, other than to assist the First Named respondent in masking the criminal provenance of monies invested in the said properties, I believe that it is appropriate to join her as a Respondent since her name is on the title, to give her an opportunity of joining in the within

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THE HIGH COURT

[redacted]

THE PROCEEDS OF CRIME

IN THE MATTER OF THE PROCEEDS OF CRIME ACT, 1996 AND IN THE MATTER OF AN APPLICATION AFFECTING PROPERTY ALLEGED TO BE IN THE POSSESSION OR CONTROL OF [redacted]

ON THE APPLICATION OF THE CRIMINAL ASSETS BUREAU

AFFIDAVIT OF JOHN O'MAHONEY

DAVID J. O'HAGAN,
CHIEF STATE SOLICITOR,
HARCOURT SQUARE,
DUBLIN 2.

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THE HIGH COURT

PROCEEDS OF CRIME

[redacted]

IN THE MATTER OF SECTION 3(1) OF THE PROCEEDS OF CRIME ACT 1996

Between

CRIMINAL ASSETS BUREAU

APPLICANT

AND

[redacted]

RESPONDENTS

AFFIDAVIT OF JOHN O'MAHONEY

I, **JOHN O'MAHONEY** of the Criminal Assets Bureau, Harcourt Square in the City of Dublin, aged eighteen years and upwards **MAKE OATH** and say as follows:

1. I am a Detective Chief Superintendent of An Garda Síochána and I am also the Chief Bureau Officer of the Criminal Assets Bureau duly appointed pursuant to section 7 of the Criminal Assets Bureau Act, 1996. I am a "member" as that phrase is used in the Proceeds of Crime Act, 1996 (as amended).

2. This affidavit is sworn by me in support of an application under the Proceeds of Crime Act for certain orders in respect of the property identified in the Schedule to the originating notice of motion. I make this affidavit on behalf of the applicant and with its authority and I do so from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe same to be true.

3. I make this affidavit from information supplied to me by Bureau Officers and members of staff of the Criminal Assets Bureau who have carried out investigations under my direction and control and also from my personal knowledge of investigating criminal conduct as a senior member of An Garda Síochána involved in the investigation of serious crime over the last 20 years.

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(a) Over a number of years, [redacted] operated a number of bank accounts and in particular, accounts with **permanent tsb** (formerly, Irish Permanent Building Society). The transactions on those bank accounts and in particular, lodgements and withdrawals are inconsistent with the means of a person on social welfare as [redacted] was during the relevant period.

(b) The lack of any explanation for the source of the monies lodged to the bank accounts. The respondent's attitude has been to deny any knowledge of the bank accounts despite the extensive evidence linking [redacted] to the accounts, which evidence is outlined in detail in the affidavit of D/Sgt. Fergal Harrington affirmed herein and was accepted by the Appeal Commissioners and the judge of the Circuit Court on appeal from the Appeal Commissioners.

(c) Cash seized in a search on the premises at [redacted] on April 21st 2006 in the sum of €19,400 and Stg£390 is inconsistent with the known means of [redacted].

(d) The fact that [redacted] is a violent criminal, with 32 convictions dating back to 1980. Those convictions include a conviction for Rape, Burglary, Robbery with a Firearm, Possession of a Firearm, and Aggravated Burglary with a Firearm.

(e) The fact that the Store Street Drugs Unit Investigation has identified the [redacted] family as being central to the importation and distribution of Cocaine in Dublin's North Inner City, with [redacted] being the leader and responsible for directing the operations of the gang.

(f) The fact that there is no record of legitimate earnings either by his tax returns or social welfare payments which would explain the transactions on the bank accounts, his ability to purchase the house the subject of these proceedings, [redacted] or the cash sum seized.

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THE HIGH COURT

[redacted]

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 1996

BETWEEN:

FELIX J. MCKENNA

PLAINTIFF/~~APPLICANT~~

- and -

[redacted]

DEFENDANTS/~~RESPONDENTS~~

AFFIDAVIT OF FELIX J. MCKENNA

I, FELIX J. MCKENNA of the Criminal Assets Bureau, Garda Siochana, Harcourt Square, Dublin 2. Detective Chief Superintendent of An Garda Siochana aged eighteen years and upwards make oath and say as follows:-

1 I am a member of An Garda Siochana holding the rank of Detective Chief Superintendent. I am the Chief Bureau Officer of the Criminal Assets Bureau. I am the Applicant to the above entitled proceedings. I am a "Member" as that phrase is used in the Proceeds of Crime Act, 1996. I make this Affidavit from facts and information supplied to me by Bureau Officers of the Criminal Assets Bureau who were involved in the investigations in this case and also from information supplied to me by investigations and enquiries carried out by the Royal Ulster Constabulary and members of the Garda Bureau of Fraud Investigation. I also make this Affidavit from facts within my own knowledge save where otherwise appears and where so appearing I depose to the same belief as I believe them to be true.

1

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(iii) An Order pursuant to Section 9 of the said Act requiring the first named Defendant/Respondent to swear and deliver to a Bank specifying all property of which the said Defendant/Respondent is in possession or control or the whereabouts or nature of which the Defendant/Respondent during the last ten years;

(iv) An Order pursuant to Section 4 of the said Act transferring the said properties to such persons thereof to the Minister for Finance or to such other persons as the Court might direct;

(v) Such further or other Order as this Court shall deem meet

SWORN the 24th day of July, 2000
by [redacted]
at [redacted]
in the City of Dublin before me a
Practising Solicitor/~~Commissioner for
Oaths~~ and I know the Deponent.

PRACTISING SOLICITOR/
~~COMMISSIONER FOR OATHS.~~

This Affidavit is filed on behalf of the Plaintiff by Lawrence A. Fitzgerald, Chief State Solicitor, Harcourt Square, Dublin 2 on the 24th day of July, 2000

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Appendix D

Newspaper Coverage of UWOs

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THE WEST AUSTRALIAN WEDNESDAY MAY 8 2002 13

THE DRUG MENACE

$70,000 assets seized daily

New confiscations powers put heat on drug dealers, conference told

■ By Ben Martin

SUSPECTED drug dealers are having an average of $70,000 in assets frozen or taken from them every working day through tough, but controversial criminal confiscation laws.

The laws, introduced to take the profit out of drugs, have been applied to dealers and crime figures who have built up massive wealth from drug networks.

The Australasian Conference on Drugs Strategy was told yesterday that the laws were the toughest in the world and the impact of laws in effect on drug dealers.

Since they were introduced on January 1, 2001, asset investigation detectives have frozen $2.1 million in assets from accused drug dealers.

Cars, boats, houses, bank accounts, shares, properties and cash have been frozen.

The asset investigation boss, Det-Sen. Sgt Dudley Congdon, told the conference in Perth that the unit had also targeted two men using the laws' unexplained wealth provision.

Police apply to the courts to freeze all the assets of a person they believe cannot properly explain how they acquired the wealth.

By the book: Robert Cock QC reads from the 1765 British legal volume. PICTURE STEVE TAKER

In a legal rarity, the onus is on the person to prove they are the legitimate owner of the property or it can be confiscated by courts.

The property can be sold and proceeds are put in a fund used to support victim-of-crime programs, anti-drug abuse programs and police operations.

Police can also apply to finance specific organised crime or drug operations with the money, effectively using a drug dealer's ill-gotten gains to target other crime figures.

But Sen. Sgt Congdon said he expected legal challenges to the laws by organised crime outfits. It is believed bikies and other crime syndicates last year began secretly, for contributions to a fund to challenge the laws.

Director of Public Prosecutions Robert Cock QC told the conference that *The West Australian*'s page-one picture on April 18 of him on a Harley-Davidson motorcycle with Attorney General Jim McGinty demonstrated the State's commitment to fighting organised crime.

He said the bike was an icon to bikie gangs who were legitimate targets of the laws and State Parliament in the background showed the laws had the support of the politicians elected by the people.

He referred to an English legal book published in 1765 which told how people who committed offences lost their rights to own property. "Here, almost 300 years later, we have a State Government which is implementing an almost identical law in respect of drug traffickers," Mr Cock said.

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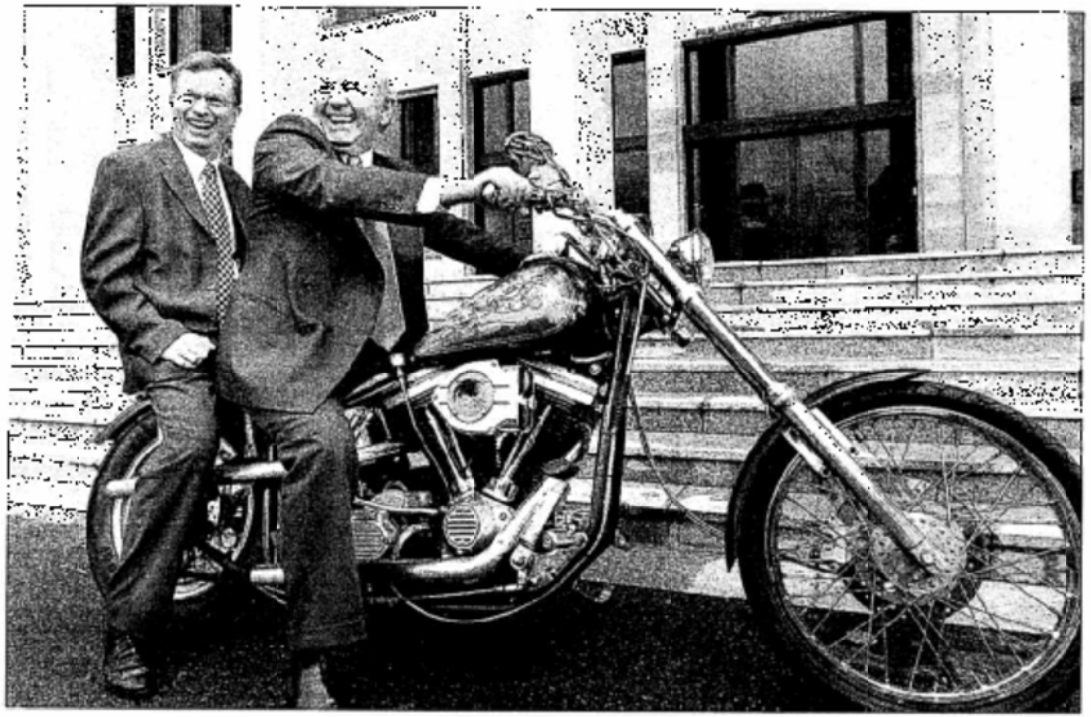

Crime fighters get their Harley

■ By Liz Tickner

THE State Government has its Easy Rider-Davidson.

Attorney-General Jim McGinty and Director of Public Prosecutions Robert Cock are eyeing another six of the motorcycles — and other property valued at millions of dollars.

The $70,000 cruising was confiscated from a convicted drug trafficker under tough laws to deprive criminals of the proceeds of their crime. It will be auctioned and the money used to help crime victims and pay for the DPP's four-member confiscations unit.

Another six Harley-Davidsons have been seized from people associated with motorcycle gangs and are "in train" pending court approval for confiscation.

The total property frozen is valued at about $2 million to include cash, shares, houses, land, cars, boats, computers and furniture.

▶ More, page 4

Easy riders: Director of Public Prosecutions Robert Cock and Attorney-General Jim McGinty on the confiscated Harley-Davidson. Picture: [illegible]

Drug dealer loses Harley

FROM PAGE ONE

[illegible] aged only [illegible] the targets of four of the [illegible] orders, worth more than $6 million.

The Criminal Property Confiscation Act came into force in January last year. And property valued at around $1.5 million has been confiscated, including two houses, a truck and the Harley.

"This is tough legislation aimed at drug trafficking and organised crime," Mr McGinty said. "Their luxury lifestyles will simply be snapped away."

Confiscation money goes into a special account restricted to specific purposes, including programs to stamp out drug-related crime.

Mr Cock said that, compared with the value of the drug trade, the confiscations unit had only scratched the surface. "But I assure people in WA that we are doing our damndest to get in there as hard as we possibly can," he said.

The drug traffickers also had to tell the other sellers, whether they were current [illegible] criminal activity or not.

"That is extremely tough, that is the way the law was designed to operate and it's the way it's going to be enforced," he said. "In my view, that would be a reasonable deterrent for any person getting involved in the drug trade."

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Freeze and seize law adds clout

By BRUCE BUTLER

TOUGH new criminal property confiscation laws could reap up to $4 million a year for WA crime-fighters.

Director of Public Prosecutions, Robert Cock QC, who will put the laws into practice, said he expected a return of three or four times what was confiscated under existing laws.

He conceded there were concerns among lawyers about the severity of the laws — branded the toughest in Australia.

But he made no apologies for the fact that drug dealers and criminals who live outside the law — and their families — could lose everything.

Key law enforcers — the police, the DPP and Attorney-General Peter Foss — are excited about the "unexplained wealth" provision, which enables the DPP to freeze and then seize any wealth which cannot be legally explained.

The law has been criticised because it reverses the onus of proof. Suspects have to prove their wealth is legitimate rather than the Crown having to prove guilt.

It has been framed with drug dealers and outlaw bikie gangs — suspected of involvement in amphetamine rackets — in mind.

The Attorney-General said it will be a particularly potent weapon against bikie gangs, whose stunts "code of silence" had beaten the law in several recent cases.

"It is a pretty savage law," Mr Cock admitted.

"We are targeting people right at the top echelon of every criminal activity.

"This is the most complete and aggressive of all the type of legislation in Australia."

Mr Cock said his office seized between $500,000 and $600,000 in confiscated assets each year under the old laws.

Robert Cock

"Realistically, we would be expecting to seize between $3 million and $4 million, but we could get lots more," he said.

"In NSW the history shows that the seizures increased and they could go up by a factor of three to four times.

"There is not much point going after $1000. Anyone can have $1000 of unexplained wealth.

"I am targeting people with a lot more than their legitimate source of income can sustain.

"I don't mind what sort of crime, anyone who doesn't have a legitimate source of income and who is living the high life. We are looking at serious wealth, six figures, hundreds of thousands of dollars."

The law will target corporate crime, theft and drug money, he said.

"This legislation is designed to stop criminals who are successful in earning real money," he said.

■ No place to hide, Page 33

Appendix B

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Socialite arrested after pyramid scheme probe

By Conor Ryan, Investigative Correspondent

Friday, July 08, 2011

SOCIALITE Breifne O'Brien has been arrested by gardaí investigating one of the country's most high-profile pyramid schemes.

The Garda fraud unit picked him up in south Dublin yesterday morning and followed this up with a search of a house in Monkstown, Co Dublin.

It is more than two-and-a-half years since the Commercial Court referred Mr O'Brien's activities to the Garda following a number of cases taken by disgruntled investors.

At the time Mr Justice Peter Kelly said papers submitted to his court suggested these creditors had been the victims of a confidence trick, but not a particularly elaborate one.

Mr O'Brien, who is originally from Cork, is in his mid-40s and is the son of businessman Leo O'Brien. He has been accused of operating the pyramid scheme for more than 15 years.

His friends, business partners and some family members have all been named among the victims.

Until he was exposed, Mr O'Brien and his wife, Fiona Nagle, were prominent figures in a social scene with powerful businessmen, bankers and politicians. When Mr O'Brien's assets were frozen in December 2008, it was also claimed he misappropriated funds given to him by investors, who were demanding the return of €18 million.

In early 2009 the sheriff seized a number of his assets including his Aston Martin car. Later that year Anglo Irish Bank secured a court order allowing it to sell some of his belongings to repay a €13m debt.

The Garda Bureau of Fraud Investigation arrested Mr O'Brien after what a spokesman said was a "major investigation into allegations of deception by a number of investors".

He was held under a section of the Criminal Justice Act which allows gardaí to question for serious offence which can carry more than five years in jail.

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Independent.ie

CAB combs rich traveller tax affairs

Sunday April 18 2004

NICOLA TALLANTand JIM CUSACK

THE Criminal Assets Bureau (CAB) has launched investigations into a number of millionaire travellers who have amassed huge fortunes but have never paid tax.

The Bureau has opened files on a list of prominent families and want to know how they made the fortunes which afford them ostentatious properties, high-powered cars and endless supplies of liquid cash.

The probe comes as English police continue their investigation into a number of travellers who they suspect are connected with the murder of a village postman in a Cambridgeshire village last December following a dispute with Irish travellers.

Investigations by the murder team have uncovered how travellers from Ireland have business interests stretching into Germany and Eastern Europe.

CAB believes some are involved in manufacture and tarmacing among other things and have set up in Eastern Europe prior to new EU entries.

A senior CAB source admitted the inquiries are slow as the finances are complex and difficult to track due to cash deals and a lot of travellers having the same or similar names.

"We are looking at some of them," the officer confirmed. "We are examining bank accounts, cash deals and assets they have acquired. We cannot say yet if we will be taking any cases but we are very much investigating some of these people.

Several visibly rich travelling families are being investigated. They are famed for their palatial homes, most of which are bedecked with chandeliers and expensive antique furniture.

While their homes are fit for royalty most live in plush caravans in the back gardens and only use the houses for Christmas celebrations.

Of the 1,700 population - a whopping 50 per cent are made up of wealthy travellers who often spend months out of the country.

In one town in Munster, a graveyard has been dubbed Marble City because of the massive stones erected in memory of travellers' loved ones.

Mercedes and top-of-the-range jeeps are parked in their driveways, despite the fact that many of the community cannot read or write.

CAB investigations have found that a lot have accumulated their wealth from years of wily antique dealing across Ireland, the UK and Europe.

As part of the investigation gardai are also expected to examine details of social welfare and unemployment claims made by people who are actually millionaires.

A very large proportion of travellers - sources say as many as 90 per cent of families - are in receipt of some form of social entitlements.

While there are many poor travellers, gardai have uncovered information that some of the wealthiest are still making claims for welfare or unemployment.

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Gardai have already carried out investigations into dealing in period furniture, jewellery and fine art which is bought from householders, then sold on at a profit.

A senior Garda source said: "They would be extremely clever and we have found cases where items have been purchased for a couple of thousand and sold within days for ?25,000 or ?30,000.

"They know exactly what they are buying and where to sell it and of course that business is largely a cash one.

"Our investigations haven't been easy as a lot wouldn't have bank accounts, although some have numerous. Those who don't, pay for everything in cash, even large building projects.

"In the end of the day it appears that little tax has been paid from the community over the years to the revenue commissioners and it is our job to find out if any is due. We will be continuing our investigations until we are satisfied."

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From The Sunday Times

November 9, 2003

Comment: John Burns: One failed criminal case doesn't constitute a crisis

Did you see the Whale on television last Monday? It wasn't billed as a wildlife programme, but there was no shortage of exotic species on The Underworld, RTE's documentary on Irish crime. The Viper hissed when a journalist strayed onto its territory. No sign of the Penguin, but we did get a virtuoso performance from the Whale.

James Gantley, to give the former gangland figure his real name, described how he'd once stopped assassins' bullets with his bare hands. Did he know the gunmen? Indeed he did; Gantley often saw them around. Didn't he bear a grudge? Not at all. Why, he laughed, he was even thinking of buying a pint for the pair who tried to blow his head off, so that he could slag them off about what "brutal shots" they were. Chuckling, Gantley carried on with a weight-lifting workout, presumably preparing himself for the next time killers come calling.

Why doesn't Gantley go to the gardai and identify the gangsters who shot him? Wouldn't he like to put them behind bars? Doesn't he worry they might kill someone else? Silly questions. The Irish underworld is another country, they do things differently there.

A few hours before the Whale's appearance on primetime television, a suspected killer walked free from a Dublin court and flashed a two-fingered salute. Six witnesses had identified Liam Keane, 19, as the killer of another Limerick man. Several had told gardai they saw Keane stick a knife in the victim. But as soon as the trial started, all six withdrew their statements and the case collapsed. We presume the witnesses were intimidated. One appears to have been assaulted on his way to court.

Immediately the country was convulsed by one of its periodic panics about crime. Enda Kenny, the Fine Gael leader, told the Dail "there is now a crisis in the administration of justice across the land". Sounds more like a crisis in Fine Gael script-writing — one collapsed trial and already Kenny has run out of superlatives.

Monday's events encapsulated Irish people's ambivalent attitude towards gangland crime. When underworld figures intimidate witnesses and cause a trial to collapse, there is outrage. But a few hours later everyone is guffawing with laughter as a criminal appears on television telling gags about the day he was shot.

There is an enormous and inexplicable fascination with gangsters and their exploits. Books detailing the doings of the Psycho or the Penguin by crime journalists such as Paul Williams positively walk out of the shops. A few years ago I was having a drink with Williams in a city-centre pub. Every few minutes we were interrupted by the barman who plied Williams with questions about Dublin's low-life. How was the Monk getting on? Had he seen the Boxer recently? Why had the Hitman fallen out with the Builder? Who did Williams reckon had shot the Snake? No sooner had he finished serving a customer but the barman was rushing back for more. He was like an oul wan who had missed Coronation Street, or the village gossip catching up after the holidays.

Treating criminals as cartoon characters in a fascinating soap opera is unwise. Usually they kill each other, and we don't need to worry. It's just one man "known to gardai" killing another. But every now and again a gangster with a wildlife nickname turns on the audience. Accustomed to a lack of response when they kill each other, they think they can get away with shooting a garda or a journalist, or intimidating a jury. Immediately it's a crisis.

Certain rituals are observed when a crime crisis is declared. The gardai ask for more resources and sweeping new powers. Last week the Garda Representative Association (GRA) called on Michael McDowell, the justice minister, to allow organised crime to be dealt with by the juryless Special Criminal Court. The GRA wanted membership of an organised crime gang to be an offence. Of course they demanded lots more money, too — the €2m extra McDowell allocated was "inadequate ".

The opposition also has a well-defined role: lambast the government and propose lots of simplistic solutions. Fine Gael really hammed it up last week. Kenny said we were facing "the biggest threat to the central core of our democracy since the murder of Veronica Guerin". He reproduced a claim from The Underworld programme that

Appendix B

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there are “40 criminal gangs” operating in Dublin and the price of a “hit” is €5,000. (The justice department reckons there are only 17 gangs nationwide, and €5,000 in rip-off Ireland would just about get you a getaway car.)

Sorry to disappoint, but there is no crime crisis in Ireland. Every day the criminal justice system deals efficiently with dozens of cases, locking up murderers, rapists and racketeers. The idea that the whole system is undermined because one case collapsed is nonsense. Particularly as the prosecution tactics in the Keane trial seem so suspect. Why did the gardai go to court without any forensic evidence? Why were they relying exclusively on the testimony of six people? Why, when the witnesses recanted, was there no legal effort to make their original statements stick? Justice Paul Carney could have been tougher on the Forgetful Five — the sixth just refused to testify. A few weeks of prison food and exercise yards might have improved their memories.

Acting on such a hard case would inevitably make bad law. Trial by jury is a basic right throughout the world. It is already curtailed in Ireland by the operation of the Special Criminal Court, established as an emergency measure in response to the IRA. It should have been abolished as part of the peace process.

Anything is preferable to abolishing jury trials. Because organised crime really would be a threat to democracy, as Kenny said, if our freedoms and basic rights are reduced in response to their two-fingered salutes.

Giving gardai more power is also unwise; they already have more than enough. The Criminal Assets Bureau can snatch houses and freeze bank accounts, no questions asked. The word of a senior garda is enough to have a paramilitary convicted. And McDowell is already giving them greater powers of detention, and the right to take DNA samples by force. All this and an annual budget of €1 billion at a time when serious crime is in decline.

Yes, reported crime fell by 7% in the first six months of this year compared to the same period last year. Serious assaults down by almost a third. Crisis? What crisis?

The lessons from last week’s episode of the crime soap opera are straightforward. There’s no need for panic measures; the government simply needs to tweak the rules of evidence to ensure that witnesses cannot resile from statements they freely make. McDowell needs to concentrate on the longer term. Ireland’s population is growing and diversifying, with greater concentration in cities and big towns. Increased wealth and the dissolution of old values and religious beliefs has led to a certain amorality and loss of respect for human life. In response we need a more professional, technologically proficient and focused force of gardai, who neither push pens nor direct traffic.

They could start by paying a visit to the Whale.

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Appendix E

Interview Protocol

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Project Overview	
Introduction	Booz Allen is conducting a comparative evaluation study of Unexplained Wealth Order (UWO) laws for the research branch of US DOJ, the National institute of Justice. These laws have two main characteristics: (1) they shift the burden to the property owner to show the legal origin of the property; and (2) they do not require that there be any evidence that a crime was committed by the property owner – merely lacking an explanation for the unexplained wealth is sufficient for the state to seize the property. We have surveyed the legislation of a large number of countries around the world to identify countries that have enacted UWO legislation, or some features of it. Countries that we have shortlisted are Australia, Canada, Ireland, New Zealand, Italy, U.K. and South Africa.
Project Goals:	The purpose of the study is to evaluate the effectiveness of UWOs and look at the possible transferability of these laws to the U.S.
Final Product:	A final report will be submitted to DOJ/NIJ and it will be available for your review.

Interviews will be semi-structured around a list of concerns. The questions listed below are representative of the ones we will ask, but we expect other questions to emerge during the course of the interviews.

Process for seizure and forfeiture of property

- Can you describe the organizational structure and operations of your Civil Asset Forfeiture Office?
- Can you explain to us the exchange of information and cooperation between the various agencies?
- How is information shared on various cases? To what extent?
- Can you describe the process of seizure and forfeiture of assets?
    - Criminal forfeiture?
    - Civil forfeiture?
    - Enhanced civil forfeiture, i.e., Unexplained Wealth Orders?

Criminal Forfeiture

- Is the criminal forfeiture post conviction, conducted in a civil or criminal proceeding?
- Does it target only proceeds derived from corruption offences or is it more inclusive?
- Is there a reversal of burden of proof?
- When does the burden shift to the defendant?

Civil Forfeiture

- Who has the burden of proof? Is there in your view a reversal of the burden of proof to the respondent?
    - If so, at what stage does the burden of proof shift to the respondent?
- Do you consider this an *in rem* or an *in personam* proceeding?
- Does the prosecution need to show that the property is the instrumentality or fruit of an offence before it can be seized or forfeited?

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- If so, must this be a specific offence or any offence?
- Does the law cover all of the property in questions or only property related to a specific offence?

Forfeiture via Unexplained Wealth Order Laws

- Can you further detail the shifting burden of proof?
- Can you further detail any requirements for a connection, or lack thereof, between the property and a crime?
- In what type of cases are UWOs most often pursued?
- Do you still have traditional civil asset forfeiture in addition to UWOs?
  - How have the two legal mechanisms worked together?
- Does the court have discretion to refuse to make an order under your UWO law?
  - Under what circumstances might a court refuse to do so?
- \How are cases identified, are they referred by the wider public, police?
- What are the requirements for private citizens, government officials or others to report the source of their wealth?
- Can you tell us about the investigative mechanisms available under the Act?
- Is the UWO law being utilized?
- Do you think the objectives set out by the law are being met? To what extent? How?
- How many cases have been filed to date? What types of cases are mostly filed?
- Are cases settled? If, so, what percentage?
- What are the provisions for property owners to be allowed use of some assets to pay defense attorneys?
- How do you measure the impact and the success of the Act? Do you set targets annually?
- What are the success rates in seizing property? In forfeiting property? How many cases are filed and from those how many result with forfeiture of property?
- What are the main challenges or difficulties faced in the implementation of the law?
- Have difficulties been encountered by having multiple states with their own UWO laws (applicable to Canada and Australia)
- What are the lessons you have learned in implementing the law?
- Background on the enactment of the law - the purpose the law was enacted?
- What was and is the level of public support for the law? What are the arguments of the opponents and supporters?
- What does the government wish to achieve with the law?

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Appendix F

Contact List of People Interviewed

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Frank Cassidy	Lead Bureau Legal Advisor Criminal Asset Bureau	Tel: 00353 1 666 3202 E: blo@cab.ie
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Dermot Walsh	Academic Law Professor at the University of Limerick	
Colin King	Academic Professor at Oxford University	
Dara Roberts	Solicitor, Dublin	
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Graeme Davidson	Deputy Director Commonwealth Director of Public Prosecution	Tel: 02 6206 5666 E: Graeme.davidson@cdpp.gov.au
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Appendix B

This document is a research report submitted to the U.S. Department of Justice. This report has not been published by the Department. Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

Appendix G

Evaluation Criteria

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Evaluation Criteria

1. Common law country with a legal system similar to the US
2. Non conviction civil based asset forfeiture
3. Reversed onus of proof (full or partial)
   a. Full reversal of onus of proof is in countries in which the burden of proof is fully transferred on the respondent from the onset of the court proceedings
   b. Partial reversal of the burden of proof is when the burden shifts to the defendant after the prosecution establish on balance of probabilities that concerned property is of illegal origin, to establish the contrary. Burden shifts during the court proceeding.
4. Can it be applied to recover proceeds derived from any unlawful activity or is its application restricted to proceeds derived from specific offences?
5. Is it an in rem or *in personam* proceeding?
6. Is there a requirement for a predicate offence?
7. How long has the law been in existence?
8. Is the law being applied? Is it used frequently? (metrics to be used in assessing the effectiveness of the application of unexplained wealth orders)
   a. Number of cases brought by independent agencies or prosecution
   b. Number of cases for which a freezing order was granted
   c. Value of assets under a freezing order
   d. Number of cases for which a unexplained wealth or forfeiture order was granted
   e. Value of forfeited assets

This document is a research report submitted to the U.S. Department of Justice. This report has not been published by the Department. Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

Appendix C

Helena Wood, *Reaching the Unreachable: Attacking the Assets of Serious and Organized Criminality in the UK in the Absence of a Conviction* (London: Royal United Services Institute for Defence and Security Studies, 2019).

Royal United Services Institute
for Defence and Security Studies

Occasional Paper

Reaching the Unreachable

Attacking the Assets of Serious and Organised Criminality in the UK in the Absence of a Conviction

Helena Wood

Reaching the Unreachable

Attacking the Assets of Serious and Organised Criminality in the UK in the Absence of a Conviction

Helena Wood

RUSI Occasional Paper, June 2019

Royal United Services Institute
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Contents

Executive Summary

The UK government's growing recognition that tackling the national security threat posed by the 37,317 nominals linked to the 4,542 organised crime groups (OCGs) mapped in the UK[1] cannot be achieved purely through traditional criminal justice outcomes was evident in its *Serious and Organised Crime Strategy 2018.* The increasingly hard-line rhetoric as regards the use of asset confiscation tools in the fight against serious organised crime – particularly since the introduction of the Unexplained Wealth Order (UWO) in 2017[2] – is a reflection of this.

This paper explores the extent to which this rhetoric has been matched by reality, with regards to greater use of the powers available under Part 5 of the Proceeds of Crime Act 2002 (POCA, of which the UWO is an investigatory tool), to allow for the confiscation of unlawfully obtained assets in the absence of a conviction – known as non-conviction-based (NCB) confiscation.

In understanding the operation of the NCB confiscation powers today, it is important to understand the history of their 16 years in operation. The high-profile demise of the original 'enforcement authority' – the Assets Recovery Agency (ARA) – in 2008[3] cast a long shadow over the perception of the powers by prosecutors and law enforcement, who now approach them with some caution. This paper notes the need for meaningful leadership from the UK government under a new Asset Recovery Action Plan to give use of the powers renewed focus.

As regards the operational environment, on ARA's disbandment, the powers were dispersed across the Serious Organised Crime Agency (SOCA – now the National Crime Agency, NCA), the Crown Prosecution Service (CPS) and the Serious Fraud Office (SFO). Having gained the ARA's staffing contingent, the NCA had an advance on other agencies, but initially failed to capitalise on this, with annual returns from NCB confiscation languishing around the £5–6 million mark. A renewed focus in the past year on the 'high end of high risk' is welcome. However, there are concerns that a higher investigative burden, particularly of grand corruption cases, may overstretch the NCA's current capabilities.

The NCA's refocus has also exacerbated a gap in NCB confiscation capability and capability at the regional and local policing tiers. The CPS – in conjunction with UK policing – has not yet stepped into the breach in the decade since the powers were extended to it. The reasons for this may include the lack of investigative resource, an in-house skills deficit and concerns regarding cost risks. The attention brought to the wider NCB confiscation regime by the introduction of the UWO has provided much-needed impetus to the CPS and policing to develop a capability

1. National Crime Agency, 'National Strategic Assessment of Serious and Organised Crime 2019', May 2019, p. 9.
2. An investigatory power available in NCB confiscation investigations.
3. Originally the nationwide NCB confiscation capability for law enforcement.

at the regional policing tier. However, the funding model for this new contingent is fragile and its longer-term place in the Regional Organised Crime Unit (ROCU) structure is unconfirmed. This paper recommends formally adding NCB confiscation as a ROCU capability, providing long-term central funding to embed specialist CPS civil lawyers and dedicated NCB confiscation investigators within these units, and ensuring that central government provides contingency funding for prosecutors in the event of adverse costs.

These findings should be viewed in the context of the bold political discourse since the implementation of the UWO – a discourse that seems to suggest the new tool is the solution to wider problems of capacity and capability in the system. This is emphatically not the case; without dealing with the underlying issues highlighted above and some of the inherent limitations in the UWO legislation,[4] the impact of NCB confiscation (including through UWOs) will remain limited.

Added together, the author finds in NCB confiscation a potentially highly potent tool – and in many cases the only means of targeting those who insulate themselves from the reach of criminal law – which is being woefully underexploited.

It is also evident that the UK has much to learn from jurisdictions (such as the Republic of Ireland, South Africa and the US) where NCB confiscation is a more mainstream part of the response.

The Irish Criminal Assets Bureau (CAB) model is frequently held up as an example of best practice, for the following reasons:

- **Broad public and political support**: Continuing cross-party and public support for the CAB from its introduction has insulated it from cuts in the broader public economy.
- **Lack of perverse incentives**: The lack of an 'incentivisation scheme'[5] has allowed the CAB to select cases on merit, unhampered by considerations as to the likely financial gain.
- **Multi-disciplinary approach**: The mix of police, revenue and social welfare powers and information is an essential component of the CAB's success.
- **Deal-making**: A more flexible approach to deal-making and settlements allows for a pragmatic response to case management.

South Africa's Asset Forfeiture Unit (AFU) model has established NCB confiscation as a more mainstream tool through the following measures:

- **Clear purpose and priorities**: The AFU was established with a clear mandate under law to tackle serious and organised crime, in a way the UK model was not.
- **Targeted outreach**: The AFU model is comprised of a central unit and individuals embedded in wider prosecutorial structures to aid case identification.

4. For example, the 60-day time limit for the filing of civil recovery claims following responses to the UWO.
5. In which a proportion of recovered proceeds are channelled back into law enforcement as a supposed incentive to carry out more asset forfeiture work.

- **Risk appetite**: The AFU was established with a clear mandate from government to fight test cases and establish jurisprudence, thus empowering it with a healthy risk appetite.

The US regime in many ways acts as a cautionary tale of the need to exercise NCB confiscation with appropriate restraint.[6] However, aspects of the US regime merit consideration by UK policymakers:

- **Interoperability**: On investigating assets, the US regime does not presuppose either the criminal or civil route; evidence gathered can be used to pursue either.
- **Tools to reduce litigation**: The range of external tools to encourage cooperation and/or reduce litigation in NCB confiscation in the US is notable.

In conclusion, this paper finds that the original promise of NCB confiscation – to target those who insulate themselves from the reach of criminal law – has at best been only marginally fulfilled. Initial moves to resolve the fundamental capacity and capability issues in prosecutorial structures and create the necessary support function in policing are welcome, but do not provide a long-term, sustainable solution; the UK must follow the example of others to fully embed the powers into the response to serious and organised crime. Any suggestion that the implementation of UWOs solves these problems is misguided.

12 Recommendations for Policymakers

Recommendation 1: The government should deliver on its commitment to publish an Asset Recovery Action Plan. Under this it should commit to formulating a specific strategy for increasing the take-up of NCB confiscation as part of the response to serious and organised crime.

Recommendation 2: The NCA should commit to reviewing its NCB confiscation staffing to consider whether the team has in place all of the skills and experience needed to undertake the more complex cases it is now pursuing under its new NCB confiscation case adoption strategy.

Recommendation 3: NCB confiscation should be adopted as a formal ROCU capability.

Recommendation 4: The Home Office should provide additional funding to the CPS Proceeds of Crime Division and to the ROCU network to recruit and train a network of NCB confiscation specialists. This funding should run for a minimum of three years to aid recruitment.

Recommendation 5: The government should ring-fence a proportion of asset confiscation receipts each year to act as a contingency fund for unexpected litigation and costs associated with NCB confiscation.

6. Following the backlash against an over-zealous use of NCB confiscation, particularly at state level in the 1990s.

Recommendation 6: UWO provisions should be amended to allow enforcement authorities to apply to the courts for a moratorium of up to an additional 120 days following responses to a UWO to allow for further evidence gathering where necessary.

Recommendation 7: Under a refreshed Asset Recovery Action Plan the Home Office, working with enforcement authorities, should lead a strategic communications campaign to raise public and political awareness of NCB confiscation and its associated strengths.

Recommendation 8: The NCB settlement policies of enforcement agencies should consider the opportunity cost of a hardline approach to settlements alongside other factors.

Recommendation 9: The Serious Organised Crime Inter-Ministerial Group should mandate officials to mainstream NCB confiscation into the broader strategic response as part of the Serious Organised Crime Strategy 2018 response.

Recommendation 10: The roll-out of NCB confiscation to the ROCUs should be accompanied by a programme of awareness raising within policing (specifically to Chief Constables) and to Police and Crime Commissioners, led by the National Police Chiefs' Council Financial Crime Portfolio.

Recommendation 11: The government should remove the presumption of the primacy of the criminal confiscation route under Section 2(a) of POCA to mirror the more flexible approach of the US, the Republic of Ireland and South Africa.

Recommendation 12: The government should consult on whether fugitive disentitlement provisions are appropriate for adoption in the UK.

Introduction

'SERIOUS AND ORGANISED crime is the most deadly national security threat faced by the UK', according to the Home Secretary.[1] Despite years of playing second fiddle, in national security terms, to the terrorism threat, the UK's growing understanding of the scale and impact of the problem in recent years has led to a recognition that 'serious and organised crime affects more UK citizens, more often, than any other national security threat'.[2]

However, with 37,317 nominals linked to the 4,542 organised crime groups (OCGs) mapped in the UK in 2018,[3] there is an emerging realisation that seeking to tackle this problem entirely through traditional criminal justice outcomes (such as criminal prosecutions) is unachievable, particularly in times of straitened police budgets and expanding policing priorities.[4] In light of this, an approach that focuses less on the primacy of criminal justice outcomes and more on 'relentless disruption' is evident in the government's *Serious and Organised Crime Strategy 2018*.[5]

It is in this context that we must view the growing governmental interest in the asset confiscation tools available in the UK's Proceeds of Crime Act 2002 (POCA) – both criminal and civil[6] – as a means of achieving this disruptive impact against serious and organised crime. As the strategy notes, 'we will use new and improved powers and capabilities to identify, freeze, seize or otherwise deny criminals access to their finances'.[7]

This statement can be viewed as part of a well-established global policy imperative that advocates targeting not only the criminal perpetrator, but also their assets. This imperative forms part of an overall approach to crime and harm reduction, which recognises that prison is a blunt instrument, frequently seen as an 'occupational hazard' by offenders. It is far more

1. HM Government, *Serious and Organised Crime Strategy 2018*, Cm 9718 (London: The Stationery Office, November 2018), p. 3.
2. National Crime Agency (NCA), 'National Strategic Assessment of Serious and Organised Crime 2019', May 2019, p. 9.
3. *Ibid.*
4. Including the rise in reports of historical child sexual exploitation cases being tackled by the police following the Jimmy Savile scandal. See Randeep Ramesh, 'NSPCC Says Reports of Sexual Abuse Have Soared After Jimmy Savile Scandal', *The Guardian*, 31 August 2013.
5. HM Government, *Serious and Organised Crime Strategy 2018*, p. 6.
6. The Proceeds of Crime Act 2002 (UK) (POCA) contains provisions that allow for the confiscation of proceeds following a conviction (criminal confiscation), in the absence of a conviction (non-conviction-based or NCB confiscation), of cash (cash forfeiture, the definition of which also now includes money held in bank accounts and some high-value goods) and taxation of criminal profits.
7. HM Government, *Serious and Organised Crime Strategy 2018*, p. 6.

impactful, so the argument goes, to remove the proceeds of crime to reduce criminal capital, remove the incentives to commit further crimes and increase public confidence in the ability of the authorities to ensure that 'crime doesn't pay'.

The empirical evidence to support the assertions of advocates of this approach is lacking. However, a lack of empirical evidence is not evidence of an absence of impact; the argument that removing the very incentives for committing crime has an impact on the perpetrator has an intuitive merit, which has led to a global consensus that an asset-focused approach has a distinct value in the fight against organised crime. Furthermore, as Colin Atkinson, Simon Mackenzie and Niall Hamilton-Smith note, 'the moral imperative upon which such approaches rest remains attractive, defensible and popular in the current climate'.[8]

The legislative embodiments of this consensus have been evident across the globe since the 1980s, with a raft of laws adopted, particularly within the criminal sphere of law, to allow for the confiscation of the proceeds of crime. However, as the legislation developed, so did the criminality; the more sophisticated criminals became increasingly adept at distancing themselves from 'hands-on' crimes and by doing so evaded conviction and consequently the reach of criminal confiscation provisions.

The growing awareness on the part of many policymakers of the limitations of the criminal sphere of law to reach and properly attack the upper echelons of criminality has led a limited (but growing) number of jurisdictions,[9] including the UK, to adopt provisions in the civil law realm to target the proceeds of 'unlawful conduct'[10] in the absence of a criminal conviction.

Non-conviction-based (NCB) confiscation is viewed as controversial by some, who believe it reflects a creeping 'civilising' of the approach to tacking organised crime,[11] which allows law enforcement to mete out justice at the lower civil standard of proof[12] without the wider protections afforded to the individual by the criminal sphere of law.[13]

8. Colin Atkinson, Simon Mackenzie and Niall Hamilton-Smith, 'A Systematic Review of the Effectiveness of Asset-Focussed Interventions Against Organised Crime', What Works: Crime Reduction Systematic Review Series No. 9, April 2017, p. 6.
9. Including Antigua and Barbuda, Australia, certain provinces of Canada, Colombia, Fiji, Guernsey, the Republic of Ireland, Italy, Malaysia, Mauritius, New Zealand, Peru, the Philippines, South Africa, the UK and the US.
10. The terminology used in Part 5 of POCA 2002.
11. Colin King and Jennifer Hendry, 'How Far is Too Far? Theorising Non-Conviction-Based Asset Forfeiture', *International Journal of Law in Context* (Vol. 11, No. 4, December 2015), pp. 398–411.
12. On the 'balance of probabilities' rather than 'beyond reasonable doubt' in the UK, 'on the preponderance of evidence' in other jurisdictions.
13. See, for example, Colin King, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland', *Cambridge University Press: Legal Studies Journal* (Vol. 34, No. 3, 2014), pp. 371–94.

However, proponents of NCB confiscation view the powers as serving both a moral imperative and tactical necessity to ensure that criminality is not left to propagate simply due to the limitations of criminal law to target high-level offenders.[14] Supporters note that while the powers serve a criminal justice policy goal, the outcome – the confiscation of property gained through unlawful conduct – does not serve as a criminal punishment. Giving law enforcement the ability to tackle assets in the absence of a conviction, it is argued, serves to restore public faith in the justice system's ability to protect the public good at the same time as removing criminal capital that would otherwise be reinvested in further criminality.[15] Finally, while the standard of proof is lower, NCB confiscation still requires the gathering of evidence and the proving of a case before a court to a judge's satisfaction.

With the nature of OCGs growing ever more complex, multi-jurisdictional and fluid in nature, using the full range of (human rights-compliant) criminal and civil tools available becomes, from a national security perspective, necessary rather than discretionary, as voiced ably by Anthony Kennedy: 'While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that "half a loaf is better than no bread"'.[16]

The majority of academic studies on the use of NCB confiscation since the broader adoption of the powers in the mid-1990s[17] have represented an oscillation between these two diametrically opposed positions. This paper, however, takes an agnostic view on the moral and jurisprudential implications of NCB confiscation, instead considering the powers from a public policy perspective, specifically the extent to which NCB confiscation is being fully deployed as part of the UK government's approach to tackling serious and organised crime, as contained in the *Serious and Organised Crime Strategy 2018.*[18]

First, this paper looks at the origins of the UK's NCB confiscation regime and its evolution to the present day, including the most recent extension of its investigative reach in the form of the Unexplained Wealth Order (UWO). In doing so, the paper seeks to evaluate whether its current deployment is both optimal in terms of its role in the response to serious and organised crime, and whether it serves the original intention of the legislation – that of opening up 'a new route to tackling the assets of those currently beyond the reach of the law'.[19]

14. See Stefan D Cassella, 'The Case for Civil Forfeiture', *Journal of Money Laundering Control* (Vol. 11, 2008), pp. 8–14.
15. See Anthony Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', *Journal of Financial Crime* (Vol. 12, No. 1, 2004), pp. 8–23.
16. *Ibid.*
17. The powers first emerged in earnest under the US Racketeer Influenced and Corrupt Organizations Act in the 1970s, but adoption at a global level only really picked up pace from the 1990s onwards, with the Republic of Ireland and South Africa being early adopters of the concept.
18. HM Government, *Serious and Organised Crime Strategy 2018*.
19. Cabinet Office Performance and Innovation Unit (PIU), 'Recovering the Proceeds of Crime', June 2000, <https://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf>, accessed 2 May 2019.

Second, this paper looks to the experience of other jurisdictions with NCB confiscation regimes (the Republic of Ireland, South Africa and the US) to consider whether the UK can learn lessons from their deployment of the powers.

Methodology

The research included a review of the available academic, media and governmental literature relating to the use of the powers and semi-structured interviews with 15 serving and former policymakers, investigators and lawyers with specific experience in NCB confiscation, including those involved in the pre-POCA consultation exercise. The paper also drew on the experience of five practitioners from the Republic of Ireland, South Africa and the US.

Limitations

This study draws on a limited pool of academic research in this field and limited access to government data.[20] It is hoped that this paper will act as a spur for further academic research.

In the interests of focus, the research centres on the use of NCB confiscation by the larger bodies empowered to use NCB confiscation – the NCA and the Crown Prosecution Service (CPS) – rather than expanding the research focus to use of the powers by the Serious Fraud Office (SFO).

It does not fully assess the use of UWOs in this context, as it is too early to judge their impact, but comments on the initial views of practitioners as to their role in supporting the wider NCB confiscation regime in the UK as part of a long-term approach to extending its use.

Terminology

This paper refers to the powers as 'non-conviction-based (NCB) confiscation', which follows the terminology used in the Financial Action Task Force (FATF) Standards. It should be noted that the terminology used internationally to describe NCB confiscation varies. The powers are frequently referred to as 'non-conviction-based asset forfeiture' by other international bodies such as the World Bank, as 'civil forfeiture' in the US, and 'civil recovery' in the UK.

20. The main source of data on NCB confiscation in the UK is held by the NCA, which is exempt from the Freedom of Information Act.

I. A History of the UK's Use of Non-Conviction-Based (NCB) Confiscation

THIS CHAPTER PROVIDES a guide to the genesis of NCB confiscation in the global approach to tackling the finances of serious and organised criminality and gives a background to the UK's use of the tools since their introduction in the UK in 2003.

What is NCB Confiscation?

Although the wording of the law differs between jurisdictions, the fundamental principles of NCB confiscation remain largely the same – namely that, in the absence of a criminal conviction, an action is taken against the property (*in rem*) on the basis that the property is believed to have been obtained in connection with 'unlawful conduct'. This contrasts with criminal confiscation proceedings, which are actions taken against the person (*in personam*) following a conviction for a criminal offence.

In NCB confiscation cases, the applicant[21] does not seek to prove the criminal liability of the respondent,[22] but to prove that the property was obtained through unlawful conduct. The standard of proof required in these cases is the lower civil standard of the 'balance of probabilities'[23] rather than the higher criminal standard of 'beyond reasonable doubt'. The end result is that, if the applicant (the state) is successful, the property is forfeited with the individual remaining at liberty.

Despite continuing debate as to whether the powers are a punitive *in personam* criminal sanction dressed up as a civil *in rem* action, they have survived successive legal challenges of this nature across the globe. For example, in initial challenges in the UK courts (Walsh vs. Director of the Assets Recovery Agency) the court found that:

> The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the 'untouchable' image of those who have resorted to it for the purpose of accumulating wealth and status.[24]

21. As opposed to the prosecutor in criminal proceedings.
22. As opposed to the defendant in criminal proceedings.
23. Terms used in other jurisdictions differ, including 'on the preponderance of evidence'.
24. Walsh vs. Director of the Assets Recovery Agency, Court of Appeal, Northern Ireland, 2005.

Legal rulings in other jurisdictions have also judged the powers to not be a means of punishment,[25] but a means of 'requiring a return to the way things were, the status quo ante, so as to restore the position of an injured party' and to provide 'a remedy to compensate an injured party for harm done to him'.[26] In the case of NCB confiscation, the 'injured party' could be seen to be the state and, by extension, society at large.

Public Policy Versus the Court of Public Opinion

There has been intense debate about NCB confiscation and the balance to be had between civil liberties on the one hand, and the state's need to protect the public on the other; the argument being that, if the state is to infringe the right of an individual to peaceful enjoyment of their property, then this ought to invoke the procedural protections afforded by criminal law.[27]

However, in the limited jurisdictions in which the powers have been enacted to date,[28] the policy argument in their favour has sought to illustrate the need for the powers by setting out instances in which the state's ability to act against criminal proceeds is limited or non-existent within the criminal law realm (see Box 1).

While still only operational in a minority of jurisdictions, an increasing number of countries, particularly common-law jurisdictions, have adopted the powers in the last decade in response to the growing procedural and evidential difficulties of tackling organised criminality and the associated proceeds of crime through traditional criminal law routes. This is particularly the case in situations where the crime takes place in one jurisdiction, the assets are sequestered in another, and the routes for gathering evidence across those borders are hampered by legal or procedural difficulties.[29]

Support at the international level for adopting the powers as a means of tackling cross-border criminal asset sequestration, particularly in grand corruption cases, is growing. For example, FATF recommends that 'countries should consider adopting measures that allow laundered property, proceeds or instrumentalities to be confiscated without requiring a criminal conviction … to the extent that such a requirement is consistent with the principles of their domestic law'.[30]

25. See, for example, Gilligan vs. Criminal Assets Bureau, IESC 82, Ireland, 2001.
26. Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds'.
27. See, for example, Liz Campbell, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm', *Victoria University of Wellington Law Review* (Vol. 41, No. 1, 2010), pp. 15–36.
28. See footnote 9.
29. This is particularly the case in relation to crimes committed in failed or failing states or in relation to grand corruption where the ability to gather – and rely on – evidence from a separate jurisdiction is limited.
30. Financial Action Task Force (FATF), 'Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery', October 2012, <https://bit.ly/2KLCKSZ>, accessed 2 May 2019.

Box 1: Common Examples of Cases Cited as Justification for NCB Confiscation

- The only known criminality is overseas, but there is no jurisdiction or ability to prosecute the individual in the state in which the assets are sequestered.
- A prosecution has been undertaken outside the jurisdiction in which the assets sit, but the prosecuting authority is not pursing confiscation of the assets.
- The defendant in a criminal case in which assets have been identified has died during proceedings, leaving unlawfully obtained assets behind.
- The suspect is overseas and the requested state refuses to extradite the individual for trial.
- A criminal prosecution has failed due to a technicality or a paucity of admissible evidence rather than the underlying merits of the case.
- Proceeds of crime have come to the attention of law enforcement but there is no identifiable offender or offence.
- The public interest is not best served by the pursuit of a criminal conviction of peripheral figures in a criminal case, but assets exist which represent the proceeds of crime, which public policy dictates should be pursued.

Source: Practitioner feedback and Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', pp. 8–23.

Legal points of argument regarding the extent to which the powers are compatible with constitutional principles in a number of jurisdictions aside,[31] there appears to be a tacit acceptance of a place for NCB confiscation in the global response to tackling serious and organised crime. Rather than being viewed as a novel domestic quirk of a handful of jurisdictions – as they were in the 1990s – the powers have gained a foothold of acceptance at the supranational institutional level, albeit begrudgingly by those who view the powers as an affront to the norms of criminal law.

A History of NCB Asset Confiscation in the UK

The legal basis for the UK's NCB confiscation regime can be found in Part 5 of POCA, which makes provision for 'the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct'.[32]

The introduction of POCA in 2002 contributed to a considerable shift in the scope and scale of asset confiscation activity as part of the UK's response to serious and organised crime, with a broadening of existing criminal confiscation and cash seizure powers, as well as the enactment of the NCB confiscation regime.

31. Despite this, NCB confiscation is viewed with suspicion by many jurisdictions, which see the powers as incompatible with their constitutional principles, leading to difficulties in gaining cooperation in evidence-gathering enforcement across borders.
32. Proceeds of Crime Act 2002 (UK), Section 240 (a).

The genesis of this shift can be traced back to an influential report from former Prime Minister Tony Blair's Performance and Innovation Unit (PIU)[33] in 2000, 'Recovering the Proceeds of Crime'[34] (known as 'the PIU report'), which noted that 'there is also much to be gained from an approach to law enforcement that focuses on treating criminal organisations as profit-making businesses. And removing assets from those living off the proceeds of crime is a valuable end in itself in a just society'.[35]

By drawing on the examples of existing NCB confiscation regimes, such as those enacted in the Republic of Ireland and South Africa in the mid-1990s (which are explored in more detail in Chapter III), the report offered the rationale for adopting analogous powers in the UK – which it recognised as controversial[36] – as a means of reinforcing the rule of law by demonstrating that the justice system was well placed to remove illegal gains.[37]

The Assets Recovery Agency: Rise and Fall

As well as laying the foundations for POCA, the PIU report, drawing on the Irish Criminal Assets Bureau (CAB) model, laid the groundwork for the establishment of the now-defunct Assets Recovery Agency (ARA).

The ARA, a non-ministerial executive government agency, was established in 2003 to act as a national NCB confiscation capability for England, Wales and Northern Ireland.[38] The ARA was not able to self-generate cases, but relied on referrals from police and other enforcement bodies. However, the PIU report set unrealistic expectations as to both the scale of criminal proceeds available for recovery and the speed and cost at which the ARA could recover them, noting that '[o]ther countries' experience of pursuing asset recovery more rigorously, including the establishment of a dedicated agency for that purpose, suggests that such initiatives rapidly cover their costs and begin generating an operating surplus, typically within three to five years of start-up'.[39]

The optimism created by the PIU report led the ARA to adopt the (in hindsight) unrealistic target of becoming self-funded within three years. In retrospect, this could be viewed as an act of self-sabotage; the ARA failed to foresee either the raft of unforeseen legislative faults requiring

33. The PIU (now defunct) was based within the Cabinet Office.
34. PIU, 'Recovering the Proceeds of Crime'.
35. *Ibid.*, p. 5.
36. *Ibid.*, p. 35.
37. *Ibid.*, p. 38.
38. The Scottish NCB confiscation regime is led by the Civil Recovery Unit.
39. PIU, 'Recovering the Proceeds of Crime', p. 23.

retrospective amendment,[40] or the levels of litigation it would face in its early years, as the powers established their human rights compliance.[41]

Political pressure surrounding the ARA's failure to meet the self-funding target reached a climax with a critical report by the National Audit Office (NAO) in 2007,[42] which noted that the ARA had collected £23 million against a cumulative cost of £65 million. Among the reasons given for this were the poor quality of referrals to the ARA in its early years of operation,[43] a problem compounded by a lack of awareness of the powers within policing and the lack of a properly developed case referral process. This was followed by a Public Accounts Committee inquiry that criticised the Home Office for lacking a credible business case for the ARA at the point of set-up, and setting unrealistic expectations regarding the speed at which assets could be recovered.[44]

Despite this, the prevailing political discourse around the failure to meet the self-funding target led to the agency being disbanded in April 2008 by the Serious Crime Act 2007, after just five years in operation. The ARA's powers were extended to the Serious Organised Crime Agency (SOCA),[45] the CPS and the SFO.[46] Its investigative and litigation staff were transferred to SOCA.

The Legacy

Examining the history of NCB confiscation in the UK is not merely an interesting academic exercise – it is in this context that its operation today must be viewed. The legacy of the ARA's high-profile demise[47] has cast a long shadow over the regime in three important ways.

First, the ARA's experience of litigating difficult and expensive cases, along with its public demise, did much – at least in the minds of those agencies empowered to use the provisions today – to

40. For example, the inability, as per the original enactment of the legislation, for respondents to access the funds to meet their legal costs from frozen assets led to delays in litigation. Furthermore, the original legislation only allowed for the freezing of property by use of a receiver, the costs implications of which soon became clear. Both of these issues were resolved by amendments made to POCA by the Serious Crime and Police Act 2005.
41. See Walsh vs. Director of the Assets Recovery Agency.
42. National Audit Office (NAO), 'The Assets Recovery Agency', report by the Comptroller and Auditor General, HC 253 2006-2007, 21 February 2007, <https://www.nao.org.uk/report/the-assets-recovery-agency/>, accessed 8 May 2019.
43. The ARA did not have the power to self-generate cases, but relied on referrals from police forces and other public enforcement agencies. Research interviews from March 2019 with a former senior law enforcement official suggests that referral pathways were inadequately established.
44. House of Commons Public Accounts Committee, 'Assets Recovery Agency', HC 391, Fiftieth Report of Session 2006–07, July 2007.
45. SOCA disbanded in 2013 and its functions were largely subsumed into the NCA.
46. Not formally covered in this research for reasons of focus, as stated in the Introduction.
47. See, for example, *BBC News*, 'Crime Assets Agency "Ill Planned"', 11 October 2007.

counter the opinion[48] that the powers are a cheap and easy route to tackling criminality. In fact, the ARA found that most cases were heavily contested, expensive to litigate, and the assets costly to manage – issues which remain true to NCB confiscation today.

Second, the issue of 'cost effectiveness' has largely become entrenched in the political and media discourse surrounding NCB confiscation (and wider confiscation tools) in the UK.[49] In the absence of a firmer evidence base for asset-based interventions in general,[50] public debate has continued to focus on the value of NCB confiscation in balance-sheet terms rather than on its merits as a tool in the armoury to counter serious and organised crime. In short, NCB confiscation, and to an extent the wider POCA confiscation regime, remains beleaguered by a sense that it must 'pay for itself'.

Third, while this paper does not advocate re-establishing a central agency for NCB confiscation, there is no doubt that dispersal of the powers led to a reduced policy focus on the role of NCB confiscation in the fight against organised crime. The continuing absence of an overarching government Asset Recovery Action Plan does little to remedy this situation; the lack of specificity in the government's *Serious and Organised Crime Strategy 2018* also does little to further the operational use of the powers in this context.[51]

Recommendation 1: The government should deliver on its commitment to publish an Asset Recovery Action Plan. Under this it should commit to formulating a specific strategy for increasing the take-up of NCB confiscation as part of the response to serious and organised crime.

48. Mainly from those in academic circles, who view NCB confiscation as a quick and easy way of achieving criminal justice outcomes, see King and Hendry, 'How Far is Too Far?', pp. 398–411.
49. PAC inquiry chairman Edward Leigh MP noted: 'It was ill-planned and only recovered about a third of its expenditure'. See *BBC News*, 'Crime Assets Agency "Ill Planned"'.
50. See footnote 8.
51. The government committed to publishing a new Asset Recovery Action Plan in September 2017. See Home Office in the Media, 'Asset Recovery Statistics – Response and Fact Sheet', 12 September 2017, <https://homeofficemedia.blog.gov.uk/2017/09/12/asset-recovery-statistics-response-and-fact-sheet/>, accessed 2 May 2019. This remains unpublished at the time of writing (May 2019).

II. Operation of the NCB Confiscation Regime Today

DESPITE THE LEGAL extension of the powers to a wider set of agencies in 2008, there has not been the expected expansion in their use, either in terms of the number of cases in which they are deployed or in the value of assets retrieved under the NCB confiscation regime as a whole. While the powers have been used a handful of times by the SFO,[52] research interviews suggest that the CPS has deployed the powers only once in 11 years,[53] despite being the lead prosecuting agency for the police and Regional Organised Crime Units (ROCUs), which undertake the bulk of serious and organised crime investigations in the UK.

Furthermore (noting the limitations of viewing 'success' through a financial prism), the reported NCB confiscation results of the NCA, as indicated in Table 1, demonstrate the lack of significant expansion of the use of the tools since 2010.

Table 1: Civil Recovery Receipts Accrued by the NCA

Year	Value of Recovered Assets (Millions of £)
2010–11	6.22*
2011–12	3.90*
2012–13	1.86*
2013–14	2.29
2014–15	8.09
2015–16	5.96
2016–17	5.56
2017–18	5.74

Source: NCA and SOCA Annual Reports and Statements of Accounts.[54] *See NCA, 'Publications', <https://nationalcrimeagency.gov.uk/who-we-are/publications>, accessed 29 May 2019.*
**Results from the SOCA Annual Report (a precursor agency to the NCA).*

52. As would be expected in an organisation with a smaller number of higher-value cases. For an example of how the SFO uses the powers, see SFO, 'SFO Recovers £4.4m from Corrupt Diplomats in "Chad Oil" Share Deal', 22 March 2018, <https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/>, accessed 23 April 2019.
53. Author interviews with former public prosecutor, London, December and February 2019. Official statistics are not publicly available.
54. These figures were taken from the 'Recovered Assets' statements in the financial accounts.

It should be noted that these figures reflect the value of property sold during the financial year, rather than the estimated value of assets subject to a Civil Recovery Order (CRO) gained in the same year but yet to be enforced; these figures are unavailable as the NCA is exempt from the Freedom of Information Act 2000. Figures relating to the volume (as opposed to value) of CROs are also lacking. This reflects a more general paucity of public data relating to the use of NCB confiscation in the UK, exacerbated by the fact that the Home Office does not include NCB confiscation in its reported figures.[55]

Paucity of data aside, benchmarking the UK against its international peers in this regard is difficult, partly due to a lack of reliable statistics as to the scale of the criminal economy in each nation. However, by way of comparison, the Irish Criminal Assets Bureau notes in its Annual Reports (2016 and 2017) that it remitted €1.4 million to the exchequer in 2016 from NCB confiscation and €1.6 million in 2017,[56] despite having a population a tenth of the size of the UK's.

Although the legacy of the high-profile closure of the ARA is one potential reason behind the limited use of NCB confiscation in the UK, this research points to varying explanations. This section explores the use of the powers by the two main agencies dealing with the bulk of serious and organised crime investigations,[57] the NCA and the CPS, and looks at the potential impacts of the Unexplained Wealth Order (UWO) on their future use.

National Crime Agency

The transfer of the powers from the ARA to SOCA (and its successor agency the NCA) brought with it the transfer of the ARA's cadre of investigators and civil litigators who were experienced in using NCB confiscation powers, thus giving SOCA a head start over other agencies in the use of NCB confiscation.[58]

However, the transfer also brought with it several legacy cases, which still needed to be litigated. This meant in practice that several low-level and low-quality cases were subsequently transferred to SOCA. Along with this, a continued lack of understanding within the wider organisation and across UK policing of the potential of NCB confiscation (and of wider POCA

55. Home Office, *Asset Recovery Statistical Bulletin 2012/13–2017/18* (London: The Stationery Office, September 2018).
56. Criminal Assets Bureau (CAB), 'Annual Reports 2016', <http://www.cab.ie/en/CAB/CABAnnualRep2016.pdf/Files/CABAnnualRep2016.pdf>, accessed 8 May 2019; Criminal Assets Bureau, 'Annual Report 2017', <http://www.cab.ie/en/CAB/CAB-AnnualReport2017.pdf/Files/CAB-AnnualReport2017.pdf>, accessed 8 May 2019.
57. This paper does not explore the use of the powers by the SFO, it being assessed that its use of the powers will be naturally limited by the smaller number of higher-value cases its remit charges it with investigating.
58. It should be noted that the extension of the powers to the SFO and CPS did not bring with it the extension of any trained investigators or staff.

tools more generally) meant that for a period of time the use of NCB confiscation within SOCA remained underexploited.

Now, over a decade since they were extended to SOCA/NCA, this position has changed. Within the NCA, high-quality cases – relating to national-level organised crime threats or the so-called 'high end of risk'[59] – are now becoming the norm. There is also a greater focus, particularly following the enactment of UWOs, on using NCB confiscation as a means of tackling the proceeds of grand corruption, leading to a concentration of cases around high-value assets, particularly in London and southeast England.[60]

From the NCA's perspective, this broad shift in the use of the powers to combat higher-level criminality is entirely fitting for its wider organisational strategy. However, refocusing the NCA's approach to NCB confiscation has wider implications which merit consideration.

First, from an anti-corruption policy perspective, the shift towards using the NCA's NCB confiscation resources represents a valuable deployment of the range of powers available to tackle corruption. However, this rebalancing of the NCA's NCB confiscation case profile has implications for the proportion of resources left available to tackle the serious and organised crime groups that are more fully and directly embedded in UK society. These groups are likely to have a more direct impact on the UK from both a community cohesion and national security perspective.[61]

Second, as the NCA takes on a greater number of corruption cases, its returns under the Asset Recovery Incentivisation Scheme (ARIS)[62] are likely to diminish, due to the policy imperative of seeking to return looted wealth to the state of origin (see Box 2). Although this is a well-justified policy, it has ramifications for the levels of funding returned to the NCA, thus impacting on the levels of funding available to reinvest in future NCB asset confiscation work. While this research does not find evidence of ARIS returns skewing case adoption decisions in corruption cases, its potential to undermine the wider NCB confiscation resourcing model for the NCA should be considered.

Third, the move to target national-level threats, while a policy choice entirely in line with the NCA's remit, has significant implications for resourcing of the NCA's response. These cases are,

59. Although not specifically defined as a term, the NCA's Annual Plan 2019–20 notes that its operational work will target the 'high end of high risk'. This model extends to its NCB confiscation strategy. See NCA, 'Leading the UK's Fight to Cut Serious and Organised Crime: Annual Plan 2019–20', <https://nationalcrimeagency.gov.uk/news/nca-publishes-annual-plan-2019-20>, accessed 8 May 2019.
60. For example, see Hugo Cox, 'NCA Focuses on Knightsbridge's Unexplained Wealth', *Financial Times*, 22 November 2018.
61. Such as drug trafficking, human trafficking and organised tax fraud.
62. For more information about the current scope of the ARIS regime, see Home Office, 'Asset Recovery Incentivisation Scheme Review', February 2015.

by their nature, more resource-intensive, more time-consuming and more heavily contested than cases previously fought by the NCA.[63] While they may result, if successful, in higher gains from a financial perspective, they represent a considerable step-up in terms of complexity for the financial investigators tasked with their pursuit. While pockets of long-term experience in the NCA's NCB confiscation cadre exist, these cannot be relied upon in the long term. With the adoption of more complex cases comes the need for reconsideration of the skills and experience mix.

Box 2: Recovery of Corruption Proceeds and ARIS

Under the ARIS scheme, law enforcement agencies and prosecutors are returned a percentage of the monies they recoup from offenders as an inducement to reinvest in further asset-confiscation activity. The amount they receive is dependent on the amount returned to the exchequer at the conclusion of the case.

Whereas in, for example, drug-trafficking cases, the entirety of the monies would be returned to the exchequer, in grand corruption cases, under the terms of the UN Convention Against Corruption (UNCAC), states must seek to return stolen assets to the country of origin. While this is a sound and moral policy imperative, its implications for the amounts available to reinvest in further asset recovery work, under the terms of the UK's ARIS scheme, may be significant.

Source: Author's interview with practitioner, London, March 2019.

Recommendation 2: The NCA should commit to reviewing its NCB confiscation staffing to consider whether the team has in place all of the skills and experience needed to undertake the more complex cases it is now pursuing under its new NCB confiscation case adoption strategy.

Fourth, the NCA's refocus on national and international serious and organised criminality, in line with its remit, leaves a distinct layer of serious and organised criminality untouched by the reach of the powers, particularly OCGs with a regional (rather than national) impact, or those groups which the NCA's limited resourcing preclude them from targeting. These offenders are often the very individuals causing direct and visible harm to the communities in which they live and operate, and against which the powers are often viewed to have the most tangible impact.

Whereas at the inception of the powers the ARA provided a national NCB confiscation function for the whole of law enforcement, this is not the case for its analogous function within the NCA, which increasingly focuses its resources on NCA criminal targets, rather than proactively seeking referrals from the police and other agencies.[64] This policy is easily justified now that the powers are not solely designated to a single agency. However, in the absence of the CPS

63. And its successor agencies.
64. Author interview with law enforcement official, London, December 2018.

stepping in to fill the gap, this leaves a significant proportion of criminal wealth beyond the reach of NCB confiscation powers.[65] In short, powers exist to tackle criminal wealth sequestered in the UK economy, however there is minimal capacity to target and confiscate this wealth.

CPS/UK Policing

The Serious Crime Act 2007 extended NCB confiscation to the Director of Public Prosecutions (the head of the CPS) in 2008.[66] However, in the decade following the extension of the powers, interviews suggest that they have been used in only one case.[67] The full reasons behind this lack of take-up are unclear. However, the factors explored below – the police–prosecutor divide, the skills gap and cost-risk concerns – go some way to explaining the lack of activity.

The Police–Prosecutor Divide

The police–prosecutor divide inherent in the UK's policing model today is not a historic legacy but a modern innovation resulting from the 1981 'Philips Commission' report, which lay the groundwork for the creation of the CPS in 1986.[68]

However, this investigator–prosecutor split is no longer the default within the wider economic crime law enforcement landscape, following an influential 1986 report by the Fraud Trials Committee, led by Lord Roskill, which recognised the limitations of this split, particularly in fraud trials,[69] and made the case for a joint lawyer–investigator investigative process, known as the 'Roskill model'.[70]

65. The ARA accepted referrals from a broad range of agencies such as the police, HMRC, trading standards, local authorities, and others. Although the NCA does not specifically turn away referrals, in practice this is now a seldom-used route. Author interview with former senior law enforcement official, London, March 2018.
66. Any financial investigator is empowered to use the investigatory tools in Part 8 of POCA to support a civil recovery investigation.
67. Interview with former public prosecutor, London, December 2017 and February 2018.
68. A 1981 report by the Royal Commission on Criminal Procedure ('Philips Commission', <https://discovery.nationalarchives.gov.uk/details/r/C3028>, accessed 29 May 2019) laid the groundwork for the split of police investigation from the prosecuting arms of the state, ultimately laying the foundations for the establishment of the CPS in 1986. The report noted that it was 'undesirable' for police to continue to both investigate and prosecute crime. The Prosecution of Offences Act 1985 therefore established the CPS to take forward prosecutions, with investigations and charging decisions remaining with the police.
69. See SFO, 'SFO Historical Background and Powers', <https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/>, accessed 3 May 2019.
70. Along with the SFO, the Financial Conduct Authority and the Competition and Markets Authority have adopted aspects of the Roskill model within their operating structures.

Elements of the Roskill model were adopted as the operating model for the ARA and continue in its successor function in the NCA. The litigation-heavy nature of NCB confiscation means that a joint lawyer–investigator model for leading investigations is essential.

The need to adopt a lawyer–investigator model to drive forward CPS adoption of NCB confiscation is even more clear: while the CPS is legislatively empowered to use NCB confiscation powers, it does not have investigative resources of its own to carry out the underlying investigation and would be reliant on police financial investigators to undertake the underlying investigative work in support of a civil recovery claim.

A solution to this may be self-evident. ROCUs, of which there are nine, formally entered the policing landscape in 2013 (subsuming the Regional Asset Recovery Teams that had existed since 2004), heralding a new range of collaborative, multi-force and multi-agency specialist capabilities at the regional policing tier.[71] CPS proceeds of crime lawyers are already co-located with police counterparts within these structures.

ROCUs have continually developed new capabilities, new technology and a better understanding of investigative methodologies and opportunities in line with the emerging threat. Following renewed interest in NCB confiscation following the implementation of UWOs, the Home Office has approved the funding of a short-term pilot project to implement NCB confiscation at the ROCU level.[72] However, short-term pilot funding does little to embed a long-term sustainable capability at the regional level.

Recommendation 3: NCB confiscation should be adopted as a formal ROCU capability.

Skills and Experience

Structural reforms in isolation are not the solution, however. Although the investigative tools used by criminal and civil confiscation financial investigators are largely analogous,[73] it is here that the similarity ends. The norms of the civil sphere of law and rules of evidence can feel like an alien world to the seasoned criminal prosecutors of the CPS and police financial investigators.

This research finds a renewed appetite for NCB confiscation in both the police and CPS, driven in part by the increased awareness of NCB confiscation following the implementation of the UWOs, but also by a recognition that the scale of organised criminality requires a disruption-focused approach rather than one focused solely on criminal prosecution.[74] Nonetheless, there is a considerable skills gap as regards civil litigation, which means that embedding the powers

71. For more information on ROCU capabilities, see HM Inspectorate of Constabulary, *Regional Organised Crime Units: A Review of Capability and Effectiveness* (London: HMIC, November 2015).
72. Author telephone interview with law enforcement official, May 2019.
73. The investigative tools housed in Part 8 of POCA can be used for both criminal and civil investigations.
74. Author interview with ex-senior police officer, London, March 2019.

into the broader response to tackling serious and organised criminality will not be easy. The recruitment of experienced private sector civil litigators will be essential.

Recommendation 4: The Home Office should provide additional funding to the CPS Proceeds of Crime Division and to the ROCU network to recruit and train a network of NCB confiscation specialists. This funding should run for a minimum of three years to aid recruitment.

Cost Risks

Finally, although difficult to prove on an empirical level, at a time of extreme constraints on the public purse – cuts that have fallen particularly hard on the CPS budget[75] – it is intuitive to assume that prosecutors may be less willing to actively pursue the use of a notoriously litigious tool to avoid taking on the considerable cost risks should the case fail. Whereas in a criminal case the CPS is not liable to pay the defendant's costs where the defence prevails,[76] in NCB confiscation 'enforcement authorities' (including the CPS) are subject to potentially substantial costs orders in cases in which they are unsuccessful in gaining a CRO. Offering some comfort to enforcement authorities around cost risk may go some way towards supporting greater use of the powers.

Recommendation 5: The government should ring-fence a proportion of asset confiscation receipts each year to act as a contingency fund for unexpected litigation and costs associated with NCB confiscation.

Impact of the Unexplained Wealth Order

The government has expended a large amount of political capital in publicising the UWO as a means of supporting the expansion of an asset-focused approach to tackling serious criminality.[77] Introduced by the Criminal Finances Act 2017, UWOs act as an additional investigative tool available to the NCB confiscation investigator, who can apply to the High Court for a UWO in relation to property over the value of £50,000 where the respondent is a politically exposed person (PEP) or suspected to be involved in serious criminality, and there are 'reasonable grounds for suspecting that the known sources of the respondent's income would have been insufficient for the purposes of enabling the respondent to obtain the property'.[78]

75. Owen Bowcott, 'Further CPS Cuts Impossible as Workload Grows, Says New Boss', *The Guardian*, 4 December 2018.
76. In these cases the defendant has recourse to 'central funds', see UK Government, 'Guidance: Claims Made out of Central Funds', last updated 15 June 2018, <https://www.gov.uk/guidance/claim-back-costs-from-cases-in-the-criminal-courts>, accessed 8 May 2019.
77. Home Office and Ben Wallace, 'UK at the Forefront of International Efforts to Tackle Corruption', 12 December 2018, <https://www.gov.uk/government/news/uk-at-the-forefront-of-international-efforts-to-tackle-corruption>, accessed 21 March 2019.
78. POCA, Section 362B(3), as inserted by the Criminal Finances Act 2017 (UK).

Discussing the relative value of the UWO in detail sits outside the scope of this paper.[79] However, its role in prompting the wider use of NCB confiscation as a tool in the UK's fight against serious and organised crime merits consideration.

Practitioners interviewed for this research have found that, although a useful additional tool to the investigator (particularly in overseas corruption investigations), and a useful lever to promote respondent cooperation in NCB confiscation,[80] UWOs are likely to remain a niche tool only suitable for a handful of cases.[81] There are a number of reasons for this.

First, the necessarily strict parameters of the legislation mean that only a limited subset of cases meet the evidential threshold to apply for a UWO.[82] Whereas it may be relatively straightforward to demonstrate a disconnect between a PEP's salary and the value of their assets, this is not always the case for organised criminality, which is frequently mingled with legitimate (or ostensibly legitimate) business and where the intelligence case to prove a disparity may come from covert sources.

Second, the value of the UWO, as opposed to other investigatory orders, such as the Disclosure Order,[83] was raised by interviewees in this research. Whereas both compel the respondent to hand evidence to the investigator, compliance with the UWO compels the enforcement authority to submit its claim to the High Court within 60 days of compliance, where there is a freezing order in place.[84] This places an onerous and possibly unrealistic time burden on the enforcement authority where there is a need to gather evidence to refute a claim set out in a response, particularly where the necessary evidence lies overseas. As such, it limits the instances in which the UWO is the most appropriate investigatory tool in an NCB confiscation investigation.

Recommendation 6: UWO provisions should be amended to allow enforcement authorities to apply to the courts for a moratorium of up to an additional 120 days following responses to a UWO to allow for further evidence gathering where necessary.

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79. For more information on UWOs, see Florence Keen, 'Unexplained Wealth Orders: Lessons for the UK', *RUSI Occasional Papers* (September 2017).
80. Since the imposition of the UWO, NCB confiscation investigators are finding that some respondents are more willing to hand over requested information voluntarily to avoid the spectre of a UWO and the media attention this brings.
81. Author interview with senior law enforcement practitioner, London, December 2018.
82. Under UWO provisions in the Criminal Finances Act 2017, the court must be satisfied that there are 'reasonable grounds to suspect' that the subject of the UWO is either a 'politically exposed person' or is involved in 'serious crime'. As of May 2019 only two individuals had been issued with UWOs, author interview with senior law enforcement practitioner, London, April 2019 and NCA, 'NCA Secures Unexplained Wealth Orders for Prime London Property Worth Tens of Millions', 29 May 2019, <https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-orders-for-prime-london-property-worth-tens-of-millions>, accessed 5 June 2019.
83. POCA, Section 357.
84. *Ibid.*, Section 362D(3).

Conclusion

Rolling out NCB confiscation powers to a broader constituency of prosecuting authorities in 2008 was intended to ensure that they became part of the mainstream toolkit available to tackle serious and organised crime in the UK.

However, this research finds that the intention has not been meted out in practice, with a lack of CPS (and police) uptake of the powers. This has left a considerable gap in the NCB confiscation capability available to tackle regionally and locally impacting criminality. The government has frequently lauded the UWO in the discourse around serious and organised criminality as a solution, appearing to imply that the new tools fix the broader problems of capacity and capability in the system. In doing so, they are misguided.

Whereas as yet unimplemented pilot projects are a move in the right direction, they do not create the long-term sustainable capacity needed to bring the powers to bear against a broader range of organised criminality operating in the UK. This paper strongly advocates for a new strategy for NCB confiscation which includes a plan for building a longer-term sustainable capacity and a joint police–prosecutor model at the ROCU level.

III. Learning from International Examples

THE FINDINGS ABOVE reveal the fundamental capacity and capability barriers to deploying NCB confiscation on even the most rudimentary scale in the UK. However, this research notes that many other jurisdictions have taken their use of the powers beyond the rudimentary into the mainstream. Looking at the models adopted by others provides useful lessons for the UK. This research selected three countries for consideration – the Republic of Ireland, South Africa and the US – all fellow common-law jurisdictions, two of which were chosen as comparison jurisdictions in the original PIU report in 2000[85] and which are well documented in the available academic literature as examples of mainstream users of NCB confiscation.[86]

This chapter aims to stimulate discussion between policymakers and practitioners on ways to prime the UK response. It does not seek to provide a definitive guide to the NCB confiscation regimes of the countries in question, this being outside of the scope of this paper and already well covered by others.[87]

The Republic of Ireland

The Irish model of NCB confiscation is frequently used as an example of best practice; in fact, the Irish experience was cited by a number of interviewees as a catalyst for the UK's adoption of the powers.[88] The following factors may be key to the central role played by NCB confiscation in the Irish strategy for tackling serious and organised criminality.

85. PIU, 'Recovering the Proceeds of Crime', p. 35.
86. Simon N M Young (ed.), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Cheltenham: Edward Elgar Publishing, 2009).
87. This research recognises that none of the NCB confiscation regimes examined are without flaws. For a comprehensive legal analysis of the differing models of NCB confiscation, see Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders: Prepared for the US Department of Justice, National Institute of Justice', 31 October 2011, <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf>, accessed 3 May 2019.
88. Author telephone interview with ex-ARA staff member, January 2018; author telephone interview with ex-ARA lawyer, February 2018.

Broad Public and Political Support

The catalyst for the implementation of the Irish regime was the high-profile murder of journalist Veronica Guerin and an Irish Garda officer by organised criminals in the early 1990s.[89] The subsequent public outcry at the perceived impunity of the Irish organised crime fraternity led to a broad base of public and political support for the implementation of the Proceeds of Crime Act 1996 and the establishment of the Criminal Assets Bureau (CAB).

This support, which continues broadly to this day, is deemed to be one of the factors behind the success of the CAB; whereas the average person in the UK is largely unaware of NCB confiscation, the CAB is a known and feared brand in the Republic of Ireland, with support across political divides. An interviewee has suggested that this has contributed to a stability of resourcing since the CAB's establishment, insulating it from broader public sector cuts.[90]

Removal of Perverse Incentives

Linked to the level of public legitimacy afforded to the CAB is its case selection. The lack of an 'incentivisation' scheme[91] in the Irish model means that case decisions are based upon risk and threat and uninfluenced by the budgetary implications of pursing low-value/high-community impact cases.

This case selection process means that the CAB is as likely to target a drug dealer's £50,000 home as their £1 million bank account, and indeed interviews suggest[92] that much of the CAB's work is focused on targeting the assets of criminals plaguing a local community, to visibly demonstrate to the wider community that 'crime doesn't pay'.

The Multi-Agency and Multi-Disciplinary Approach

The CAB's success is frequently attributed to its multi-agency approach, which co-locates officers from the police, revenue and social welfare authorities. All CAB officers have the powers of all three agencies,[93] and all cases are investigated from an NCB confiscation, tax and social welfare perspective from the start (rather than in a hierarchical fashion), with no presumption as to which route will eventually be used to target the asset.

This approach has facilitated greater collaboration, a default assumption of information sharing and fewer issues regarding admissibility or evidence. The ease of inter-agency information

89. Harrison Tenpas, 'The Incredible and Tragic Story of Veronica Guerin, the Journalist Murdered by Irish Drug Lords', *The Ranker,* undated, <https://www.ranker.com/list/story-of-murdered-irish-journalist-veronica-guerin/harrison-tenpas?page=2>, accessed 9 May 2019.
90. Author telephone interview with CAB official, January 2019.
91. All funds are returned directly to the exchequer.
92. Author telephone interview with CAB official, January 2019.
93. Criminal Assets Bureau Act 1996 (UK), Section 8 (6)(a).

sharing under this model in particular is frequently cited as core to the CAB's success, including access to social welfare data, which is often key to establishing familial and locational links within crime groups. Furthermore, the CAB has trained a cadre of asset profilers sitting outside the agency within Irish policing to identify new cases for CAB attention.

The Art of the Deal

Linked to the Republic of Ireland's multi-agency approach is a greater role in the Irish system for deal-making. The ability to gather evidence to support three separate interventions against the same asset/individual gives the CAB a strong hand in approaching the respondent with several levers to increase cooperation.

For example, the respondent may consent to paying a substantial tax bill from cash in the bank if the CAB agrees to stay the proceedings against the property (thus saving the CAB investigatory time) or to drop a social welfare fraud case if the respondent agrees to a consent order against the property.[94]

This deal-making approach allows the CAB more flexibility in cases that have less direct community impact, freeing up resources to target and litigate a more hardline approach against the more publicly visible wealth of a community-based criminal. The lack of strict hierarchical guidance (as compared to the UK)[95] on the relative merits of pursing criminal wealth via criminal, civil or other routes is a key facilitator of this more flexible approach.

Lessons to Learn for the UK

Although this research accepts the difficulty in translating an operating model fit for purpose in a country with a population of 5 million to a more populous and financially complex system, such as the UK's, it finds much to be learned from the Irish example.

Political and Public Support

Clear ongoing public support for the use of NCB confiscation in the Republic of Ireland can be, in some ways, linked to the CAB's proactive and highly public promotion of the powers in the media. This public support has, in turn, translated into cross-party political awareness and support, thus protecting CAB budgets and staffing levels.

94. Under the Proceeds of Crime Act 1996 (Ireland) an 'interlocutory order' freezes property for a minimum of seven years before the property can be forfeited, unless the respondent consents to its confiscation.
95. The use of asset-confiscation powers by UK prosecuting authorities in the round is dictated by the Attorney General's guidance under Section 2A of POCA (commonly known as the 'hierarchy of powers'), which, although becoming ever more flexible, gives a distinct preference to the use of criminal over civil interventions.

Recommendation 7: Under a refreshed Asset Recovery Action Plan the Home Office, working with enforcement authorities, should lead a strategic communications campaign to raise public and political awareness of NCB confiscation and its associated strengths.

Multidisciplinary Approaches

To an extent, the NCA's model for NCB confiscation has replicated the Irish model, with embedded tax inspectors and hybrid tax and NCB confiscation settlements a strong feature. The NCA also houses the multi-agency National Economic Crime Centre (NECC),[96] which offers the NCA's NCB confiscation team access to a range of cross-government information on a needs basis.

However, the rolling out of NCB confiscation to the ROCU network, as proposed in this paper, cannot assume the same levels of information access. In particular, policing interviewees in this research cited difficulties in obtaining access to Department for Work and Pensions data due to data-sharing restrictions. Given that the NECC benefits from a multi-agency approach, has been charged by ministers with promoting the use of UWOs,[97] and can avail itself of the NCA's wide information-sharing gateways,[98] it is potentially well-placed to support the ROCUs in information-gathering in relation to NCB confiscation.[99]

Deal Making

In contrast to the Irish model, the UK's approach to NCB confiscation has traditionally been to pursue a high-minded policy of litigating up to the court steps rather than taking a more commercially minded and flexible approach to settlement. While the policy rationale for this is well argued – a hardline approach sends a tough message to wider criminality – it brings with it a significant opportunity cost in terms of cases not pursued due to the resource burden of fighting on.

Recommendation 8: The NCB settlement policies of enforcement agencies should consider the opportunity cost of a hardline approach to settlements alongside other factors.

Perverse Incentives

Evident in the mindset of the CAB officer is the focus on community impact and harm reduction over revenue implications. It is clear that the absence of a financial incentivisation system

96. The NECC is a multi-agency unit based within the NCA. It was established in December 2018 to coordinate the law enforcement response to economic crime.
97. NCA, 'National Economic Crime Centre Launched', <https://www.nationalcrimeagency.gov.uk/news/national-economic-crime-centre-launched?highlight=WyJuZWNjIl0=>, accessed 23 April 2019.
98. Section 7 of the Crime and Courts Act 2013 gives NCA officers broad permission to disclose information in furtherance of the NCA's permitted purposes.
99. Author interview with ex-senior police officer, London, March 2019.

and a historic lack of financial performance targets is key to this.[100] This cannot be said for the UK system, where, particularly since the onset of police austerity, there is potential for consideration of ARIS returns to impact on case selection[101] in both the criminal and civil realms. Government officials[102] note an intention to review the operation of the ARIS scheme, which this paper urges should include consideration of the potential to scrap the scheme in favour of a more systemic use of returned funds to fund broader capacity-building programmes of activity across the system as a whole.

South Africa

The factors attracting business and tourism to South Africa in the immediate post-apartheid period from the mid-1990s onwards were the same as those attracting OCGs, who quickly availed themselves of the favourable business and shipping infrastructure, language and climate.[103]

In response, the South African government introduced the Prevention of Organised Crime Act 1998 which, among other things, introduced NCB confiscation and laid the groundwork for the establishment of the Asset Forfeiture Unit (AFU) within the National Prosecuting Authority of South Africa (NPA) office in 1999.

NCB confiscation was quickly embedded into the response to serious and organised crime. Research interviews suggest that NCB confiscation is frequently the confiscation tool of choice in South Africa,[104] partly due to wider weaknesses in the criminal justice system, but also due to the factors set out below.

Clear Purpose and Priorities

It is notable that NCB confiscation was legislated for under the Prevention of Organised Crime Act 1998. Whether intentional or not, this legislative 'badging' of NCB confiscation as an organised

100. At the outset, POCA performance was led by financial targets, in both the criminal and civil realms. The unintended consequences of a target-driven system for a criminal justice response soon became clear and targets were scrapped in the late 2000s.
101. The inference being that the police, in a time of financial crisis, are more likely to take on easy-to-win, high-value cases, which return them a higher proportion of ARIS funding, rather than higher-impact but lower-value cases. There is currently no empirical data to support this theory. However, author interviews with police officers in January 2019 in London suggest that this may be happening in practice.
102. Author interview with government policy officials, London, May 2019.
103. For further information on the growth of organised crime in South Africa, see Kholofelo A Mothibi, Cornelius J Roelofse and Atlas H Maluleke, 'Organised Crime in South Africa Since Transition to Democracy', *Sociology and Anthropology* (Vol. 3, No. 12, 2015), pp. 649–55.
104. Author telephone interview with South African AFU official, January 2019.

crime tool (as opposed to a proceeds of crime tool)[105] placed the powers firmly in the minds of prosecutors as a mainstream tool in the fight against organised crime, rather than being viewed (as it frequently is in the UK) as a tool merely for dealing with financial crimes such as money laundering and fraud.

Furthermore, the AFU was established with a clear mandate and purpose to 'build the capacity to ensure that asset forfeiture is used as widely as possible to make a real impact in the fight against crime'.[106] This allowed the AFU to focus its resources against the major crime figures on the NPA's 'most wanted' list.

This immediate focus on targeting the powers at the top tier of criminality ensured that limited resources were targeted effectively towards the criminal networks against which they would have the most visible impact.

Targeted Outreach

Identifying appropriate cases to take forward for NCB confiscation can be a challenge in the initial stages of identification and case implementation.[107] Siting the AFU within the wider prosecutorial structures is said to have had a distinct advantage in this regard; whereas standalone NCB forfeiture units are forced to rely on the willing cooperation of others, embedding the powers within a wider structure means cooperation is mandated from above.

To enhance the mainstreaming of the powers into the wider prosecutorial response, the AFU established a dispersed (rather than fully centralised) model, with AFU officers sitting alongside officers in regional NPA offices. Interviewees suggest that this targeted outreach model also helps to increase knowledge and understanding of the powers among non-specialist staff.[108]

Furthermore, in recent years the AFU has commenced a programme of seconding members of the South African police service into the unit on a rolling basis to ensure cases are identified at an earlier stage and information is more routinely shared between police and prosecutors.

Acceptance of Risk

South Africa entered its NCB confiscation journey with its eyes open – it accepted from the start that NCB confiscation would, by its nature, court a legal war of attrition as cases pushed the

105. In the UK, POCA tools writ large have suffered from a perception that they are solely a tool for use in financial crime, fraud, money laundering and asset recovery, rather than a broader tool for tackling serious and organised crime.
106. National Prosecuting Authority of South Africa (NPA), 'Asset Forfeiture Unit', <www.npa.gov.za/node/13>, accessed 9 May 2019.
107. This was an initial challenge for ARA, who were dependent on case referrals from UK law enforcement partners.
108. Author telephone interview with South African AFU official, January 2019.

boundaries of conventional legal practice. On this basis, far from setting unrealistic, politically driven financial targets (as the UK did), the AFU was created with a mandate 'to develop the law by taking test cases to court and creating the legal precedents that are necessary to allow the effective use of the law',[109] thus giving the AFU the political backing it needed to accept risk and tackle it head on.

Lessons to Learn for the UK

Clear Purpose

From the beginning, NCB confiscation in South Africa had a clear place in the fight against serious and organised crime. While the NCA is now directing these powers against its top targets, the lack of a clear UK-wide strategy for the powers' use in other agencies is evident. It is notable that the *Serious and Organised Crime Strategy 2018* only mentions NCB confiscation powers in the context of newly implemented powers, such as UWOs. The creation of the Serious and Organised Crime Inter-Ministerial Group in 2018[110] offers an opportunity to give cross-departmental focus to the role of NCB confiscation in the broader response to serious and organised crime.

Recommendation 9: The Serious Organised Crime Inter-Ministerial Group should mandate officials to mainstream NCB confiscation into the broader strategic response as part of the *Serious and Organised Crime Strategy 2018* response.

Targeted Outreach

Research suggests that knowledge of NCB confiscation remains limited in the wider policing community, even within specialist units.[111] The lack of a concerted outreach plan is evident, thus limiting the powers' potential as a tool against serious organised criminality. The suggested roll-out of NCB confiscation into the ROCU network provides an opportunity to increase awareness.

Recommendation 10: The roll-out of NCB confiscation to the ROCUs should be accompanied by a programme of awareness raising within policing (specifically to Chief Constables) and to Police and Crime Commissioners, led by the National Police Chiefs' Council Financial Crime Portfolio.

Acceptance of Risk

The inherently litigious nature of NCB confiscation means that any case adoption carries an unquantified level of risk. As such, as noted above, without contingency budgetary support, case adoption by the CPS is likely to be tempered, at least on a subconscious level, by concerns about potential costs orders should cases be unsuccessful. Offering contingency budgetary

109. NPA, 'Asset Forfeiture Unit'.
110. The Serious and Organised Crime Inter-Ministerial Group involves secretaries of state from the National Security Council and the Social Reform Committee.
111. Author interview with ex-senior police officer, London, March 2019.

support, as recommended earlier in this paper, will allow the CPS to increase its risk appetite to take on cases of merit.

The US Example

The US has traditionally been viewed as the 'driver' of NCB confiscation globally and is certainly its most prolific user; a 2018 paper notes that NCB confiscation accounts for roughly half of the assets confiscated under the US federal asset forfeiture programme.[112] This is, in part, due to the country's long and established history and culture of NCB confiscation, stemming from 18th-century powers implemented to protect the US from piracy.[113] This strong history has embedded NCB confiscation as a mainstream part of the US asset-confiscation approach – interviewees even suggest that NCB confiscation is often the tool of choice even where a criminal conviction has been obtained, based on the fact that legal skills and experience in US asset confiscation have traditionally coalesced around the civil, rather than the criminal, sphere of law.[114]

A Tale of Controversy

Despite its prolific and established use, the use of NCB confiscation in the US is not without controversy; the perceived disproportionate use of the tools from the 1990s onwards, particularly at state (as opposed to federal) level, led to widespread public and political criticism and ensuing legislation in the form of the Civil Asset Forfeiture Reform Act 2000 (CAFRA), which, among other things, raised the evidentiary bar for NCB confiscation in the US.[115]

112. Stefan D Cassella, 'Nature and Basic Problems of Non-Conviction Based Confiscation in the United States', 20 May 2018, <https://assetforfeiturelaw.us/?p=1641>, accessed 4 April 2019. In 2018, $1.4 billion was deposited into the US Department of Justice's Asset Forfeiture Fund – it is not clear what exact proportion of this was related to NCB confiscation, but by Casella's estimates it would be around half. See US Department of Justice, 'FY2018 Asset Forfeiture Fund Reports to Congress', <https://www.justice.gov/afp/fy2018-asset-forfeiture-fund-reports-congress>, accessed 3 May 2019.
113. Jeffrey Simser, 'Perspectives on Civil Forfeiture', University of Hong Kong, 2008, <http://siteresources.worldbank.org/INTTHAILAND/Resources/333200-1089943634036/475256-1201245199159/2008Mar-asset_recovery-civil-forfeiture.pdf>, accessed 3 May 2019. Although it should be noted that these laws originally focused on the instrumentalities of crime. Amendments to legislation in the 1970s and 1980s extended NCB confiscation to proceeds.
114. Author telephone interview with Stefan D Cassella, US asset forfeiture law expert, January 2019.
115. The Civil Asset Forfeiture Reform Act 2000 amended chapter 46, title 18 of the United States code to insert Section 983, which raised the required level of proof from 'probable cause' to the higher level of 'preponderance of evidence'.

The continuing political and public controversy surrounding the US NCB confiscation experience[116] serves as a sobering lesson on the need to ensure the proportionate use of the powers. Nevertheless, this research identifies a number of positive aspects of the US system, which have supported its use as a mainstream tool when used in a proportionate fashion.

Flexibility of Legal Pathway

One of the key strengths identified in the US system is the flexibility and interoperability of the criminal and civil confiscation regimes, whereby the investigator need not decide at the outset whether the eventual case will be handled through the criminal or civil jurisdiction.

The flexibility inherent in the US confiscation model is, in large part, a facet of the US's combined criminal and civil court structure[117] and asset-based criminal confiscation regime,[118] which is in stark contrast to the UK, where criminal and civil courts are separate and have distinct cultures and rules of evidence. However, in common with the other jurisdictions examined, this flexibility is also based on the lack of presupposition of the primacy of the criminal confiscation route, in contrast to the UK's more rigid approach set out in primary legislation and the Attorney General's guidance.[119]

Tools to Reduce Litigation

Deal Cutting

The US criminal justice approach, writ large, has a strong culture of deal cutting, with plea bargaining being an established and central feature.[120] This culture extends to the NCB confiscation realm, whereby the regime's more aggressive use of deal making and external levers encourages settlement rather than protracted litigation. For example, there are some limited examples of the use of Deferred Prosecution Agreements (DPAs) in which one of the terms is the non-contesting of a civil forfeiture claim.[121]

116. Nick Sibilla, 'Congressman Slams Civil Forfeiture as "A Series of Government Shakedowns"', *Forbes*, 11 January 2019.
117. US courts hear both criminal and civil cases.
118. Whereas the UK criminal confiscation regime is a debt-based system, which does not confiscate assets per se.
119. Section 2(a) of POCA makes statutory provision for the issuing of guidance regarding the use of the powers by the Attorney General in England and Wales or the Advocate General in Northern Ireland. Section 2(a) (4) notes that the guidance 'must indicate that the reduction of crime is in general best secured by means of criminal investigation and criminal proceedings'.
120. See *The Economist*, 'The Troubling Spread of Plea-Bargaining from America to the World', 9 November 2017.
121. For example, see US Department of Justice, 'Deferred Prosecution Agreement with Science Applications International Corporation', 8 March 2012, <https://www.sec.gov/Archives/edgar/data/353394/000119312512114121/d315165dex101.htm>, accessed 29 May 2019.

Fugitive Disentitlement Provisions

Proponents of NCB confiscation often support their position by appealing to the need for a tool to deal with the assets of defendants whose absence from the jurisdiction prevents a criminal prosecution from proceeding. To support cases of this nature, the US has gone further under CAFRA in implementing provisions that 'disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action'[122] in cases where individuals refuse to return to face criminal charges in US courts. In effect, these provisions allow the state to put its case to the courts without having to face protracted litigation from a respondent who has fled the jurisdiction to avoid criminal charges. This both limits litigation from this category of respondents and offers levers to persuade offenders to return to the jurisdiction to defend their case.[123]

Lessons to Learn for the UK

Flexibility of Pathway

The continuing presupposition of the criminal route within the UK's POCA legislation, following through into the Attorney General's guidance,[124] in part conspires to keep NCB confiscation as a niche and under-used tool. Although this guidance has become more flexible over time,[125] the inherent inflexibility contained in the enabling legislation impacts on both decision making and the prosecutorial mindset as regards NCB confiscation.

Recommendation 11: The government should remove the presumption of the primacy of the criminal confiscation route under Section 2(a) of POCA to mirror the more flexible approach of the US, the Republic of Ireland and South Africa.

122. Cornell Law School Legal Information Institute, 'US Code 28, Part VI, Chap. 163, Section 2466. Fugitive Disentitlement', <https://www.law.cornell.edu/uscode/text/28/2466 >, accessed 3 May 2019.
123. Notable cases in which these provisions have been invoked include the Camelot Cancer Care Inc. case, see United States of America vs. Real Property Commonly Known as 7208 East 65th Place, Tulsa, Oklahoma, et al., 'Motion to Dismiss Claims and Answers Filed by Maureen Long and Camelot Cancer Care, Inc.', United States District Court for the Northern District of Oklahoma, 15-CV-324-GKF-TLW, 17 March 2016.
124. Attorney General's Office, 'The Proceeds of Crime Act 2002, Guidance under Section 2(a)', January 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678293/2018_01_s2A_Guidance.pdf>, accessed 9 May 2019.
125. Previous iterations of the guidance in 2009 and 2012 held more firmly to the notion that the criminal route should have primacy.

Tools to Reduce Litigation

Making a deal with the opposition on the court steps is not entirely anathema to the UK's prosecutorial traditions, but is perhaps less culturally ingrained and more strictly governed in the UK system than in the US.[126] That said, the formalisation of assisting offenders' provisions under the Serious Organised Crime and Police Act (SOCPA) 2005,[127] and the introduction of DPAs against corporate persons in the Crime and Courts Act 2013, demonstrate a greater acceptance of deal making as part of the mainstream criminal justice response.

Extending this shift to the NCB confiscation realm and learning from a more pragmatic approach to deal making from the US example would do much to limit litigation and thus increase capacity to take on a greater number of cases. As previously noted, greater flexibility in enforcement authority settlement policies may be a way of achieving this.

Furthermore, although only applicable to a minority of cases, there is an argument to be made that the UK should consider replicating the US's fugitive disentitlement provisions.[128]

Recommendation 12: The government should consult on whether fugitive disentitlement provisions are appropriate for adoption in the UK.

Findings – The International Perspective

With well-established systems in place in many other countries, it is within the UK government's gift to cherry-pick from the experience of others to prime and significantly grow their NCB confiscation response. This short study identifies several themes, the most important of which are distilled below.

First, communication is key. The UK government, the NCA, national agencies and the NPCC could do more to highlight the use of NCB confiscation to a public, parliamentary and policing audience as a means of increasing awareness and support for its use.

Second, strategy is essential. The UK government needs to place the tools within their rightful context – that of a tool for tackling serious organised crime – through advocating for their greater use in a meaningful Asset Recovery Action Plan and through greater ministerial engagement.

126. See Attorney General's Office, 'The Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise', 30 November 2012, <https://www.gov.uk/guidance/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise>, accessed 14 March 2019.
127. SOCPA served to extend and formalise the common-law concept of 'turning Queen's evidence'.
128. Although this research recognises that these powers will only be applicable in a limited number of cases.

Third, collaboration is vital. The future roll-out of the powers within UK policing should include a multi-agency response within its scope and ensure that outreach structures to police forces are included in the plan.

Fourth, flexibility is necessary, whether in terms of the approach to deal making, the primacy afforded to criminal routes or the inter-operability of the criminal and civil approach to tackling dirty assets. Rigidity in the use of the powers will only serve to keep the powers in their (currently limited) place.

Conclusion

THE EXTENT TO which serious and organised criminals are increasingly using borders, corporate vehicles and complex money-laundering schemes to distance themselves from their day-to-day operations means that there is a stronger need to adopt an approach that focuses on undermining a criminal business model, rather than simply tackling an individual in isolation. In line with this, an asset-focused approach has merit as a means of reducing the criminal capital available to continue doing business.

Furthermore, given the necessary constraints[129] of a prosecution-focused approach, growing awareness of the scale of organised criminality and continuing policing and prosecutorial austerity, adopting approaches that make the best use of resources via a disruption-focused approach are a necessity. In short, given the limited ability of law enforcement to arrest its way out of the problem, NCB confiscation is a means of demonstrating to a frustrated public that these individuals remain within the reach of the law.

For this reason, this paper makes the case for a more defined place for NCB confiscation in the fight against organised crime in the UK. That the powers have failed to take their place in this response to date, at least on any great scale, undermines the justification given to Parliament in the passage of the POCA – the argument that the powers were a necessary response to the growing problem of organised crime.

At a strategic level, this unfulfilled promise can be traced back to a lack of leadership from the Home Office since the disbandment of the ARA in 2008, the continued absence of a meaningful Asset Recovery Action Plan and the lack of specificity on the role of NCB confiscation in the *Serious and Organised Crime Strategy 2018.*

At an operational level, it can be traced back to the lack of capacity and capability in the law enforcement and criminal justice response. Although it has been a long time coming, the NCA's deployment of its own NCB confiscation resources against the 'high end of high risk' marks a step-change in its deployment of these tools. However, this refocusing on nationally and internationally impacting criminality (that which is within the NCA's purview) leaves questions regarding the ability of the NCA to deal with this more complex caseload. It also further exacerbates the considerable capacity and capability gap left by the ARA in relation to the deployment of the powers against ROCU and local policing targets.

129. The extent to which the criminal law necessarily protects the individual from miscarriages of justice and wrongful removal of liberty, through the higher burden of proof and the criminal law disclosure regime.

This paper does not propose reinventing an ARA-style central body, but recommends that ROCUs formally fill this gap. This can be achieved through adding NCB confiscation as a formal ROCU capability, providing long-term sustainable funding and training specialist CPS and financial investigators in NCB confiscation. To do this requires central government investment and budgetary comfort to increase CPS risk appetite.

Building sufficient capacity and capability, however, will not solve the problem; more is needed to ensure NCB confiscation is embedded as a core tool in the fight against serious and organised crime. The experiences of other countries offer ample examples of ways in which the powers have been deployed to greater scale and effect, through political support and strategic focusing, increased multi-agency working and greater flexibility and pragmatism as regards target selection and deal making.

In summary, ensuring the tools are used to optimal effect will take focus, time and resources. Any inference that UWOs alone provide a shortcut to expanding the use of the broader NCB confiscation toolbox are misguided. Bringing the use of the powers to bear against the full range of UK and overseas criminality impacting on the UK's national security requires a significant shift in thinking if the tool is to become the feared sanction that it has become in Ireland.

In the next few years, a more visible use of the tools by the NCA is likely, as it targets high-profile figures and corrupt elites via its cadre of trained NCB confiscation specialists. If they are successful, a higher level of financial returns via this route may be observed. However, the government should exercise caution in conflating increased revenue with increased impact. Without a central plan for expanding both capacity and capability and a strategy to ensure that they are deployed against the most dangerous echelons of serious and organised criminality, the tools' impact will remain limited.

In short, as noted by Kennedy, 'the effectiveness of civil recovery must also be considered in terms of not just how much money it removes but from whom it is removed'.[130]

130. Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', pp. 8–23.

About the Author

Helena Wood is an independent consultant in financial crime and asset confiscation and an Associate Fellow at RUSI, with research interests in the UK's activity under the Proceeds of Crime Act 2002 as a means of tackling serious and organised crime. Prior to moving into consultancy in 2015, she held a number of roles in UK government and law enforcement, including at the National Crime Agency, Assets Recovery Agency, HM Treasury, and the Charity Commission.

Appendix D

Florence Keen, *Unexplained Wealth Orders: Global Lessons for the UK Ahead of Implementation* (London: Royal United Services Institute for Defence and Security Studies, 2017).

Royal United Services Institute
for Defence and Security Studies

Occasional Paper

Unexplained Wealth Orders

Global Lessons for the UK Ahead of Implementation

Florence Keen

Unexplained Wealth Orders

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RUSI Occasional Paper, September 2017

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Executive Summary

THE CRIMINAL FINANCES Act 2017, which received Royal Assent in April 2017, introduces a new investigatory power to law enforcement in the form of Unexplained Wealth Orders (UWOs), which will require respondents to explain the source of their wealth if they are a Political Exposed Person (PEP) outside the European Economic Area or if there are reasonable grounds to suspect that the respondent is or has been involved in serious crime; if there is clear inconsistency in their apparent legal income and their visible assets in the UK; and if the value of the asset is greater than £50,000. A UWO can be granted only if all three tests are met. Enforcement authorities must apply to the High Court for the order, which can then make this assessment.

The powers extend the UK's current non-conviction-based asset recovery regime contained within the Proceeds of Crime Act (POCA) 2002, and seeks to address the difficulties law enforcement currently faces when trying to gather evidence on the wealth of serious criminals and corrupt officials in the UK and from other jurisdictions.

The powers are thus aimed at those suspected to be involved in serious and organised crime, as well as foreign politicians and officials (and their associates). In addition to relieving the state of the requirement to prove a criminal charge, the state is also not required to prove that the property in question is the instrument or the proceeds of crime, with the burden shifting onto the respondent to show that their assets have been obtained through legal means. The UK is already one of only a handful of jurisdictions worldwide that have adopted asset confiscation in the civil sphere, in large part due to the perception of civil recovery as an infringement on civil liberties in other territories. This further extension of the powers has, however, been lauded by many as the most effective way to pursue criminal assets, and prevent the economic and social harms created by the laundering of illicit funds through the property market.

This paper provides a background to the introduction of UWOs, explaining the current civil recovery regime contained within POCA 2002, and why the introduction of these new powers was felt necessary in the current climate. Specifically, it shows how the optimum conditions for gathering evidence to support cross-border civil recovery claims are often difficult to achieve, particularly against highly organised and well-resourced domestic suspected criminals or against foreign PEPs. This paper provides a detailed account of the UWOs introduced in the Criminal Finances Act 2017, noting the government's rationale behind them, and outlining some of the practicalities involved in using them.

Second, it assesses the non-conviction-based asset recovery regimes of the Republic of Ireland and Australia as case studies – both of which hold comparable 'reverse burden of proof' mechanisms, but which differ in their recovery success rates. The Republic of Ireland's regime, led by the Criminal Assets Bureau, is multidisciplinary. It draws on a range of officials in different

agencies that have been seen to efficiently share information and utilise resources when using non-conviction-based asset recovery, and holds impressive figures with regard to civil confiscation. Other factors of note include the political climate the asset recovery regime came into, namely that public opinion had been mobilised into supporting stringent crime laws in the wake of high-profile murders committed by organised crime groups.

Australia, conversely, has yielded mixed results, with UWOs having been introduced at both the Commonwealth and state level. Given the scope of UWOs, and subtle differences depending on each territory, evaluating their merit is complex. Overall, total confiscation rates have been low, with the Commonwealth yet to achieve any successful UWOs. This has been attributed to a number of factors: a lack of expertise in financial investigations and resource allocation; inter-agency disputes; and a degree of judicial reserve, meaning that the orders were not prioritised.

After examining the potentially important lessons learned from these jurisdictions, as well as the UK's current civil recovery architecture, it is clear that, upon the commencement of the Criminal Finances Act later this year, the success of UWOs will be dependent on a number of variables. The UK government should take note of these variables, which include:

- **Expertise and necessary allocation of skills**: Because the targets of UWOs are those involved in serious and organised crime and foreign PEPs involved in corruption, cases will be highly complex. This will require skilled financial investigators with an established track record in civil recovery, with talent harnessed and retained in relevant agencies.
- **Inter-agency cooperation**: In the UK, the powers will be available to a range of government agencies, which will need to be joined up in order to be effective. As evidenced by the Australian experience, a lack of clarity around agency roles and responsibilities can cause notable difficulties; although the Republic of Ireland's Criminal Assets Bureau has managed to share information across agencies to great effect.
- **Appropriate resource allocation**: Without a certain level of investment from the UK government, UWOs will simply not be used. Financial support will be required throughout investigations and court hearings, particularly in light of the financial resources at the disposal of those who will be the targets of UWOs. Sensible allocation of the Asset Recovery Incentivisation Scheme is also recommended as a more effective way of providing additional funding for financial investigators. Prosecutorial support must also be a priority, with the Crown Prosecution Service an essential part of this picture which must be supported both financially and legally.
- **Political will**: Underpinning the above must be the genuine political will and resolve to ensure that UWOs do not sit untouched on the statute books. This will require leadership from the government if the UK is to see any success.

UWOs could certainly prove to be a powerful tool in efforts to tackle attempts to invest the proceeds of serious and organised crime and corruption in the UK. This paper is intended to help key stakeholders and observers understand both the complexity of UWOs and their viability – if the appropriate level of commitment from the government is given.

Introduction

THE CRIMINAL FINANCES Act 2017[1] will give UK law enforcement agencies and their partners enhanced powers to recover the proceeds of crime, tackle money laundering, tax evasion and corruption, and combat the financing of terrorism. The Act contains provisions for Unexplained Wealth Orders (UWOs), which create a new investigative tool requiring individuals to explain the source of their wealth to enforcement authorities if there are reasonable grounds for suspecting that there is a discrepancy between their known income and the assets on display.[2] An order can be made under the conditions that:

- The respondent is a Politically Exposed Person (PEP)[3] outside the European Economic Area (EEA); or there are reasonable grounds to suspect the respondent has been involved in serious crime.
- The respondent's known income is insufficient to obtain the asset.
- The value of the asset is greater than £50,000.[4]

Targeted at those involved in grand corruption or in serious crime, the provision extends the UK's current non-conviction-based asset recovery architecture (explained later in the paper), contained within Part 5 of the Proceeds of Crime Act (POCA) 2002, to presume that, where no reasonable explanation is offered on the origin of property, it is deemed to be 'recoverable property'.[5] In this instance, the enforcement authority can consider whether or not to take further action against the property, which may include recovering the property using the civil recovery powers provided in Part 5 of POCA.

UWO provisions come after a series of public statements from the government relating to asset recovery as a means of improving law enforcement's response to corruption and serious crime: the government's *UK Anti-Corruption Plan*, published in 2014, cited among its immediate priorities the need to 'strengthen our law enforcement response so that we can pursue, more effectively, those who engage in corruption or launder their corrupt funds in the UK'.[6] This echoed measures set out in the Home Office's Serious and Organised Crime Strategy 2013,[7] which committed to the strengthening of POCA and the recovery of hidden assets overseas. The *National Security Strategy and Strategic Defence and Security Review 2015* (SDSR) cemented

1. Home Office, 'Criminal Finances Bill Receives Royal Assent', 27 April 2017.
2. Enforcement authorities must make an application for the order to the High Court.
3. According to section 362B (7) of the Proceeds of Crime Act 2002, a PEP is an individual who has been entrusted with prominent public functions by an international organisation or state outside the UK or the European Economic Area (EEA). It also includes family members and associates.
4. Rachel Davies, 'Unexplained Wealth Orders: A Brief Guide', *Transparency International UK*, 30 May 2017.
5. 'Proceeds of Crime Act (POCA) 2002 (UK)', Part 5.
6. HM Government, *UK Anti-Corruption Plan* (London: The Stationery Office, 2014), p. 8.
7. HM Government, *Serious and Organised Crime Strategy,* Cm8715 (London: The Stationery Office, 2013).

this, committing to 'new measures to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime and corruption or to evade sanctions'.[8]

The introduction of UWOs has the potential to represent a major shift in UK anti-crime efforts, and could theoretically diminish the ease with which organised criminals and corrupt officials launder the proceeds of crime through the UK. This could possibly lead to it acting both as a deterrent to criminals, as well as setting a strong example for other jurisdictions to follow.

That said, there are a number of hurdles which must be overcome if UWOs are to be a success. This paper will explore the practicalities of UWOs once they are operational, beginning with an assessment of the current asset-confiscation framework that exists in the UK, and why it was felt necessary to introduce this additional investigative power. In doing so, the paper considers the experience of two other jurisdictions: Australia and the Republic of Ireland, which both already have analogous provisions in relation to non-conviction-based asset recovery, which reverse the 'burden of proof' requiring individuals to explain the source of their wealth. While neither jurisdiction contains legislative instruments that precisely match those which the UK is introducing, there may be important lessons to be learned about the principle of 'reverse burden-'based asset recovery systems.

The author conducted desk-based research and non-attributable interviews with key experts from the academic, legal and law enforcement community. Based on the findings, the paper assesses the barriers in the current legal framework that UWOs hope to overcome, and in doing so will outline how the UK government is most likely to deliver the hoped-for impact via UWOs once the Criminal Finances Act is commenced.

8. HM Government, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom*, Cm9161 (London: The Stationery Office, 2015), p. 42.

I. Corruption and Serious Crime: Economic and Social Harms

IT HAS LONG been recognised that corruption and serious crime threaten the UK's national security, economic prosperity and reputation on the world stage. In 2014, then Home Secretary Theresa May stated that 'cracking down on corruption, and working to recover stolen assets, is an issue which has increasingly gained international importance and is one we must continue to work hard on'.[1] This sentiment was echoed at the global Anti-Corruption Summit in May 2016, hosted by then Prime Minister David Cameron, in which representatives of 43 countries and seven international organisations signed the Global Declaration Against Corruption.[2] This committed the signatories to pursuing and punishing those who have profited from corruption, by actively enforcing anti-corruption laws, tracking down stolen assets and returning them to their legitimate owners, and ensuring that there will be no impunity for corruption.

Although precise figures are impossible to obtain, the IMF has estimated that the amount of money laundered globally equates to between 2% and 5% of global GDP annually.[3] This means between $800 billion and $2 trillion being illegally funnelled through the system, which, regardless of a margin of error, is staggering. It is clear that substantial amounts of this money ends up laundered through the UK. The National Crime Agency (NCA) has estimated that it could be up to £90 billion per year,[4] much of which has ended up in London's property market.[5]

The problem is not simply an economic one; there is an undeniable relationship between organised crime, corruption and political destabilisation. Money laundered by corrupt officials means less money for state resources, severely cutting into national budgets for healthcare, social services and economic infrastructure.[6] The effects of organised crime on undermining

1. Theresa May, 'Home Secretary Speech at Ukraine Forum on Asset Recovery', 29 April 2014.
2. Cabinet Office and Prime Minister's Office, 'Global Declaration Against Corruption', Policy Paper, 9 December 2016.
3. Michel Camdessus, 'Money Laundering: the Importance of International Countermeasures', speech given at the IMF in Paris, 10 February 1998.
4. Home Office, 'Criminal Finances Bill: Unexplained Wealth Orders', Factsheet, Part 1, Chapter 1, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564467/CF_Bill_-_Factsheet_2_-_UWOs.pdf>, accessed 13 July 2017.
5. Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (London: Transparency International UK, 2017).
6. Transparency International UK, *Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery* (London: Transparency International UK, 2016).

the development of weak and fragile states are also evident. Recent scandals, such as the Panama Papers,[7] and the Global Laundromat,[8] which are likely to be just the tip of the iceberg, have brought the multinational scale of international corruption and organised crime into even sharper focus.

Vast sums of this money have ended up in real estate: the value of property in the UK under criminal investigation for allegedly being the proceeds of international corruption was £180 million between 2004 and 2015.[9] In March 2017, Transparency International identified £4.2 billion worth of property in London deemed to have been purchased with suspicious sources.[10] They also found that 52% of land titles owned by anonymous companies in London were in the boroughs of Westminster, Kensington and Chelsea, and Camden, and that 91% of overseas companies owning London land titles are registered in secrecy jurisdictions (or tax havens).[11] While there are also other factors to take into account, the presence of corrupt money in the property market has evidentially been a contributory factor in the housing crisis by driving up prices substantially. It is in this context that the introduction of UWOs must be understood.

The UK and the Proceeds of Crime Act 2002

The UK's current response is within both the criminal and civil asset confiscation architecture expressed in POCA.[12] The legislation followed developments during the 1980s and 1990s,[13] which culminated in an international consensus by the end of the twentieth century that asset recovery was the best possible tool with which to tackle the vast wealth accrued by organised crime, money laundering and corruption.[14] Galvanised by the mantra that 'crime should not pay', jurisdictions around the world more fully began to adopt a 'follow-the-money' approach that centred on the aggressive pursuit of criminal assets, working on the logic that starving organised crime groups of their financial lifeblood diminishes their ability to sustain a criminal enterprise and thus the incentive to commit crime, and consequently reduces crime as a whole.

7. Luke Harding, 'What Are the Panama Papers? A Guide to History's Biggest Data Leak', *The Guardian,* 5 April 2016.
8. Luke Harding, 'The Global Laundromat: How Did it Work and Who Benefited?', *The Guardian,* 20 March 2017.
9. House of Commons Home Affairs Committee, 'Proceeds of Crime', HC 25, Fifth Report of Session 2016–17, 15 July 2016, p. 4.
10. Transparency International UK, *Faulty Towers*, p. 4.
11. Transparency International UK, 'London Property: A Top Destination for Money Launderers', 2 December 2016.
12. See POCA Part 2 for Criminal Confiscation and Part 5 for Civil Recovery.
13. See, United Nations Office on Drugs and Crime, 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988', 18 December 1988; Council of Europe, 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime', European Treaty Series 141, 8 November 1990. This convention introduced the idea of seizing property as a response to organised crime.
14. Edward Rees, Richard Fisher and Richard Thomas, *Blackstone's Guide to The Proceeds of Crime Act 2002*, 5th edition (Oxford: Oxford University Press, 2015).

Although the vast majority of jurisdictions have adopted post-conviction criminal confiscation regimes, a handful, including the UK, the Republic of Ireland and Australia, have gone one step further and adopted a form of asset confiscation in the civil sphere, known as 'non-conviction-based asset recovery'. These tools share a common purpose: to ensure that criminals do not benefit from the proceeds of crime, thus removing its economic incentive; and ultimately to recover the ill-gotten gains as compensation.

Contained within Part 5 of POCA, the UK's civil recovery provisions allow action to be taken against property (as opposed to against the person) where the enforcement authority[15] can prove 'on the balance of probabilities' (as opposed to 'beyond reasonable doubt' in criminal cases) that the property was 'obtained through unlawful conduct'. Facing the prospect of their assets being confiscated on the grounds that they represent the proceeds of crime, the respondent must refute the case made by the state in order to retain the assets.[16]

While there must be reasonable grounds to suspect that said property has been obtained through criminality, the civil standard is significantly lower than the criminal. It does not require a criminal conviction for the offence in question, which is why as a tool it is often considered contentious . Despite this, the major challenges of the High Court, the House of Lords and the European Court of Human Rights (ECHR) against civil recovery on human rights grounds have been defeated.[17]

Civil recovery has been justified not only by its *in rem* nature,[18] but also by what is perceived to be the changing nature of international corruption and serious and organised crime. The 'Mr Bigs' at the centre of criminal enterprises tend to employ complex procedures to distance themselves from their criminality, often making it difficult to secure a conviction against them.[19] The criminals targeted by civil recovery are perceived to be highly organised, employing significant time and resources to avoid detection, and are consequently often immune to traditional criminal investigations and prosecutions. Civil recovery therefore provides an additional weapon in the armoury of law enforcement when trying to recover property obtained by unlawful conduct, where criminal proceedings have proven inadequate.[20]

15. Currently, the NCA, the Crown Prosecution Service (CPS) or the Serious Fraud Office (SFO).
16. Colin King, 'Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction Based Asset Forfeiture', *International Journal of Evidence and Proof* (Vol. 16, No. 4, 2012).
17. See, for example, Gale and Another vs Serious Organised Crime Agency, UKSC 49, 'Judgment of the Supreme Court', London, 26 October 2011, <https://www.supremecourt.uk/cases/docs/uksc-2010-0190-judgment.pdf>, accessed 28 July 2017; and Assets Recovery Agency vs Cecil Walsh, KERC 5186, 'Judgment', Court of Appeal in Northern Ireland, Belfast, 26 January 2005, <http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2005/2005%20NICA%206/j_j_KERC5186.htm>, accessed 28 July 2017.
18. Against the property, not the person.
19. Anthony Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds', *Journal of Financial Crime* (Vol. 12, No. 1, 2005), pp. 8–23.
20. This has often happened when respondents have fled the jurisdiction, are deceased or where a technicality has caused the collapse of the criminal case.

Not Far Enough?

Despite Cameron's assertion in 2015 that 'London is not a place to stash your dodgy cash',[21] evidence would suggest that the UK remains a favoured place for criminals to launder the proceeds of crime. This is in large part due to its financial stability, trusted legal system and common language, as well as its vast international footprint, which means that trillions of pounds transact each year through UK banks and their subsidiaries. It is these precise characteristics that were referenced in the government's 2015 *UK National Risk Assessment of Money Laundering and Terrorist Financing* as making the UK an attractive place to launder the proceeds of crime and corruption.[22]

Thus, despite the extensive civil recovery regime in the UK, as outlined in POCA, the legislation as it stands has been unable to effectively tackle these assets. A fundamental weakness that has been identified in the current system is that the UK is dependent on mutual legal assistance from other countries in order to gather evidence in support of civil recovery claims.[23] This reliance on evidence-gathering in the country of *origin* is problematic, particularly concerning claims against assets in the UK derived from corrupt regimes, for a number of reasons: cooperative regimes come and go depending on the political climate; political will is required from jurisdictions on both sides; and an independent police and judiciary is needed with well-resourced law enforcement with asset-recovery responsibility.[24]

Optimum conditions for gathering evidence in support of cross-border civil recovery claims are therefore rare, so countries act as 'safe havens' for criminal organisations and their assets – whether complicit or not.[25] This point is critical: organised crime and corruption often transcends state boundaries, particularly in an increasingly interconnected world, and without the means to gather evidence across borders even the strongest legislation will be rendered largely ineffective. It is the problem of gathering this evidence, either against highly organised and well-resourced domestic criminals or against foreign PEPs, which UWOs seek to address.

It is important to state that UWOs will not be a complete answer to the problem of gathering evidence across borders, and that difficulties with collating evidence from corrupt or non-cooperative jurisdictions is likely to remain. Respondents may well provide an explanation for their wealth that is ostensibly reasonable; rebuttal will require evidence and the judicial cooperation of the overseas jurisdiction. Moreover, even if the jurisdiction has the will to assist, it may be prevented from doing so constitutionally or legally. The majority of international money laundering conventions apply only to criminal matters, and most domestic regimes only contain criminal confiscation regimes, meaning that many jurisdictions simply do not have the legal architecture in place to recognise non-conviction based proceedings.

21. David Cameron, 'Tackling Corruption: PM Speech in Singapore', speech given in Singapore, 28 July 2015.
22. HM Treasury and Home Office, *UK National Risk Assessment of Money Laundering and Terrorist Financing* (London: The Stationery Office, 2015).
23. Transparency International UK, *Empowering the UK to Recover Corrupt Assets*.
24. *Ibid*.
25. HM Government, *Serious and Organised Crime Strategy*, p. 36.

II. Unexplained Wealth Orders

THE GOVERNMENT'S 2016 *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* underpinned the key legislative elements of the Criminal Finances Act, combining the government's primary objectives regarding money laundering, terrorist finance and economic crime more broadly.[1] It was within this document that the government committed to exploring UWOs as a legal option,[2] and by October 2016, when the Bill was introduced to Parliament, explicit provisions for UWOs were made. Clause I inserts new sections 362A–362H into Chapter 2 Part 8 of POCA, defining them as:

> an order requiring an individual to set out the nature and extent of their interest in the property in question and to explain how they obtained that property in cases where that person's known income does not explain ownership of that property.[3]

The rationale is contained within the Bill's explanatory note: primarily, that while law enforcement agencies often have reasonable grounds to suspect that identified assets are the proceeds of serious crime and corruption, POCA does not always allow them to freeze or recover certain assets due to the considerable need to rely on evidence from other countries.[4] This reflects the fact that information needed to satisfy evidential standards is often contained in jurisdictions other than the UK – particularly in cases of grand corruption. These jurisdictions may be uncooperative, or have a weak legal framework that makes conviction more difficult. UWOs address the evidential barriers that prevent law enforcement from acting when there appears to be a substantial difference between what an individual earns and what is on display, be it property, cars or expensive artwork.

UWOs are aimed chiefly at those suspected to be involved with serious and organised crime, as well as foreign politicians and officials (and those associated with them) known as PEPs, who pose a high risk of corruption. Importantly, in the case of non-EEA PEPs and their associates, there is no requirement that they be connected with suspicion of criminality in order for them to be subjected to the orders, only that they cannot demonstrate legitimate origin of wealth. Section 362B (1-10) sets out certain requirements for making a UWO: that the value of property subject to an order is greater than £50,000; and that the court must be satisfied that there are reasonable grounds to suspect the respondent or PEP is connected to, or has been involved in, serious crime (as specified in Schedule 1 of the Serious Crime Act 2007).

1. Home Office and HM Treasury, A*ction Plan for Anti-Money Laundering and Counter-Terrorist Finance* (London: The Stationery Office, 2016).
2. *Ibid*., section 2.33, p. 21.
3. 'Proceeds of Crime Act 2002', s362A(3), <http://www.legislation.gov.uk/ukpga/2017/22/section/1/enacted>, accessed 15 August 2017.
4. Home Office and HM Treasury, 'Criminal Finances Bill: Explanatory Notes', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560122/Criminal_Finances_Bill.pdf>, accessed 14 July 2017.

The critical way in which UWOs go further than the UK's current civil recovery procedure is that they not only relieve the state of proving a criminal charge (as is already the case in civil recovery), but that the state is not required to prove that the property in question is the instrument or proceeds of crime – which so often depends on mutual legal assistance from other jurisdictions. In effect, the burden is on the owner to show that the assets were gained through legitimate means.

The power to apply to the High Court for a UWO will be available to the NCA, the CPS, the Financial Conduct Authority (FCA), the SFO, the Public Prosecution Service for Northern Ireland and HM Revenue and Customs. If approved, the individual or company must respond within a certain time period, and if a reasonable explanation for the wealth is not given, or if a false explanation is given or if there is a failure to respond, the property is presumed to be 'recoverable' without any further need to link the assets to criminality.[5] This is because any of the above responses can be used to contribute to evidence that can lead to the application of a UWO to the High Court, if law enforcement chooses to proceed.

Once the Criminal Finances Act is commenced, the real work begins: much of the success of UWOs will depend on a number of variables, including: the government's political commitment and will; correct resource allocation and expertise within law enforcement; and overcoming the likely challenges law enforcement agencies will face on human rights grounds.

The next section looks at the lessons that can be learned from unexplained wealth provisions in the Republic of Ireland and Australia, both of which act *in rem* against property that constitute the proceeds of crime without the need for a predicate offence, and which reverse the burden of proof on to the respondent.

Republic of Ireland

With the introduction of POCA and the Criminal Asset Bureau Act (CAB) (both in 1996), the Republic of Ireland became one of the first countries in Europe not only to adopt a model of non-conviction-based asset recovery, but also to create provisions analogous to the UWO which reverse the burden of proof to prove the source of the assets on to the respondent, which is where comparisons can be drawn with the UWOs being brought in under the Criminal Finances Act 2017.

It is pertinent to note from the outset that while similarities can be drawn between the UWOs being enforced in the UK and the Republic of Ireland's unexplained wealth provisions, the process in the Republic of Ireland is distinct. Even the term UWO is not recognised parlance, despite often being referred to in many discussions of their experience. Unlike the UK, the Irish legislation applies more broadly and does not additionally focus on foreign PEPs, primarily targeting persons suspected of being involved in serious and organised crime.[6]

5. Home Office, 'Criminal Finances Bill: Explanatory Notes'.
6. Natasha Reurts, 'Unexplained Wealth Orders: The Overseas Experience', *Bright Line Law,* 14 March 2017.

The Irish legislation is predicated on 'belief evidence', in which there must be reasonable grounds to suspect that the property is connected to the proceeds of crime, which must be admissible as evidence during proceedings. The responsibility for producing this evidence lies with the Criminal Assets Bureau (hereafter, 'the Bureau'), and evidence can be drawn from a number of sources, such as tax returns and benefits statements.[7] If the threshold is met, the High Court can make a Section 2 order, which requires the respondent to prove that the property is not the proceeds of criminal conduct. This applies for 21 days, unless an application under Section 3 can be brought – which can last up to seven years, during which the respondent can bring evidence to the contrary.

The picture of non-conviction-based asset recovery in the Republic of Ireland is one of relative success; in 2015, the value of assets frozen under Section 2 of POCA was €941,078.59, which equated to thirteen cases (compared with ten from 2014), although notably the asset value decreased, from €6.76 million in 2014. The Bureau, however, cite two foreign international corruption cases that commenced in 2014 and brought to full Section 3(1) hearing during 2015 as the reason for the decrease. Under Section 3, eleven cases before the High Court had orders made to the value of €7,225,091.98 in 2015,[8] compared with a value of €1.564 million from nine cases in 2014. These figures are broadly typical for the Republic of Ireland, and while they may not appear to be substantial, they are high compared to asset-recovery counterparts in other jurisdictions. There are a number of reasons for this.

First, the climate in which POCA 1996 was introduced in the Republic of Ireland following the deaths of crime reporter Veronica Guerin and Jerry McCabe, a detective of An Garda Síochána (Irish Police – known as the Garda), at the hands of organised criminals. As one academic interviewed confirmed, these crimes were significant in that they 'mobilised' public opinion into supporting tough-on-crime laws.[9] Notably, there was no major legal challenge to POCA 1996 from civil liberties and private bar organisations;[10] and although prominent organisations[11] and academics did voice some concerns, they had no real standing to challenge the Act. There have been High Court challenges in the years since, but the legislation has proved resilient; just recently the notorious crime boss John Gilligan (connected to the murder of Guerin) lost his Supreme Court appeal[12] against the Bureau in which he challenged POCA on freezing orders

7. Author interview with subject matter expert, London, April 2017; Anthony Kennedy, 'Justifying the Civil Recovery of Criminal Proceeds'.
8. Criminal Assets Bureau, 'Criminal Assets Bureau Annual Report 2015', p. 11, <http://www.justice.ie/en/JELR/CAB_Annual_Report_2015.pdf/Files/CAB_Annual_Report_2015.pdf>, accessed 26 July 2017.
9. Author interview with subject matter expert, London, April 2017.
10. Booz Allen Hamilton 'Comparative Evaluation of Unexplained Wealth Orders'.
11. National Council for Civil Liberties, 'Proceeds of Crime: Consultation on Draft Legislation – The Situation in the Republic Of Ireland', May 2001.
12. Murphy vs. Gilligan, 'Judgment in the Matter of the Proceeds of Crime Act 1996 and 2005', Supreme Court of Ireland, IESC 3 (SC), 1 February 2017.

made in 1996,[13] alleging breaches of the European Convention on Human Rights.[14] More than 20 years since its inception, the Bureau is seemingly institutionalised in Irish society, with an overwhelming acceptance that despite its arguably draconian nature, it is a robust and effective tool. One academic interviewed confirmed that there was a high level of public awareness of the work of the Bureau – and are persuaded of its value to society.[15]

The structure of the bureau has also influenced its success. It is multidisciplinary, drawing on staff from the Garda, social welfare and revenue services. Key to its functionality is the free exchange of information between these departments. This means that top-level expertise is exploited when using its non-conviction-based asset recovery powers, ensuring that nothing is missed.[16] The Bureau does not experience a high staff turnover, resulting in great consistency of knowledge and expertise surrounding the use of the laws, an essential component given the complicated nature of cases. While the Bureau's primary tool is POCA 1996, it is also able to use the powers and provisions under criminal, tax and social welfare law, with the tax element proving particularly valuable. This means that once someone is the target of the Bureau, criminal proceeds can be taxed, putting law enforcement in an extremely strong position.[17]

Australia

Australia's civil recovery regime is based on a federalist model. UWOs (in varying forms) have been implemented at different times, and in different territories. Much like the Irish model, Australia's regime does not focus on foreign PEPs, as will the UK's, and was broadly formed in response to organised crime and motorcycle gangs. Similarities can, however, be drawn, and without going into extensive detail, this paper provides a brief overview of the different instruments in place and assesses their effectiveness.

The first Australian territory to introduce unexplained wealth provisions was Western Australia (WA) with the Criminal Property Confiscation Act 2000, on which another, the Northern Territory (NT), modelled its Criminal Property Forfeiture Act 2002. Under these Acts, there is no requirement to show reasonable grounds for suspecting a person has committed an offence, and after the order has been made, the burden of proof is placed upon the respondent.[18]

Despite being deemed unsuitable by the Commonwealth government in 2006, the decision was revisited with the Crimes Legislation Amendment Bill 2009, leading in 2010 to the incorporation of UWOs into POCA 2002:

13. Gilligan vs. Criminal Assets Bureau, 'Judgment of Mr Justice Morris', High Court of Ireland, 1 IR 526 (HC), 26 February 1997.
14. Tim Healy, 'CAB Praised for "Determination and Dedication" as John Gilligan Loses Supreme Court Appeal', *Independent.ie,* 1 February 2017.
15. Author interview with subject matter expert, London, April 2017.
16. Author interview with employee of the Criminal Assets Bureau, London, March 2017.
17. Author interview with employee of the Criminal Assets Bureau, London, March 2017.
18. Nicolee Dixon, 'Unexplained Wealth Laws', Queensland Parliamentary Library and Research Service, August 2012.

> (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.[19]

Under the Act, the High Court can make a UWO where a preliminary order has been made, and the court is not satisfied that the total wealth of the person was not derived from one or more of the following: an offence against the Commonwealth; a foreign indictable offence; and/or a state offence that has a federal aspect.[20]

However, the Commonwealth's UWO regime necessitates an offence (such as tax crimes or money laundering) and does not require a criminal conviction before a UWO can be made. It also has an additional safeguard built in which provides three different types of orders: unexplained wealth restraining orders; preliminary unexplained wealth orders; and a final unexplained wealth order – effectively a confiscation order.[21] The powers reside in the Criminal Assets Confiscation Taskforce (CACT), launched in 2011 to strengthen the government's pursuit of criminal assets. Led by the Australian Federal Police (AFP), the taskforce also draws upon experts from the Australian Taxation Office and the Australian Crime Commission.[22]

After the introduction of UWOs by the Commonwealth government, additional Australian states introduced their own UWO provisions: South Australia (SA) has stand-alone unexplained wealth legislation; and the Serious and Organised Crime (Unexplained Wealth) Act 2009, which has broad similarities to provisions in WA and the NT. New South Wales amended the Criminal Assets Recovery Act 1990 in 2010, introducing a form of UWOs, where a higher threshold is required before the burden of proof is reversed. Under the Criminal Proceeds Confiscation and Other Acts Amendment Act 2009, Queensland introduced amendments not technically regarded as UWOs, but it created a statutory presumption that the unexplained element of a person's wealth is the proceeds of illegal activity, subject to finding that a person is engaged in serious and organised crime.[23]

Given this wide scope and the subtle differences in UWOs depending on the jurisdiction, evaluating their merit for the purposes of this report is complex. The non-conviction based asset recovery regime has yielded mixed results depending on territory. WA has seen relative success: as of December 2016, there were 28 applications for UWOs, 24 of which have been successful (amounting

19. 'Proceeds of Crime Act 2002 (Australia)', Section 5, Part 1-2, Objects, <http://www.austlii.edu.au/au/legis/cth/consol_act/poca2002160/s5.html>, accessed 9 August 2017.
20. Lorana Bartels, 'Unexplained Wealth Laws In Australia', *Trends & Issues in Crime and Criminal Justice* (No. 395, July 2010), pp. 1–6.
21. Natasha Reurts, 'Unexplained Wealth Orders'.
22. Criminal Assets Confiscation Task Force, 'Taking the Profit out of Crime', 2013, <https://www.afp.gov.au/sites/default/files/PDF/criminal-assets-confiscation-taskforce-brochure.pdf>, accessed 27 July 2017.
23. *Ibid*.; for a detailed overview of Australian jurisdictions' varying UWO legislation, see Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders'.

to a confiscation figure of AUD 6.9 million[24]). In the NT, the figure is AUD 3.5 million, and, in NSW, AUD 2.6 million.[25] At the Commonwealth level, no UWOs have yet been successfully imposed.

One explanation given for these low recovery rates is that funds appear to be confiscated in less controversial ways, such as through the tax system, which is notably robust in Australia. Thus, assets can be recovered for the same purpose via a different route.[26] However, the low success rate of UWOs in Australia is not simply explained by the fact that other legislation is stronger. Pursuing UWO cases is resource-intensive, and as demonstrated in the Republic of Ireland, success is predicated on a deep level of knowledge and expertise, which is reportedly lacking in Australia. One academic interviewed pointed to an overall 'lack of competence' and specialism in non-conviction-based asset recovery, with officers rotating between departments, often without having any expertise in financial investigations.[27] In contrast, the success of legislation in the NT has been explained by the fact that it has a relatively small population, enabling greater cooperation between agencies, and thereby harnessing the specialism of financially skilled individuals.[28]

There is also perceived risk aversion, in which unsuccessful cases can lead to a destruction of careers, meaning law enforcement agents have avoided pursuing cases when possible.[29] The risk of losing a case at trial also has financial consequences, with likely requirements to pay court costs and damages, also contributing to the fact that relatively few cases are pursued.[30] The low use of the legislation may also have been influenced by unsympathetic courts, which have been known to look less favourably on the reverse burden of proof mechanism due to a perceived infringement on civil rights, as was reported about the courts in WA.[31]

An additional factor often cited has been historical tensions between the AFP and the Director of Public Prosecutions (DPP), with critics viewing the latter as 'overly conservative' when it comes to pursuing cases.[32] While the law does not require a predicate offence, the DPP has attested that it must show some evidence that a person has been engaged in criminal activity, which may explain why there have been fewer cases brought.[33] The division in responsibilities between the AFP and the DPP was also somewhat unclear, and another source of friction;[34]

24. Marcus Smith and Russell G Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia', *Trends & Issues in Crime and Criminal Justice* (No. 523, 1 December 2016).
25. *Ibid*.
26. Author interview with subject matter expert, London, April 2017.
27. Author interview conducted with subject matter expert, London, April 2017.
28. Smith and Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia'.
29. Author interview with subject matter expert, London, April 2017.
30. Smith and Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia'.
31. Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders'; Author interview with subject matter expert, London, April 2017.
32. Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders', p. 113.
33. *Ibid*.
34. Smith and Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia'.

however, with the creation of the CACT in 2011, which integrated the relevant agencies, this has been partially mitigated.

It is worth remembering that Commonwealth UWO legislation is still relatively new, and therefore lacks jurisprudence. As time goes on, it is possible that the tool will become more utilised. Indeed, the Financial Action Task Force's[35] Mutual Evaluation Report of Australia in 2015 noted the lack of asset recovery as a clear deficiency,[36] which may galvanise Canberra into greater action.

35. The Financial Action Task Force (FATF) is the global standard setter for money laundering, terrorist finance and other threats relating to the integrity of the financial system. It monitors and assesses the progress of member states based around its Recommendations.
36. FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures; Australia – Mutual Evaluation Report', April 2015.

III. Lessons for the UK

UPON THE COMMENCEMENT of the Criminal Finances Act, the success of UWOs will be contingent on a number of factors. Based on evidence from the UK's current regime, and the use of similar pieces of legislation in the Republic of Ireland and Australia, this paper highlights four key lessons that the government needs to take into account: expertise in non-conviction based asset recovery; inter-agency cooperation; resources; and political will.

Expertise

A consistent theme throughout the research for this paper is that the success of asset recovery (whether criminal or civil) hinges upon the expertise held within law enforcement. As demonstrated, the accomplishment of the Republic of Ireland's non-conviction based asset recovery regime owes a great deal to the fact the Bureau in charge of its implementation has not experienced a high staff turnover, thereby retaining individuals with deep knowledge of asset-recovery processes over the previous two decades. This stands in stark contrast to the situation in certain Australian territories, which have witnessed a 'revolving door' of staff moving between departments, resulting in a frequent lack of financial qualifications required to investigate the proceeds of crime.

As the UWOs that the UK is introducing are targeted at serious and organised crime and foreign PEPs involved in corruption, cases will be highly complex, making knowledge and capability even more pertinent. The individuals being targeted by the UWOs are also likely to have significant resources at their disposal with which to challenge the orders. It is almost certain that once the first UWO is issued, it will be challenged in the High Court. To prepare for this, and to ensure that law enforcement does not fall at the first hurdle, cases must be watertight, with sufficient levels of evidence to satisfy the High Court. That said, an overly cautious attitude towards pursuing UWOs and a lack of willingness to take risks may also have negative consequences, as demonstrated by the AFP.

The agencies in the UK tasked with using UWOs certainly have highly proficient individuals; however, in recent years there has been a drain of skilled financial investigators into the private sector – which offers higher salaries and benefits that the public sector simply cannot match. This is something of which the government should be mindful; retaining financial investigators with a proven track record in civil recovery will be crucial to the success rate of cases. The same must also be said of harnessing and retaining skilled proceeds of crime prosecutors, particularly those with the necessary litigation skills required to pursue UWO proceedings.

Inter-Agency Cooperation

The second element to the workability of UWOs is inter-agency cooperation. As discussed, the powers will be available to a range of government agencies in the UK, each with varying

specialisms. The Republic of Ireland's highly successful Criminal Assets Bureau, with its multi-agency basis, has demonstrated the merit in inter-governmental information sharing as a strong tool in putting together unexplained wealth provisions. Australia's federal model, on the other hand, has been chaotic at times, with agencies undercutting one another instead of working together to pursue UWOs. The UK government should take note, ensuring that the relevant agencies are joined up in order to enhance public-to-public information sharing. As described, the powers will be available to a number of different agencies and cooperation between them is crucial if UWOs are to be successful.

This also feeds into the need for clarity of mission, whereby all relevant agencies understand the rationale behind UWOs, and have a shared vision of their implementation. As demonstrated in Australia, tensions between certain agencies were fuelled by differences in their approach towards the legislation. It is the UK government's responsibility to provide this clarity.

Resources

While there are limits to the amount of money the government can reasonably be expected to spend, without a certain level of investment, UWOs will not get off the ground. Given the significant cuts to policing since 2011 (around 20%), the government's track record in this regard is not promising. Reconsideration of the investment put into financial investigations is necessary; the powers will ultimately be impotent if financial support is not committed, especially giving enforcement authorities budgetary backing to take 'test cases' as the legislation is implemented. This bolstering of resources into financial investigations is even more relevant in light of the sizeable resources that will likely be at the disposal of many of the targets of UWOs. As previously discussed, UWO cases will almost certainly be taken to the High Court and beyond[1] upon their use, which could last years, and would take up substantial costs in litigations, hearings, etc.

Sensible allocation of proceeds retrieved by the Asset Recovery Incentivisation Scheme (ARIS)[2] is a potential solution that requires further investigation. The setting of ARIS's 'top-slice' at approximately £5 million followed recommendations of the Criminal Finances Board in 2015, which accordingly made the use of funds more transparent. Specifically, this money has been allocated to fund investigations in key national asset recovery capabilities, including the Joint Asset Recovery Database (JARD),[3] the regional Asset Confiscation Enforcement (ACE) Teams, as well as additional intelligence resources for the NCA to respond to cash-based money laundering.[4] ARIS could, however, be used even more effectively to provide additional funding for financial investigators to be aligned to Regional Organised Crime Units to take the legislation through its test phase.

1. For example, the Supreme Court and the European Court of Justice.
2. Under ARIS, agencies receive 50% of whatever they recover from cash forfeiture orders, confiscation orders and civil recovery and taxation cases. The rest is invested back into the Home Office.
3. The Joint Asset Recovery Database holds information about asset recovery cases going through the criminal justice system.
4. House of Commons Home Affairs Committee, 'Proceeds of Crime'.

Prosecutorial support must also be prioritised. The contribution of the CPS is a crucial piece of this puzzle, without which UWOs will not get off the ground. Although UWOs are an investigative tool, they will be obtained and litigated by prosecutors in the High Court, meaning that from the outset of investigations there is a new cost burden for prosecutors that does not exist in criminal proceedings. The government must ensure that the CPS is supported both financially and legally in order to take on the extra risk that UWOs undeniably present through, for example, the government committing to underwriting the CPS's litigation risk, which would enable it to pursue UWOs in a much more unconstrained way. There is also a clear need to properly resource the process from end to end, a point demonstrated with the introduction of POCA 2002, in which additional resources provided to law enforcement were not matched for prosecutors. This consequently led to blockages, as prosecutors were unable to cope fully with the increased volume of work under static – and sometimes diminished – resources.[5]

Political Will

The final and most obvious point is that all of the above are underpinned by the political will and resolve to ensure that UWOs do not sit dormant on the statute books. The political climate during the Anti-Corruption Summit in May 2016 was ripe, but events since, namely the referendum in favour of Brexit, and the general lack of the mention of corruption in the Conservative manifesto (except for merging the SFO into the NCA[6]) calls into question the future commitment of the government in its fight against corruption. The government needs publicly to restate its commitment to UWOs, prioritising them as an element of the UK's role in tackling corruption and serious crime at the national and international level. As one lawyer commented, politicians can 'talk a good talk', but without true courage and leadership from government, the orders will not work in practice.[7]

5. Author interview with UK law enforcement, London, June 2017.
6. Since the election, this policy now appears to be off the table, and was not mentioned in the Queen's Speech in June.
7. Author interview conducted with financial crime lawyer, London, May 2017.

Conclusion

THE INTRODUCTION OF UWOs into the UK's confiscation architecture is an undeniably radical approach taken by the government, attempting to address the considerable practical difficulties in obtaining evidence in its current civil recovery regime. It may indeed prove to be a significant piece of legislation, with Transparency International UK citing it as the most important piece of anti-corruption legislation – alongside the Bribery Act 2010[1] – of the past 30 years.[2] The intentions are therefore admirable, and if implemented successfully and used broadly, dependent on expertise, inter-agency cooperation, resources and political will, it could make significant headway in tackling organised crime and corruption. Early interviews with law enforcement practitioners suggest that with the appropriate levels of resource and political commitment, UWOs could be an important and powerful tool in the effort to tackle serious crime and corruption in the UK.

One potential caveat that we should be wary of is the displacement factor, namely that UWOs may simply relocate the proceeds of crime to other jurisdictions with weaker asset recovery regimes. While there is little statistical evidence to back this up, it is reasonable to assume that those seeking to hide the proceeds of their crime will attempt to find other means with which to launder funds, and is something that should be monitored going forward.

Despite concerns that UWOs may simply displace criminal assets away from London to other financial centres, constraining the ease with which criminals hide their assets must be an objective to which governments aspire. This is particularly the case for the UK, which has a reputation of being a home for the proceeds of organised crime and corruption. With the introduction of UWOs, the UK has made a strong statement on the international stage, which must be recognised as a positive step. There needs to be an effort to ensure appropriate UWOs are brought successfully, while not losing sight of the underlying causes of serious crime and corruption, and making full use of the existing tools at the government's disposal.

1. 'Bribery Act 2010 (UK)', c.23.
2. Transparency International UK, 'Transparency International UK Press Briefing: Unexplained Wealth Orders', 13 October 2016.

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Appendix E

Helena Wood, *The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape* (London: Royal United Services Institute for Defence and Security Studies, 2016).

Royal United Services Institute
for Defence and Security Studies

Occasional Paper

The Big Payback

Examining Changes in the Criminal Confiscation Orders Enforcement Landscape

Helena Wood

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RUSI Occasional Paper, February 2016

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I would like to thank all of those who took time out of their increasingly busy and pressured working days to share their views and expertise with me. I hope that this paper both accurately reflects their views and shows the importance of the work they do.

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Executive Summary

THE UK LEGISLATION for removing the proceeds of crime from the hands of convicted criminals, governed by the Proceeds of Crime Act 2002 (POCA), is viewed as particularly punitive due to its ability to capture a wide pool of income and assets, some of which are not linked to the indictable offence.[1] While this is desirable in policy terms, the broad framing of the law has created unintended consequences for those charged with enforcing the orders and the system has faced increasing criticism, most prominently in a 2013 report of the National Audit Office (NAO),[2] regarding the disparity between the levels of orders made in the courts and the amounts eventually collected from the criminal.

The NAO's report and some of the wider media coverage could be criticised for their focus on revenue-raising and 'value for money'[3] rather than the impact on criminals, and for their failure to highlight the complexity of the law and the extent to which this (and not administrative failures) has led to the backlog of uncollected confiscation orders – currently £1.6 billion and rising.[4] However the report did make a number of valid points, including on multi-agency co-ordination, and provided a catalyst for the government to recognise the centrality of the enforcement process to the success of the confiscation-orders regime as a whole.

This paper examines the legislative and systemic changes to the confiscation-order enforcement process introduced by the government in 2014 and 2015, and examines the extent to which these offer the needed shift in priority towards enforcement to reduce the current backlog and to prevent a future build-up. This paper makes recommendations for consideration by policy-makers.

The paper firstly examines recent amendments to the POCA made under the Serious Crime Act 2015, including changes to the pre-order process, changes to the incentives to pay, the clarification of judicial discretion and changes to the ability to write-off orders.

Regarding the pre-order process, this paper welcomes the moves to introduce third-party claims on assets prior to the enforcement stage, but cautions the effect these may have on the overall time taken to reach the stage of making the order. This paper then challenges the evidence base for lowering the burden of proof in the seeking of a restraint order and recommends that the Criminal Finances Board, the Home Office-led cross-government strategy body, examine two issues

1. Helena Wood, 'Enforcing Confiscation Orders: From Policy to Practice', *RUSI Occasional Paper*, February 2016.
2. National Audit Office, *Confiscation Orders*, HC 738 (London: The Stationery Office, December 2013).
3. *Evening Standard*, 'Confiscation Order Overhaul Urged', 22 March 2014.
4. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*, HC 326 (London: The Stationery Office, July 2015).

highlighted by this study as being more pertinent to asset restraint: institutional risk-appetite within the Crown Prosecution Service (CPS); and the dissipation test set by case law.

The Serious Crime Act 2015 also makes changes to the incentives provided in law to pay confiscation orders in a timely fashion. This paper broadly welcomes the new compliance orders, which offer considerable discretion to the court to set restrictive conditions which can be invoked as a result of non-payment and, if policed properly, could offer a real incentive to pay. However, this paper points to the lack of a clear understanding of what incentivises an individual to pay (or not), and challenges the evidence that increasing the default sentence will increase payments. This paper recommends that the Criminal Finances Board examine the issue of compliance incentives in broad terms, including the effect of the default sentence. This will ensure that future policy and legislation is based on hard facts rather than supposition.

The case of *R v Waya* led to a landmark 2012 ruling in the Supreme Court on the concept of judicial discretion which was later incorporated into primary legislation. This paper concludes that this is a positive development. If put into practice with due care and consideration, judicial discretion should balance the need to ensure that confiscation orders are sufficiently punitive, while being enforceable in practice. However, this report points to the minimal and non-compulsory judicial training in this complex field and recommends that the judiciary consider implementing more comprehensive, compulsory training on confiscation orders.

Finally, this paper examines the new ability in law to write-off orders where the offender is deceased. This paper welcomes this practical measure which reflects the realities of the enforcement process. However, this paper concludes that this measure does not go far enough. While any measures to widen the category of assets available to write-off must be balanced with the message this sends to criminals and the wider public, this paper urges the Criminal Finances Board to critically examine whether a further category of assets may be suitable for write-off or, alternatively, 'parking' to ensure that non-collectable orders do not distort the discourse in this field and distract the enforcement authorities from collecting those orders which are practical to collect.

This paper concludes that, while many of the recent legislative amendments are welcome and stand up to critical analysis, some lack a firm evidence base; they are not a panacea. This paper notes that the workings of the law alone cannot account fully for the backlog; systemic and structural issues have also played their part. Therefore this paper considers some of the systemic changes to the enforcement process.

A key problem with the enforcement of confiscation orders has been the large number of bodies with a stake in the process, from investigators to prosecutors to the court service. Co-ordination among these bodies has previously been poor and long-term ownership of the enforcement process by investigating agencies has been lacking. This paper therefore welcomes efforts to increase strategic co-ordination, through the Multi-Agency Enforcement Group, and at a practical level, through the Asset Confiscation Enforcement (ACE) teams. These ACE teams – multi-agency practitioner teams focused on using collective powers and expertise to enforce uncollected orders – are already having

a positive impact. This paper, however, points to the unstable funding model on which they are based and recommends that these be funded in a more sustainable way.

This paper highlights the increasingly multinational nature of criminal confiscation and points to some of the new measures put in place to address this. This paper welcomes the deployment of asset-recovery advisors – CPS personnel based overseas to aid asset-confiscation initiatives – and the increase in asset-sharing agreements, a type of memorandum of understanding with other countries agreeing to the sharing of assets where they aid the UK with their enforcement efforts. This paper, however, notes that these measures should be supplemented with a programme of overseas technical assistance, perhaps funded from the overseas aid budget.

In concert with changes in the public-sector approach to confiscation-order enforcement, there has been an increased focus on the potential role of private-sector assistance. The private sector offers a number of skills currently unavailable in government and the greater use of enforcement receivers, court-sanctioned private individuals with powers to seize and sell assets, should be considered, as long as costs can be balanced. Furthermore, the lack of a searchable public database of unpaid confiscation orders means that the authorities fail to harness the potential of the financial sector, in particular, to identify assets available for enforcement.

However this paper questions the viability of 'selling off' £1.6 billion of uncollected payments to the private sector, a measure suggested in recent Treasury communication with Parliament; given the framing of the law, examined in the RUSI paper 'Enforcing Confiscation Orders: From Policy to Practice', this idea may not be commercially viable. This is because there is no clear asset base for a high proportion of the uncollected orders.

In conclusion, this paper welcomes the renewed emphasis on the enforcement process as part of a holistic approach to the confiscation-orders regime. Indeed, measures taken by the government in this respect could be seen to go further than any efforts in this field to date. However, some do not go far enough and others appear to have a precarious future. The lack of focus on the enforcement process during the drawing up of the law and in the subsequent twelve years of its operation has created a legacy that the government must now seek to tackle in the long term – recent changes should be seen as a starting point and not as an end.

Recommendations

Recommendation 1: To improve understanding of the field, the Home Office Criminal Finances Board should commission a study of restraint orders with the following aims:[5]

- To empirically investigate the link between restraint orders and enforcement success
- To understand whether concerns raised by investigators regarding the perceived reticence of the CPS to apply for restraint orders are well founded

5. The Criminal Finances Board is a Home Office-chaired policy body which aims to set the strategic direction for criminal-finances work, including asset recovery. It has representatives from the policy, law-enforcement, prosecutorial and judicial sectors.

- To examine the effect of case law in this field and the potential to provide clarification in future primary legislation.

Recommendation 2: The Criminal Finances Board should commission a study examining which measures incentivise offenders to pay. This study should examine the effectiveness of current compliance incentives, after they have had time to have an impact, including compliance orders, default sentences and interest. It should also identify and examine other options, perhaps drawing on experiences in other fields of debt enforcement.

The study should further assess the effects of compliance incentives across a range of values for confiscation orders and across a range of predicate offences. This study should consider the effect of the sanction on both those who did not pay the confiscation order and on those who did.

Recommendation 3: To ensure that judicial discretion is exercised with due consideration to the intent of the legislation, this study recommends a more comprehensive and compulsory training programme on criminal confiscation for judges.

Recommendation 4: The Criminal Finances Board should reconsider the issue of orders which are deemed to be uncollectable. It should further examine whether there is evidence to support wider categories of orders being subject to mechanisms allowing them to be written-off. Alternatives, such as a system for 'parking' orders to prevent further accrual of interest, should also be examined. It should examine this issue in the widest sense, giving due consideration to issues of practicality, as well as the policy and political implications of such a decision.

Recommendation 5: ACE teams should be a permanent fixture of the criminal-confiscation landscape. The funding for these teams should be made on a multi-year basis and taken from a core budget, rather than unstable Asset Recovery Incentivisation Scheme top-slicing. This will allow for investment and stable staff recruitment and retention.

Recommendation 6: To complement asset-sharing agreements, the government should consider prioritising capacity-building across a range of priority jurisdictions in asset-tracing, through technical-assistance programmes. Consideration should be given to meeting the cost of this technical assistance from the government's overseas-aid budget given existing pressures on law-enforcement resources.

Recommendation 7: The Criminal Finances Board should commission a study, once the new strategy has had time to take effect, to examine whether the new CPS Receivership Strategy is having a positive effect on the use of enforcement receivers, and whether this use is in line with the guidance given that case-selection decisions should include consideration of harm and crime reduction.

Recommendation 8: The Criminal Finances Board should explore the potential for maintaining a central public register of unpaid confiscation orders. It should consider making the register available in a format which is easily accessible and searchable by private-sector institutions.

Examining Changes in the Criminal Confiscation Orders Enforcement Landscape

THE PROCEEDS OF Crime Act 2002 (POCA) consolidated previous legislation governing the state's ability to take the proceeds of crime out of the hands of criminals, and expanded the ability of law enforcement to reach a wider category of criminal assets than ever before.[1] The legislation is widely viewed as particularly punitive as it, in some cases, reverses the burden of proof onto the defendant and seeks reparations even from legitimate income. While this measure was not new, its broader application meant that, at its inception, the POCA was heralded as a solution to the problem of 'traditional' law-enforcement tactics – arrest and commodity seizure – failing to tackle more complex organised criminal networks.[2]

However, while desirable in policy terms, the author's research in this field suggests that the broad framing of the law allows courts to make confiscation orders which often far outstrip the asset base available to pay them; this has unintended consequences for those charged with enforcing those orders.[3] This paper, based on around twenty-five semi-structured interviews with current and former public- and private-sector practitioners working in the policy and executive bodies between July and November 2015, concludes that in drafting the law, the practicalities of enforcing orders based on such broad assumptions were, at best, an afterthought. The combination of orders outstripping assets and a failure to consider practicalities has led to the much-reported figure of '£1.6 billion' in uncollected confiscation orders as at April 2015.[4]

The disparity between the payable amounts issued to convicted criminals in confiscation orders and the eventual payment actually received has generated widespread criticism of the regime. In December 2013, this situation culminated in the National Audit Office (NAO) – the parliamentary auditor of government activity – criticising the government's confiscation-order regime.[5]

1. For example, POCA took an 'all crimes' approach to criminal confiscation and introduced civil powers to seize and forfeit cash suspected to be the proceeds of crime.
2. Cabinet Office, 'Recovering the Proceeds of Crime', June 2000, <http://webarchive.nationalarchives.gov.uk/+/http:/www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf>, accessed 1 October 2015.
3. See Helena Wood, 'Enforcing Confiscation Orders: From Policy to Practice', *RUSI Occasional Paper*, February 2016.
4. National Audit Office, *Confiscation Orders*.
5. *Ibid*.

The NAO report raises a number of overarching criticisms, given below, with those particularly relevant to the enforcement process highlighted:

- The lack of a coherent strategy for confiscation orders
- A flawed incentive scheme of payments back to contributing agencies,[6] and weak accountability of the incentivisation system which compounds the problem
- The absence of good performance data or benchmarks across the system, which weakens decision-making processes
- Insufficient awareness throughout the criminal-justice system of both the impact of and mechanisms to recover the proceeds of crime
- **Outdated, slow ICT systems, poor data and poor joint-working which hamper enforcement efficiency and effectiveness**
- **The fact that the main sanctions for not paying orders – default sentences of up to ten years and an additional 8 per cent interest on the amount owed – do not work.**

The NAO report and subsequent media coverage of the issue could be criticised for their sole focus on revenue-raising and 'value for money'. Arguably, this is an unfair measurement of success for a criminal-justice process which is, in this case, retributive and not commercial. Moreover, due to its limited focus and parameters, such a measurement does not highlight the wider criminal-justice value of the confiscation-order regime. Nevertheless, the report does make a number of valid points in relation to some of the perceived failures in the enforcement process. This has provided a useful catalyst for the government to rethink the priority given to the enforcement process within the regime as a whole.

Throughout 2014 and 2015, policy-makers and practitioners have put in place a number of legislative and systemic changes that aim to reduce the backlog of unenforced orders and restrict future disparities between the amounts set by the confiscation orders made in court and the amounts actually collected.

This paper builds on the analysis of another RUSI paper, 'Enforcing Confiscation Orders: From Policy to Practice', which examines the framing of the law and practice around the enforcement of confiscation orders. The current paper first examines the key legislative changes to the POCA confiscation-order enforcement process made recently under the Serious Crime Act 2015. Second, it analyses some of the systemic enforcement developments.

The overarching aim of this paper is to assess whether the changes made mark the required shift in emphasis towards the enforcement process, and to evaluate the utility and durability of these changes. The paper will do so by examining the following questions:

- To what extent will the amendments to POCA primary legislation brought in by the Serious Crime Act 2015 solve some of the issues surrounding the enforcement of confiscation orders? Do these go far enough?

6. Under the current arrangements, law enforcement, prosecutors and court-enforcement teams receive a percentage of enforcement receipts to reinvest in their agencies.

- What systemic changes have been made to the enforcement process since the critical NAO report? What is their potential impact? How durable are these changes?

Legislative Changes: Serious Crime Act 2015

In 2015, the government amended the POCA through the Serious Crime Act 2015 in order to address, among other things, some of the concerns surrounding the enforcement process. This section critically analyses some of the most significant legislative amendments to ascertain whether these are likely to have the desired effect on enforcement results. These changes can be grouped into five categories:

1. Pre-order changes (that is, changes to the process *prior* to the confiscation order being made)
2. Incentives to pay (that is, measures to encourage defendants to pay, on time, the full amount as stipulated in their confiscation order)
3. Judicial discretion (that is, allowing the court more latitude to set confiscation orders at a level it deems 'appropriate' rather than following a strict legislative formula)
4. Extension of investigatory powers to the enforcement process
5. The ability to write-off orders.

Pre-Order Changes

Third-Party Interests

As stated in the government's 2013 *Serious and Organised Crime Strategy*,[7] criminals often introduce third-party claims (such as by a spouse or family member) against assets at the enforcement stage to frustrate efforts to enforce confiscations orders. These often include claims by spouses on the family home – which may or may not be legitimate. While there are clearly instances of third parties having legitimate interests in property, a significant proportion of claims are judged by financial investigators and court enforcement staff to be vexatious and disruptive.[8] Such claims can considerably lengthen enforcement proceedings.

Prior to the recent POCA amendments, third parties had no right to make a claim for their share in the defendant's alleged assets until the enforcement stage. This led to legitimate interests in property only coming to light following the making of the confiscation order. This has often led to protracted disputes over the 'available amount' following the imposition of the order; in turn, this has hindered efforts to collect the funds detailed in the confiscation order in a timely fashion.

Amendments made by the Serious Crime Act 2015 seek to rectify this issue. The new powers aim to force third-party interests to the fore *before* the confiscation order is made, both in the prosecutor's statement on 'criminal benefit' and by giving the court powers to require information on third-party interests before determining the level of the confiscation order. This amendment

7. HM Government, *Serious and Organised Crime Strategy*, Cm 8717 (London: The Stationery Office, October 2013).
8. Interviews with officials, June and July 2015

will not, however, completely eradicate this disruption to the enforcement process. In relation to the amendments, a Home Office Circular published in May 2015 notes that:[9]

> It is likely that the Crown Court will only make determinations under new section 10A where the defendant's interest in a particular property can be established without too much difficulty. In more complicated cases, it is anticipated that the defendant's interest in property will be determined as it is now, at the enforcement stage.

Furthermore, interviews carried out during this study raised concerns over the introduction of third-party deliberations at this stage,[10] which may slow down the hearing process for confiscation orders. Despite this, this paper concludes that this amendment is likely to reduce some of the protracted deliberations *at the enforcement stage*; the court is likely to be less forgiving of defendants and third parties if they have had the opportunity available to represent their interests at an earlier stage.[11]

Use of Restraint Orders

A restraint order is the primary tool used during the investigation stage to prevent the dissipation of assets before a confiscation order is made. A prosecutor can apply to the court for a restraint order at any time after the start of an investigation, as long as the case meets the criteria set out in the law.[12] Practitioners interviewed during the course of this study deemed that restraint orders have a significant effect on the overall success of enforcement after a confiscation order has been made.[13]

The Serious Crime Act 2015 reduces the burden of proof for seeking a restraint order from 'reason to *believe*' to 'reason to *suspect*'. The burden of proof for restraint orders is now the same as the burden for powers of arrest. As stated in the Home Office Circular, '*Belief* is a high threshold which is normally formed in later stages of an investigation. Consequently, many applications are unsuccessful and assets that could be used to satisfy a confiscation order are at risk of being dissipated.'[14]

However, practitioners interviewed during this study questioned the value of this amendment, citing their view that only a minimal proportion of applications for restraint orders are turned down on grounds of failing to meet evidential thresholds, once applied for (though no statistics

9. Home Office, 'Amendments of the Proceeds of Crime Act 2002 by: The Serious Crime Act 2015, The Policing and Crime Act 2009, The Crime and Courts Act 2013', 22 May 2015, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429570/HO_Circular_-_Amendments_to_the_Proceeds_of_Crime_Act_2002.pdf>, accessed 1 October 2015.
10. Interview with official, June 2015.
11. The law specifically allows the court to draw an inference from non-compliance with pre-order enquiries.
12. Section 41 of POCA.
13. Although it should be noted that this is based on opinion and not based on empirical evidence.
14. Home Office, 'Amendments of the Proceeds of Crime Act 2002'.

were available to support this view).[15] Instead, research indicated that there were two possible alternative (and opposing) reasons why restraint applications either failed or were not sought – on the one hand, the risk appetite of the Crown Prosecution Service (CPS),[16] and on the other, case law establishing the dissipation test.

According to prosecutors, established case law explains the low numbers of restraint orders applied for and granted.[17] Prosecutors cited case law which established that restraint may only be applied for if a real, rather than 'fanciful', risk of dissipation can be established.[18] For example, the judicial case against the imposition of a restraint order often centres on the time lag between arrest and the application for an order in cases where no evidence can be presented that the defendant has sought to dissipate his or her assets in the meantime.

The prevailing view of law-enforcement practitioners was that the issue stemmed from the perceived organisational reticence of the CPS (in cases where it is the prosecuting authority) to apply for restraint orders. It was felt that this was due to the potential cost implications to the organisation should the case fail.[19]

Irrespective of the explanation offered, practitioners interviewed in this study believed that the number of restraint orders being sought is too low, and that this has an effect on the availability of assets at the enforcement stage (though no statistics were available to support this view). The NAO's 2013 report makes a similar claim, citing the low number of restraint orders sought during the investigation phase as having a direct impact on the subsequent ability to enforce confiscation orders, particularly orders relating to 'hidden assets'.[20] The report states, 'Within law enforcement and prosecution agencies, few officers and staff have good understanding about proceeds of crime legislation. In many cases effective powers, such as restraint orders, are applied late or not used at all'.[21]

The conflicting views put forward in this study demonstrate that this is a poorly understood area lacking an empirical evidence base and that the recent changes made are deemed unlikely to have a significant effect on the number of restraint orders sought and issued and the eventual impact on success of enforcement measures.

15. Interviews with officials, June and July 2015
16. The CPS are the main prosecuting authority for cases investigated by the police and the National Crime Agency.
17. England and Wales Court of Appeal (Criminal Division) Decisions, EWCA Crim 1374, Case No: 2008/01221/C5, 2008, <http://www.bailii.org/ew/cases/EWCA/Crim/2008/1374.html>, accessed1 October 2015.
18. Much of the case law established in the Lord Justice Moses ruling on *R v B,* for example, centred on the time lag between the arrest and making the application for restraint, the argument being that if the defendant did not seek to dissipate the assets immediately after arrest, then a real risk of dissipation can hardly be proven.
19. Interviewees cited *CPS v Eastenders Group* as an example of where an ultimately failed investigation led to the CPS picking up extensive costs relating to the restraint of a business under Section 42 of POCA.
20. Helena Wood, 'Enforcing Confiscation Orders'.
21. National Audit Office, *Confiscation Orders*.

Recommendation 1: To improve understanding of the field, the Home Office Criminal Finances Board should commission a study of restraint orders with the following aims:[22]

- To empirically investigate the link between restraint orders and enforcement success
- To understand whether concerns raised by investigators regarding the perceived reticence of the CPS to apply for restraint orders are well founded
- To examine the effect of case law in this field and the potential to provide clarification in future primary legislation.

Incentives to Pay

Confiscation orders are, in effect, akin to a debt (rather than an order confiscating actual property) and are, as such, the responsibility of the defendant to pay by any means he or she sees fit, by realising property to the value of the order. Prior to changes made in the Serious Crime Act 2015, the only two means to incentivise compliance were through the imposition of a 'default sentence' to be served in the event of non-payment (explored further below) and through the charging of interest of 8 per cent once the order becomes overdue. The act contains a number of provisions to increase the incentives to pay on time, which are analysed below.

Compliance Orders

The Serious Crime Act 2015 introduced a significant, wide-ranging power available to the court at the time of making the confiscation order, called a 'compliance order'. Under this new power, the court may issue *any* compliance measure it deems fit to encourage payment of the confiscation order, though it is duty bound to consider putting in place a travel ban on the defendant. As stated in the explanatory note to the legislation:[23]

> The Court is at liberty to impose any restrictions, prohibitions or requirements as part of a compliance order provided they are considered appropriate for the purpose of securing that the confiscation order is effective, *but it must consider whether to impose a ban on the defendant's travel outside the UK*. [Emphasis added]

While the court is duty bound only to consider the imposition of a travel ban on the defendant, it *may*, under the new powers, apply any restrictions it deems necessary where this is 'considered appropriate' to making the confiscation order effective.

Outside of the travel ban, it is worth exploring other analogous powers and the ways in which they have been used to have an impact on criminal behaviour. It could be argued that a compliance order, given its broad nature, is somewhat analogous to the civil sanctions available

22. The Criminal Finances Board is a Home Office-chaired policy body which aims to set the strategic direction for criminal-finances work, including asset recovery. It has representatives from the policy, law-enforcement, prosecutorial and judicial sectors.
23. Explanatory Notes to the Serious Crime Act 2015, <http://www.legislation.gov.uk/ukpga/2015/9/Notes>, accessed 27 October 2015.

under Serious Crime Prevention Orders brought in under the Serious Crime Act 2007.[24] These orders were introduced to deter a return to criminality by 'lifetime criminals' and, for example, have been used to restrict access to the financial system, to limit access to the Internet and to restrict ownership of companies.[25]

Given its wide-ranging applicability, if used proportionately and policed properly, compliance orders could offer real incentives to defendants to pay their confiscation orders as it gives the court significant latitude to limit the defendant's personal freedoms until he or she pays. Moreover, if used by the courts in innovative ways, this power has the potential to have a significant impact on levels of payment. This is a view supported by the majority of responses provided in the interviews undertaken for this study.[26]

Default Sentences

As noted above, the imposition of a 'default sentence' to be served in the event of non-payment of a confiscation order was previously one of the few tools available in the legislation to encourage payment. It should be noted that the serving of the default sentence does not extinguish the confiscation order – it remains – but that once the sentence is served, no additional sentence can be imposed if payment is still not forthcoming.

The Serious Crime Act 2015 extended the default sentences in order to encourage payment. The legislation has introduced new payment bands which are not directly comparable with those set previously. However, the tables below show the previous default sentences for reference. For example, for confiscation orders over £1 million, the maximum default sentence has been extended from ten to fourteen years.

Table 1: Maximum Default Sentences for Non-Payment of Confiscation Orders under the Serious Crime Act 2015.

Amount	Maximum Term
£10,000 or less	6 months
£10,001–£500,000	5 years
£500,001–£1 million	7 years
More than £1 million	14 years

24. Though it should be noted that these are orders sought through the court by law-enforcement agencies rather than sanctions sought by the court themselves.
25. Matthew Claughton, 'Increased Use of Serious Crime Prevention Orders', Olliers Solicitors, 22 April 2011, <http://www.olliers.com/latest-news/increased-use-serious-crime-prevention-orders.html>, accessed 1 October 2015.
26. Interviews with officials, June and July 2015.

Table 2: Maximum Default Sentences for Non-Payment of Confiscation Orders Prior to the Serious Crime Act 2015.

Amount	Maximum Term
£200 or less	7 days
£201–£500	14 days
£501–£1,000	28 days
£1,001–£2,500	45 days
£2,501–£5,000	3 months
£5,001–£10,000	6 months
£10,001–£20,000	12 months
£20,001–£50,000	18 months
£50,001–£100,000	2 years
£100,001–£250,000	3 years
£250,001–£1,000,000	5 years
More than £1 million	10 years

The effect of this extension is yet to be seen. However, a number of studies conducted prior to these changes have questioned the value of the default sentence as an incentive to pay the order. For example, the Home Office confiscation orders attrition study of 2009 states that:[27]

> The default sentence, while a crucial weapon in the enforcement armoury, was not seen by respondents as a panacea. Court enforcement staff thought that the threat seemed to work with some offenders, particularly those serving relatively short sentences who were keen to get out of custody as quickly as possible. However, it was seen as less useful in the case of offenders serving longer sentences as the default sentence then posed little proportionate risk to them.

Furthermore, the NAO's 2013 report finds that only 2 per cent of confiscation orders were paid off in full following the serving of a default sentence.[28] Moreover, the Public Accounts Committee 2013–14 Session on confiscation orders notes that £490 million was still owed by criminals who have served or were, at the time, serving their default sentence.[29]

Although these reports are based on the previous levels of default sentence, studies such as the Home Office attrition study note that non-payment largely correlates with the larger confiscation orders (often linked to those serving longer sentences).[30] It is therefore debatable whether the new

27. Karen Bullock et al., 'Examining Attrition in Confiscating the Proceeds of Crime', Home Office Research Report 17, July 2009.
28. National Audit Office, *Confiscation Orders*.
29. House of Commons Committee of Public Accounts, *Confiscation Orders: Forty-Ninth Report of Session 2013–14*, HC 942 (London: The Stationery Office, March 2014).
30. Karen Bullock et al., 'Examining Attrition in Confiscating the Proceeds of Crime'.

level will have any more effect than the previous ten-year default sentence for confiscation orders over £1 million, which was reasonably punitive but failed to have the desired effect.

This paper therefore questions the value of this measure, given the lack of evidence that increasing the default sentence has any greater effect of reducing incidences of non-payment over and above previous levels. This is a view supported by a number of practitioners interviewed for this study.[31]

This issue also highlights the lack of wider understanding of what incentivises individuals to pay orders. For example, 8 per cent interest is levied on overdue orders. Yet there is no published evidence that this has any impact on the individual to pay. In fact, most respondents in this study questioned the incentive value of this interest: in April 2015, £432 million of the £1.6 billion in uncollected debt from confiscation orders represented interest alone.[32]

Recommendation 2: The Criminal Finances Board should commission a study examining which measures incentivise offenders to pay. This study should examine the effectiveness of current compliance incentives, after they have had time to have an impact, including compliance orders, default sentences and interest. It should also identify and examine other options, perhaps drawing on experiences in other fields of debt enforcement.

The study should further assess the effects of compliance incentives across a range of values for confiscation orders and across a range of predicate offences. This study should consider the effect of the sanction on both those who did not pay the confiscation order and on those who did.

Judicial Discretion

The original framing of the legislation deliberately put in place measures to curtail the discretion available to judges to set the amount of a confiscation order and to link this to the facts of the case.[33] The level at which the order was set was instead dictated by a strict set of criteria set out in the legislation. This has long been a criticism of the confiscation-order process,[34] especially from defence barristers and latterly conceded by some practitioners, due to the potential for 'disproportionate orders'. A number of interviewees in this study noted that this had 'knock-on' effects for both the ability of the courts to enforce the confiscation order and the 'willingness' of the defendant to pay.

Recent case law, such as Supreme Court rulings in *R v Ahmad and Ahmed* and *R v Waya*,[35] explained in the text box, has redressed the balance. These rulings led the Home Office to propose changes

31. Interviews with officials, June and July 2015.
32. HM Courts and Tribunals Service, *Annual Trust Statement 2014–15*.
33. This is thought to have been to ensure that judges were obliged to consider as wide a pool of criminal assets as possible, rather than setting the order depending on what they perceived to be the severity of the offence.
34. See Jonathan Lennon and Aziz Rahman, 'Taking the Profit out of Crime, or Just Taking the Mickey?', Rahman Ravelli Solicitors, 20 February 2013, <http://www.rahmanravelli.co.uk/articles/confiscation-3/>, accessed 1 October 2015.
35. United Kingdom Supreme Court Judgement, *R v Waya*, UKSC 51, 2012, <http://www.bailii.org/uk/cases/UKSC/2012/51.html>, accessed 1 October 2015; United Kingdom Supreme Court Judgement,

Box 1: Case Law Demonstrating the Principle of Proportionality.

R v Ahmad and Ahmed

In this case, Shakeel Ahmad and Syed Ahmed had been convicted of a complex Missing Trader Intra-Community (MTIC) fraud, which had resulted in the company for which they were both responsible obtaining a 'benefit' from VAT rebates amounting to £16.1 million. According to the strict interpretation of the law, they could be seen to have *each* 'benefited' to the tune of £16.1 million and were therefore each given a confiscation order of this amount; this meant that the total amount owed to the Crown was £32.2 million (rather than the original £16.1 million, which was the *actual* proceeds of the crime).

The Supreme Court ruling made a judgement that this was in fact disproportionate and held them to be jointly responsible for payment of the £16.1 million. The ruling stated:[1]

> It is true, as has been said many times, that the legislation is directed towards the proceeds and not the profits of crime, but it would not serve the legitimate aim of the legislation and would be disproportionate for the state to take the same proceeds twice over.

R v Waya

In 2003, Terry Waya purchased a flat for £775,000 with £310,000 of his own money and with a £465,000 mortgage. He lied about his income when applying for the mortgage. In April 2005 he re-mortgaged the flat with a different lender, paying off the original loan in full with no loss to the original lender.

In July 2007, Waya was convicted of obtaining money by deception in relation to the false statements made when applying for the original mortgage. In January 2008, he received a confiscation order to the value of £1.54 million. This was calculated by deducting Waya's contribution of £310,000 from the increased market value of the flat.

This ruling was appealed, and the Court of Appeal reduced the value of the confiscation order to £1.11 million, based on 60 per cent of the flat's increased market value (this was the percentage of the value of the flat provided by the mortgage originally).

The case was then taken to the Supreme Court, which reduced the confiscation order to £392,400. The court held that the benefit obtained by Waya from his crime following completion of the purpose was 60 per cent of any *increase* in the flat's market value over its acquisition price (as the original loan had been 60 per cent of the purchase price).

In making this judgement the Supreme Court introduced the condition of proportionality into the POCA regime. In the ruling, the court stated that the POCA must be interpreted in such a way as to be conducive to Article 1, Protocol 1 of the European Convention on Human Rights (the right to property). The rulings stated that the court must, in making the final confiscation order, follow the letter of the law 'except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1.'[2] This ruling adds a significant element of judicial discretion into the process.

Source: Précis by the author based on the judgements.

1. United Kingdom Supreme Court Judgement, *R v Ahmed and Ahmad*.
2. United Kingdom Supreme Court Judgement, *R v Waya*.

via the Serious Crime Act 2015,[36] which enshrine the fundamental concept of proportionality in the making of confiscation orders.

While it is not the role of judges to consider whether the confiscation order issued is enforceable in practice – rather, it is to ensure they interpret the law in the way it was intended by Parliament – this measure may be cautiously welcomed insofar as it may lead to the setting of confiscation orders at levels which better reflect the actual proceeds received from the crime committed (rather than those amounts which have been set following inflexible formulæ). Linking the confiscation order to the real gain from the offence may make some orders more enforceable in practice as more assets may be realistically available to fulfil the order.

Yet to take full advantage of this development, judges will require further training in this complex area of criminal law. Currently, training is non-compulsory and only two hours in length. While judges are clearly proficient in criminal law, this legislation departs in some ways from standard rules of criminal procedure – for example, in its reversal of the burden of proof in 'lifestyle' cases.[37] Many respondents in this study therefore raised concerns that some judges, with discretion but minimal experience in the field of proceeds of crime, might make judgements that undermine the original intention of the legislation – namely, that 'crime shouldn't pay'.

Recommendation 3: To ensure that judicial discretion is exercised with due consideration to the intent of the legislation, this study recommends a more comprehensive and compulsory training programme on criminal confiscation for judges.

Extension of Investigative Powers

Part 8 of the POCA contains a number of financial-investigation tools, such as production orders, account monitoring orders and customer information orders, which allow financial investigators to apply to the courts for access to key personal financial information. These powers, prior to changes in the Serious Crime Act 2015, were only available to investigators at the pre-sentencing phase – they could not be used when the order was made in order to search for assets with which to fulfil unpaid orders. Interviewees for this paper noted that this proved a significant barrier to trace assets that could be used to pay confiscation orders.

Section 38 of the Serious Crime Act 2015 seeks to rectify this anomaly by extending these powers to the post-order stage. While this measure is not yet operational, due to the need for the Home Office to amend the POCA Codes of Practice (expected to be completed in early 2016),[38] practitioners

R v Ahmed and Ahmad, EWCA Crim 391, 2012, <http://www.bailii.org/ew/cases/EWCA/Crim/2012/391.html>, accessed 1 October 2015.

36. Section 19, Schedule 4, Serious Crime Act 2015.
37. Where certain trigger offences, such as drug trafficking, are the predicate offence, the legislation allows for presumptions to be made about the entirety of the defendant's income, which the defendant must then rebut. This is unusual in criminal proceedings, where the onus of proof is usually on the prosecution.
38. The POCA Code of Practice covers the details of how law-enforcement officers should use the powers in practice. See Attorney General's Office, 'Code of Practice Issued Under Section 377A of

interviewed during this study viewed this as a significant step forward and believed it should allow them to identify previously unknown bank accounts and financial products held by those with outstanding confiscation orders. In cases where defendants are seeking to challenge the order under appeal by asserting that they do not have assets available to fulfil the order, this change will provide essential evidence to challenge these assertions in enforcement proceedings.

Ability to Write-off

Prior to the changes made in the Serious Crime Act 2015, there was limited ability to write-off a confiscation order deemed not to be collectable by enforcement authorities. This has contributed to the backlog of cases and rising debt by keeping orders on the balance sheet, against which practitioners view no chance of enforcement and against which interest continues to accrue at a rate of 8 per cent per annum. For example, the HM Courts and Tribunals Service (HMCTS) Annual Trust Statement 2014–15 notes that of the £1.6 billion of outstanding debt, only £203 million may be realistically collectable.[39] Interviews for this paper highlighted this as the main area where practitioners would like to see a more rational debate.

Deceased Defendant

The Serious Crime Act 2015 amends the POCA to allow courts to write-off an order against a defendant who has died before the full payment has been made and where it is not feasible to seek further payment from his or her estate. Published figures note that, as at December 2013, £24 million of the uncollected total might be attributed to deceased offenders;[40] these cases, despite a proportion of them having no chance of being enforced, have, until now, had to remain on the balance sheet continuing to accrue interest.[41] This measure should therefore be viewed as a practical response, recognising that there are categories of orders which serve no purpose by remaining on the balance sheet continuing to accrue interest.

However, does this measure go far enough? Interviewees in this study highlighted a number of older cases which enforcement staff judge to be unenforceable in practical terms for a variety of reasons – such as orders being made which do not reflect the available assets, or orders where low amounts are outstanding but where the offender has been deported. These orders continue to accrue interest and require regular administrative review by enforcement staff in the HMCTS, thus distracting personnel from concentrating on those orders which are potentially enforceable.

Opening up a wider category of uncollected orders to write-off could be politically unpalatable and should be considered carefully in terms of the message this would send to offenders. However, continuing to hold orders on the balance sheet which are deemed by experienced staff to be

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the Proceeds of Crime Act 2002', 29 November 2012, <https://www.gov.uk/guidance/proceeds-of-crime-act-2002-code-of-practiceunder-section-377a>, accessed 18 November 2015.

39. HM Courts and Tribunals Service, Annual Trust Statement 2014–15, p. 9.
40. *Hansard*, House of Commons, 'Confiscation Orders', Column 688W, Written Answers, 2 April 2014.
41. There is, however, an opportunity for some of these cases to be enforced against the deceased's estate in certain circumstances.

uncollectable distracts from wider examination of the impact and efficacy of the system overall. When questioned on the one change they would like to see to the enforcement process, the vast majority of interviewed practitioners highlighted the ability to move orders deemed to be uncollectable from the balance sheet to ensure that the uncollected total is a true reflection of the actual asset base available to enforce.

It may be, for example, that a process can be developed, with strict, publicly available criteria, which practitioners could use to assess whether an order is eligible and appropriate to be written-off. To ensure transparency and propriety, written-off orders could be audited by an external body, such as the NAO or a private company, on an annual basis to ensure the criteria are being strictly followed.

Alternatively, or perhaps in tandem, a system could be developed whereby orders could be 'parked' off the balance sheet where they are currently deemed uncollectable, such as in the case of deported defendants (as at December 2013, £86 million was owed by defendants who had been deported[42]), but which, for deterrent objectives, may be useful to keep 'open'. This would prevent currently uncollectable orders from creating an administrative burden while also keeping enforcement options open.

This paper suggests that the measures in the Serious Crime Act 2015 are a starting point. While it may be politically difficult to discuss the issue of write-offs or the parking of orders, the measurement of the regime's real effects remains difficult where uncollectable orders remain on the balance sheet in perpetuity.

Recommendation 4: The Criminal Finances Board should reconsider the issue of orders which are deemed to be uncollectable. It should further examine whether there is evidence to support wider categories of orders being subject to mechanisms allowing them to be written-off. Alternatives, such as a system for 'parking' orders to prevent further accrual of interest, should also be examined. It should examine this issue in the widest sense, giving due consideration to issues of practicality, as well as the policy and political implications of such a decision.

Summary

Some of the measures aimed at improving the enforcement success of confiscation orders contained within the Serious Crime Act 2015 offer a pragmatic and evidence-based response to some of the issues identified during the twelve years since the powers came into operation. However, others do not stand up to analysis and lack a firm empirical basis. Taken together, these legislative changes are a welcome start, but do not mark the end of necessary reform.

Systemic Changes in the Enforcement Landscape

While a high proportion of the total uncollected orders backlog can be attributed to the unintended consequences of the law, this does not solely account for the £1.6 billion of uncollected orders.[43] As

42. *Hansard*, House of Commons, 'Confiscation Orders', Column 688W, Written Answers, 2 April 2014.
43. Helena Wood, 'Enforcing Confiscation Orders'.

highlighted in the NAO's 2013 report, a number of systemic and structural issues, such as lack of multi-agency co-ordination, play a contributory role. The government responded to some of these issues by implementing a number of measures and initiatives in 2014 and 2015. This section examines whether these, coupled with legislative changes, represent the necessary long-term shift in focus towards the enforcement process to tackle both the backlog of uncollected orders and to ensure that a future build-up does not occur. Broadly, these systemic and structural changes fall into three categories: domestic co-ordination; international asset confiscation; and the use of the private sector.

Domestic Co-ordination

Given the large number of bodies with a stake in the enforcement process, including law enforcement, prosecutors and HMCTS, until recently domestic co-ordination was poor. Symptoms of this included the lack of a 'cradle-to-grave' approach to confiscation (from investigation to enforcement) and the previous lack of support offered to the enforcement authorities by the investigating agency. The 2013 NAO report highlighted the need for better cross-government co-ordination and the formulation of a mutually agreed strategy.[44] Following the NAO report, a renewed focus on the enforcement process has led to a better understanding of the potential gains of improved co-ordination. Efforts in this regard are explored below.

The Multi-Agency Enforcement Group

Some welcome steps to align the disparate activities relating to the enforcement process have been made since 2013. Interviewees in this study pointed to the Multi-Agency Enforcement Group chaired by the National Crime Agency (NCA) and attended by the CPS, HMCTS, the Regional Asset Recovery Teams (RARTs[45]) and others. Prior to the formation of this group, there had been no forum to highlight and discuss solutions to common high-level legislative and policy challenges, or to seek senior-level support for cross-agency initiatives. This group provides this forum, and meets regularly to discuss strategic cross-agency issues relating to the enforcement process. It reports on its findings to the Criminal Finances Board, chaired by the Treasury. This includes making recommendations for policy and process changes.

A number of interviewees in this study saw this as a positive measure,[46] especially as a means of seeking common solutions to legislative and procedural issues, and for establishing shared principles for prioritising historical, uncollected cases. The author understands that this new group is now considered an essential long-term component of the enforcement landscape.

Asset Confiscation Enforcement Teams

Adding to the NAO's wider concerns regarding co-ordination, a 2012 Home Office study examined the use of financial investigation. On the enforcement process, it found that 'fragmentation of

44. National Audit Office, *Confiscation Orders*, p. 18.
45. The RARTs sit within the 'Regional Organised Crime Units' (ROCUs) and lead cross-county (level 2) asset-confiscation and money-laundering investigations.
46. Interviews with officials, June 2015.

the process across different agencies was considered to reduce effectiveness'.[47] To rectify this weakness, in 2015 the Home Office established Asset Confiscation Enforcement (ACE) teams with the responsibility of assisting in the enforcement of outstanding uncollected confiscation orders. There are currently nine ACE teams aligned with Regional Organised Crime Units.[48] The NCA and HM Revenue and Customs also have their own in-house ACE-style teams.

ACE teams are financial-investigator-led units which are co-located with HMCTS enforcement staff and CPS representatives in the same facility. Their express purpose is to use their collective knowledge, powers and skills to enforce orders. Unpublished performance data seen during this study show that this multi-agency approach is already bearing fruit and is increasing the systematic return to older uncollected confiscation orders. Previously, financial investigators had no formal role in supporting the enforcement of orders once they were made. This resulted in some orders being sought by investigators which did not reflect the potential amount that could be collected in practice. Now, financial investigators routinely attend enforcement hearings to support HMCTS colleagues in their enforcement efforts. For example, they are able to use financial intelligence and evidence gathered during a case to rebut the excuses put forward by the offender for non-payment.

The author understands from interviews that this approach is helping to reduce delays in the process and increase enforcement success. All of the interviewees for this paper emphatically supported this new model for enforcement and viewed it as a common-sense initiative,[49] facilitating the return to older uncollected orders with a new collective approach. As a result, it fulfils the policy intention behind the legislation that 'crime shouldn't pay'.

While the success of the teams should be judged according to the impact that they have on crime rather than revenue generation, they do appear to be cost-effective. For example, between December 2014 and July 2015, the RART-based ACE teams finalised 682 cases and enforced £12 million; the *annual* running cost for these teams was only £1.5 million.[50] These were, by and large, older orders, which would not have necessarily been prioritised under the previous single-agency approach.

In addition to their work in enforcing previously uncollected orders, the disruptive effect of ACE teams – maintained by the pressure they place on non-compliers through doorstep visits, chasing letters and financial investigation – should not be disregarded. Even when these teams are not successful in fully enforcing older uncollected orders, interviewees noted the potential disruptive effect that they have on the financial activities of offenders, especially 'career criminals'.[51] Before the ACE teams were in place, this deterrent effect of leaving outstanding orders open was rarely evident, given the more limited reach of HMCTS working alone.

47. Rick Brown et al., *The Contribution of Financial Investigation to Tackling Organised Crime: A Qualitative Study*, Home Office Research Report 65, September 2012.
48. There are ten multi-agency ROCUs in England and Wales, charged with increasing operational activity against regional organised crime.
49. Interviews with officials, June and July 2015.
50. Figures received via Freedom of Information request from the National RART Coordinator's office.
51. Interviews with officials, September and October 2015.

However, the funding base for ACE teams is currently uncertain.[52] The nine ACE teams attached to the RARTs are currently funded from a proportion of the Asset Recovery Incentivisation Scheme (ARIS),[53] which represents the annual 'returns' from the POCA asset-confiscation regime.[54] This funding is currently on a trial basis and only covers the 2015/16 financial year. As a result, it is not certain whether this funding will be available in the future.

While the Home Office, based on the results to date, has voiced its support for the model and considers funding for the next financial year to be likely,[55] interviewees in this study have cited the lack of clarity on long-term funding as leading to difficulties in investing in the model and in recruiting and retaining quality staff to take forward this important initiative. Furthermore, a number of interviewees in this study voiced concerns about repeating past mistakes; in 2003 an enforcement task force was established,[56] based on a similar model, to aid the enforcement of uncollected confiscation orders made under pre-POCA legislation. This task force was widely noted as being highly successful. However, it was disbanded once the backlog was reduced, rather than being retained in a more limited form to ensure that a future build-up did not occur under the new legislation.

Recommendation 5: ACE teams should be a permanent fixture of the criminal-confiscation landscape. The funding for these teams should be made on a multi-year basis and taken from a core budget, rather than unstable ARIS top-slicing. This will allow for investment and stable staff recruitment and retention.

International Asset Confiscation

The HMCTS 2014–15 Trust Statement notes that £211 million of the uncollected total is deemed as 'hidden assets' against which no enforcement action is likely. Practitioners note that a high proportion of this is likely to be based overseas but is currently untraceable. A further £9 million of the outstanding debt is known to be overseas but currently deemed to be uncollectable. Outside of this total, an unquantified number of overseas assets will be currently subject to ongoing enforcement efforts.[57]

In practice, a financial investigator's efforts to trace assets across borders are often frustrated either by criminals leaving minimal traceable financial footprints or by the limitations of the international

52. It should be noted that the HMRC and NCA ACE-style teams are funded separately for those housed within the RARTs, with funding taken from the NCA/HMRC core budget.
53. Under the ARIS scheme asset-forfeiture receipts are paid into a central fund controlled by the Home Office. Police, law enforcement and the CPS then receive back a proportion of the funds to reinvest in further asset-forfeiture activity.
54. For their efforts, those bodies operating in the system are offered a share of the takings to reinvest in further initiatives to counter activity relating to the proceeds of crime.
55. Interview with officials, September 2015.
56. Criminal Justice Portal, 'Taking the Profit out of Crime – Assets Recovery Agency Goes Live', 24 February 2003, <http://www.cjp.org.uk/news/archive/taking-the-profit-out-of-crime-assets-recovery-agency-goes-live-24-02-2003/>, accessed 30 September 2015.
57. A total figure of overseas assets was not available to the author at the time of writing.

asset-tracing system[58] – including the lack of adequate tracing mechanisms, non-existent beneficial-ownership records in the host country and a lack of property-ownership registers.

With increasing knowledge of the workings of the POCA, criminals are frequently seeking to move their assets overseas to evade detection during confiscation investigations.[59] Even if these assets can be traced during the financial-investigation stage, enforcing these assets following the instatement of a confiscation order is a much more difficult prospect, especially where domestic legislation in the host country is lacking, or where mutual legal assistance (MLA[60]) treaties are not present.

In sum, while intelligence may suggest that assets exist overseas, finding them and enforcing orders to recover them is difficult, especially in instances when these are in countries with limited property registers and with limited capacity to trace assets, or where the political environment obstructs effective legal and judicial co-operation. These issues are not specific to developing countries; interviewees in this study suggested that, despite the legal frameworks being in place to encourage co-operation, even tracing assets believed to be held in EU countries can be problematic.[61] In recognition of this issue, efforts are being made at a practical and political level to increase the chances of successful international enforcement.

Asset-Recovery Advisors

At a practical level, the CPS is in the process of deploying six specialist asset-recovery advisors (ARAs) overseas. It is planned that these ARAs will be deployed to priority countries to work directly with local criminal-justice agencies in the asset-tracing process. The first ARAs are based in Spain and the UAE – two well-known destinations for British criminals to locate their assets.[62]

This move is welcome – often the barrier to international asset recovery is simply a lack of understanding of the local legislation and MLA processes – and is already having an effect. For example, in 2014 the CPS secured its first-ever enforcement for the recovery of assets in the UAE in support of an unpaid confiscation order. The work of the CPS ARA secured the sale of a £300,000 property owned by an individual convicted in 2011 of drug-importation offences. The confiscation order against the individual was therefore paid off in full.[63] Given the historic challenges of co-operating in this field with the UAE this success should be viewed as significant.

58. For example, some countries do not have property registers in place and/or do not have skilled financial investigators in place to assist with the tracing of assets overseas.
59. Interview with official, June 2015.
60. MLA is a method of co-operation between states for obtaining assistance in the investigation and prosecution of offences.
61. Interview with official, June 2015.
62. This view is based on the author's experience in the Financial Action Task Force (FATF) International Asset Tracing project during summer 2009.
63. Solicitors Journal, 'Crown Prosecution Service Completes First Ever Asset Recovery in UAE', 27 August 2015, <http://www.solicitorsjournal.com/news/crime/property/crown-prosecution-servicecompletes-first-ever-asset-recovery-uae>, accessed 27 October 2015.

However, while these postings are believed to be for an initial period of two years,[64] recent media reporting on the impact of the funding cuts to the CPS which represent 25 per cent of the organisation's budget, and the lack of protection from future cuts,[65] lead to questions on the viable longevity of this response.

Additionally, interviewees in this study cited the UK's track record in enforcing confiscation orders from other jurisdictions against assets in the UK as a potential issue.[66] Interviews for this paper suggested that a number of international partners view the UK response, via MLA channels, as slow and cumbersome. This may have an impact on the priority given by host nations to the requests of ARAs. This is an issue which must be considered when looking to solutions to the challenge of international asset-tracing to support UK enforcement cases.

International Asset-Sharing Agreements

Further to this initiative, the Treasury Minute responding to the 2013 NAO report notes that the Home Office plans to increase the use of asset-sharing agreements with priority countries.[67] These agreements essentially commit to sharing a proportion of the realised proceeds with the country which has assisted with their enforcement. The UK has asset-sharing agreements in place with a number of countries already, including the US, Canada and Jamaica.[68]

An increase in the numbers of asset-sharing agreements is a welcome addition to a range of measures aimed at creating a more conducive international environment for criminal confiscation. However, it relies on positive relations with, as well as good domestic legislation and practices in, the country in question. Moreover, criminals have an increasing tendency to hide their assets in jurisdictions which are either beyond the reach of UK diplomatic efforts or where domestic asset-tracing capabilities are limited.[69] In effect, they recognise the barriers that these present to the enforcement process.

The UK has a strong track record in delivering technical assistance to developing countries in relation to the framing of their domestic proceeds-of-crime legislation, and in relation to the skills base required to trace and confiscate assets. Assistance is provided through a range of fora, including the UK's international-aid programme.[70] Asset-sharing initiatives should therefore be complemented by efforts to increase technical assistance on asset-tracing to priority jurisdictions where capacity is low.

64. Interview with official, September 2015.
65. The CPS is funded by the Attorney General's Office (AGO). The AGO is not ring-fenced from the government's austerity cuts.
66. Interviews with officials, June 2015.
67. HM Treasury, *Treasury Minutes: Government Responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth Reports from the Committee of Public Accounts: Session 2013–14*, Cm 8871 (London: The Stationery Office, October 2013).
68. House of Lords, European Union Committee, 'Money Laundering and the Financing of Terrorism', Nineteenth Report of Session 2008–09, 2009, Chapter 3.
69. Based on author's previous experience.
70. Department for International Development, 'Caribbean Criminal Asset Recovery Programme', Development Tracker [GB-1-2-3478], <http://devtracker.dfid.gov.uk/projects/GB-1-203478/>, accessed 27 October 2015.

Recommendation 6: To complement asset-sharing agreements, the government should consider prioritising capacity-building across a range of priority jurisdictions in asset-tracing, through technical-assistance programmes. Consideration should be given to meeting the cost of this technical assistance from the government's overseas-aid budget given existing pressures on law-enforcement resources.

Role of the Private Sector

The skills needed to manage and enforce the recovery of complex assets, such as businesses, are not always available within government and law enforcement. For this reason, the subject of private-sector involvement in the enforcement process is one which is currently subject to considerable debate. In the context of this paper, the three areas which merit particular attention are:

- Proposals to sell off the £1.6-billion backlog to the private sector
- Use of enforcement receivers
- Proactive private-sector notification regarding confiscation orders.

Selling off the Debt

This author understands that, following the criticism received in the NAO report, one idea mooted within Whitehall was the potential to sell off a proportion of the £1.6-billion debt to private-sector firms to enforce and keep any returns. Reporting to Parliament on the plans to progress the NAO recommendations, the Treasury Minute states 'This will be achieved by operational agencies working together to analyse the stock of unenforced orders, *and through the Ministry of Justice exploring options for selling off unenforceable debt to the private sector* [Emphasis added].'[71]

Detailed examination of the legal criteria used to determine the level at which a confiscation order is set demonstrates that a large proportion of the uncollected amount is not related to an evident asset base.[72] For this reason, this study concludes that the selling off of the debt is an unrealistic prospect, which, once analysed by private-sector partners, would not provide a reasonable expected return for the investment. Furthermore, were the debt to be sold, those buying the debt would lack the legal and investigatory powers available in the public sector, such as access to POCA investigatory powers or MLA channels, to aid enforcement.

The majority of interviewees in this study saw this proposal, on these grounds, as wholly unachievable and questioned the value for the private sector in taking on debt that UK authorities with the full weight of the law behind them had been unable to enforce. Respondents in this study noted that, since making this statement to Parliament, the concept had not progressed. No information was available during this study which supported the viability of this concept in practice.

71. HM Treasury, *Treasury Minutes: Government Responses on the Forty Fifth to the Fifty First and the Fifty Third to the Fifty Fifth Reports from the Committee of Public Accounts: Session 2013–14*, Cm 8871 (London: The Stationery Office, 2014).
72. Helena Wood, 'Enforcing Confiscation Orders'.

Use of Enforcement Receivers

Where an individual subject to a confiscation order has proved unwilling to settle a debt in the time allotted by the order, one of the few means available to the authorities to seek to collect the order is through the appointment of external enforcement receivers. Enforcement receivers may also be useful in cases where there are complex businesses or properties to manage in the enforcement process, as the receiver may have the specialist skills available to achieve the best value. Under the POCA, the prosecutor has the power to apply to the court for the appointment of an enforcement receiver – a privately contracted individual, often aligned to one of the larger accountancy firms, who has the power to take control of, and disperse assets to, the value of the confiscation order. The enforcement receiver then remits the value of the assets to the court, after taking payment for his or her services from the proceeds.

Interviews for this paper suggest that authorities are often hesitant to use enforcement receivers, even when these may be the only means left available to enforce the confiscation order following the serving of the default sentence.[73] This hesitance is thought by a number of practitioners to be due to the costs associated with their use. Private-sector interviewees noted that the reluctance to apply for the appointment of an enforcement receiver at an early stage can lead to the dissipation or depreciation of available assets on which the confiscation order was originally based, leaving them with limited options once appointed.

The 2013 NAO report highlighted that in 2012, thirteen enforcement receivers were used in 112 cases, collecting £15.1 million at a cost of £3.2 million.[74] The NAO was unable, however, to assess whether the use of enforcement receivers offered 'value for money' in relation to other enforcement options and criticised the CPS for the absence of a strategy on receivers. The CPS has now published a Receivership Strategy which acknowledges that 'private sector receivers bring specialist skills and experience that may not be generally available in the public sector'.[75] The guidance states that 'the CPS will generally only apply for the appointment of an enforcement receiver if the convicted defendant cannot or will not voluntarily realise his assets and the sale of the assets will cover the receivers [*sic*] costs.'

It also acknowledges that the decision on whether to appoint an enforcement receiver is not solely a balance-sheet concern; it notes that 'value for money is not just a question of how much may be recovered, but should also take into account issues, such as harm and crime reduction and the Government and CPS strategies on serious and organised crime and asset recovery.' This point is pertinent: achieving the policy aim of 'crime shouldn't pay' by taking the proceeds of crime out of the hands of the criminal should be at the forefront of decision-making when looking at whether to appoint an enforcement receiver in cases where the skills are not available in-house – rather than whether the appointment returns a 'profit' to the exchequer.

73. Interviews with officials, June and July 2015.
74. National Audit Office, *Confiscation Orders*, p. 34.
75. Crown Prosecution Service, 'Proceeds of Crime', Chapter 5, <http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/index.html#a78>, accessed 1 October 2015.

It is too early to consider what impact the guidance is having on the levels of appointments of enforcement receivers and, if so, whether this impact is desirable. This, however, should be a future consideration.

Recommendation 7: The Criminal Finances Board should commission a study, once the new strategy has had time to take effect, to examine whether the new CPS Receivership Strategy is having a positive effect on the use of enforcement receivers, and whether this use is in line with the guidance given that case-selection decisions should include consideration of harm and crime reduction.

Proactive Private-Sector Notification Regarding Confiscation Orders

Given the considerable time it takes between initiating a confiscation investigation and the final issuing of the confiscation order (often years), it is difficult for private-sector institutions to keep track of case progress – this is particularly pertinent for them when a restraint order is in place under which they are holding assets. There is currently no proactive process for notifying the private sector that a confiscation order has been made. Although the issuing of an order is a public matter, these are notified on an individual, court-by-court basis; there is no central database which can be checked or data-mined.

Interviews with individuals working within the banking sector suggest that many of the larger institutions may be willing to use their technical abilities to run systematic checks on confiscation orders to aid authorities to keep track of assets subject to restraint. The lack of such a process misses a potentially valuable intelligence stream and risks restrained assets being missed during the enforcement process.[76]

To help achieve this aim, lessons can be learnt from other areas of the court service: the process by which County Court Judgments are available in a public register and routinely used by credit-reference companies as a source of information on the credit-worthiness of an individual is an example. This process is managed by Registry Trust, a not-for-profit private company, established by the Register of Judgments, Orders and Fines Regulations 2009, which maintains the public register. Maintaining a similar public register of unpaid confiscation orders may offer potential to harness the capabilities of regulated-sector institutions to highlight potential funds and assets on a time-sensitive basis, although this would have to be properly managed to ensure its compliance with the principles of the Rehabilitation of Offenders Act 1974.

Recommendation 8: The Criminal Finances Board should explore the potential for maintaining a central public register of unpaid confiscation orders. It should consider making the register available in a format which is easily accessible and searchable by private-sector institutions.

76. Even where assets have been subject to a restraint order and the bank are holding these funds on this basis, there is still a lack of process to highlight to those banks the existence of the confiscation order. This process may improve under the current ACE team model.

Summary

In sum, a number of welcome steps have been taken to address some of the systemic and structural issues that have previously hindered the effective operation of the enforcement process. These measures are a step on the road towards ensuring the enforcement process is viewed as an intrinsic, rather than optional, part of the confiscation-orders regime. However, the long-term basis and impact of some of these measures are yet to be seen. The Criminal Finances Board has a role to play in ensuring that these efforts are put on a long-term footing and that their impact is regularly reviewed.

Conclusion

The NAO's criticisms of the confiscation-order regime, while missing the wider value to criminal justice in some regards, have provided a useful and timely catalyst for the government to reassess the priority given to the enforcement process and its centrality to the success of the regime.

This paper argues that the legislative and systemic changes made by the government in 2014 and 2015 go further than any previous effort to ensure that the enforcement of orders is given the priority it is due. However, these efforts should be seen as a starting point and not as an end. Analysis demonstrates that some of the amendments to the system made under the Serious Crime Act 2015 stand up to critical analysis and are welcomed by practitioners; others, however, lack a firm evidence base.

Some additions, such as the ability to introduce third-party interests during confiscation hearings and the extension of POCA investigatory powers to the enforcement stage itself are welcome and may have a significant impact on the process. Furthermore, the clarification in primary legislation of the introduction of judicial discretion may prevent orders being set at levels which are inappropriate for the circumstances; this has the unintended, but welcome, potential consequence of making enforcement more achievable.

In relation to incentives to pay, the picture is more mixed. On the one hand, the introduction of compliance orders, while untested, introduces a level of creative thinking to the process and, subject to their proper use and policing, offers an arguably stronger incentive to comply than measures such as default sentences and interest penalties.

The case for the increase in the default sentences for non-payment is not certain and the evidence base for the change is minimal. This paper recommends further work to increase understanding of what incentivises payment to ensure that any future policy or legislation in relation to this is evidence-based rather than speculative.

Furthermore, legislative changes relating to the evidential threshold for restraint orders do not solve the problems according to the interviews conducted for this study. Respondents in this study widely questioned whether this measure would have an effect, and pointed to both case law and institutional risk appetite as two possible reasons for the low number of restraint orders. This paper recommends further work to understand their impact and the barriers to their wider use.

Perhaps most importantly, while the introduction of the ability to write-off orders relating to deceased offenders is a pragmatic and welcome measure in a politically sensitive area, arguably it is insufficient and fails to address other practicalities. While mindful of the potential messages that may be inadvertently given to the criminal fraternity, to ignore the issue and to allow the uncollected debt figure (in particular the interest) to continue to mount is a mistake. Only by making difficult decisions on this matter will the front-line staff be able to concentrate on those orders which are achievable, rather than being distracted by those which are not.

Changes in the legislative landscape are, however, only one part of the shift in emphasis towards the enforcement process, and these have been complemented by changes in the systemic and structural landscape. The most recent round of systemic changes to the enforcement process, covering domestic and international co-ordination and the use of the private sector, is welcome insofar as these changes recognise the centrality of the enforcement process to the success of the overall regime. However, there are aspects of these changes which require wider consideration.

In relation to domestic co-ordination, particular credit should be given for the establishment of the strategic-level co-ordination mechanism of the Multi-Agency Enforcement Group and, at a practical level, for the ACE teams which are already having an impact on the number of orders enforced. Past experience of the Enforcement Taskforce, as highlighted in this paper, suggests that these teams should be a permanent fixture of the enforcement landscape. However, concerns have been raised that the funding model for the ACE teams is unstable and is hampering efforts to recruit and retain the best staff. This paper recommends putting this model on a proper footing.

At an international level, in recognition of the increasing multijurisdictional nature of asset confiscation, the establishment of overseas CPS asset-recovery advisors is a positive move. However, this study is concerned that the further 25 per cent cut to the CPS budget may have an impact on the sustainability of this initiative.

Within the diplomatic sphere, the extension of asset-sharing agreements to a wider set of countries sets a positive context for co-operation. They are, however, one means of increasing the willingness of various parties to co-operate in this field. Increasingly, criminals are moving their assets to countries outside of the diplomatic reach of the UK or to areas where the local technical and legislative ability to trace and seize assets is more limited. On this basis, this paper proposes that the UK should extend its programme of overseas technical assistance to include a specified set of priority countries.

This paper also highlights the growing debate on the role of the private sector in the enforcement process. Based on the framing of the law and knowledge of the composition of the £1.6 billion in uncollected orders, this paper concludes that proposals to sell off the debt are impractical and uncommercial. However, it is noted that there is a need to reconsider the utility of enforcement receivers and their unique ability to aid authorities in enforcement. It further recommends creating a publicly available database of unpaid orders to allow the private sector to keep track of assets which are subject to restraint.

Looking at the legal and systemic changes, it is clear that the government is learning some of the lessons of the early operation of the POCA confiscation-orders regime. The extent to which further changes are predicated on the continued parliamentary and media spotlight remains to be seen. What is clear, however, is that the Criminal Finances Board has a role to play in keeping momentum. There has been strong progress in recent years, yet the reform process is by no means complete.

About the Author

Helena Wood is an Associate Fellow at RUSI. Her research focuses on the efficacy of the powers of the Proceeds of Crime Act 2002 in the fight against organised crime and on the UK's anti-money-laundering architecture and its compliance with the Financial Action Task Force standards.

Now working as an independent consultant on criminal-justice matters, Helena has over a decade of public-sector and law-enforcement experience, with a particular focus on the proceeds of crime and international law-enforcement co-operation.

During her public-service career, Helena had a variety of intelligence, strategy and policy roles in a number of UK government departments, including the National Crime Agency, the Serious Organised Crime Agency, the Treasury and the Charity Commission.

Appendix F

Natalie Skead *et al*, *Pocketing the Proceeds of Crime: Recommendations for Legislative Reform* (Canberra: Australian Institute of Criminology, 2020).

CRIMINOLOGY
RESEARCH GRANT

Pocketing the proceeds of crime: Recommendations for legislative reform

Professor Natalie Skead
Associate Professor Hilde Tubex
Professor Sarah Murray
Dr Tamara Tulich

Report to the Criminology Research Advisory Council
Grant: CRG 27/16–17

July 2020

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This research is current as at December 2018.

Acronyms and abbreviations

CARA NSW	*Criminal Assets Recovery Act 1990* (NSW)
CPCA NSW	*Confiscation of Proceeds of Crime Act 1989* (NSW)
CPCA Qld	*Criminal Proceeds Confiscation Act 2002* (Qld)
CPCA WA	*Criminal Property Confiscation Act 2000* (WA)
DPP	Director of Public Prosecutions
MDA WA	*Misuse of Drugs Act 1981* (WA)
NSW CC	New South Wales Crime Commission
NSW DPP	NSW Director of Public Prosecutions
NSW ODPP	Office of the Director of Public Prosecutions (NSW)
Qld ODPP	Office of the Director of Public Prosecutions (Queensland)
Queensland CCC	Crime and Corruption Commission Queensland
SDOCO	serious drug offender confiscation order (Queensland)
UWA	University of Western Australia
WA CCC	Western Australian Corruption and Crime Commission
WA ODPP	Office of the Director of Public Prosecutions for Western Australia

Abstract

This project, undertaken in 2017 and 2018, examined the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective. The study was undertaken in three Australian jurisdictions—Western Australia, New South Wales and Queensland—and looked into the attitudes to and impact of legislation related to confiscating the proceeds of crime. Forty interviews were conducted with a range of legal and government stakeholders and members of the public directly or indirectly involved in or affected by the operation of confiscation legislation. The report outlines a suite of best practice recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives.

Executive summary

Serious drug-related and organised crime poses considerable economic, political and social threats to Australian society. Legislation confiscating the proceeds of crime is an increasingly important tool in the global fight against serious drug-related and organised crime. Appropriately framed proceeds of crime legislation can deter and prevent crime, offset the costs of crime prevention and of policing, and recompense victims of crime and the community more broadly.

However, judges and legal commentators have raised concerns that Australian proceeds of crime laws do not strike the right balance between crime prevention and deterrence and the maintenance of legal principles and protections.

This study addresses these concerns through:

- a comparative doctrinal legal analysis of proceeds of crime legislation in Western Australia, New South Wales and Queensland:
  - *Criminal Property Confiscation Act 2000* (WA) (CPCA WA);
  - *Confiscation of Proceeds of Crime Act 1989* (NSW) (CPCA NSW);
  - *Criminal Assets Recovery Act 1990* (NSW) (CARA NSW); and
  - *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA Qld);
- a review of the existing criminological and legal literature on proceeds of crime legislation; and
- a qualitative empirical study involving interviews with key stakeholders in Western Australia, New South Wales and Queensland to capture the attitudes to and effects of proceeds of crime legislation in these jurisdictions.

Research aims

This project examines the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective. It formulates recommendations for ensuring that such legislation effectively targets those engaged in serious drug-related and organised crime without undermining accepted legal principles and protections. It produces a suite of recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives.

Findings

A number of common themes emerged from the legal and criminological analyses and from the empirical data collected. Generally, it was considered that confiscation of proceeds of crime legislation is an important component of a jurisdiction's legislative armoury against crime. However, it is clear from the project that there is a need for reform in a number of areas.

Non-conviction-based civil proceedings

All Australian jurisdictions provide for some form of non-conviction-based confiscation that is not dependent on criminal prosecution. Without exception, all confiscation proceedings are civil in nature with a civil standard of proof and civil rules of evidence.

The study's empirical data reflected the strong commentary in the literature against non-conviction-based civil confiscation that apply a lower standard of proof and shift the onus to the defendant in proceedings. Despite this, interviewees generally considered the combination of conviction-based and non-conviction-based confiscation to be necessary for the effective operation of confiscation regimes.

Recommendations:

Retain non-conviction-based scheme for unexplained wealth, but require evidence linking the defendant to some confiscable criminal activity, as in the NSW and Queensland schemes.

Retain non-conviction-based schemes for other categories of confiscation but amend legislation such that the legal burden of proof remains with the Crown.

Executive discretion

In all the confiscation regimes investigated, the decision whether to confiscate property lies with the relevant enforcement agency—the police, Office of the Director of Public Prosecutions, or crime commission, as the case may be.

Perhaps of greatest concern are the provisions in Western Australia and Queensland that provide for automatic confiscation in certain circumstances. In these instances, final confiscation is a matter of executive discretion, with the role of the judiciary being simply to declare as a matter of fact that the property confiscated.

Recommendations:

Provide for the executive discretion as to whether to institute confiscation proceedings to be guided by considerations of public interest.

Integrate adjudication by courts into each stage of the confiscation process, including specifically at the final stage of confiscation.

Judicial discretion

A key concern emerging from the study was the absence of judicial relief against confiscation in some circumstances. Judicial avenues for relief are imperative on rule of law grounds to appropriately supervise prosecutorial and executive confiscation discretion and to balance the impact of the legislation against its clear purposes.

The Queensland regime, for example, includes a broad judicial discretion to refuse to make any order on public interest grounds. Similar provisions exist in New South Wales. By contrast, under the WA drug trafficker confiscation scheme, if the defendant is declared a drug trafficker, all of their property is automatically confiscated. The court must make an order to this effect and has no discretion in this regard.

While there is a limited hardship provision incorporated into the crime-used property confiscation provisions in the CPCA WA, there is no judicial discretion embedded in the other confiscation categories (unexplained wealth, crime-used property substitution orders, crime-derived property confiscations, criminal benefits confiscations and drug trafficker confiscations). While this omission is seemingly intentional, the inclusion of a hardship provision only for crime-used property confiscations and not for other forms of confiscation is capricious and arbitrary.

Recommendation:

Introduce, at every stage of the confiscation process and into all categories of confiscation, a guided judicial discretion taking into account excessive disproportionality, severe hardship and the public interest.

Offences triggering confiscation

Without exception, Australian legislation regulating the confiscation of proceeds of crime was introduced to address serious drug-related and organised crime. However, the Queensland and WA schemes cast the confiscation net far wider, potentially capturing lower-level criminal activity. In contrast, confiscation under the CARA NSW targets only more serious criminal activity.

When considering drug trafficker confiscations, interviewees expressed concerns about the quantity of a prohibited drug that would trigger a drug trafficker declaration and consequent confiscation. Similar concerns were expressed in relation to cannabis.

Recommendations:

Limit the offences triggering confiscation to those criminal activities that the legislation was initially directed at: serious drug-related offences, organised crime, and terrorism. This is best done by providing an exhaustive list of confiscable offences, as in the CARA NSW.

Review the quantities of prohibited drugs enlivening the drug trafficker confiscation provisions.

Definition of crime-used property

New South Wales, Queensland and Western Australia each provide for the confiscation of crime-used property (termed 'tainted property' under the CPCA Qld). In Queensland and Western Australia, the definition is wider than in New South Wales and includes property intended to be used in or in connection with an offence or part of an offence (s 104 (1)(a) CPCA Qld; s 146(1)(a) CPCA WA).

Courts have adopted a narrow interpretation of 'crime-used property', which requires sufficient proximity between the act or omission and the commission or facilitation of the confiscation offence. Despite this apparently narrow construction of crime-used property, the term is capable of very broad application.

Recommendations:

Narrow the definition of crime-used property to property that has a substantial connection to the criminal activity in question.

Provide for the confiscation of only that portion of crime-used property actually used in connection with the offence.

Allow for the exercise of judicial discretion in making a confiscation order, based on proportionality between the value of the confiscated property and the severity of the offence.

Disproportion, arbitrariness and lack of parity

Crime-used property confiscations in all three jurisdictions provide a stark illustration of the sometimes disproportionate and arbitrary operation of the legislation. The definition of crime-used property permits the confiscation of property that may have a tenuous link with relevant criminal activity. Moreover, the value of the property confiscated often has no bearing on the severity of that activity and can vary markedly from case to case. In Queensland and New South Wales, confiscation provisions are tempered by a public interest discretion. This is not the case in Western Australia.

The drug trafficker confiscation provisions in Western Australia provide another illustration of the potentially disproportionate, arbitrary and harsh operation of the scheme.

Recommendations:

Allow for a judicial discretion in making orders under the legislation, based on hardship and proportionality between the value of the property and the severity of the offence.

Ensure drug trafficker confiscation provisions require a substantial connection between the drug trafficking and the confiscable property, whether as crime-used property, crime-derived property, or criminal benefits.

Constitutional validity

Interviewees did not express significant constitutional concerns with the New South Wales, Queensland or WA confiscation schemes. One potential area of concern, however, is the application of some deeming provisions. Section 157(1)(d) of the CPCA WA, for example, provides that a person is taken to have been convicted of a confiscation offence even if 'the person was charged with a confiscation offence but absconded before the charge is finally determined'. Section 160 defines 'absconds' to include the situation where the person dies. There is no standard of proof to be met in relation to commission of the offence, which is deemed (vs CPCA NSW ss 5(1)(d), 16(b)). This means, for example, that a criminal benefits declaration can be made under s 16 with the deemed conviction also meaning, by the operation of s 16(2), that 'the respondent is conclusively presumed to have been involved in the commission of the offence'.

Recommendations:

Allow a party to lead evidence to refute what has been statutorily deemed.

Amend the burden of proof in deeming a person to have been convicted of an offence to be at the criminal standard, or, at the very least, at the civil standard.

Implementation of unexplained wealth confiscations

The difficulty and disparity in the success of implementing unexplained wealth schemes across Australia led to calls by a few interviewees for a national unexplained wealth scheme. This, however, has proved politically intractable. The architecture for such an arrangement is now in place through the National Cooperative Scheme on Unexplained Wealth set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). However, to date, only New South Wales has referred the necessary powers to allow it join the scheme and to work alongside the Commonwealth, the Northern Territory and the Australian Capital Territory.

What clearly emerged from many interviews was that success in unexplained wealth confiscation requires significant resourcing and skills, specifically in forensic accounting.

Recommendations:

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

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

Until then, in jurisdictions not currently part of the scheme, appoint and adequately resource a dedicated, multidisciplinary independent expert body to implement, investigate and enforce the existing schemes.

Third party interests

The third party protection provisions in New South Wales and Queensland are complex and inconsistent, but they are largely effective. This is not the case in Western Australia.

Significant concerns in this regard emerged from the empirical study, particularly in relation to the impact of confiscation on innocent partners and dependent children.

While some interviewees considered such consequences to be acceptable 'collateral damage', the overriding impression was that this is a flaw in the legislation that must be addressed. Similar concerns are evidenced in the case law and commentary.

Recommendations:

Include effective and appropriate third party interest exclusion provisions that apply across the board to all types of restraint and confiscation.

Allow for a guided judicial discretion, taking into account hardship to third parties and the impact of the order on third party property rights.

Accurately define the property targeted by the legislation as being interests in property rather than the item of property itself, and then clearly and correctly identify it as such throughout the operative sections of the legislation.

Release of property to cover legal costs

The use of restrained funds for engaging legal representation has been an ongoing concern in the literature. This concern was reflected in the findings of the empirical study.

Each confiscation regime studied differs in its approach on this issue. However, all require—under either case law or applicable statutory provisions—court proceedings to seek the release of restrained property for the purposes of covering legal expenses.

Recommendation:

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

It is noted that on 19 September 2018, the WA Attorney General, John Quigley, announced a review into the CPCA WA. The terms of reference of the review are relevant to several of the findings and recommendations detailed in this report. The authors made a submission to the review based on these findings and recommendations.

Introduction

Serious drug-related and organised crime poses a significant threat to Australia's national security, economy, and the community more generally. The Australian Crime Commission reports that:

> Organised crime is big business, with profits from transnational organised crime for 2009… around US$870b—an amount equal to 1.5 percent of global GDP at that time. This figure has almost certainly grown since then (2013: 5).

The Australian Crime Commission estimates that crime costs Australia nearly $47b a year (Smith et al. 2014: 76), with the cost of serious and organised crime estimated to be $36b per annum (Australian Crime Commission 2015a, 2015b). Successive Australian governments have affirmed the broad impact of such criminal activity, with the *National Organised Crime Response Plan 2015–2018* (Australian Government 2015: 2) stating '[s]erious and organised crime affects our community, economy, government and way of life'.

Legislation confiscating the proceeds of crime is perceived as an increasingly important tool in the global fight against serious drug-related and organised crime—for example, by disrupting criminal activity and impeding its financing. At the international level, this is reflected in conventions requiring state parties, including Australia, to enact domestic confiscation legislation and to suppress the financing of terrorism (see *United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substance* (1988); *United Nations Convention for the Suppression of the Financing of Terrorism* (1999); *United Nations Convention against Transnational Organized Crime* (2000); UNSCOR 2019). However, the United Nations Office on Drugs and Crime (2011: 5) estimates that, worldwide, '[l]ess than 1 per cent of global illicit financial flows are currently seized and frozen' pursuant to proceeds of crime legislation.

Australia, like many other countries, has introduced a raft of proceeds of crime confiscation statutes, primarily aimed at stripping those involved in criminal activity of any ill-gotten gains and of any property used in carrying out that activity. Each jurisdiction in Australia has legislation confiscating the proceeds of crime (see Table A1 in *Appendix A: Detailed legislative mapping*). Available statistics indicate that around $800m in criminal proceeds have been recovered between 1995–96 and 2013–14 under all Commonwealth, state and territory legislation—an average of approximately $44m per annum (Smith & Smith 2016). This is significantly less than the $36b estimated annual cost of serious drug-related and organised crime (Australian Crime Commission 2015a, 2015b).

Criminal proceeds confiscation legislation is intended both to stop criminals profiting from their offending and to incapacitate criminal activity by targeting its economic base—that is, by eradicating the working capital available and necessary to finance further criminal activity (Skead 2013; Skead & Murray 2015; see also Fisse 1992; Thornton 1994). In addition, the legislation creates an income pool for offsetting the costs of combating crime, and it results in at least some financial benefit to victims of crime and the community more broadly. This, together with the perceived effectiveness of this criminal justice tool as a means of deterring crime, makes the proliferation of confiscation legislation inevitable. In the current political climate, there is a strong appetite for robust confiscation legislation (Skead & Murray 2015).

However, there are concerns about the wide net such robust legislation inevitably casts and the implications this has in many instances: violating civil liberties, including fundamental property rights, and disregarding due process, natural justice and fairness. Confiscated property—real or personal—vests in the Crown. There is therefore a risk that confiscation legislation may affect the rights of third parties with an interest in confiscated property—such as dependent children, spouses, mortgagees, lessees, lessors, and co-owners. This proprietary impact is discordant with the objectives of the legislation. Furthermore, the reach of Australian proceeds of crime legislation may extend beyond the confiscation of property that is the proceeds of crime: it may result in the confiscation of legitimately acquired property. For example, in *Queensland v Henderson* (2011) 218 A Crim R 111, at [65], Keane J noted that 'the [Queensland] Act… operate[s] to authorise the forfeiture of property which is not derived from criminal activity by the current owner of the property'.

This project confronts the complex and under-researched challenge of tackling crime through property confiscation legislation from a legal and a criminological perspective, and seeks to formulate recommendations for ensuring that such legislation effectively targets those engaged in crime without undermining accepted legal principles and protections.

Background and overview of Australian proceeds of crime confiscation schemes

Australia's first confiscation regime was introduced into the *Customs Act 1901* (Cth) in 1979. Division 3 of part XIII of that Act established a confiscation regime allowing the imposition of pecuniary penalties against those who engaged in prescribed narcotic dealings (Australian Law Reform Commission 1999). The wide-scale introduction of comprehensive proceeds of crime legislation followed from the mid–1980s, as part of concerted efforts to curb the exploding drug trade taking hold in Australia.

Legislation authorising the confiscation of the proceeds of crime following a criminal conviction emerged in Australian jurisdictions in the 1980s. These changes were in response to international efforts to counter transnational organised crime and to a series of domestic royal commissions into drug trafficking and organised crime (see, for example, Freiberg & Fox 2000; Skead & Murray 2015). There were compelling policy reasons for this legislation. In the second reading speech on the first Commonwealth Proceeds of Crime Bill 1987, the then Deputy Prime Minister and federal Attorney-General, Mr Lionel Bowen stated that:

> The Proceeds of Crime Bill provides some of the most effective weaponry against major crime ever introduced into this Parliament. Its purpose is to strike at the heart of major organised crime by depriving persons involved of the profits and instruments of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive—profit—and prevent the re-investment of that profit in further criminal activity (1987: 2314).

The introduction of conviction-based proceeds of crime legislation by the Commonwealth, states and territories was not uniform (see Table A1 in *Appendix A: Detailed legislative mapping*). This led to a highly complex and unsatisfactory web of legislation dealing with proceeds of crime. The complexity of these regimes has increased with subsequent reform, which has 'resulted in progressively more expansive legislation' (Skead & Murray 2015: 463).

From the late 1980s onwards, after a number of inefficiencies were identified with conviction-based regimes, most Australian jurisdictions augmented their criminal confiscation regimes with non-conviction-based civil confiscation schemes (see, for example, Australian Law Reform Commission 1999; Freiberg & Fox 2000; Clarke 2002; Morris 2001; Lusty 2002). Non-conviction-based confiscation schemes allow for the confiscation of property in the absence of a criminal conviction, on the civil standard of proof, and 'on the basis of "unlawful" rather than "criminal" conduct' (Freiberg & Fox 2000: 242). All Australian jurisdictions provide for some form of non-conviction-based confiscation.

The most recent innovation in proceeds of crime legislation—introduced first in Western Australia in 2000—is the confiscation of unexplained wealth. This form of non-conviction-based confiscation goes a step further (see Parliamentary Joint Committee on Law Enforcement 2012: 9). Unexplained wealth provisions require a person who is suspected of having wealth exceeding their lawfully acquired wealth to pay to the Crown the value of that excess wealth. Typically, unexplained wealth provisions reverse the onus of proof to require the person responding to an unexplained wealth application to prove that their property and assets have been lawfully obtained. These features result in 'a greater likelihood that assets of crime will be confiscated' (Parliamentary Joint Committee on the Australian Crime Commission 2009: [5.50]). Unexplained wealth confiscation regimes now exist in all Australian jurisdictions except for the Australian Capital Territory.

While originally designed to combat drug trafficking, proceeds of crime legislation is also increasingly perceived as crucial to countering terrorism by freezing and confiscating property that is used in, for use in or derived from terrorism offences (see, for example, Explanatory Memorandum to the Proceeds of Crime Bill 2002 (Cth); Michaelson & Goldbarsht 2018). Additionally, there is a growing awareness in Australia and internationally of the connections between organised crime and terrorism (Australian Criminal Intelligence Commission 2017; Smith et al 2010; UNSCOR 2014; UNSCOR 2015a; UNSCOR 2015b; UNSCOR 2019), albeit that the exact links are 'are yet to be fully understood' (Ochoa 2018: 71).

Categories of confiscation

The circumstances in which property, real or personal, may be confiscated under Australian proceeds of crime legislation generally fall into four categories (see Skead 2013: 296; Skead 2016: 27):

- crime-used property confiscation (conviction-based, non-conviction-based and hybrid regimes)—where property is used in or in connection with the commission of a prescribed offence;
- crime-derived and criminal benefits property confiscation (conviction-based and non-conviction-based)—where property is derived from the commission of a specified offence, such as literary proceeds, or obtained by a person involved in the commission of a prescribed offence;
- unexplained wealth confiscation (non-conviction-based)—where a person's wealth exceeds the value of their lawfully acquired property; and
- drug trafficker confiscation (conviction-based and non-conviction-based)—where a person is declared or taken to be a declared drug trafficker.

All of these confiscations are available in five out of the nine Australian jurisdictions (see Table 1). However, proceeds of crime legislation in the remaining four jurisdictions do incorporate at least some of these confiscation categories.

Table 1: Confiscations available by jurisdiction

Jurisdiction	Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
Cth	✓	✓	✓	
NSW	✓	✓	✓	✓
Vic	✓	✓	✓	✓
Qld	✓	✓	✓	✓
WA	✓	✓	✓	✓
SA	✓	✓	✓	✓
Tas	✓	✓	✓	
ACT	✓	✓		
NT	✓	✓	✓	✓

Current state of the literature

There is a significant body of Australian and international research on the confiscation of property under proceeds of crime legislation (see, for example, Thornton 1994; Bagaric 1997; Bell 1999, Clarke 2002, 2004; Fisse 1992; Freiberg & Fox 1992, 2000; Gray 2012a, 2012b; King, Walker & Gurulé 2018; Moffitt 1985; Skead 2013, 2016; Skead & Murray 2015; Smith et al 2010; Smith & Smith 2016; Smith 2018, and the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union 1984, the Costigan commission). Much of the existing scholarship focuses on the sociological and criminological aspects of the regimes, including whether such legislation operates as a successful deterrent against the commission of targeted crime, the impact of the legislation on law enforcement practices, and how to evaluate the effectiveness of the regimes, particularly with limited data available and the staggered reform and implementation processes across Australia (see, for example, Bartels 2010; Fisse & Fraser 1993; Fraser 1990b; Freiberg & Fox 1992; Goldsmith, Gray & Smith 2014; Smith & Smith 2016). Recent work has examined how to improve the effectiveness of unexplained wealth confiscation regimes by removing or reducing legal and procedural impediments (Smith & Smith 2016).

Since the 1980s, legal commentators have identified concerns with the impact of Australian proceeds of crime legislation on individual rights, on relatives and innocent third parties, and on established legal principles; in particular, the principle of proportionality in sentencing and the presumption of innocence (Bagaric 1997; Clarke 2004; Croke 2010; De Brennan 2011; Feldman 1989; Fisse 1989a, 1989b; Fraser 1990b; Freiberg 1992). Commentators have also voiced disquiet about the retrospective operation of some confiscation legislation (Skead & Murray 2015) and about the potential impact of the regime in effectively limiting access to legal representation, in particular through the inability for a person to use confiscated funds to engage legal representation (Fisse 1989a; Freiberg 1992; Carew & Ollenburg 2006; Edwards 1999; Temby 1989; Thornton 1992). More recently, scholars have amplified concerns about the extension and 'normalisation' of conviction-based regimes to include non-conviction-based frameworks (De Brennan 2011), new species of confiscation orders, and 'superannuation orders' (Freiberg & Pfeffer 1993), and as a civil regulatory response to tax evasion (Leighton-Daly 2013a, 2013b).

The 'civilisation' of confiscation

There is an enduring debate in the literature about the appropriateness of using civil confiscation as an adjunct to or instead of measures available under the criminal law. In the early 1990s, Freiberg observed:

> Over recent years it has become evident that crime is being 'civilised'. By this I mean that there is under way a process by which the civil law is used in addition to, or instead of, the criminal law, or where civil procedures are integrated into criminal prosecutions. In practice, 'civilisation', represents a process of stripping citizens of their rights (1992: 50).

Gray (2012a) argues that non-conviction-based confiscation orders are in fact 'criminal' not 'civil' in nature, and that the enhanced procedural and evidentiary safeguards of the accusatorial process should therefore apply—such as the burden of establishing proof beyond reasonable doubt and the presumption of innocence (see also Feldman 1989; Fisse 1989a, 1989b, 1992; Freiberg 1992; Skead and Murray 2015: 464).

Unexplained wealth confiscation is a particularly concerning example (Clarke 2004:284). The Commonwealth Parliamentary Joint Committee on Law Enforcement reported:

> Unexplained wealth laws are more intrusive than proceeds of crime laws because, in their purest form, they do not rely on prosecutors being able to link the wealth to a criminal offence, even at the lower civil standard (2012: 9).

These concerns are not universally held. For example, Bell (1999) suggests the arguments about the consequences of 'civilisation' on individual rights hold little weight as there is no liberty aspect to civil forfeiture proceedings. In a similar vein, Lusty (2002) argues that civil forfeiture regimes that reverse the onus of proof or incorporate a rebuttable presumption requiring a defendant or third party to demonstrate that property in question has been lawfully acquired are necessary, justifiable, and consistent with the presumption of innocence. For Lusty (2002), civil forfeiture is justifiable in principle, since it provides a civil remedy to society to compensate for the harm caused by such activity and to redress unjust enrichment.

The use of civil confiscation has clear benefits for law enforcement and prosecutorial authorities (Skead & Murray 2015; Campbell 2010). The civil nature of confiscation proceedings means that the civil standard of proof and civil rules of evidence apply—'necessarily making the Crown's job in securing a confiscation all the easier' (Skead & Murray 2015: 465). This is only enhanced in unexplained wealth confiscations that also shift the burden of proof from the Crown to the defendant. In the terrorism context, civil forfeiture regimes have the benefit of reducing the investigatory and prosecutorial challenges of establishing terrorism offences or a connection to terrorist activity to the criminal standard of proof (Bell 2004). This includes the increased reliance on national security intelligence—and, indeed, criminal intelligence, in the organised crime context—that may be incapable of supporting a prosecution or being used as evidence in a criminal trial (Zedner 2014; see also Roach 2010; Tulich 2012; Walker 2005). In relation to organised crime, Smith and Smith explain:

> Unexplained wealth legislation is viewed as the best way of preventing further crime. It enables law enforcement to attack the profit of criminal networks without needing to demonstrate a causal connection between the offences and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offence was committed. However, it is necessary to be mindful of the rights arguments related to unexplained wealth legislation, particularly if the Australian approach becomes more effective in the future (2016: 58).

At the same time, there is an acknowledgement in the literature of the practical challenges faced by law enforcement agencies and prosecutors in investigating criminal profits and ownership of assets in crime-derived and unexplained wealth confiscations. These matters require expertise beyond the investigating of crimes and proving of elements of an offence (Goldsmith, Gray & Smith 2014).

The consequences of 'civilisation' extend beyond law enforcement prerogatives and the rights of a particular individual who is subject to an order. For example, De Brennan (2011: 357) describes the impact of this 'function creep' on blameless relatives and other third parties.

Proprietary consequences: Innocent third parties

There is, however, little research on the proprietary consequences of confiscation legislation (Skead 2013, 2016; Skead & Murray 2015). While it is expected and accepted that proceeds of crime legislation will affect the property rights of criminals, by vesting title in their confiscated property in the Crown, there is a risk that confiscation of such property may also affect the rights of third parties with an interest in the confiscated property. Such third parties may include persons connected with the wrongdoer such as dependent children, spouses, partners, and beneficiaries, as well as unrelated third party interest-holders such as mortgagees, lessees, lessors, and co-owners.

Furthermore, the reach of Australian proceeds of crime legislation may extend beyond the confiscation of proceeds of crime: it may result in the confiscation of legitimately acquired property. Recent case law is illustrative. In the Northern Territory case of *Emmerson v Northern Territory* (2013) 33 NTLR 1, Barr J commented:

> Property forfeited…may be the fruits of many years of hard work…The property is forfeited irrespective of its provenance. Most people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay…However, the overlapping legislative scheme in question has travelled a very long way from the principle that crime should not pay…the forfeiture may take property which is unrelated to any criminal activity… (at [110], [111], [114]).

In a similar vein, in *Queensland v Henderson*, Keane J noted at paragraph 65 that 'the [Queensland] Act…operate[s] to authorise the forfeiture of property which is not derived from criminal activity by the current owner of the property'. And, in a case dealing with the WA legislation, McKechnie J lamented 'I see no way to avoid the clear purpose of the [Act]. It is an unfair result but one compelled by the words of the statute' (*Permanent Custodians Ltd v Western Australia* [2006] WASC 225, at [23]).

The courts

In spite of these and other comments by members of the judiciary lamenting the 'unfair, if not cruel' (*Director of Public Prosecutions (South Australia) v George* (2008) 102 SASR 246, at [233]) and draconian (*Director of Public Prosecutions (Northern Territory) v Green* [2010] NTSC 16, at [221]) nature of the confiscation regimes, Hickey is critical of the approach taken by Australian courts:

> The decision in *Cini* contributes to a growing body of decisions in which Australian courts have deemed it unnecessary to construct the forfeiture provisions of the POCA [*Proceeds of Crime Act 2002* (Cth)] in accordance with policy arguments or considerations of justice (2017: 119).

The role of the judiciary in proceeds of crime confiscation regimes is also controversial because judicial discretion has been removed in certain confiscation proceedings—which Skead and Murray (2015: 468) describe as automatic and non-judicial confiscations.

For example, in Western Australia, the court has no discretion in making an unexplained wealth declaration. If it is more likely than not that the respondent has unexplained wealth, the court must make the declaration sought (CPCA WA s 12(1)). The removal of discretion is also a feature of the Commonwealth proceeds of crime regime which has been the subject of criticism (Odgers 2007: 331).

Questions have also been raised about the constitutional validity of proceeds of crime regimes. However, the constitutional invalidity of current state or federal proceeds of crime regimes is considered to be unlikely (Clarke 2002, 2004; Skead & Murray 2015). Skead and Murray explain:

> Without avenues for constitutional invalidity, it is the role of the judiciary to apply the law as written by the legislature. The Parliament therefore has a pivotal role in ensuring that proceeds of crime appropriately balances the clear competing interests at stake. The authors contend that this crucial balancing process should be guided by rule of law considerations. (2015: 478–9)

These statements and controversies highlight the need for a thorough examination of the legislation, its implementation, and effect. There is the risk that much of this legislation is compromised by its undermining of accepted legal principles and protections and by its failure to target only those engaged in serious drug-related and organised crime. Despite this, there is a lack of empirical research into the impact and effectiveness of proceeds of crime legislation.

Absence of empirical research

The absence of empirical research into proceeds of crime legislation, and especially into the operation, impact, and effectiveness of such legislative regimes, has been noted by numerous scholars (Freiberg & Fox 2000; Bartels 2010; Clarke 2004). Freiberg and Fox explain:

> Little is known about how confiscation laws actually work. The reluctance to examine their impact is not confined to Australia. Though the literature on confiscation is considerable (especially in the United States), it tends to be descriptive, exegetical, or doctrinal in nature. Complex and difficult legislative initiatives are more often addressed by researchers of a jurisprudential rather than empirical bent. In Australia, the multi-jurisdictional nature of the undertaking also acts as a deterrent. (2000: 242–3)

Some empirical research has been undertaken in Australia, most notably a recent small empirical study comprising 20 interviews looking at the effectiveness of unexplained wealth confiscation (Smith & Smith 2016). However, to date there has been no empirical study examining the impact and effectiveness of the range of confiscations available under Australian confiscation of proceeds of crime legislative schemes.

It is acknowledged that the proceeds of crime confiscation schemes operating in each Australian jurisdiction are distinct (Skead 2013; Skead & Murray 2015), as is the overall criminal justice climate into which each scheme was introduced (Tubex et al. 2015). However, to date there has been no comparative, jurisdiction-based qualitative mapping and examination of the range of Australian confiscation of proceeds of crime legislative schemes. Legal scholarship has, in the main, provided a detailed survey of the legislation in a single jurisdiction (Thornton 1990; Weinberg 1989), an international comparative legislative review (McClean 1989), or a comparative doctrinal analysis of one or more aspects of the regime, such as unexplained wealth provisions (Bartels 2010; Feldman 1989; Skead 2013, 2016). There is therefore little understanding of the legal and criminological complexity and impact of the various legislative schemes.

Aims of this study

The overall aim of this project is to produce a suite of best practice recommendations for the reform of Australian proceeds of crime legislation, with a view to ensuring just, valid and effective statutory schemes that achieve their legitimate objectives. This will be achieved through the first ever comparative criminological and legal analysis of Australian proceeds of crime legislation in three Australian jurisdictions: New South Wales, Queensland, and Western Australia.

More specifically, this project seeks to:

- complete an exhaustive mapping and legal and criminological analysis of the proceeds of crime legislation, case law, and contextual data in the three target states;
- undertake a comprehensive and comparative empirical examination of the attitudes to, and effects of, proceeds of crime regimes in the three target states through interviews with key stakeholders; and
- prepare a suite of best practice recommendations for the reform of Australian proceeds of crime legislation.

Methodology

The research process involved a combination of:

- comparative doctrinal legal analysis of proceeds of crime legislation in three Australian jurisdictions (New South Wales, Queensland, and Western Australia);
- a review of existing criminological and legal literature around proceeds of crime legislation; and
- a qualitative empirical study involving a range of interviews with key stakeholders in each target jurisdiction to capture the attitudes to and effects of proceeds of crime legislation.

Ethics approval was obtained from the University of Western Australia (UWA) on 20 February 2017 (protocol # RA/4/1/8869), in accordance with the requirements of the National Statement on Ethical Conduct in Human Research and the policies and procedures of UWA.

The project team formulated a suite of law reform recommendations based on the legislative and criminological mapping and the empirical data collection.

Comparative analysis

The project team mapped and compared the key features of the legislation in each target state. The legislative regimes in New South Wales, Queensland and Western Australia were selected as the legislation in each is distinct. The NSW regime has resulted in the highest monetary value of confiscations: between 1995–96 and 2013–14, New South Wales confiscated $321,305,348 of the total $793,177,166 confiscated from all Australian jurisdictions (Smith & Smith 2016: 51–52). The Queensland legislation has recently undergone significant reform to broaden its scope and application. Meanwhile, the WA scheme has been described as 'draconian' and 'extreme' (*Centurion Trust Co Ltd v Director of Public Prosecutions (Western Australia)* [2010] WASCA 133, at [75]). These three jurisdictions therefore provide a useful comparative core.

The desktop doctrinal legal analysis involved a review of extant legal documents, including Australian proceeds of crime statutes and associated legislation, proposed bills, related cases and parliamentary debates. This analysis highlighted those features in each jurisdiction's legislation which may be extreme and may result in overreach. It also highlighted features which are fair and legitimate—both in their framing and their application—and achieve the underlying and/or articulated objectives of the legislation, and may therefore be considered as best practice.

Criminological analysis

To understand the broader criminological context in which each of the schemes was introduced, an analysis of relevant aspects of the broader criminal justice system in these jurisdictions was conducted. The broader criminological information consisted of data and information on Australian organised and drug-related crime, relevant papers from the Australian Institute of Criminology and the Australian Criminal Intelligence Commission, information and publications on political stances and electoral platforms in relation to confiscation legislation, media reporting, parliamentary debates, criminological reports, and journal articles on these topics.

Empirical study

The project team undertook an empirical study to gather the perspectives of key stakeholders on issues relevant to the operation and efficacy of proceeds of crime legislation. The empirical study was based on semi-structured interviews to capture the attitudes to and effects of proceeds of crime legislation. Key stakeholders included police, members of the judiciary, legal practitioners, departments of attorneys-general, non-government agencies, politicians, academics, and members of the public who were directly or indirectly affected by the implementation of proceeds of crime confiscation legislation. In total, the project team interviewed 40 stakeholders.

The empirical study sought to:

- identify, through interviews with senior police officers working in this area, any issues related to implementing and enforcing proceeds of crime legislation and areas in need of reform;
- identify legal issues through interviews with judges and legal practitioners. Issues here related to the experience of Australian courts and legal practitioners in applying proceeds of crime legislation and areas in need of reform;
- acquire government perspectives through interviews with senior staff at the Office of the Director of Public Prosecutions in New South Wales and Western Australia and the NSW and Queensland Crime Commissions;
- understand the broader political and criminological context of proceeds of crime through interviews with politicians and academics working in the area; and
- gain insight into the impact of the legislation on a personal, social, and economic level through interviews with members of the public affected directly or indirectly by the confiscation of proceeds of crime. These interviews were limited to individuals in Western Australia.

The semi-structured interviews allowed the participants to develop and qualify their ideas, enabling rich insights into their experience with and the operation of the legislation. This approach revealed those areas of greatest practical concern and most in need of reform.

Recruitment

The initial invitations to participate in the research were sent to those in the legal profession known to be involved with proceeds of crime legislation, as well as to those identified by a search of practitioners involved in the implementation of this legislation, according to the key stakeholder categories as described above and in Table B1 in *Appendix B: Empirical study*. From there, snowball sampling was used, asking the interviewees to refer us to other relevant individuals working in this area. Members of the public in Western Australia were recruited through their legal representatives, who first contacted their clients for approval to participate before providing the research team with contact details.

Potential interviewees were first contacted by email. The email explained the aims of the research and the nature of an interviewee's involvement, including a Participant Information Form and Participant Consent Form approved by the UWA Human Research Ethics Committee (*Appendix B: Empirical study*).

Interviews

Interviews were conducted face to face at either UWA, the interviewee's office, the interviewee's home, or over the phone. Thirty-five interviews were conducted face to face. Five interviews were conducted over the phone because of the location of the participant. Two participants provided written comments—one in addition to the interview, and one because of unavailability at the time of the data collection. For the interviews in New South Wales and Queensland, two members of the project team travelled to Canberra, Sydney, and Brisbane to conduct the interviews. The vast majority of interviews were conducted by two members of the project team, according to best practice and to increase the validity of the data interpretation. The duration of the interviews typically varied between half an hour and an hour. All interviews with one exception (due to the interviewee's preference) were recorded with consent, de-identified, and professionally transcribed. The transcriptions were sent back to the interviewees for their approval. At this stage in the data collection, one interviewee withdrew from the research and the corresponding interview recording and transcript were deleted. Comments and corrections from the participants were taken into account and the amended transcripts were used for the data analysis.

Analysis of data

The transcribed interviews were subject to content analysis. This included systematically reading of all the transcripts, labelling the major themes (by each semi-structured question and other themes arising), organising the themes by key stakeholder category and by jurisdiction, and summarising the findings (see *Findings of the empirical study* below). As per the Participant Information Form (see *Appendix B: Empirical study*), quotes were anonymised and participants were given the opportunity to review and approve quotes. In both the *Criminological analysis* and *Discussion and recommendations* sections of this final report, the discussion is illustrated with quotes from these interviews.

Limitations of the empirical study

While most of the invited interviewees agreed to participate, some declined the invitation, mainly because they did not feel well-placed to be interviewed as they did not have current experience with the legislation. In such instances, they often referred the project team to other potential interviewees. If no response was received, a follow-up email was sent. Despite the efforts of the project team, some key stakeholders could not be interviewed. The project team regrets the absence of any police representative from Western Australia and any representative from the Queensland Office of the Director of Public Prosecutions (Queensland ODPP). Initial approval to participate was obtained from Western Australia Police Force (WA Police), but this never eventuated in a confirmed appointment. The Queensland ODPP declined to participate as it is not their practice to comment on policy or the legislative framework within which they operate. The NSW and Queensland interviews covered a broad range of stakeholders but were, in comparison with the WA interviews, limited in number. The project team acknowledge that the views of these interviewees may not be broadly representative of all those working in the area.

The data presented in the WA case studies was drawn primarily from the five interviews conducted with members of the public. The facts provided were corroborated only through the interviewees' legal representatives and media reports. As a result, the case studies may reflect a one-sided, subjective view of the interviewees' personal experiences with the legislation.

Comparative legislative analysis

For ease of reference, the detailed mapping of the legislative regime for each target jurisdiction, including the operation of the confiscation regimes and recent case law, is contained in *Appendix A: Detailed legislative mapping*. Table 2 below provides a comparison of the features of each regime by category of confiscation.

New South Wales

New South Wales, unlike the other jurisdictions studied, has two pieces of legislation governing the recovery of the proceeds of crime. The *Confiscation of Proceeds of Crime Act 1989* (CPCA NSW) contains a comprehensive regime for conviction-based crime-used property, crime-derived property, and drug trafficker confiscations. This regime is administered by the New South Wales Office of the Director of Public Prosecutions (NSW ODPP). The *Criminal Assets Recovery Act 1990* (CARA NSW) is administered by the New South Wales Crime Commission (NSW CC) and contains a non-conviction-based regime that targets those involved in serious drug crimes, as well as providing for unexplained wealth orders to recover criminal assets.

New South Wales was the first Australian jurisdiction to enact conviction-based proceeds of crime legislation, with the *Crimes (Confiscation of Profits) Act 1985* (NSW). Upon its introduction into the Legislative Assembly, then Attorney General, Mr Terry Sheahan (1985: 9570), described the Crimes (Confiscation of Profits) Bill as 'a major new weapon' in the 'Government's continuing assault on organized [sic] crime in New South Wales'. This Act permitted the confiscation of property that was used in or in connection with or derived from the commission of a serious offence. Sheahan continued:

> The Government accepts and recognizes [sic] that confiscation is a penalty that should be imposed only after a person is tried and convicted, and only after that person has had the advantage of all the important protections and rights available under the criminal justice system. (1985: 9572)

The Act provided for forfeiture and pecuniary penalty orders, as well as restraining orders to preserve assets pending confiscation proceedings. To protect innocent third parties, the Act included hardship provisions and judicial discretion in the determination of a forfeiture application. A 'major innovation' (Sheahan 1985: 9574) of the regime was enabling the Public Trustee (now the NSW Trustee & Guardian), when directed by the court, to control and manage property subject to an order.

Three years after the introduction of the 1985 Act, the NSW Government moved to reform the regime by significantly increasing existing powers and introducing tough new measures against drug traffickers. Drawing on legislation in the United Kingdom, the new *Confiscation of Proceeds of Crime Act 1989* (CPCA NSW) reversed the onus of proof as to the source of property and introduced an 'assumption' that all of a drug trafficking offender's assets at the time of conviction and any property dealt with in the preceding six years were the proceeds of crime (Dowd 1989: 7320–22). The Act empowered the New South Wales Director of Public Prosecutions (NSW DPP) to apply for conviction-based confiscation orders.

In 1990, New South Wales again led the way by introducing a non-conviction-based regime targeting those involved in serious drug crimes. This regime was enacted in the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW). Then Minister for Police and Emergency Services, Mr Ted Pickering (1990: 4266), explained:

> It is the Government's intention to urge the Commonwealth and other State governments to adopt complementary legislation, so that the fight against the drug trade will be an effective national campaign. The most innovative aspect of this legislation is that it will create a scheme of asset confiscation which operates outside and completely independently of the criminal law process.

Under this regime, the State Drug Crime Commission, an independent statutory authority, was given primary responsibility for the administration of the legislation. The commission could institute proceedings and apply to the Supreme Court of New South Wales on the basis that it was more probable than not that a person was involved in drug-related activities. Where satisfied that there were reasonable grounds for suspecting that a person was involved in drug-related activities, the Supreme Court had to make a restraining order (s 10). Once this order was made, the commission could apply for an assets forfeiture order and/or a proceeds assessment order. This regime was extended by the *Drug Trafficking (Civil Proceedings) Amendment Act 1997* (NSW) to encompass all 'serious criminal offences' and has since been renamed the *Criminal Assets Recovery Act 1990* (CARA NSW). The State Drug Crime Commission has since been renamed the NSW Crime Commission (NSW CC), and remains the responsible agency for initiating proceedings under the CARA NSW.

In 2010, New South Wales further augmented its proceeds of crime regime by introducing unexplained wealth confiscation—this time following Western Australia's lead. The *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW) amended the CARA NSW to include unexplained wealth orders for the recovery by the NSW CC of criminal assets. In the second reading speech on the bill for this Act, the Minister for Police and Finance explained:

> …the New South Wales Crime Commission can apply to the court for such an order when it has reasonable suspicions that the person is involved in serious criminal activity or when it holds reasonable suspicions that the person's wealth is derived from the serious criminal activity of another person or persons. The court must be satisfied on the balance of probabilities that the wealth is not, or was not, illegally acquired property. (Daley 2010)

In 2016, the CARA NSW was expanded once again to incorporate crime-used property substitution declarations.

In 2015–16, the estimated value of property confiscated pursuant to the CPCA NSW was $3.7m (NSW ODPP 2016: 25), and the estimated realisable value of confiscation orders under the CARA NSW was $33,092,706 (NSW Crime Commission 2016: 27).

In 2018, New South Wales enacted the *Unexplained Wealth (Commonwealth Powers) Act 2018* to refer its state powers for the purposes of joining the National Cooperative Scheme on Unexplained Wealth set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). It remains the only state so far to have done so.

Queensland

In Queensland, the *Criminal Proceeds Confiscation Act 2002* (CPCA Qld) provides for a non-conviction-based scheme for the confiscation of crime-used and crime-derived property and unexplained wealth. The Queensland Crime and Corruption Commission (Queensland CCC) administers these categories of confiscation. The Act further provides for a non-conviction-based serious drug offender confiscation scheme, also administered by the Queensland CCC; and a conviction-based scheme, administered by the Queensland ODPP.

Queensland's first proceeds of crime statute was the *Crimes (Confiscation) Act 1989* (Qld). This legislation commenced on 12 May 1989 and introduced a conviction-based confiscation scheme. It extended the forfeiture provisions already available in the *Drugs Misuse Act 1986* (Qld) to apply to all criminal activity and to proceeds of crime located outside of Queensland (see Clauson 1989: 4037–9). As with the NSW scheme, where a person was convicted of a serious offence the Act empowered a nominated court to make a forfeiture order and/or a pecuniary penalty order (s 6). It also provided for the preservation of assets through restraining orders pending confiscation proceedings (s 17). In 1995, the Act was amended to provide for the automatic forfeiture of property subject to a restraining order, unless the owner of the property could demonstrate that the property was not tainted (see Explanatory Note, Crimes (Confiscations of Profits) Amendment Bill 1994).

In line with most other Australian jurisdictions, in 2002 the Queensland Government moved to complement its conviction-based scheme with a non-conviction-based civil confiscation scheme. The *Crimes (Confiscation) Act 1989* (Qld) was replaced by the *Criminal Proceeds Confiscation Act 2002* (CPCA Qld), which came into operation on 1 January 2003. The Act 'improved and strengthened' the existing conviction-based scheme (Dixon 2002: 1), expanding the range of offences subject to automatic forfeiture. It also introduced a civil confiscation scheme, modelled on the CARA NSW (see Explanatory Note, Criminal Proceeds Confiscation Bill 2002).

In 2009, the Queensland regime was revised following a statutory review of the Act, which recommended the implementation of all but one of the recommendations of the Parliamentary Crime and Misconduct Committee's *2006 Report no. 71: Three year review of the Crime and Misconduct Commission*. The *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) amended the CPCA Qld to enable the confiscation of property held outside of Queensland. It also reversed the onus of proof, once the state has established that a person has engaged in 'serious crime related activity', requiring the respondent to then prove that their wealth was lawfully acquired.

The regime was expanded again in 2013, following an election promise from the Liberal National Party of Queensland to introduce 'tough new laws to target the ill-gotten gains of criminals' (Bleijie 2013: 1344). The *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) introduced an unexplained wealth scheme and a serious drug offender confiscation order scheme which enable forfeiture of lawfully acquired property. The Queensland CCC administers the civil confiscation scheme and the serious drug offender confiscation order scheme.

The Queensland CCC (2018: 6) reported that, from 1 July 2017 to 31 May 2018, $8.596m was forfeited to the state following the conclusion of 42 confiscation matters. In 2016–17, it was reported that property confiscated pursuant to the non-conviction-based and serious drug offender confiscation schemes in the CPCA Qld amounted to $8.994m, while $1.377m was collected pursuant to forfeiture orders and $79,796 pursuant to pecuniary penalty orders under the conviction-based scheme (Qld ODPP 2016: 21).

Western Australia

In Western Australia, the *Criminal Property Confiscation Act 2000* (CPCA WA) provides for the non-conviction-based confiscation of crime-used property, crime-derived property, criminal benefits, and unexplained wealth, and for the conviction-based confiscation of the property of a declared drug trafficker. The Office of the Director of Public Prosecutions for Western Australia (WA ODPP) is the responsible authority for all confiscation matters except unexplained wealth confiscation proceedings and those relating to criminal benefits. Responsibility for these matters has recently been transferred to the Western Australian Corruption and Crime Commission (WA CCC).

Proceeds of crime legislation was initially introduced into Western Australia in 1988 in the form of the *Crimes (Confiscation of Profits) Act 1988* (WA). Like the NSW equivalent, the WA Act provided for the conviction-based confiscation of property that was used in in connection with or derived from the commission of a serious offence. The Act empowered a nominated court, where a person was convicted of a serious offence, to make a forfeiture order and/or a pecuniary penalty order (s 6). It also provided for the preservation of assets through restraining orders pending confiscation proceedings (s 20). In considering whether to make a forfeiture order, the court could have regard to hardship (s 10).

However, the 1988 Act—like other Australian conviction-based regimes—was regarded as largely ineffective in combating organised crime, enabling 'certain individuals to retain dishonestly acquired personal wealth, [leaving] authorities with restricted capacity to locate or confiscate ill-gotten gains' (Barron-Sullivan 2000: 8611). These deficiencies related to the difficulty of gathering evidence to link property and/or wealth to criminal activity (Barron-Sullivan 2000: 8611) and are viewed as contributing to the burgeoning drug trade in Western Australia in the 1990s.

The Act was replaced in 2000 by the *Criminal Property Confiscation Act 2000* (CPCA WA), which commenced on 1 January 2001. The CPCA WA provides for the non-conviction-based confiscation of crime-used property, crime-derived property, criminal benefits and unexplained wealth, and for the conviction-based confiscation of the property of a declared drug trafficker. In the second reading speech on the Criminal Property Confiscation Bill 2000 (WA), the bill was touted as being 'the strongest and most effective of its kind in the world' (Barron-Sullivan 2000: 8611). This description was in no small part due to the extensive, non-conviction-based powers to confiscate unexplained wealth that the Act conferred on law enforcement agencies, the first powers of their kind in Australia.

However, these provisions have not been used. The current Minister for Environment, Mr Stephen Dawson, has observed:

> Although Western Australia was the first jurisdiction to implement what was considered to be groundbreaking legislation providing for the confiscation of unexplained wealth, those powers have seldom been used. In the 16 years since the commencement of the Criminal Property Confiscation Act, a total of 28 applications for unexplained wealth declarations have been made. However, since 2011, only one application has been made. This is because the DPP simply has not had the resources to pursue those applications. The result is that the Criminal Property Confiscation Act has not significantly benefited the fight against serious and organised crime in this state. The fight against organised crime is greatly enhanced by legislation that ensures that crime does not pay. Western Australia is armed with such legislation, but it is not being used. (2017: 4073)

In an effort to combat this underuse, in 2017, the McGowan government introduced a bill to grant the WA CCC powers to investigate, initiate, and conduct proceedings relating to unexplained wealth confiscation and to criminal benefits. The *Corruption, Crime and Misconduct and Criminal Property Confiscation Amendment Act 2018* (WA) received Royal Assent on 13 July 2018.

On 16 August 2018, a private member's bill, the Misuse of Drugs Amendment Bill 2018, was introduced into the WA Legislative Council by Mr Aaron Stonehouse (2018: 4676d) to amend s 32A(1) of the *Misuse of Drugs Act 1981* (MDA WA) by inserting a provision, clause 4, that a court is not required to declare a person to be a drug trafficker if it is 'clearly unjust to do so'.

On 19 September 2018, Western Australia's Attorney General, John Quigley, announced a review of Western Australia's proceeds of crime confiscation legislation, to be conducted by former WA Chief Justice the Hon Wayne Martin AC, QC (Quigley 2018). The terms of reference for the review include considering whether the Act contains adequate safeguards to avoid 'undue hardship, unfairness or injustice to respondents and third parties'.

In 2016–17, $11.92m was recovered from all confiscation actions in Western Australia (WA ODPP 2017: 32–34). This included $6.47m recovered from drug trafficker confiscations and $5.38m recovered from crime-used or crime-derived property confiscations, leaving $70,000 from other confiscation categories.

Comparisons of confiscation regimes by jurisdiction

Each jurisdiction provides for all four of the categories of confiscation identified above. However, the categories in each jurisdiction differ in some key respects:

- whether a confiscation is conviction-based, non-conviction-based, or both;
- whether the court has discretion in the making of a restraining order or confiscation order or declaration;
- whether it is necessary to establish a connection between criminal or illegal activity and the property;
- whether the property is automatically confiscated; and
- which agency type has primary responsibility for the administration of the confiscation regime.

Table 2: Categories of confiscations in New South Wales, Queensland and Western Australia

Jurisdiction		Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
NSW	*Conviction-based*	✓	✓	✗	✓
	Non-conviction-based	✓	✓	✓	✓
	Must show connection between property and illegal activity	✓	✓	✓[a]	✓[b]
	Judicial discretion	varies per order	✗	✓	✗
	Third party protections	✓	✓	✓	✓
	Automatic confiscation	✗	✗	✗	✗
	Responsible agency	NSW ODPP and NSW CC	NSW ODPP and NSW CC	NSW CC	NSW ODPP and NSW CC

Table 2: Categories of confiscations in New South Wales, Queensland and Western Australia

Jurisdiction		Crime-used property confiscation	Crime-derived property confiscation	Unexplained wealth confiscation	Drug trafficker confiscation
Qld	*Conviction-based*	✓	✓	✗	✓
	Non-conviction-based	✓	✓	✓	✗
	Must show connection between property and illegal activity	✗non-conviction-based ✓ conviction-based	✗non-conviction-based ✓ conviction-based	✓ [c]	all property from the six years prior to the application is confiscable
	Judicial discretion	✓	✓	✓	✓
	Third party protections	✓ extensive	✓ extensive	✓ extensive	✓ extensive
	Automatic confiscation	✓	✓	✓	✓[d]
	Responsible agency	Queensland ODPP	Queensland ODPP and Queensland CCC	Queensland CCC	Queensland ODPP
WA	*Conviction-based*	✗	✗	✗	✓
	Non-conviction-based	✓	✓	✓	✓
	Must show connection between property and illegal activity	✓	✓	✗	✗ all property is confiscable
	Judicial discretion	✗	✗	✗	✗
	Third party protections	✓ objections to restraint ✓ release of confiscable property	✓ objections to restraint ✓ release of confiscable property	✓ objections to restraint ✗ release of confiscable property	✓ objections to restraint
	Automatic confiscation	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed	✓ restrained property is automatically confiscated if no objection is filed
	Responsible agency	WA ODPP	WA ODPP and WA CCC	WA ODPP and WA CCC	WA ODPP

a: Reasonable suspicion that the respondent has either engaged in serious crime related activity or has acquired property derived from the serious crime related activity of another person

b: Confiscation is limited to benefit/s derived from drug trafficking/serious crime related activity

c: Reasonable suspicion that the respondent has either engaged in serious crime related activity or has acquired property derived from the serious crime related activity of another person

d: Of restrained property of person convicted of a serious criminal offence

Criminological analysis

After the overview of the legislative history of proceeds of crime legislation in the three subject jurisdictions, this section draws on the criminological and legal literature, media reporting and available data, alongside some findings of the empirical study to examine the broader context in which the recent non-conviction-based civil legislative schemes were introduced and the underlying rationale for their introduction.

Political imperatives

A first and important driver for the introduction of the non-conviction-based civil legislative schemes was the political imperative to expand legislative powers to combat organised and drug-related crime, as can be seen from the parliamentary debates in all three jurisdictions subject to the research.

New South Wales

As indicated in the *Comparative legislative analysis* section, New South Wales was the first Australian jurisdiction to pass conviction-based proceeds of crime legislation, with the *Crimes (Confiscation of Profits) Act 1985* (NSW). During the second reading of the Crimes (Confiscation of Profits) Bill, then Attorney General Mr Terry Sheahan (1985: 9570) described it as 'a major new weapon which will be an important part of the Government's continuing assault on organized crime', designed to target 'criminals convicted of serious offences from which large profits are gained that are unlikely to be claimed by the victims of those offences'. Sheahan (1985: 9570) contended that the 'irresistible lure' of the profits made meant that existing penalties, such as long custodial sentences, were ineffective against organised and drug-related crime.

In 1989, the NSW Parliament reformed the conviction-based regime by expanding existing powers and introducing new measures against drug traffickers in the new CPCA NSW. During the second reading debate, then Attorney General Mr John Dowd (1989: 7320) touted the Confiscation of Proceeds of Crime Bill as ensuring the potential of confiscation legislation was 'fully realised' by 'providing those who are responsible for the Act's day-to-day operation with the means to carry out their responsibilities as effectively as possible'.

The bill received multi-partisan support in the parliament, with the Opposition expressing strong support for the provisions focusing on drug offences (Vaughan 1989: 8282). The Australian Democrats lauded the potential of the bill to target organised crime (Kirkby 1989: 82814). While concerns regarding the 'sweeping' nature of the new provisions were raised during debate in the Legislative Council (eg Legislative Council 1989: 8284–8286), they were outweighed by the need to target 'Mr Bigs' and the increasingly profitable drug trade (Legislative Council 1989: 8286). Dr Elisabeth Kirkby (Australian Democrats) explained (1989: 8286):

> In this case, the loss of those civil liberties is perhaps a small price to pay compared with what we are trying to achieve, which is to prevent these very vicious criminals, whom I would describe as far more vicious than many other criminals, from making enormous gains and profits from one of the worst trades of all, dealing in drugs.

In a similar vein, Mr Bryan Vaughan (Labor) (1989: 8284) argued with respect to the drug trade that '[n]othing that this Parliament can ever do will be enough to destroy this new evil empire'.

As indicated previously, in its initial form the CARA NSW was the *Drug Trafficking (Civil Proceedings) Act 1990* (NSW). The scope of the Act was expanded in 1997 and it was renamed. The political responses to the original legislation must be understood in that context—it was far narrower in scope and more limited in its operation, compared with the current regime. This legislation was primarily driven by a 'tough on crime' policy response. In introducing the bill, then Premier, Mr Greiner (1990: 2528) observed:

> There is no doubt the proposed legislation is tough. But unless governments are willing to take a tough line on drug profits the situation described by Mr Justice Moffitt will continue to get worse. It is my intention to urge the Commonwealth and other State governments to adopt complementary legislation, so that the fight against the drug trade will be an effective national campaign.

Against this, however, Mr Greiner (1990: 2529) added:

> I want to emphasise, however, that no criminal consequences will flow from this legislation. Rather, the consequences are that the person has to justify, account for, and explain where his or her assets came from…No doubt some people will contend that this legislation is unfair—that it amounts to convicting people of offences on a lower standard of proof and without the protection of the criminal law. I have already said that this legislation is all about the accounting of profits in civil proceedings, not imposition of criminal sanctions in criminal courts…In the case of drug crime there is normally no identifiable victim with a recognised cause of action in the civil courts. In an important sense the whole community is the victim, and certainly those whose lives are destroyed by drugs are victims. What the proposed legislation will do is analogous to giving the Crown a civil right of action to recover, on behalf of the community, assets and profits obtained illicitly by people who benefit from the drug trade.

The Premier (1990: 2530–31) outlined a number of purported safeguards in, and limits to, the legislation as then drafted.

The legislation was supported by the then Opposition. According to Mr Robert Carr (Labor) (1990: 3516–17):

> Let it be argued that the provisions are draconian. Whether that adjective is appropriate or not, the provisions are nonetheless appropriate. That is why the Opposition is supporting the bill…The Premier was accurate in saying that many of the measures in the bill reflect provisions in income tax laws—for example, the reverse onus and the balance of probability…It is altogether appropriate that it also be reflected in laws directed at drug crimes…The proposed legislation is tough. Its toughness is appropriate; it is balanced by safeguards…

Mr Bryan Vaughan (1990: 4275), member of the then Opposition in the Legislative Council, asked rhetorically:

> Anyone concerned about civil liberties must be perturbed by some of the provisions in the bill. But what else can we do? The fabric of our society is threatened by drugs.

Nevertheless, some serious concern was expressed by other Members of Parliament.

Elisabeth Kirkby (Australian Democrats)

Dr Kirkby (1990: 4281), though supporting the legislation, raised many questions and concerns:

> The unusual feature about this piece of legislation is that it seeks to reverse the burden of proof. It also calls for a lower level of proof than is usually expected. To secure confiscation of assets, it will need to be shown, on the balance of probabilities only, that the person concerned is either in receipt of moneys that are the result of drug trafficking, or owns property that has been purchased with the proceeds of drug trafficking; and that is not the case in respect of the proceeds of normal criminal activity. It is also extremely unusual that, even if a person is found to be innocent of a charge, that person can be dealt with under proposed section 6(l)(b) of the Act. I believe that that provision will be considered by the majority of legal experts and academic people with a knowledge of the law as most unusual and probably very dangerous.

Jack Hallam (Australian Labor Party)

Mr Hallam (1990: 4301), then Leader of the Opposition, although supportive of the legislation, expressed similar concerns:

> I am concerned that, within this legislation, there is great potential for monumental mistakes, because of the wide-ranging powers to be given to the State Drug Crime Commission to reverse the onus of proof. …Officers in the State Drug Crime Commission could pervert justice in the course of their duties, as happened in the Grassby case…

Richard Jones (Australian Democrats)

Mr Jones (1990: 4312–13), expressing doubts as to the efficacy of any confiscation regime, added:

> In the United States of America property associated with the drug trade can be seized… The United States authorities have cracked down on drugs; it has been engaging in a war against drugs. The United States has no wars to fight, other than the war on drugs. Just as it lost the war in Vietnam, and just as Russia lost the war in Afghanistan, the United States will also lose the war on drugs. No matter how much property the authorities try to seize, no matter how much they crack down and they introduce draconian laws, corruption and organised crime will become more entrenched at the highest level. I know in my heart that this legislation will not work.

Ian Macdonald (Australian Labor Party)

Mr Macdonald (1990: 4313–15) noted:

> I support the general intent of this bill. I have no objection to the Government's scheme or proposals in relation to fighting both organised crime and the drug-related industry in this State. My objection, as it has been in relation to a number of measures that have been brought before this Chamber, is the continual attack on and diminution of civil liberties of ordinary citizens of this State. I propose to deal with only one or two provisions in this bill which I believe demonstrate clearly how zealots in this Government have overruled good sense, good judgment and wisdom in approaching the issue of drugs…The onus of proof is reversed. The test is also reduced. Clause 6 totally oversteps the mark; it is draconian in the extreme…This bill will impose penalties on people who have not been convicted. As far as I am concerned, if a person has not been convicted there is grave doubt as to whether he has been involved in actions in which certain individuals think he may have been involved…

Queensland

The CPCA Qld was not introduced into the Queensland Parliament until October 2002, long after the NSW legislation, and two years after the equivalent legislation in Western Australia. As in New South Wales, the Queensland legislation was in large part a response to political pressure and the desire of the then Queensland Government to appear 'tough on crime'. As the then Attorney-General of Queensland, Mr Rod Welford (Labor) (2002: 3859), commented on introducing the bill:

> Our government is committed to building and maintaining a safe community where law abiding citizens can have confidence that criminals are not permitted to profit from or make a living out of the proceeds of their crimes…Our government is determined to ensure crime does not pay. I commend the bill to the House.

The CPCA Qld was met with little objection from the then Opposition who supported the bill upon its introduction. Again, given both major parties generally supported the bill, criticism during its passage through the Queensland Parliament was limited.

Lawrence Springborg (National Party)

The primary criticisms made by the Opposition at the time were that the Government had acted too late in bringing the legislation to parliament:

> Whilst the Opposition is broadly supportive of this legislation, it is a little bit unfortunate that it is probably three to four years late in coming to this parliament. (Springborg 2002: 4939)

Further, there was criticism that the Government had voted down purportedly similar draft legislation introduced by the Opposition only a few weeks previously:

> The government does not give the Opposition any kudos but then introduces its own legislation a bit further down the track…Whilst there were some differences between the two bills, the differences were not all that major. There were some differences with regards to the process, but when we read it a lot of it was similar in substance and in what it sought and seeks to achieve on behalf of putting in place a civil forfeiture regime in this state. Unfortunately, because of the government's reticence, risk averseness and the dillydallying on this issue over the last few years, we have seen in this state a situation where criminal assets have gone unrecovered as a consequence of legislation which was not broad or effective enough to enable our state authorities to take the necessary action to recover such tainted assets. (Springborg 2002: 4940–41)

Finally, in response to criticisms by groups such as the Civil Liberties Council for Queensland and the Bar Association of Queensland, Mr Springborg (2002: 4942) commented:

> There is due regard to process. There is due regard to natural justice. The sky is not going to fall. If this is such a problem, if we are going to see all of these people unjustly wronged not only in Australia but also throughout the world, then where are they? Where are all of these examples of people who have been wrongly stripped of their assets because of the draconian actions of government in this country and elsewhere? Once again we are playing hypotheticals and we are taking risk averseness to the nth degree. It is not going to be a problem and it should not be a problem…

Peter Wellington (Independent)

Mr Wellington also supported the bill. With regards to the reversal of the onus of proof, Mr Wellington (2002: 4947) observed:

> I believe [the reverse onus] will prevent criminals from insulating themselves from law enforcement actions. This certainly is a forward and a very great step and I commend the minister for this initiative. I also support the minister's clear intent of taking strong action against these criminals. Let us make sure that Queensland is never seen as a safe haven for the laundering of illegal money or a home for criminals. Queensland does not want this dirty money…

And, further, that:

> The legislation is not just strong; the legislation is actually saving significant Queensland taxpayers' dollars. It is saving our Queensland police resources. It is saving our court system. It is saving solicitors. It is saving a whole range of services that are so often involved… (Wellington 2002: 4947)

Bill Flynn (One Nation)

Mr Flynn commended the overall purpose of the bill as 'quite laudable'. However, he noted that, even as a former police officer, he had significant concerns with various aspects of the legislation, particularly with reversing the onus of proof:

> First, I strike difficulty with the reversal of the onus of proof in certain circumstances…One of the things about the democratic society we live in and about our judicial system is that when we accuse somebody of something we generally have to demonstrate that they did what we accused them of. As much as we no doubt will pull into the net with impunity those who have got away with such acts for ages, there may be some situations where the law might get it wrong and there might be people who quite legitimately have not kept records or whatever and who are unable to justify the existence of such property… (Flynn 2002: 4950)

Elisa Roberts (One Nation)

Miss Roberts (2002: 4955–6) expressed concerns about the potential impact of the non-conviction civil based scheme on innocent third parties:

> …the clause has at its core a major flaw—that is, the notion that a person who has not been convicted of an offence and is therefore innocent can have his or her property forfeited. I am aware that many members of the public would gladly see the forfeiture of criminal proceeds, but one is either a criminal or not. There is no such thing as half guilty or half innocent. The fact that conviction of an offence is not a prerequisite to the confiscation of a person's property is beyond belief.…[it] takes away our basic rights and the freedom which we have in this country where we are only penalised if something is beyond reasonable doubt, where the onus is on the prosecution to prove that a person is guilty. How is a person supposed to fight a case if they have had all of their assets frozen? What are they supposed to do? Apply for legal aid and be told that they are not entitled to it? What about the wife or the child of the accused?

Elizabeth Cunningham (Independent)

In a similar vein Mrs Cunningham (2002: 4957) stated:

> …the basic tenets of justice need to be defended, and we will continue to defend them. We need the presumption of innocence to be defended. We need to know that people who are convicted of crimes have actually been identified. We need to know that people whose property is about to be confiscated will have some means of redress. This bill does not give those people redress. It does not give them justice. It does not give them a fair go.

Western Australia

Also in Western Australia, there was a strong political driver behind replacing the *Crimes (Confiscation of Profits) Act 1988* (WA) with the non-conviction-based CPCA WA. With the state election looming in February 2001 it was reported in the media:

> The West Australian Premier, Mr Richard Court, has signalled that law and order will be a key election platform for his Coalition Government as it attempts to win a third successive term…Mr Court said his Government needed to take heed of community concerns, particularly in areas like law and order, to win a third term…The Government's crackdown would include targeting the "Mr Bigs" of the drug industry and boosting front-line police numbers by 300. (Drummond 2000)

This 'tough on crime' challenge was keenly taken up by the Opposition:

> Opposition legal affairs spokesman Jim McGinty said the state government had been dragging its feet over the confiscation legislation. The move was recommended more than two years ago by a select committee into drugs and the government promised to introduce the laws a year ago. (Southwell & Burns 2000)

As both major political parties generally supported the bill, criticism in parliamentary debate was surprisingly limited to a select few members, generally members of minority parties and independents.

Jim McGinty (Labor Party)

As the primary spokesperson for the Opposition (Labor) on this bill, Mr McGinty was not necessarily critical of the bill's provisions in and of themselves but of the ability of the WA Government to appropriately administer the bill if passed. However, Mr McGinty did identify six areas in which the legislation challenged accepted criminal justice norms. These were: retrospectivity of operation, reversal of the onus of proof, breadth of application, impact on innocent parties, limited judicial discretion, and the fact that it was not conviction-based. He noted:

> This Bill contains a number of provisions that those of us who are interested in the rule of law might find repugnant at first blush. (2000a: 523[1])

Regardless, he also called for amendments to be made to toughen up the bill in relation to legal professional privilege and disclosure:

> The one criticism I make of the legislation is that it is not tough enough in dealing with the architects of the many schemes designed to promote criminality in this State. I urge the Government to look at an amendment along those lines. (2000b: 539[5])

Robert Wiese (National Party)

In addition to addressing the issues raised by Mr McGinty outlined above, Mr Wiese (2000a: 649–650[6]-[7]) noted that:

> As a person from a farming background, I found myself in the extraordinary situation of having to stand up for what I believe to be basic legal principles that have been part of the legislative framework of this State and of Australia for a long time…I have found myself battling alone for things that I believe are basic to our system of law. I am surprised and amazed that, as a person with no legal background, I am the one standing up for a range of things that I believe most lawyers would regard as sacrosanct in our system of law.

Mr Wiese was particularly concerned that the bill did not adequately recognise victims of crime or provide for their compensation. He introduced amendments to this effect. Mr Wiese (2000b: 2809[1]) was the primary critic of the bill in the Legislative Assembly, particularly during the consideration in detail stage of the debate:

> These questions should be of enormous concern to every member of this Parliament. I have not attempted to amend many of these provisions because they form the cornerstones of the Bill. To attempt to amend them would be to tear the legislation apart, and that is not practicable. I hope some members have enough gumption and respect for the precedent of law and the protections that the legislation of this country has given its citizens for centuries to reject this Bill. We should not throw those concepts out the door and set a precedent by passing this legislation. I guarantee that it will be used to enact other legislation that abandons these longstanding principles of law that are the cornerstones of our legislative system.

Phillip Pendal (Independent)

Mr Pendal (2000: 650[7]) agreed that the bill could not be amended:

> The member for Wagin is on the right track, but I am inclined to think the Bill is unamendable. It is essentially an obnoxious and evil piece of legislation which tramples upon a host of rights that are entrenched in the statute books not for the protection of the Mr Bigs and the crooks, but for the protection of ordinary Western Australians who will fall foul of this legislation.

Helen Hodgson (Australian Democrats)

Ms Hodgson (2000: 3527[2]) expressed concern with non-conviction-based confiscation:

> Our problem arises when one goes beyond that to a system that does not require conviction. Some of the issues in the Bill of the infringements of people's rights and the reversals of conventions and conditions of the law, of not only this State but this country, go beyond what is acceptable.

Giz Watson (Greens)

Ms Watson (2000: 3530[5]) expressed concern with the provisions providing for the reversal of the onus of proof, the civil standard of proof, and the limited discretion of the courts:

> Specific concerns of the Greens with the Bill are, firstly, the reversal of the onus of proof. Prior to being convicted, people will have to prove that they have come by a particular asset lawfully…Another matter of concern is that the standard of proof required by a person charged is the balance of probabilities; that is, a person must prove on the balance of probabilities that the asset was lawfully acquired. I acknowledge that that is a lesser standard of proof than beyond reasonable doubt. However, the fundamental issue of reversing the onus of proof proposed by the Bill is of great concern to the Greens. Members of the legal profession have raised this issue with me as they believe that this legislation will turn on its head some very fundamental principles of law. It has been noted that the Bill will remove the discretion of the courts. We have seen a lot of legislation introduced that is aimed at doing precisely that. I feel that it is a fundamental undermining of the separation of powers and the role of the court system in our administration of law.

In conclusion, then, in all three jurisdictions there was a strong political drive for the introduction of proceeds of crime legislation to be 'tough on crime' and, more particularly, to address serious drug-related and organised crime by taking away the profits of such crime. The main criticism by the Opposition in both Western Australia and Queensland was that the legislation was being introduced too late and/or was not tough enough. Nevertheless, some criticisms were noted in all three jurisdictions, which mainly related to aspects of the legislation that also emerged as concerns in the interviews undertaken for this report. These aspects are:

- the reach of the legislation;
- the overturning of fundamental principles of law;
- the interference with the separation of powers by taking away judicial discretion; and
- the civil nature of what are fundamentally criminal sanctions.

It must be emphasised that, despite these criticisms and despite the legislation being referred to as 'draconian', in all three jurisdictions the legislation enjoyed bipartisan support. This is a clear reflection of the law and order politics which have dominated Australian political debate since the 1980s in a number of jurisdictions (see Skead & Murray 2015; Tubex et al. 2015).

Addressing increasing crime rates

The parliamentary debates identified a second important justification for the introduction of non-conviction-based civil proceeds of crime legislation—that is, addressing increasing rates of serious drug trafficking and organised crime.

New South Wales

The project team was unable to locate drug-related crime data for New South Wales before 1990, and so relied upon other available evidence of the increasing rates of serious drug trafficking and organised crime before the NSW legislation was introduced.

The NSW Government justified the introduction of the Drug Trafficking (Civil Proceedings) Bill 1990, now the CARA NSW, by referring to highly publicised organised crime activities, particularly drug trafficking. For instance, during the second reading debate on the bill in the Legislative Assembly Premier Greiner (1990: 2527) referred to four royal commission inquiries into organised crime and illicit drugs:

- the Australian Royal Commission of Inquiry into Drugs (Williams commission);
- the Royal Commission of Inquiry into Drug Trafficking (Stewart commission);
- the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (Costigan commission); and
- the Royal Commission to inquire in respect of certain matters relating to allegations of organised crime in clubs (Moffitt commission).

All four inquiries recommended the adoption of law enforcement measures to target the profits of organised crime and of drug trafficking in particular. To this end, several of these royal commissions urged governments to introduce tougher confiscation schemes.

The NSW Government further justified the introduction of civil confiscation legislation by reference to certain highly publicised underworld figures identified by the Williams commission and the Costigan commission—including Barry Richard Bull and Richard Bruce ‘Snapper’ Cornwell. Also discussed during the parliamentary debates were the mafia-sanctioned murder of Liberal Party candidate Donald Mackay and the subsequent escape of mafia boss Robert Trimbole; the murder of Australian Federal Police Assistant Commissioner Colin Winchester; and the recent police crackdown on marijuana production and supply.

From the above we can conclude that, even if there was not necessarily an increase in the prevalence of drug-related and organised crime, there was certainly a legitimate concern about the need to address serious drug-related and organised crime and those who control it.

Queensland

For Queensland, the project team relied on the data published on the Queensland Police Service website that provides reported offence rates per 100,000 persons, recorded monthly and dating back to 1998 (Table 3).

Table 3: Reported drug trafficking offences per 100,000 people per month and drug production offences in Queensland (1998–2008)

Year	Reported drug trafficking offences	Reported drug production offences
1998	125	2,240
1999	147	1,847
2000	132	1,945
2001	91	1,938
2002	86	1,946
2003	148	3,180
2004	175	1,832
2005	216	1,706
2006	257	1,468
2007	273	1,480
2008	278	1,511

The available reported crime data does not demonstrate a significant increase in reported drug trafficking offences in the four years before the introduction of the CPCA Qld in 2002. Interestingly, the 2001 and 2002 figures show the lowest recorded trafficking reports. However, after the introduction of the Act there is a significant increase. However, it is difficult to determine if this is related to an increase in the prevalence of drug dealing and trafficking or to increased police activity in this area.

Similarly, reports of drug production offences appear stable from 1998 to 2002. A spike in reported production offences can be seen in 2003, with reports falling back within the normal range in 2004.

Western Australia

To verify the evidence basis of this claim for Western Australia, regard was had to the *Crime and justice statistics for Western Australia* provided by the UWA Crime Research Centre, with data on drug-related recorded offences available from 1998 to 2006. Table 4 represents the percentage of drug-related criminal offences that were reported to WA Police and subsequently recorded, and the percentage of these offences that relate to dealing and trafficking in illicit drugs.

Table 4: Drug-related offences and drug dealing and trafficking offences as a proportion of all reported offences in Western Australia (1994–2006)

Year	Offences recorded in Offence Information System that relate to drugs (%)	Drug offences that relate to dealing and trafficking %(*n*)
1994	4.2	0.2 (527 reports)
1995	3.9	0.2 (523 reports)
1996	5.0	0.2 (505 reports)
1997	5.0	0.18 (688 reports)
1998	4.9	4.8 (723 reports)
1999	5.2	4.8 (725 reports)
2000	5.0	4.6 (722 reports)
2001	5.0	5.8 (929 reports)
2002	4.9	5.6 (890 reports)
2003	4.5	6.8 (955 reports)
2004	4.7	10.7 (1,370 reports)
2005	5.9	9.9 (1,576 reports)
2006	5.8	9 (1,566 reports)

As can be seen, the percentage of drug-related offences in the six years before the introduction of the CPCA WA in 2000 constitutes a small proportion of the overall reported/recorded crime (below 5%) and it has remained relatively stable since, although it increased in 2005 and 2006. However, the percentage and number of reports of drug dealing and drug trafficking offences did increase significantly in 1998 before the introduction of the CPCA WA, and so it appears there was a legitimate concern regarding this crime trend and the need for it to be addressed. Interestingly, the percentage and number of reports continued to increase after the introduction of the legislation. As with Queensland, from this data it cannot be determined if this is related to an increase in the prevalence of drug dealing and trafficking or to increased police activity in this area.

As stated by one of the WA interviewees:

> …it's an impossible question because there are too many factors that impact. For example, if the Police decide to put resources into a particular activity like burglaries, then you'll see a drop in burglaries. If Police decide that they're going to concentrate on confiscation work, then you'll see more money being turned over and that's obviously taking money out of the criminal system. Confiscation has a role to play. What the impact of that is very difficult to ascertain…

In conclusion, in both Western Australia and New South Wales there was a legitimate concern related to serious drug-related and organised crime and the need for broader legislative means to deal with this. However, evidence to support such concerns could not be found for Queensland.

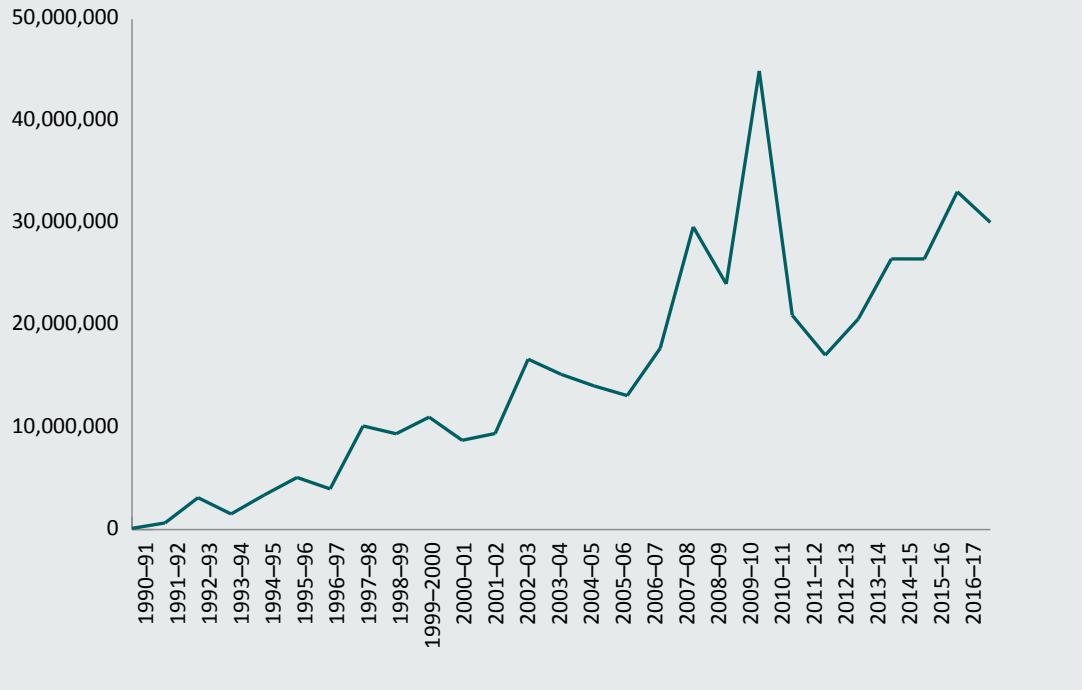
Revenue raising

Raising revenue was also referred to as a potential driver for the introduction of legislation confiscating the proceeds of crime, and this was found to be the case in all three jurisdictions examined.

New South Wales

In New South Wales, the amounts recovered under the CARA NSW are published in the annual reports of the NSW CC. Figure 1 shows the total amount confiscated each year since the CARA NSW came into force.

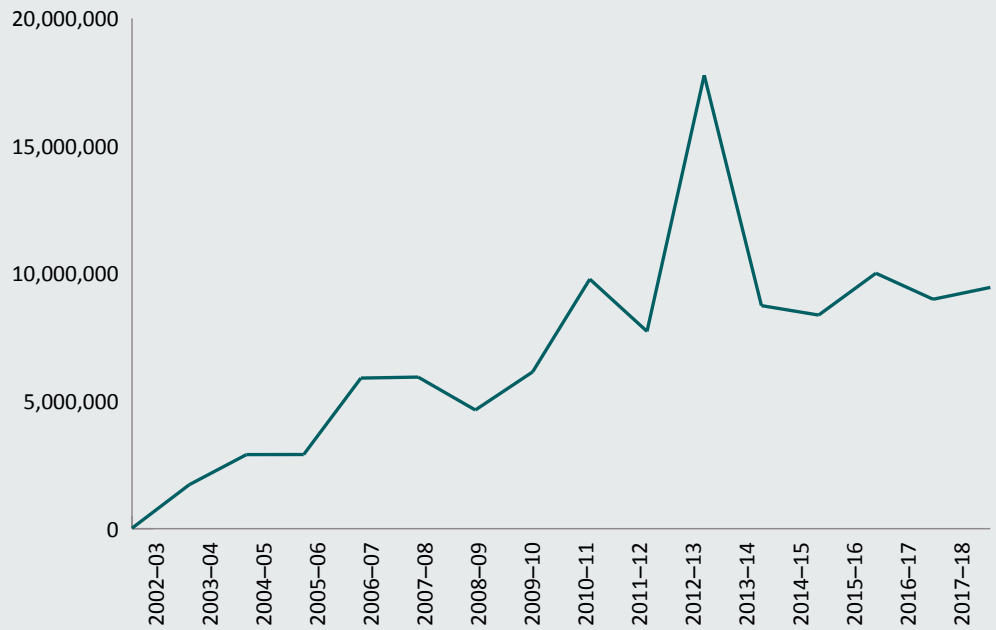
Figure 1: Total amount confiscated in New South Wales under CARA NSW (1990–2017) ($)



Queensland

In Queensland, the amounts recovered under the CPCA Qld are reported in the annual reports of the Queensland CCC and the Queensland ODPP. Figure 2 shows the total amount confiscated each year since the CPCA Qld came into force.

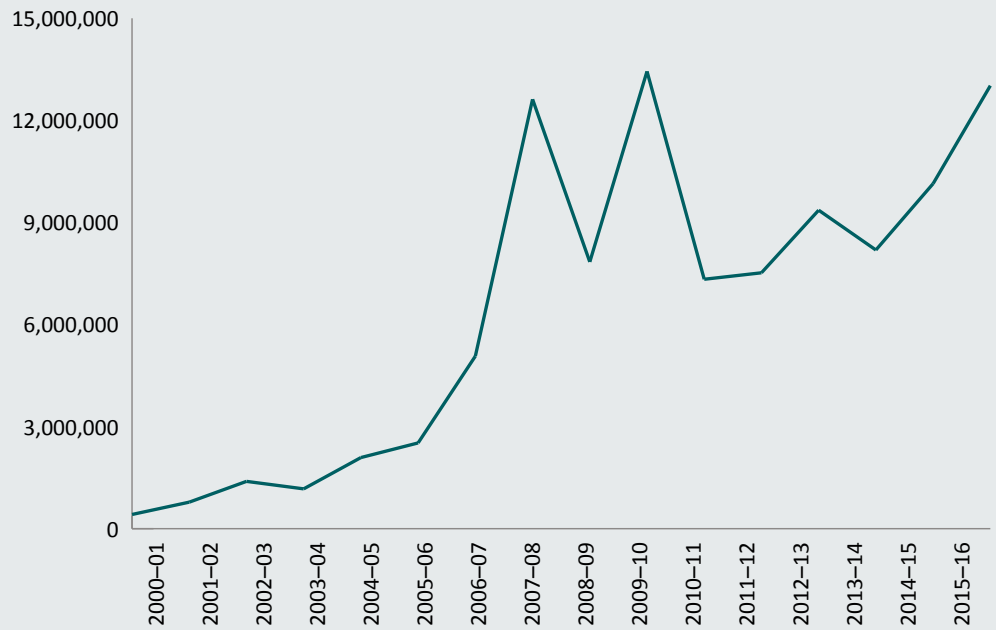
Figure 2: Total amount confiscated in Queensland under CPCA Qld (2002–2016) ($)



Western Australia

In Western Australia, the annual reports of the WA ODPP provide details on the number and value of confiscations under the CPCA WA. Figure 3 shows the total amount confiscated each year since the CPCA WA came into force.

Figure 3: Total amount confiscated in Western Australia under CPCA WA (2000–2016) ($)



From these figures, it is clear that the amounts confiscated under the schemes in all three jurisdictions have increased steadily since their introduction with spikes in some years. The NSW scheme has been by far the most successful in this regard, making good the political promise that the legislation would raise additional revenue for the state. However, as noted by some interviewees, the amount recovered is only a fraction of the total serious drug-related and organised crime economy, the cost of which has been estimated in 2015 as being $36b (Australian Crime Commission 2015a, 2015b).

Deterring serious drug-related and organised crime through incapacitation

A final driver behind the introduction of far-reaching civil confiscation legislation was to deter serious drug-related and organised crime by targeting and incapacitating the so-called ‘Mr Bigs’. As was reported in the WA media on the introduction of the CPCA WA:

> WA Director of Public Prosecutions Robert Cock QC, who helped draft the WA laws, said last year they would provide a new deterrent and help crack down on the Mr Bigs of the illicit drug trade who often amassed great wealth while escaping prosecution. (Southwell & Burns 2000)

And, further:

> The Mr Bigs of the WA drug world are getting away with it and the outlook for cutting down the illicit trade is bleak, according to the State's top judge. Acting Chief Justice Geoffrey Kennedy told a drug action conference at the weekend that big-time drug dealers rarely came before WA courts. Only the lower-level dealers and addicts were seen. "At this stage one can only be pessimistic about the prospects of eliminating trading in drugs," Justice Kennedy said. Director of Public Prosecutions Robert Cock QC said large-scale trafficking was unaffected by prosecutions. "I can confirm that most people charged would not fall into the category of Mr Bigs," Mr Cock said. Mr Cock said authorities should fight the drug menace with new tools such as the Profits of Crime Bill. The legislation introduced in State Parliament last month reverses the legal onus of proof so that suspects must prove they got their wealth through lawful means. WA Police Union president Michael Dean blamed recent problems in the drug squad for the poor results. He said well-known Perth drug barons had mounted a concerted campaign of complaints against the squad. (Reed 2000)

However, there was a consensus across interviewees from all three jurisdictions that the legislation had not been successful in targeting the 'Mr Bigs', and that it was primarily lower-level criminals that had been caught by the legislation. As various interviewees observed:

> It seems to me not one Mr Big has yet been caught. The Mr Bigs don't get caught because they are so smart—the street dealers are simple and naive and take too many risks.
>
> …I think there's also a risk that in practice, it is in fact used or can in fact be used to target the easiest targets, the low-hanging fruit. So complicated investigations, in relation to Mr Bigs, consume a lot of resources and require a lot of commitment and effort on the part of police investigators and other financial investigators and the DPP, because all agencies these days are cash-strapped. Whilst there may be good intentions when the legislation first comes in, I think over time, there's an increasing risk that it'll be used against easy targets.
>
> I certainly haven't seen any cases involving people who you could describe as being a Mr Big or a kingpin or anybody at the top of the pyramid. If indeed it was intended to uncover those individuals, I don't think it's anywhere near that goal—near achieving that goal. There have been some major confiscations proceedings and I'm aware of several involving many millions of dollars but they have been high-wealth individuals; they haven't been people who are the head of some sort of organised network…but I've not seen any cases involving people who are the head of any large networks or even medium-sized networks.

Therefore, it is questionable whether the legislation has achieved its objective of deterring serious drug-related and organised crime. Several interviewees expressed some doubt:

> Most criminals are more worried about whether they are caught or not, not whether or not they lose their property when they are caught. So [I have] serious concerns on whether or not it's acting as an effective deterrent.
>
> I heard a judge once, judge who's now retired, when the prosecutor was calling for deterrents—we need to send a message—he said, "I just wanna stop you there." He says, "Have a look at the back of the court. How many people from the press are here?" "None, Your Honour." "Who's gonna hear about this? Where's the deterrent if I get this bloke a big whack like you're asking me to do? Where's the deterrent other than to him?" "Well, people will hear from it. His family will probably." Pretty bad rope line that you're relying on.

Some interviewees did, however, recognise that the legislation had had some impact on behaviour, particularly in relation to the quantity of a drug that would trigger a confiscation:

> …it's a buyer beware situation, if you engage in criminal activities, you know what you are risking, and you should know, based on the regular reporting of the 'draconian' consequences of this legislation in the media. Certainty about these consequences is what is making this legislation effective.
>
> I think the most sophisticated drug dealers are aware of the impact of the 28 grams in cases. Anecdotally, that is sort of brought out by the fact that quite often you will see the quantities involved individually will be 27.8 grams or something like that.

Regardless, many legal practitioners commented that their clients were caught by surprise, not being aware of the far-reaching impact of the legislation on their property rights:

> The general view is out there amongst the drug populace…is that if they catch you with something that you've acquired as a result of your dealing or your lifestyle that's been funded by that, then you could potentially lose it. They don't know that you will lose everything that you've ever had irrespective of how it was gained. It's just not known.
>
> They're stunned. They're not surprised that their property is frozen. That doesn't surprise them. What stuns them is when I say to them, "If you're convicted, everything you own, everything you control and everything you have ever given away is gone," and they go, 'I know, but these assets have got nothing to do with crime'.
>
> Yeah, I would say most of them understood the concept. We had some prior awareness of the concept of confiscations legislation and that property can be seized and taken, and then you then have to show that it's legitimate. Were they other than superficially aware? I suspect not and that may be because, for a time, the confiscations agencies around the country have been fairly active in achieving settlements rather than litigating to an outcome. And so quite often, substantial confiscation proceedings resolve without achieving a judgement that generates publicity, and that then acts as a deterrent.

It is clear that, while it may have had some effect on drug-related criminal behaviour, non-conviction-based civil confiscation legislation in the three jurisdictions examined has not achieved its objective of capturing high-level criminals involved in serious drug-related and organised crime. Rather, it has primarily affected low-level offenders, many of who are unaware of the potentially far-reaching consequences of the confiscation. In this respect, the legislation has not had a significant deterrent effect.

Conclusions of criminological analysis

The introduction of a non-conviction-based civil confiscation scheme in New South Wales, Queensland and Western Australia was in each case underpinned by a strong, political 'tough on crime' imperative. It is apparent from the parliamentary debates and the absence of opposition to the introduction of the legislation that, although well-understood, the need for a robust stand on law and order outweighed the concerns that the legislation flouted fundamental principles of law and might have detrimental effects.

There is evidence that, before the introduction of the legislation in each state, serious drug-related crime was increasing, based on the information available for New South Wales and Western Australia. Queensland on the other hand, mainly seemed to follow the lead of the other jurisdictions. The legislation has achieved some demonstrated success in stripping those involved in criminal activity of their ill-gotten gains, thereby diminishing the economic base of criminal activity. In doing so, it has resulted in increased state revenue, with the value of confiscations growing steadily, albeit negligibly when compared with the overall cost of organised and drug-related crime in Australia. It is clear that, despite its reach, the legislation has not been effective in targeting high-level offenders. Instead, it has had an impact on less sophisticated, low-level drug users and traffickers and, more concerningly, on innocent third parties, as will be illustrated in the empirical findings.

Findings of the empirical study

These findings reflect the views of 40 interviewees on the broad themes discussed in the interviews. As noted in the Methodology section, the interviews were semi-structured, led by some general questions but giving interviewees the opportunity to provide further comments based on their experiences. The findings are presented by jurisdiction, according to the broad themes raised in the interviews. Interviewees were also categorised by reference to the nature of their interest in and experience with confiscation legislation. The interviewees are listed by category and by jurisdiction in Table B1 in *Appendix B: Empirical study*.

New South Wales

In New South Wales, six people were interviewed. While limited in number, the interviewees covered a broad range of the stakeholders that are involved in each stage of the confiscation process, including legal practitioners, police, the NSW ODPP, and the NSW CC. However, the project team acknowledge that the views of these individuals may not be broadly representative of all those working in the area.

Interviewees generally considered that the NSW dual-statute system works well, with NSW CC administering the CARA NSW and the NSW ODPP administering the CPCA NSW. Of note, it was reported that the NSW CC settles 98 per cent of matters. This success in negotiating settlements was attributed to the fact that investigations are conducted by forensic accountants, and the cost of settling is often far less than the cost of litigating.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

The main drivers for the introduction of confiscation legislation in New South Wales were identified in the reports of royal commissions and in the emergent understanding globally that removing the benefits of crime through confiscation is an effective way to disrupt and dismantle organised and serious crime. It was said there was a general view that the New South Wales civil confiscation scheme, introduced in 1990, was a great improvement and more effective than the previous conviction-based scheme. Initially, however, there were criticisms that this non-conviction-based scheme operated as a 'tax on criminals'.

One of the barristers interviewed was of the opinion that, while drug offenders were the initial target of the legislation, the subsequent broadening of its reach captured a whole range of other offenders. This interviewee referred to the popularity of law enforcement legislation for politicians who then rely on law enforcement officers to be ethical and responsible in the way they enforce the legislation.

It was mentioned by several interviewees that the political appetite for robust confiscation legislation in New South Wales was relatively weak compared with Western Australia. Examples given were the relatively late introduction of non-conviction-based crime-used property confiscation in New South Wales (2016) compared with Western Australia (2000), and the hesitation in New South Wales about introducing a civil standard of proof into the legislation. In the view of these individuals, another feature of the WA legislation that would not be accepted by the Parliament of New South Wales is the removal of judicial discretion from the confiscation process.

Q2. Who, in your experience, is affected by this legislation?

NSW interviewees agreed that the legislation does not capture the 'Mr Bigs' of organised crime, who tend to distance themselves from day-to-day criminal activities. The NSW police interviewee preferred the WA unexplained wealth scheme, which does not require a link to any specified criminal activity. It was considered unnecessarily burdensome to have to prove a link between a particular asset and specified criminal activity, particularly because property is often derived from a mix of legal and illegal activity.

Q3. Do you think this legislation is effective in achieving its aims?

The interviewees directly involved in the implementation of confiscation legislation were generally positive about its effectiveness.

While the CARA NSW is largely regarded as effective, some interviewees noted that it would be incorrect to describe it as successful given that only a very small percentage of the overall value of the NSW criminal economy is confiscated each year. However, confiscation legislation was still considered a useful way to discourage and dismantle organised crime, with the revenue it generates for the state being a welcome windfall. Generally, it was thought that more resources are required for the legislation to be successful.

The CPCA NSW was considered to be effective in achieving its aims. Third parties are adequately protected under the scheme, as there is judicial discretion as to whether to confiscate property or not. Additionally, the impact of the confiscation is less severe because the Act applies to the confiscation of less valuable property.

Interviewees were also of the shared view that the legislation is having a deterrent effect, with some general public awareness of its operation. However, this also means that it is important to move quickly on confiscations before property is disposed of.

Q4. What areas of the legislation, if any, need to be reformed?

The project team raised particular areas of concern with the legislation and invited further comments from interviewees on any other areas for improvement.

Non-conviction-based civil proceedings

The addition of the non-conviction-based civil confiscation scheme in the CARA NSW to the conviction-based scheme in the CPCA NSW was viewed positively.

However, one barrister disagreed with the lower standard of proof required by the CARA NSW—that is, a reasonable ground to suspect or on the balance of probabilities.

Lack of judicial discretion

One interviewee from a government agency expressed support for the removal of judicial discretion, as is the case in the WA regime. However, the interviewee did acknowledge the need for some discretion in exceptional individual circumstances.

The legal practitioners expressed strong support for a guided judicial discretion in the confiscation process, based on public interest, particularly in relation to crime-used confiscations where the risk of disproportionate and aberrant outcomes abound. One interviewee considered this to be an important restraint on executive decision-making.

Impact on (innocent) third parties

From the NSW CC interviewee's point of view, the third party protections in the CARA NSW are adequate, striking a good balance between achieving the objectives of the legislation and operating fairly.

One practitioner disagreed with this view, expressing concern about the impact of the legislation on innocent family members. Further, they observed that the legal costs of opposing restraint and confiscation can be prohibitive because of the civil nature of confiscation proceedings.

Further suggestions for improvement of the CARA NSW and the CPCA NSW

One interviewee suggested that the effectiveness of both statutes would be bolstered by the use of telephonic interception in investigations—although offenders are unlikely to disclose criminal activities over the phone, they do tend to discuss their property holdings and financial affairs.

The introduction of a uniform national scheme for recovering unexplained wealth received some support from interviewees from law enforcement agencies.

Queensland

In Queensland, six people were interviewed from the legal profession, the judiciary, the Queensland CCC and academia. Once again, the project team acknowledge that the interviewees' views may not be broadly representative of all those working in the area.

As in New South Wales, the responsibility for administration of the confiscation regime is divided between two entities. The Queensland ODPP is the responsible authority for the conviction-based scheme, and the Queensland CCC is responsible for the non-conviction-based scheme. A good working relationship between the Queensland ODPP, the Queensland CCC, and the Queensland Police Service (Queensland Police) was seen as critical to the effective operation of the scheme. As in New South Wales, the majority of cases handled by the Queensland CCC are settled before trial.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

Only one interviewee expressed a view on the rationale for introducing the CPCA Qld. In his view, the new non-conviction-based scheme was introduced into Queensland in 2002 because the existing conviction-based scheme was proving ineffective in capturing the ill-gotten gains of those involved in criminal activity.

Q2. Who, in your experience, is affected by this legislation?

Consistent with the views of interviewees in New South Wales and Western Australia, the prevailing view of Queensland interviewees was that the legislation has not been successful in capturing the ill-gotten gains of the 'kingpins' of drug-related and organised crime operating in that state. It was, however, seen as successful in targeting a number of 'high-wealth individuals' who had accumulated significant prosperity, with several confiscation cases involving millions of dollars.

One barrister interviewee stated that in his experience his clients were only 'superficially aware' of the possible consequences of the legislation. As noted above, one of the reasons for this is that most confiscation matters are settled out of court and therefore not reported in the media. This view was reinforced by a judge interviewee who indicated that, for the legislation to act as a deterrent, confiscation orders must be publicised so that people are aware of how the legislation operates.

Q3. Do you think this legislation is effective in achieving its aims?

In general, the comments on the effectiveness of the Queensland legislation were positive, but some problematic aspects were raised.

According to the Queensland CCC interviewees, the current structure of the CPCA Qld is unduly complex in the way it has brought three aspects of confiscation together in one statute. They stated it was in need of a full review and rationalisation. Nevertheless, they considered that all three aspects of the CPCA Qld have their place and have, to some extent, operated successfully in removing the financial benefits of crime and preventing them from being reinvested in further criminal activity—although it is considered not to be what one might call 'a big money spinner'.

Q4. What areas of the legislation, if any, need to be reformed?

Non-conviction-based civil proceedings

The barrister interviewee commented that one of the problems with a civil scheme is the burden that is placed on defendants to show that their assets are completely free from taint. Not all people are careful and organised in keeping their financial records, and so may not be able to demonstrate the legitimate source of their property. This is particularly the case for those who might be employed on a 'cash for services rendered basis'.

The barrister commented further that many practitioners involved in confiscation matters are criminal lawyers with limited understanding and experience of civil matters. As a consequence, it takes them longer to familiarise themselves with the legislation and the required civil procedures, which in turn increases costs and delays for their clients.

Expressing a more jurisprudential view, the judge interviewee considered that the purpose of confiscation legislation is to act as a deterrent, and that this is more appropriately achieved through civil proceedings, as criminal proceedings have a number of other aims including punishment, rehabilitation and retribution.

Lack of judicial discretion

In the barrister's view, judicial discretion is essential to allow for adjustment in exceptional circumstances. He considered that legislative drafting is at best an attempt to capture all the possible scenarios that can arise and that, as this is an impossible task, a public interest judicial discretion is needed.

By contrast, interviewees from the Queensland CCC were concerned that the public interest discretion in chapter 2A of the CPCA Qld creates too much uncertainty. They preferred the relative clarity of the hardship provision.

Impact on (innocent) third parties

The Queensland practitioner interviewee outlined the potential for the CPCA Qld to operate unfairly on innocent third parties—mainly family members of the offender. However, according to the judge, the inclusion of a judicial discretion in the legislation adequately addresses this concern.

Further suggestions for improvement of the CPCA Qld

There were no further suggestions for improving the CPCA Qld in the interviews conducted.

Western Australia

Twenty-six of the interviews were conducted in Western Australia, covering a broad range of stakeholders. While there was consensus between the interviewees on many of the issues raised in the interviews, the dissenting views are highlighted in the discussion below. Data obtained from the interviews with the five members of the public are collated in the WA case studies section.

Q1. What do you see as the main drivers for the introduction of confiscation legislation?

Political imperative

Interviewees directly involved in the introduction of the CPCA WA stated that there was a strong political driver behind its introduction. The Criminal Property Confiscation Bill 2000 (WA) was initially introduced into the WA Parliament by the then Liberal Attorney General, in what was described as a 'tough on crime pre-election bid'. As the Liberal Party was seeking a third term in office, the legislation was seen as a powerful 'vote-winning' tool. The electoral appeal stemmed from the claim that the legislation would combat organised and drug-related crime by targeting the so-called 'Mr Bigs' that were beyond the reach of the conviction-based confiscation legislation in force in Western Australia at the time. In response, the Labor Party felt politically compelled to endorse this 'law and order' initiative. When the election was called in February 2001, the CPCA WA had been passed but not yet proclaimed. The Labor Party won the election and implemented the legislation.

Addressing crime

Within the context described above, interviewees saw the main focus of the legislation as the targeting of high-level drug-related and organised crime. There was concern that drug trafficking was getting out of hand and required a stronger legislative reaction to serve as a deterrent. Interviewees also spoke of another underlying justification: that criminals should not profit from their illegal activity—'crime doesn't pay'. To overcome the normal evidentiary barriers to securing a criminal conviction in order to achieve a confiscation, the legislation introduced non-conviction-based confiscation.

Raising revenue

In addition, the fact that the WA Government could raise revenue through civil confiscation was said to be a welcome addition to the state budget, particularly given that this revenue was seen as potentially benefiting the community by being used to compensate victims and to deliver drug rehabilitation programs.

Dissatisfaction with judicial discretion

Another driver for the introduction of the CPCA WA was said to be political dissatisfaction with decisions under Western Australia's first confiscation legislation, particularly those related to sex offences. Two particular developments were noted. First, decisions determining that a property at which an offence was committed was not crime-used property, and, second, decisions determining that property should not be subject to confiscation where third parties might be affected. The legislation tightened the existing provisions related to crime-used property confiscations, including by removing judicial discretion.

Public opinion

Underlying all the above is the perception among interviewees that, in general, Western Australia is a punitive state in which law and order debates flourish and are electorally attractive. Several interviewees mentioned the general public view that sentencing was not severe enough and that an additional form of punishment was desirable.

Q2. Who, in your experience, is affected by this legislation?

Across the WA interviewees, there was a shared view that, for various reasons, no real 'Mr Bigs' had been caught by confiscation legislation. This was because high-end 'criminal bosses' are streetwise and know how to place themselves beyond the reach of the legislation—for instance, they do not have any significant assets in their own name, and enforcement agencies do not have the expertise or resources to track them down.

People affected by confiscation legislation were described as falling into two broad categories. First, there are low-profile drug dealers, mainly dealing to support their own drug habits—referred to as 'low-hanging fruit'—who are easy to catch but without significant confiscable assets. Second, there are the middlemen, who live a comfortable life but are not particularly well-off. The latter were considered more difficult to target because of the complexities of their financial arrangements. The interviewees considered that, in practice, the low-range offenders are therefore more commonly affected by confiscation.

Q3. Do you think this legislation is effective in achieving its aims?

Some interviewees, mainly those from the prosecutorial services, considered the legislation had achieved some important objectives. Some held the view that, while the legislation did not eradicate drug trafficking and organised crime, it has altered offender behaviour and has made deriving profit out of crime more difficult. One politician interviewee considered that most aspects of the legislation had been effective but the unexplained wealth provisions had not, and that greater investigative powers were required for this form of confiscation to be effective.

In a more general sense, most of the interviewees were, in principle, satisfied with the CPCA WA. However, they regarded the way the Act has been implemented and the disproportionate, arbitrary and disparate effects it can have as problematic. There is a view that the legislation would be acceptable if it was limited to confiscating the actual proceeds of crime. However, in its current form, the legislation allows for lawfully acquired property to be confiscated in certain circumstances.

Views on the deterrent effect of the legislation were mixed and are therefore presented by category of interviewees. Most legal practitioners indicated that their clients were not aware of the far-reaching impact of the CPCA WA, particularly in relation to declared drug trafficker and crime-used property confiscations. They therefore did not perceive the legislation as having a deterrent or preventative effect. In their experience, most clients were aware that they risked losing the proceeds of their illegal drug activity, but not that they stood to lose all their assets. These interviewees felt that, if deterrence was the aim of the legislation, its full reach should be more explicitly publicised. One interviewee referred to the lack of evidence in the criminological literature that more severe punishment has any deterrent effect at all. Another interviewee said that the risk of being caught is a more effective deterrent than the punishment that might ensue. Further, one interviewee commented that, when people get involved in taking drugs, 'rationality is the first thing that goes out of the window' and this negates any deterrent effect the risk of confiscation may have.

One judge stated that the data clearly proves that there is no deterrent effect because drug cases have kept increasing. However, increased public awareness of the legislation was noted. One judge indicated that some drug dealers try to circumvent confiscation by having just under the defined amount of a drug that would mean them being declared a drug trafficker.

By contrast, an interviewee from government stated that people engaging in criminal activity are—or at least should be—aware of the risks they are taking, particularly as the 'draconian nature' of the legislation is regularly reported on in the media.

Q4. What areas of the legislation, if any, need to be reformed?

Most interviewees had suggestions for improvements of the legislation. Only one interviewee was of the view that no adjustments were required. The interview questions highlighted some particular areas of concern that have been the subject of academic criticism, while other areas of concern emerged from the interviews. All are discussed below, and some are further developed in the *Discussion and recommendations* section of this report.

Non-conviction-based confiscation

Regardless of the category of interviewee, there was broad support for a non-conviction-based scheme. This was for several reasons. First, it is often very difficult to secure the conviction of high-end drug traffickers and those involved in organised crime. Second, there is a need to act swiftly in restraining property before it is concealed. Third, there are significant challenges in linking assets to specific criminal activity.

Executive discretion and the collaboration between WA Police and the WA ODPP

In responding to questions about the exercise of executive discretion and how the legislation was operationalised in practice, interviewees indicated that this had evolved over time. Initially, it seems there was a lack of clarity as to who was to take primary responsibility for initiating confiscation proceedings. Several interviewees expressed the view that initially the WA ODPP did not consider it had a discretion in taking action under the legislation, and either followed the lead taken by WA Police or consulted with WA Police as to whether to institute proceedings. More recently, it seems to be clearer where the discretion sits, with the WA ODPP, as an independent prosecutorial agency, exercising discretion on whether to proceed to confiscation or not.

Some interviewees felt uncomfortable with the WA ODPP exercising this discretion and leaving the court to merely 'rubber-stamp' the decision if all the administrative boxes are ticked. Of specific concern in this regard were the possible perverse incentives that may influence decision-making, such as meeting key performance indicators.

Lack of judicial discretion

There were strongly opposing views on this aspect of the CPCA WA.

From the prosecutorial and one politician's point of view, certainty and predictability are paramount, and judicial discretion would undermine the primary aims of the deliberately far-reaching legislation. Another politician disagreed and felt that judicial discretion was needed. However, this interviewee also recognised the public distrust in judicial decision-making and the consequent political difficulty in incorporating an acceptable degree of judicial discretion into the scheme.

Most other interviewees were supportive of some judicial discretion and the safeguards this ensures. In particular, with one exception, the judge interviewees were uneasy about the absence of judicial discretion in confiscation proceedings. Several reasons were given.

First, the role of the court would be watered down to a 'rubber-stamping' exercise. Second, no consideration could be given to the individual circumstances of each case and the flow-on effects of confiscation for any innocent third parties. Third, the implementation of the legislation would be too strongly influenced by political agendas and electoral gain. Fourth, no consideration could be given to the potential disproportionality between the confiscation and the seriousness of the offence. Fifth, the arbitrariness and potential for lack of parity in the extent of a confiscation—for example, for two offenders whose criminal activity may be similar but who have vastly different asset holdings.

Impact on (innocent) third parties

There were also opposing views on this aspect of the CPCA WA.

From the prosecutorial point of view, the statutory protections available to third parties are adequate, even if the conditions are onerous.

While there was some concern expressed by government agents in this regard, one interviewee considered it an inevitable consequence of confiscation legislation. That interviewee stated that, if such unfortunate consequences were publicised through the press, it might strengthen the deterrent effect of the legislation.

One of the politician interviewees questioned the 'innocence' of third parties who—knowingly or unknowingly, directly or indirectly—benefit from the defendant's criminal activity. On this view, it is not the responsibility of the state to protect these third parties from the choices made by their offending parent or partner. Rather, the legislation was introduced to combat crime, regardless of any 'collateral damage' to third parties.

Legal practitioner and judge interviewees were more concerned with the potential impact of the legislation on third parties and the difficulty they may have in protecting their shared assets. The hardship provision is very limited: it applies only to crime-used property confiscations and is very difficult to establish. These interviewees referred to several well-known cases reported in the media and to examples from their own experience. There was a consensus that women and children are particularly vulnerable to the adverse effects of confiscation. For these interviewees, the protections currently in place are inadequate. It was acknowledged that whether and to what extent third parties are really innocent and unaware of what is going on may be a vexed question. But, even if a third party has some awareness, other factors may come into play—for example, roles within the relationship or pressure from the defendant. It becomes more problematic when dependent children are involved as they can hardly be blamed for benefiting from the illegal activity of a parent. According to these interviewees, there should be more effective safeguards for truly innocent parties and children. Judicial discretion was considered an appropriate solution.

Transfer of unexplained wealth and criminal benefits confiscation powers

Some interviewees expressed guarded support for the recent transfer of powers relating to the unexplained wealth and criminal benefits confiscation schemes to the WA CCC. The predominant view was that this transfer would be an improvement, provided the following changes were also made. First, the WA CCC should act as an independent agency tasked with investigating the criminal activity as well as the confiscation matter. Currently this is not the case. Second, the WA CCC should be given wider investigative powers. Third, there should be a better integration of the activities of the WA CCC with those of WA Police and the WA ODPP. An alternative suggestion was that confiscation following criminal conviction should remain with the WA ODPP, and the WA CCC should take responsibility for non-conviction-based confiscations.

Several interviewees acknowledged that the WA CCC is better placed to pursue unexplained wealth confiscations than WA Police because they have more expertise. However, these interviewees also acknowledged that this will require the WA CCC to make more efficient use of resources than they do at present. However, even interviewees who supported the transfer of powers did not regard it as a panacea for the existing problems with implementing unexplained wealth confiscation if the WA CCC is not better resourced.

Other interviewees did not see the benefit of the transfer of responsibility for unexplained wealth confiscation to the WA CCC because, in their view, the WA ODPP is doing a good job in this area. Some interviewees even saw it as a dangerous shift of powers, with the WA CCC becoming the investigator, the prosecutor and the arbitrator, and the role of the courts being ultimately diminished throughout the process.

Further suggestions for improvement of the CPCA WA

A couple of interviewees expressed concern that the period of 28 days during which a person can object to a freezing order was too short, particularly for those living in regional and rural Western Australia, who may need longer to obtain legal advice and representation.

A further concern was that there is no mechanism in the CPCA WA to claim compensation for loss sustained where property is frozen and then released following a successful objection application.

WA case studies

The project team interviewed six members of the public who were affected by action taken under the CPCA WA. After the team sent out the interview transcripts, one interviewee withdrew from the project because of the possible impact on ongoing legal proceedings. The remaining five interviews are presented as case studies. The data have been de-identified and only general information is provided.

The case of Miss A

Miss A lives in regional Western Australia and inherited with her siblings their father's property, the family home. One of her brothers was living in the house when about 10 years ago he was charged with having sex with an under-aged person in the house. The property was frozen and freezing notices were issued to all of the siblings. They attended the police station as they were not familiar with criminal property confiscations. Miss A sought legal advice. She was charged $6,000 as the lawyer said she had to familiarise herself with this, at that time, 'rather new piece of legislation'. As Miss A thought she was being overcharged, she went on the internet and tried to find out about the legislation. This confirmed her initial impression that $6,000 was an excessive charge. She took the lawyer to court, the court found in Miss A's favour and her expenses were reimbursed.

Over the years, Miss A has consulted several lawyers. She has found many to be inexperienced with this legislation. She has paid thousands of dollars in an attempt to settle the case and recover her family home. This put enormous pressure on her and the family and placed a lot of strain on their relationships. At the time of the interview, the family were close to settling the case: the property will be released on Miss A paying the state the value of her brother's share in the property. The property is of significant emotional value to Miss A. It is the family home, it is where Miss A grew up, and it was built by her father. Miss A intends to buy out her other brothers and sisters so that she will have the full title to the house.

Miss A described this as a very stressful experience, which lasted 10 years, and she estimates it has cost her around $30,000. In addition, she has continued to pay the annual rates without getting any financial benefit from the property. Further, as no-one was permitted to live in the house and it is on a large block, she has had to pay someone to maintain and clear the land on a regular basis.

The case of Mr B

Mr B rented out his house. The tenant installed a hydroponic cannabis set-up in the roof. It caught fire and the police attended with the fire brigade. The insurance claim was paid out, and the property was repaired. The police froze the property on the basis that it was crime-used. Mr B settled out of court and agreed to pay a fairly modest sum to the state. There was only a negligible difference between the cost of litigating—and only potentially succeeding, even with a costs order on a party/party basis—and the cost of paying the agreed sum to the state, which made the latter a far more preferable option.

Mr B explained that he had suffered stress as a result of the freezing of the property and that it had cost him between $60,000 and $70,000 in lawyers' fees in addition to the 'without prejudice' payment of $34,000 to the state. Mr B lives in regional Western Australia and had great difficulty finding a lawyer with experience of criminal confiscations. The case took about 12 months to settle. Two years later Mr B is still paying back money he had to borrow from family. He describes his experience with the legislation as being 'barbaric'. He is particularly upset that he was not permitted to have legal representation at his interview with the WA ODPP, which he described as 'intimidating'. While he had heard of the legislation, he had no real understanding of it and so felt he needed legal support.

The case of Miss C

Miss C's partner had problems with addiction, which she knew about but which they were trying to address through counselling. According to Miss C, her partner was selling drugs to support his own habit but was not a drug dealer. The family home was lawfully acquired. On the night of the police raid, she was arrested together with her partner and drugs were found on the premises. She spent the night in jail, charges had been made at that time but were later dropped. She describes the great insecurity she experienced in not understanding what was happening or where to go for help. Although the family home was registered in her partner's name, over the years Miss C had contributed a considerable amount to its upkeep and to supporting the family. After a bad experience with her first lawyer—which cost her $25,000 over two months—Miss C decided to take things into her own hands. She resigned from her job, took over management of the family business, and represented herself in the confiscation proceedings. She was able to prove that she had contributed over 50 percent of the value of the house. The house was later sold to enable Miss C to settle the case. Miss C's partner finds it difficult to accept that he lost his share in the house and business that he worked so hard for through legal means. From her perspective, Miss C was mainly concerned about supporting her partner in seeking help for his addiction. She said this period had an enormous negative impact on her mental health. She spoke about having to find the strength to fight the system, without legal advice or any other support, to retain what was lawfully hers.

The case of Mr D

Mr D was running a business and was charged with supplying over 50 grams of a prohibited substance, triggering the drug trafficker confiscation provision. As a consequence, all his assets—reportedly worth between $3m and $4m—were frozen. Two and half years later, at the time of the interview, his property was still frozen. He is able to prove his income and the fact that his business and other assets were legally acquired. He has represented himself in the court proceedings so far because no funds have been released by the WA ODPP for his legal representation. He cannot pay off his loans to the bank, and is now at risk of bankruptcy.

Mr D was selling drugs to support his own habit. He was not aware of the fact that possessing over a certain quantity of that particular drug may result in a person being declared a drug trafficker. Mr D spent eight weeks in prison. However, at the time of the interview his criminal case had not yet proceeded to trial and he had not been convicted of any crime.

The case of Ms E

Ms E was married for about 24 years. The marriage was fraught with problems, largely fuelled by her husband's alcohol abuse and gambling. She threw her husband out of the family home 10 years ago. However, she did not have the resources to finalise the divorce and property distribution. The family home was registered in the names of both Ms E and her husband, and Ms E and her children continued to live in the home. This included paying mortgage repayments and attending to necessary repairs and maintenance.

Five years later, Ms E's son came across a newspaper article reporting that his father had been arrested with over 60 kilos of cannabis with a street value of around $500,000. Ms E's husband was convicted, declared a drug trafficker, and imprisoned. The family home became the subject of confiscation proceedings. Ms E contacted a lawyer. The lawyer charged her $36,000, but ultimately advised that he was not able to assist her as 'he couldn't win the case'. Ms E is still at risk of losing her home. As a result of his father's crime, her son lost his job in the import/export industry. He has been unable to find other stable work because background checks reveal his family history. Ms E is suffering debilitating emotional distress, is dependent on sleeping medication, and is currently battling cancer. Ms E says these conditions are as a result of all the stress. Ms E never had any involvement with drugs. She describes how she lost all her other assets during her marriage due to her husband's spending, and she does not understand why she is being victimised for her husband's crimes.

Discussion and recommendations

> There are some really ugly blotches on our justice landscape. (Interviewee)

As noted above, there were a number of drivers underlying the introduction and proliferation of non-conviction-based civil proceeds of crime legislation. These drivers included deterrence, incapacitation, and punishment. There were also political imperatives and enforcement agency priorities. Whether or not the legislation has achieved the principal objective of deterrence is difficult to determine and a matter of some doubt.

A number of common themes emerged from the legal and criminological analyses and the empirical data collected. Generally, it was considered that confiscation of proceeds of crime legislation is an important component of a jurisdiction's legislative armoury against crime. However, it is clear from the project that many, although not all, interviewees see a need for reform in a number of areas. As one interviewee commented:

> I think that the Act is probably due for a review and a revamp and being brought up to date. There were anomalies identified…I think we can learn from the experiences of other jurisdictions, which is why I'm interested in the outcome that you come to, and how it can be refined.

Areas of particular concern are identified below. There is a need for urgent revision of certain areas of the legislation to ensure the schemes achieve their legitimate objectives in an effective and fair manner.

While the need for reform appears to be widely acknowledged in the empirical data, the project team accepts that the political realities mean there has historically been very little appetite for legislative change to confiscation regimes. For instance, as one interviewee observed:

> I understand both sides of politics think the drug trafficker regime is a bit harsh; yet neither side will blink.

And another:

> It's very hard to backtrack. I mean I'm not saying it's not possible but…we'll need the support. If you don't have the support of both sides of the parliament, it would be difficult.

Non-conviction-based civil proceedings

All Australian jurisdictions now provide for some form of non-conviction-based confiscation that is not dependent on criminal prosecution. Without exception, all confiscation proceedings are civil in nature, with a civil standard of proof and civil rules of evidence. This means the Crown's task in securing a confiscation is made easier. Some jurisdictions go a step further, by diluting ordinary rules of evidence to permit hearsay evidence and some opinion evidence (eg CPCA WA ss 105 and 109).

Non-conviction-based regimes allow the restraint and confiscation of assets suspected of being tainted by criminality without securing a criminal conviction. There has been strong commentary against non-conviction-based civil confiscation proceedings. Such proceedings essentially wrap criminal sanctions in civil jackets:

> There is something deeply disturbing about the tendency to discard conviction as a pre-requisite to the imposition of sanctions. This readiness to accept or promote the idea that civil sanctions are non-punitive or less onerous leads inexorably to the lessening of procedural safeguards… (Freiberg 1992: 51)

Similar criticisms were reflected in the empirical data collected. One interviewee observed:

> …to achieve what the parliamentarians and police wanted they had to abandon the burden of proof, rule of law principles, so that proof was reversed, you had to prove you are innocent rather than the other way around which has been the basis of our law for centuries. Now, that is an enormous imposition on human rights.

And another:

> The lawyer in me says that we shouldn't be punishing anyone without a conviction. The political realist in me says that 'that's difficult'.

Further, although civil in nature, it is undeniable that confiscation proceedings are tightly bound up with the associated criminal investigations and/or proceedings. Having the two procedures operating in parallel creates an administrative burden. It also raises issues relating to both the substantive risk of double punishment—despite this intention being formally excluded by provisions such as s 9 of the CPCA Qld—and the investigative process. Interviewees described it thus:

> I think what I would do is rather than make it a civil action, I would make it a part of the criminal proceedings, so part of hybrid proceedings. I would legislate so the process doesn't have to be filed separately, it can just be filed in the criminal proceedings.
>
> So it was really a double punishment after the event…the first punishment obviously being the [criminal] penalty and then the confiscation.

Indeed, paragraph 55(iii) of the Queensland ODPP's *Director's guidelines* (2016) instructs Crown Prosecutors and legal officers '*to apply* for appropriate confiscation orders *at sentence*' (emphasis added).

Of particular note, the WA ODPP's *Statement of prosecution policy and guidelines* states that, 'where the confiscation of property is potentially a mitigating factor', the WA ODPP should act promptly and prior to conviction or sentence (WA ODPP 2018, Appendix 2: [5]). This suggests an inextricable and impermissible link between the two proceedings. This is despite both paragraph 22 of the guidelines and s 8(3) of the *Sentencing Act 1995* (WA) indicating that the added impact of the confiscation on the sentence imposed is not a relevant consideration in deciding whether to commence confiscation proceedings.

Regarding investigations, concerns were also expressed as to the cross-pollination of information between the civil and criminal investigations. One interviewee asked:

> The proceeds of crime police officers should keep what happens in those interviews separate from criminal investigations…Why can't WA police have Chinese walls?

As the Law Council of Australia (2014: 4) has pointed out, where civil confiscation proceedings precede criminal proceedings, the lack of separation between the civil and criminal proceedings poses a threat to the privilege against self-incrimination.

Unexplained wealth confiscations present a particularly extreme example. For instance, in New South Wales a court:

> …must make an unexplained wealth order if the court finds that there is a reasonable suspicion that the person engaged in a serious crime related activity or derived…property from any serious crime related activity. (CARA NSW s 28A(2))

This was criticised by one interviewee:

> I still say the lower standard of reasonable grounds to suspect to get an order against you, an unexplained wealth order to be calculated [sic], presented too low a standard.

The unexplained wealth confiscation provisions go even further in Western Australia by not requiring a link with any identified criminal activity. Wealth can be targeted simply if it is 'more likely than not that the total value of a person's wealth is greater than the value of the person's lawfully acquired wealth' (CPCA WA s 12(1)). In such circumstances, there is a presumption that the wealth is not lawfully acquired, and the onus is on the respondent to demonstrate on the balance of probabilities that their wealth was lawfully acquired. An interviewee described this particular provision as follows:

> [The WA unexplained wealth provisions are] better than the unexplained provisions pretty much in any other jurisdiction because they are not connected to criminal activity and that's a critical aspect...that's a much neater system.

Gray notes that unexplained wealth schemes effectively impose 'the "punishment" of taking a person's wealth or property away when no specific allegation of wrongdoing need be made, let alone proven beyond reasonable doubt' (Gray 2012b: 34).

Despite the criticism levelled at non-conviction-based civil proceedings, generally interviewees considered the addition of non-conviction-based confiscation to the earlier conviction-based schemes to be necessary for their effective operation:

> …if you're looking at the high end, they're never gonna get convicted of anything and yet they're clearly living off the profits of whatever, whether it be drugs, ammunition, guns, etc., prostitution, whatever. The legislation's not gonna work if it had to be conviction-based…it would just be too hard.
>
> I think it does have to be non-conviction-based, otherwise, it can't function…it is targeted at a particular social evil that is difficult to detect, difficult to prove a specific crime and yet, you know as a matter of common experience, it's not the only instance that's been involved.

While this view was expressed mainly in relation to unexplained wealth confiscations, non-conviction-based proceedings were also considered necessary in the initial freezing and restraint stages of other confiscations:

> You need to be able to react quickly. You can't wait. If you wait until conviction…[the property] will be gone.

Within the bounds of a non-conviction-based scheme, while there was little concern expressed as to the civil nature of the proceedings, there was considerable concern about shifting the burden of proof to the defendant and applying the lower, civil, standard of proof. In its submission to the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 the Law Council of Australia stated:

> By reversing the onus of proof the…unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. (Senate Legal and Constitutional Affairs Legislation Committee 2009: [2.59])

Freiberg has expressed a similar view:

> It is not unreasonable, therefore, to argue that the criminal standard ought to be maintained in the process of making a confiscation order. Because the consequences of such orders are drastic and because the legislation is founded upon criminal activity, it is more important to focus upon the substance of the process and the severity of the sanction rather than upon the formalistic nature of the process described in the Act. (Freiberg 1992: 53)

Recommendations:

Retain the non-conviction-based scheme for unexplained wealth, but require evidence linking the defendant to some confiscable criminal activity, as in the NSW and Queensland schemes.

Retain the non-conviction-based schemes for other categories of confiscation, but provide that the legal burden of proof remains with the Crown.

Executive discretion

There is no provision in any of the three confiscation regimes investigated in this project mandating the institution of confiscation proceedings. Rather, the decision about whether to confiscate property lies with the relevant enforcement agency—the police, office of the Director of Public Prosecutions, or crime commission, as the case may be. One interviewee commented:

> …there's got to be some sort of filter put on what property is recovered by the State. If somebody is declared a drug trafficker, the opened bottle of milk in the fridge is confiscated. Well, we're not going to be doing anything about that. The hundred-dollar gift given to the daughter for Christmas last year is confiscated but again we are not going to do anything about that. The motor vehicle that is worth a couple of thousand dollars at best, we're not going do anything about that. But under the legislation, it's all been confiscated. So you're going to have to deal with, and our systems do deal with, those sorts of situations.

In *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, Gageler J (in dissent) expressed concern at this common feature in the Australian criminal property confiscation landscape. His Honour did, however, leave open the possibility of a constitutional challenge to the federal proceeds of crime regime where confiscation does not occur by statutory direction but rather on the basis of overt executive discretion:

> The penalty or sanction imposed by the legislative scheme, such as it is, lies in the threat of statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP. (at [135])

His Honour classified the extent of the prosecutor's discretion, allowing for 'civil forfeiture as a means of punishment for criminal guilt', as potentially resulting in an executive usurpation of the judicial function—that is, as 'purporting to confer on the DPP part of an exclusively judicial function' (see at [138]). Similarly, it has been observed that '[t]he role of the DPP is not to make judgements as to whether a particular sentence is appropriate or not' (Abetz 2011: 7081[1]).

Perhaps of greatest concern in this regard are the provisions encountered in Western Australia and Queensland that provide for automatic confiscation in certain circumstances. In these instances, final confiscation is a matter of executive discretion, with the role of the judiciary being simply to declare as an historical fact that the property is confiscated. One interviewee described this situation as follows:

> So the discretion is at the start rather than the end because the prosecutor will then decide whether or not to make the application and once the application is made then the court's hands are tied and the court almost becomes a rubber-stamping exercise.

In this regard, Gageler J (at [136]) did take some comfort in the fact 'that the DPP will exercise the discretion with the utmost propriety'.

However, the interviews suggested that this is not the case in all instances. For example, in one interview with a barrister it was reported that the threat of confiscation of a family home may have been used to extract a guilty plea and thus secure a conviction. The guilty plea was entered and the confiscation proceedings were then abandoned. This account is in direct conflict with the WA ODPP's *Statement of prosecution policy and guidelines 2018*, which provide that:

> The DPP will not negotiate in confiscation proceedings in order to secure or influence the entry of a plea of guilty to any offence. (WA ODPP 2018 at Appendix 2 [7])

The risk of the abuse of the confiscation legislation is heightened where confiscation metrics are reflected in enforcement agency performance measures. For example, a report by the Western Australian Auditor General (2018: 19), identifies '[t]he gross value of restrained (frozen) assets' and [t]he net proceeds from confiscated assets' as key performance indicators for both the WA ODPP and WA Police. The report notes concerns by both agencies with these performance measures. Further it states that competing agency priorities can result in conflicting interests in exercising prosecutorial discretion: '[d]ifferent agencies involved have quite distinct and independent roles and responsibilities…There is a risk that agencies will not appropriately prioritise confiscation activities'.

As noted by some interviewees:

> …it is encouraging the DPPs around Australia to put more of their staff towards following up proceeds of crime because it's a profit centre…If you're sitting there at the DPP and you're making a decision about what cases we're going to pursue and what you are not, you're obviously going to lean towards one that is going to bring revenue to you and make you look good in the eyes of the Attorney General and the Government.
>
> The DPP and the police in fact have targets for property confiscation. They are issued with targets and if they reach their targets they are paid bonuses…To me that is a clear perverse incentive.

The seemingly unlimited nature and extent of the executive discretion, and the consequent difficulty involved in its review, is particularly concerning when viewed through a rule of law lens (Fisse 1989b: 23). In 2011, then President of the Law Society of Western Australia Hylton Quail stated:

> A potentially greater threat to the rule of law…is the manner in which the Act is enforced by charging police officers and the police asset confiscation unit who are responsible for deciding in which matters confiscation will be pursued.…Criminal lawyers tell their clients to cross their fingers and hope they don't get a notice. (2011: 2)

One interviewee described it thus:

> I think either the judge should have that right to make that call or somebody other than the DPP. To me it just doesn't sit right. There's got to be someone that has a more a big picture perspective perhaps of the social consequences of what's gonna happen there.

As another interviewee highlighted:

> …because the legislation is so draconian [executive] discretion becomes the only discretion in the system.

In a similar vein, barrister Shash Nigam commented in an interview on ABC Radio that 'you have to try and settle these matters out of a court to try and get something back or try and get some sort of a result' (ABC Radio 2018).

Nevertheless, another interviewee noted:

> I wouldn't want to hamstring the DPP too much. Their job is difficult enough as it is…But there ought to be a system with clear lines of challenge to the DPP's exercise of discretion.

Recommendations:

Provide for the executive discretion as to whether to institute confiscation proceedings to be guided by considerations of public interest.

Integrate adjudication by courts into each stage of the confiscation process, including specifically at the final stage of confiscation.

Judicial discretion

The effectiveness of confiscation legislation is often seen as bound up with the absence of judicial discretion (Australian Law Reform Commission 1999: [3.24]–[3.25]). This position was echoed in some interviews:

> It was fundamental to the enactment of the *Criminal Property Confiscation Act 2000* (WA) that the Court's discretion to order confiscation or not was to be limited. The reason for that stemmed from the decisions of the Court under the old legislation which the legislature considered erroneous because they took into account irrelevant matters or gave inappropriate weight to some factors.

> I think the judicial discretions have to be refined and limited, otherwise you would end up with the sorts of…you have to carefully craft the manner in which the discretion can be used, otherwise frankly you won't get anyone suffering the consequences of what they're up to.

Nevertheless, a key concern emerging from both the literature (eg Skead & Murray 2015; Odgers 2007: 330–1) and the empirical data is the unworkability of the legislation without the possibility of judicial relief in at least some circumstances. There are many instances where third parties have been significantly affected by confiscation schemes. For some interviewees this is the appropriate, albeit high, price of the respondent engaging in criminal activity. For others, there is seen to be a need for greater protection of third parties who are implicated through no fault of their own. It was considered that this is best done through the exercise of judicial discretion.

> …at the end of the day everything has to be looked at by a judge and so…That doesn't mean that there may not be a time where there's some unscrupulous investigator who is abusing the powers that are there…it's hard to legislate or guard against, you can only sort of say well the final recourse has to be the court.

However, not all interviewees supported the introduction of a broad, open judicial discretion:

> I think though the problem is that you then create that uncertainty and at the end becomes this enormous body of jurisprudence.
>
> Rather than some judge being left to sort of 'mmm yes, no you're a nice person, you're not a good person' whatever, I think the legislation ought to give you the guidelines.

In the WA context, there was also concern about powers that were introduced to facilitate confiscations in regional areas and vested in justices of the peace:

> A freezing notice is made by a justice of the peace, of course without notice to the owner or to anyone. There's no counter party present and in my view, it's the most remarkable power—given the consequences that flow from the issue of a freezing notice, it's astounding that justices of the peace have the power. I'd be a lot happier if they were with magistrates.

The rule of law dictates that some judicial avenues for relief are needed, not only to appropriately supervise prosecutorial and executive discretion but also to balance the potential impact of the confiscation legislation against its clear purposes. As one interviewee put it:

> For my part, the confiscation should relate to the proceeds of crime and unexplained wealth…And I think, there is room for judicial decision on this, is the ability to say, 'Well, this property was acquired in a way completely unrelated to any drug use and therefore should not be confiscated'.

The CPCA Qld, for example, includes broad judicial discretion to refuse to make any order on public interest grounds—for example, s 31(2)(a) in relation to non-conviction-based restraining orders; s 58(4) in relation to forfeiture orders; s 93ZZB(2) in relation to a serious drug offender confiscation order; and s 89G(2) in relation to unexplained wealth orders. Similar provisions exist in the CARA NSW.

Under the drug trafficker confiscation scheme operating in Western Australia, by contrast, if a defendant is declared a drug trafficker, all of their property is automatically confiscated, whenever it was acquired and whether or not it was connected with any criminal activity. The court is required to make an order to this effect and has no discretion in this regard (see CPCA WA s 8). In *Western Australia v Roth-Beirne* [2007] WASC 91, Hasluck J noted that:

> the obligation imposed upon the court…is mandatory. Once the court is satisfied that the statutory requirements have been met the court must make a declaration. (at [20])

This is despite the fact that the court may consider that a confiscation is unduly harsh—for example, if it renders both the defendant and their dependants impecunious—and goes beyond achieving the underlying objective of the legislation of ensuring crime does not pay.

There is a limited hardship provision incorporated into the crime-used property confiscation provisions in the CPCA WA (see particularly s 82(3)). There is no judicial discretion embedded in the other confiscation categories—unexplained wealth, crime-used substitution orders, crime-derived property, criminal benefits, and drug trafficker confiscations. While for the most part this absence of discretion appears intentional, the inclusion of a hardship provision for crime-used property confiscations but not for crime-used substitution confiscations is capricious and arbitrary. One interviewee said:

> She didn't have the protection of that because it wasn't crime-used. It was a crime-used substitution…So that protection, the hardship protection…didn't apply here because it was a crime-used property substitution declaration, so what they do is they can get a declaration that your assets to the value of the property in which the offence occurred are confiscated and that protection didn't extend…so she had to move out of the house. And I think that was probably the most egregious injustice that I saw in terms of punishing an innocent person.

This discrepancy was in issue in the case of *Director of Public Prosecutions (Western Australia) v Bowers* [2010] WASCA 46. Special leave to appeal to the High Court of Australia was granted (see *Bowers v Director of Public Prosecutions (Western Australia)* [2010] HCA Trans 277, 21 October 2010); however, the matter was settled before the appeal was heard.

In 2011, the then WA Attorney General acknowledged this anomaly but indicated that it was being addressed through the exercise of executive discretion (Porter 2011: 7083[3]). The then shadow Attorney General, John Quigley, recommended legislative amendments and said: '[i]f you allowed a discretion to exist within the courts to look at justice, I think the problem could be largely alleviated' (ABC News 2011).

While the inclusion of a hardship provision into each stage of the confiscation process is desirable, the objects of the legislation must also be considered. As Kirby P noted in *R v Lake* (1989) 44 A Crim R 63 (at 66–7):

> In considering hardship, it is necessary to bear in mind, of necessity, in achieving its objects, the Act will cause a measure of hardship in the deprivation of property. Indeed, that is its intention…Something more than ordinary hardship in the operation of the Act is therefore meant. Otherwise the Act would have, within it, the seeds of its own [in] effectiveness in every case.

Similarly, as one interviewee put it:

> …any confiscation of property is likely to have adverse effects on third parties…Such hardship however has to be balanced against the public interest.

Recommendation:

Introduce at every stage of the confiscation process, and into all categories of confiscation, a guided judicial discretion taking into account excessive disproportionality, serious hardship, and the public interest.

Offences triggering confiscation

Without exception, Australian confiscation of proceeds of crime legislation was introduced to address serious drug-related crime and organised crime. As drafted, however, the schemes in two of the states under review cast the confiscation net far wider, potentially capturing lower-level criminal activity.

For example, in Western Australia a 'confiscation offence' includes 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more' (CPCA WA s 141(1)(a)). Under s 313(1)(b) of the *Criminal Code Act Compilation Act 1913* (WA) 'any person who unlawfully assaults another is guilty of a simple offence and is liable…to imprisonment for 18 months and a fine of $18 000'. However, under s 221(1) if 'the offender is in a family relationship with the victim of the offence' or 'the victim is of or over the age of 60 years', the offender is then liable to imprisonment for three years and a fine of $36 000—and is therefore subject to crime-used property confiscation under the CPCA WA.

While assaulting another is not to be condoned, subjecting the offender to criminal confiscation laws based on the age or identity of the victim arguably goes well beyond the objectives that the WA laws were intended to achieve. In this respect, '[t]his legislation is cast more widely than the evil to which it is directed' (McGinty 2000c: 935[22]).

A 'serious criminal offence' under the Queensland confiscation regime means 'an indictable offence for which the maximum penalty is at least five years imprisonment' (CPCA Qld s 17(1)). Assuming similar sentencing norms, the extension of the possible period of imprisonment to five years would appear to go some way towards limiting confiscation to more serious targeted offences. However, this may not always be the case. For example, under s 75 of the *Criminal Code Act 1899* (Qld), a person who by words or conduct threatens to enter or damage a dwelling with intent to intimidate or annoy any person commits a crime that carries with it a possible imprisonment of two years. But if the offence is committed at night the offender is liable to imprisonment for five years, which triggers the confiscation provisions.

In comparison, confiscation under the CARA NSW targets more serious criminal activity—including activity relating to drug trafficking, sexual servitude, firearms, child prostitution and abuse or arson or to an offence that is:

> …punishable by imprisonment for five years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide. (CARA NSW s 6)

Even though narrower than the Queensland and WA schemes, the expansiveness of the application of the CARA NSW drew some criticism from interviewees:

> Law enforcement legislation is always popular with governments. There's an incentive to pass it without thinking it, necessarily thinking through all the possible implications. And then, you're left with the risk of overzealous law enforcement officers who will test the limits.

On drug trafficker confiscations, interviewees expressed concerns about the quantity of prohibited drugs triggering a drug trafficker declaration and consequent confiscation. Pursuant to the CPCA Qld, the serious drug offender confiscation provision may be triggered by a series of three drug possession offences involving as little as two grams of a dangerous drug, including heroin, cocaine and methylamphetamine (CPCA Qld ss 93A, 93F(2)(a)(ii); *Drugs Misuse Act 1986* (Qld) s 9; *Drugs Misuse Regulations 1987* (Qld) schedule 3). In Western Australia, the weight threshold for a single offence is 28.0 grams. Nevertheless, interviewees commented:

> The 28 grams…It doesn't take into account the purity of the drug, so if you're a smart drug dealer, you will have 27 grams of 90 percent pure, you're not going to lose your property. If you're not so smart, you'll have 28.1 grams of 30 percent pure you will lose your property. Now, the value between those two quantities…it's chalk and cheese. So what they should really do is talk about the purity of the drug if they're going to use a scale like the grams…And what I'm saying is that the 28 grams is in many cases meaningless and it's just what was considered to be a large quantity back in 2000 or 1999.
>
> The legislation will be infinitely more reasonable if it requires for example commercial quantities of drugs. Or at least large trafficable quantities before it applied…if they're actually a crime syndicate…they should be doing [commercial quantities] or they're not much of a crime syndicate.

Similar concerns were expressed in relation to cannabis:

> Now there is an issue there around the arbitrary definition around what is a drug trafficker in that three kilograms of cannabis is not necessarily a lot. It can be three kilos of cannabis or twenty plants but there's no guideline on what state those plants need to be in. They could be twenty seedlings. They could be twenty plants of which half of them are male plants which are useless. The three kilograms of cannabis might be roots and stems and stalks which you obviously don't use, you use the leaf or bud I think. So the definition of drug trafficker is rather arbitrary in regards to cannabis.

Recommendations:

Limit offences triggering confiscation to the criminal activity at which the legislation was initially directed—serious drug-related offences, organised crime, and terrorism. This is best done by providing an exhaustive list of confiscable offences, as does the CARA NSW.

Review the quantities of prohibited drugs enlivening the drug trafficker confiscation provisions.

Definition of crime-used property

> Only half in jest, Laurie Levy QC, who has argued more confiscation appeals than anyone else in the state, said in a recent paper that the only way to avoid the property confiscation provisions was to offend after parachuting out of an aeroplane. I actually think the DPP would argue the aeroplane is sufficiently connected (facilitating the commission of the offence) on the basis of a property-substitution value calculation. (Quail 2011: 3)

In each of the three state schemes under review, there are provisions relating to the confiscation of crime-used property (termed 'tainted property' under the CPCA Qld). Crime-used property is broadly defined. For example, under s 9B of the CARA NSW, it is 'property that was used in, or in connection with, a serious crime related activity'. In Queensland and Western Australia the definition is wider and includes property intended to be used in or in connection with an offence or part of an offence (CPCA Qld s 104 (1)(a); CPCA WA s 146(1)(a)).

While the actual crime-used property is targeted in the first instance, if the respondent does not have a confiscable interest in that property, other property equivalent in value may be confiscated from the respondent under property substitution provisions.

The CPCA Qld provides an illustration of the intended application of the crime-used confiscation provisions (see schedule 1, part 3, s 5):

(1) A is convicted of the confiscation offences of—
  (a) supplying a dangerous drug; and
  (b) carrying on the business of unlawfully trafficking in a dangerous drug.

(2) A used a motor vehicle to transport the drug to a proposed buyer.

(3) Whether the drug was on A or in A's motor vehicle, the motor vehicle was used in connection with the commission of each offence mentioned in subsection (1).

(4) The motor vehicle is [crime-used property] under section 104 (1) (a).

In *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478, the High Court of Australia dismissed an appeal from a decision of the WA Court of Appeal (*Director of Public Prosecutions (WA) v White* (2010) 199 A Crim R 448), in which the Court of Appeal (McLure P) adopted the following narrow interpretation of crime-used property:

> The use must, at its widest, be indirectly in connection with the facilitation of a confiscation offence. There is a sufficient relationship between the act or acts constituting the use and the specific confiscation offence if the acts have the consequence or effect of facilitating that offence ((2010) 199 A Crim R 448 at [39]).

Despite this apparently narrow construction of crime-used property, it is capable of very broad application. In *White*, the respondent (White) had been found guilty of the wilful murder of Anthony Tapley. The murder occurred at a property leased by the respondent. The property was surrounded by a six-foot fence with barbed wire and two metal gates that were padlocked to prevent Tapley from leaving the property. The respondent shot several times at, and injured, Tapley while both men were on the property. Trying to escape from the respondent, Tapley ran towards and climbed up the gates. The respondent caught up with Tapley and shot him while he was on top of the gates. Tapley, still alive, fell off the gates onto the ground outside the property. The respondent unlocked the gates, walked out of the property and shot Tapley six times. The respondent dragged his body back onto the property before removing and incinerating it. McLure P found that:

> …the intentional locking of the gates was for the purpose, and had the effect, of preventing or impeding [the deceased's] departure from the [property] before the respondent had finished dealing with him. That use of the land facilitated [the deceased's] murder. (at [39])

The property was therefore found to be crime-used property.

As White did not own the crime-used property in question, the value of that property was confiscated from him pursuant to a substitution order.

In all three jurisdictions under review, there are many examples illustrating the breadth and arbitrariness resulting from the application of crime-used property provisions. Such provisions have been applied expansively even where courts have construed the term narrowly. For example, in *Queensland v Noble* [2018] QSC 59, the respondent was convicted following guilty pleas of multiple counts of serious animal cruelty. He was sentenced to three years imprisonment suspended for five years. Following his conviction, an application was made to the Supreme Court of Queensland to confiscate the property on which the offences had taken place, pursuant to the crime-used ('tainted') property confiscation provisions of the CPCA Qld. Crow J accepted that the property in question fell within the 'broad definition' under that Act. However, the Supreme Court also acknowledged that the property was acquired and paid for 21 years earlier—many years before the offences took place—and that 'no part of the value of the property had been acquired from unlawful and disgraceful conduct'. Further, 'there [was] no evidence to suggest there was any financial gain…from involvement in the serious criminal offences' (see at [34]). Moreover, the property had a total market value of $600,000 but only a portion of the property—perhaps one-eighth and specifically not the dwelling on the property—was used in connection with the respondent's offences (see at [40]). In addition the court noted that the respondent was 71 years of age and that the property was his sole source of income and the couple's 'most substantial retirement asset' (see at [59]). Yet, as the court observed, the crime-used property confiscation provision operated to apply to the whole property in an 'all or nothing' way (see at [36]). In considering that result, Crow J stated that 'the [confiscation] of the…property would be wholly disproportionate to the nature and gravity of the offences and would be manifestly unfair to both [the respondent and his wife]' (see at [78]).

A NSW interviewee considered judicial discretion to be an effective way of addressing such disproportionality:

> I think there needs to be a discretion about forfeiture of instruments of crime—and in some regimes there is none—because the effects can be entirely disproportionate to a particular offence. And it generates bad outcomes and bad law in my opinion.

Recommendations:

Narrow the definition of crime-used property to property that has a substantial connection to the criminal activity in question.

Provide for the confiscation of only that portion of crime-used property actually used in connection with the offence.

Allow for the exercise of judicial discretion in making a confiscation order, based on proportionality between the value of the confiscated property and the severity of the offence.

Disproportion, arbitrariness and lack of parity

Common themes emerging from the interview data were the potential disproportion, arbitrariness, and lack of parity of several features of the confiscation schemes in the jurisdictions under review.

One NSW interviewee noted the lack of parity in punishment that can arise from the separation of sentencing and confiscation proceedings:

> I think that is an area of concern because most sentencing regimes expressly prohibit confiscation outcomes being taken into account in sentencing and you can end up with two classes of people who are sentenced. Those who have nothing to confiscate and get a particular outcome and then those who do have something to confiscate and according to the letter of the law should receive exactly the same penalty despite the fact that they might lose a real property which represents their life savings.

Another commented:

> There's twin brothers, and they're both caught at the airport with a kilo of heroin in their bags. One (A) has lived a dissolute life, acquired nothing, and has only debts and a really bad past to go with it. His twin brother (B) has worked hard all his life and acquired a house, he has a family who live there, he's got assets, shares, superannuation—they both get caught, they both get brought in, they both get seven years jail, but in addition, there's a property declaration against both, but B loses his house in addition, he loses his family, he loses his business, he loses all his assets…That is—manifest hardship above and beyond what any other person sustains.

Crime-used property confiscations in all three jurisdictions provided a stark illustration of the potentially disproportionate and arbitrary operation of the legislation. As discussed above, the definition of crime-used property permits the confiscation of property that may have a somewhat tenuous link with relevant criminal activity. Moreover, the value of the property confiscated often has no relationship to the severity of the criminal activity, and can vary markedly from case to case:

> A man takes a girl out on a little dinghy and deals indecently with her and is sentenced to three years' jail. All that the DPP can apply to have confiscated is the dinghy, worth, say $500. However, if the man commits exactly the same crime on a $5 million yacht owned by a friend, the DPP can apply to have up to $5 million worth of honestly acquired assets of the offender confiscated in substitution for the $5 million yacht used in perpetuating the crime. So effectively, we as a community are saying that if this man commits the crime on a luxury yacht, he deserved to be given his jail sentence, plus a $5 million fine; but if [he] commits the crime on a dingy, a prison term plus a $500 fine is sufficient. With all due respect, I believe this makes a mockery of our legal system. (Abetz 2011: 7081[1])

In New South Wales and Queensland, these confiscation provisions are tempered by a public interest discretion. This is not the case in Western Australia. The WA drug trafficker confiscation provisions provide another compelling illustration of the potentially disproportionate, arbitrary, and harsh operation of the CPCA WA. Interviews with legal practitioners and respondents provided multiple examples of this, as does *Davies v Western Australia* [2005] WASCA 47. In Davies, close to 19 kilograms of cannabis was discovered in the ceiling cavity of the Davies' Perth home. Mr and Mrs Davies were aged 81 and 77 respectively and had been married for 58 years. Mr and Mrs Davies were both charged with and convicted of possession of cannabis with the intent to sell or supply it to another, under s 6(1)(a) of the MDA WA. The jury accepted that the Davies had allowed their son, Tyssul, to store the cannabis in their house and to retrieve it when he wished. Mr and Mrs Davies were each sentenced to a 16-month suspended sentence.

Under s 32A of the MDA WA, if a person is convicted of an offence under s 6(1) of that Act in respect of no less than three kilograms of cannabis, the court shall declare the person to be a drug trafficker on application by the Director of Public Prosecutions of WA (WA DPP). As a result, on conviction, Mr and Mrs Davies were declared 'drug traffickers'. Pursuant to the drug trafficker confiscation provisions in the CPCA WA, when a person is declared to be a drug trafficker under s 32A(1) of the MDA WA, all property owned or effectively controlled by the person at the time the declaration is made, and any property given away by the person at any time before the declaration is made, is confiscated. The confiscation in these circumstances is automatic—that is, there is no need for an application to be made to effect the confiscation. One interviewee described this operation thus:

> Moving on from that to drug trafficker confiscations…I think this is where some of the worse problems are right now…So, for anyone who's declared a drug trafficker, all of their property can be confiscated. Everything they've ever owned or ever given away potentially…And there doesn't seem to be a time limit on this either. So you could have given away a gift fifty years ago before you ever engaged in criminal activity and the DPP would be able to confiscate it.

Following their declaration as drug traffickers, the Davies' family home—their primary asset, built by Mr Davies 40 years earlier, and financed legitimately through many years of hard work—was confiscated. Indeed, perhaps the harshest aspect of this case is the disparity between the severity of the offences and the proprietary consequences of the convictions. Further, despite a stated objective of the WA proceeds of crime legislation being to deprive a person of 'the material gain that the criminal intends to get, or has got, from criminal activity' (Prince 2000: 934[21]), Davies clearly demonstrates that these provisions can operate more broadly to strip a person declared to be a drug trafficker or taken to be a declared drug trafficker of all of their gains, whether ill-gotten or not.

Recommendations:

Allow for a judicial discretion in making orders under the legislation, based on hardship and on proportionality between the value of the property and the severity of the offence.

Ensure drug trafficker confiscation provisions require a substantial connection between the drug trafficking and the confiscable property, whether as crime-used property, as crime-derived property or as criminal benefits.

Constitutional validity

Interviewees did not raise significant constitutional concerns with the confiscation schemes in New South Wales, Queensland or Western Australia.

While interviewees did point out the need for greater judicial discretion, its absence does not necessarily result in invalidity under the Kable principle (see *Kable v Director of Public Prosecutions (New South Wales)* (1996) 189 CLR 51 versus *South Australia v Totani* (2010) 242 CLR 1; Freiberg and Murray 2012: 341, 348–9).

The principle renders a state law invalid if it confers functions on a state court which substantially impair the court's institutional integrity and capacity to exercise federal judicial power under Chapter III of the *Constitution. International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 saw s 10 of the *Criminal Assets Recovery Act 1990* (NSW) invalidated for requiring mandatory ex parte restraining order hearings. More permissive wording is now typically used (eg CARA NSW s 10A(4); CPCA WA ss 41(2), 42, 57). Further, recent cases like *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 and Emmerson have seen the High Court of Australia emphasise the inherent powers of state Supreme Courts to address unfairness in proceedings and the scope of executive discretion, making findings of unconstitutionality less likely.

In *Emmerson*, the High Court found in relation to the *Criminal Property Forfeiture Act 2002* (NT):

> …that the determination of whether the statutory criteria are satisfied may readily be performed, because of the ease of proof of the criteria, does not deprive the process of its judicial character. (see French CJ and Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ at [65])

A challenge to the constitutionality of the Northern Territory provisions, which are based on the WA scheme, was unsuccessful in that case.

Further, the fact that legislation cuts across rule of law considerations will not necessarily render it unconstitutional (see Skead and Murray 2015: 479). With this said, this may be an area for future development as noted by Crennan and Kiefel JJ in *Momcilovic v The Queen* (2011) 245 CLR 1 (at [562]–[563]).

However, one area of potentially greater concern is the application of deeming provisions. A particularly stark example is evident in the CPCA WA where it provides that a person who absconds or dies may 'taken to be a declared drug trafficker', enlivening the drug trafficker confiscation provisions even if the person has not been convicted of a relevant drug offence (CPCA WA ss 159(2), 160(2); see also CPCA NSW ss 5(1)(d), 16(b)).

Notwithstanding this concern, arguments that these deeming provisions are unconstitutional are unlikely to succeed. In *Silbert v Director of Public Prosecutions for Western Australia* (2004) 217 CLR 181 a majority of the High Court indicated that s 6 of the *Crimes (Confiscation of Profits) Act 1988* (WA), by providing that a person was 'taken to have been convicted of a serious offence' if they had absconded, did not amount to a legislative determination of guilt (see also CPCA WA s 157; *Director of Public Prosecutions (Western Australia) v Smith as administrator of the estate of Leslie Thomas Hoddy (Dec)* [2008] WASC 141.) Similarly, Kirby J, while noting it 'attach[ed] serious consequences to a deemed "conviction"' (at [37]) found that there are no 'criminal consequences' which flow and that it is a 'legislative fiction…devic[e] used to identify persons of a class against whom application under the Act may be made' (at [42]-[45]). The provisions carried the 'normal hallmarks of judicial assessment, discretion, judgment and reconsideration' (at [48]) and were therefore valid. His Honour did note that a 'deeming provision' which precluded an individual 'from proving the truth of contested matters' would likely receive different constitutional treatment (see at [44]).

One provision which may depart too greatly from the judicial process is s 157(1)(d) of the CPCA WA. It provides that a person is taken to have been convicted of a confiscation offence even if 'the person was charged with a confiscation offence but absconded before the charge is finally determined'. The Act defines 'absconds' to include the situation where the person dies (s 160). There is no standard of proof to be met in relation to commission of the offence, as it is deemed (compare with CPCA NSW ss 5(1)(d), 16(b)). This means, for example, that a criminal benefits declaration can be made under s 16 and the deemed conviction will also mean (by the operation of s 16(2)) that 'the respondent is conclusively presumed to have been involved in the commission of the offence'. This is different to the approach taken originally, in s 53(2) of the *Crimes (Confiscation of Profits) Act 1988* (WA), discussed in *Silbert*, which provided that if a person is taken to have been convicted of a offence, 'a court must not make a forfeiture order in reliance on that conviction unless it is satisfied, beyond reasonable doubt, that the person committed the offence'.

These concerns were shared by some interviewees:

> I mean it's proceeds of crime, they should be able to prove the crime to a criminal standard. Whether or not they have to bring the prosecution, I accept there's reasons why that might not be right. So, for example, if someone actually puts themselves beyond the jurisdiction so that the charge can never be dealt with—so they flee—I accept that if the Crown can prove its case beyond reasonable doubt they should still be entitled to seize the assets. But I think the point is that it's, for me, it's not whether the person was in fact charged and convicted, it's the threshold test that it should be the beyond reasonable doubt standard that applies.

Recommendations:

Allow a party to lead evidence to refute what has been statutorily deemed.

Amend the burden of proof for deeming a person to have been convicted of an offence to the criminal standard of proof or, at the very least, the civil standard of proof.

Implementation of unexplained wealth

There was little concern expressed by interviewees about each Australian jurisdiction having its own confiscation regime or about these regimes differing in some respects. The fact that the schemes are harsher in some jurisdictions than in others may result in 'jurisdiction shopping', particularly for organised crime. However, this particular issue was not raised as a concern in the empirical study.

By contrast, the difficulty of implementing unexplained wealth schemes across Australia—and the disparity in the success of these schemes—led to calls by a few interviewees for a national unexplained wealth scheme. This idea has proven politically intractable, despite the architecture for such an arrangement now in place under the National Cooperative Scheme on Unexplained Wealth, set up by the *Unexplained Wealth Legislation Amendment Act 2018* (Cth). To date, only New South Wales has referred the necessary powers to the Commonwealth, allowing it to join the scheme and work alongside the Commonwealth, the Northern Territory and the Australian Capital Territory.

According to several interviewees, a national scheme presents several difficulties. Some of these relate to information-gathering, investigations, and allocation of confiscated wealth:

> There was an opportunity there that I think really was missed that we all had uniform laws across Australia for the recovery of unexplained wealth. That didn't happen, each jurisdiction went off and formulated their own different version of it, with in my mind, varying degrees of success.

The NSW CC *Annual report 2016–2017* states that at the date of reporting it had not yet received any payments flowing from successful shared confiscations (NSW Crime Commission 2017: 40). This is despite the NSW CC working with the Commonwealth to investigate confiscation matters since 2009. Schedule 5 of the *Unexplained Wealth Legislation Amendment Act 2018* (Cth) allows for the sharing of such proceeds by the Cooperating Jurisdiction Committee set by the Intergovernmental Agreement on the National Cooperative Scheme on *Unexplained Wealth (Unexplained Wealth Legislation Amendment Act 2018* (Cth) ss 297A and 297C).

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

While supported by some interviewees, the transfer of unexplained wealth jurisdiction to the WA CCC in 2018 was received with some cynicism by others. This was primarily due to concerns about insufficient resourcing and expertise and the extent of the powers conferred on the WA CCC.

Recommendations:

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

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

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

Third party interests

In recognition of the importance of protecting third party rights, it was noted in the Australian Law Reform Commission's *Confiscation that counts* report in 1999 that:

> [I]n the interests of simplicity, uniformity, certainty and fairness of operation, it is highly desirable that a single universally applicable test be formulated in relation to the grounds on which third party interests may be relieved from the application of restraining and forfeiture orders. (at [12.30])

It is clear from the legal analysis in the three jurisdictions under examination that a single universally applicable test has not been formulated. While the third party protection provisions in New South Wales and Queensland are complex and inconsistent, they are largely effective. This is not the case under the WA scheme where, in addition to being very limited, the provisions do not adequately protect third party interests.

Significant concerns in this regard emerged from the empirical study, particularly in relation to the impact of confiscation on innocent partners and dependent children. These concerns were expressed in many of the WA interviews:

> I mean, you've got a spouse and children living in the house, and they stand to become homeless…It's reasonable to think that in many cases, those people just go along with what usually hubby is doing because it's too hard to stop it…But the consequences to them is extraordinarily serious.

With one exception, all the members of the public interviewed in Western Australia were third parties who were caught up in confiscation proceedings and who faced the very real prospect of losing their family home as a result of the nefarious activities of others. This often brought with it long-lasting, devastating effects for the interviewees and their families.

While some interviewees from politics and government considered such consequences to be acceptable 'collateral damage', the overwhelming impression was that this potential harshness is a flaw in the legislation that must be addressed.

Concern about the impact of the legislation on third parties is also evidenced in the case law and commentary. Again, this is particularly the case with respect to the WA confiscation scheme which, unlike the schemes in New South Wales and Queensland, generally does not afford the court any discretion to refuse to make a confiscation order.

Following his announcement of a review of the WA confiscation legislation, the Attorney General, John Quigley, provided the following illustration in a radio interview in 2018:

> There's been cases continually coming to the floor which on the face of them would appear to be harsh to the point of being unjust. Now one of these—the most recent one that came across my desk—was the lady who was…an immigrant, a single mum raising a couple of kids working as a feather plucker in a chicken factory, fairly menial manual labour…Her husband deserted her. She kept on struggling with the finances, paying the mortgage on the family home. And then two or three years after he deserts her he gets involved with drugs with a new woman…commits an offence and as a result of his offending, because the family home was half in his name the home gets seized and no discretion in the courts to weigh the justice of this or not get seized and she's going to have to sell the home, and the kids will be out on the street or looking for state housing. (Radio 6PR 2018)

Although the potentially harsh operation of the legislation might be addressed by providing for the exercise of a guided judicial discretion, in some cases the problem is more fundamental. It is, at least in part, the result of two factors: first, inadequate provisions for the release of third party interests in restrained or confiscated property; and, second, a failure to identify correctly the 'property' that is the subject of an order.

Inadequate provision for release of third party interests in restrained or confiscated property

The CPCA WA allows for the release of restrained and/or confiscated property, provided that a number of conditions are met (ss 82(4), 83(2), 87(1)). These conditions drastically limit the circumstances in which property will be released. The applicant must be an owner of the property and innocent of any wrongdoing. Additionally—and, most critically—each other owner, including the respondent, must be innocent. In *Permanent Trustee Co Ltd v The State of Western Australia* [2002] WASC 22, for example, both the joint tenant and the registered mortgagee of restrained property were innocent owners. However, because the other joint tenant—also an owner of the property—was declared a drug trafficker (and therefore not innocent of wrongdoing), the conditions for the release of the property from confiscation were not satisfied and the property was confiscated.

Section 82(3) of the CPCA WA is a far broader release provision. It is specifically directed at protecting a spouse or de facto partner and/or dependent children who do not have an interest in the restrained property and who are at risk of homelessness as a result of the restraint. The conditions for s 82(3) to apply are, however, onerous and difficult to establish. In *Lamers v The State of Western Australia* [2009] WASC 3, Mr Lamers was declared a drug trafficker, which resulted in the automatic confiscation of his property. Mr Lamers lived in his home with Ms Willis, his de facto partner, and Ms Willis' daughters. Ms Willis objected to the confiscation of Mr Lamers' home on two grounds, including under s 82(3). Templeman J rejected Ms Willis' objection under s 82(3) for several reasons. One reason was that s 82(3) only applies to the release of property that has been restrained on the basis that it is crime-used. It does not apply to property restrained pursuant to the crime-derived, drug trafficker, unexplained wealth, criminal benefits, or substituted property provisions of the CPCA WA. The property in *Lamers* had been confiscated under the drug trafficker provisions, and therefore s 82(3) did not apply.

Another reason for rejecting Ms Willis' claim was that—even if s 82(3) did apply —there was no evidence that they would not be able to obtain alternative rental accommodation. This was despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, His Honour opined that:

> …if the confiscation legislation is to achieve its objective, it will necessarily cause a measure of hardship in the deprivation of property. However, if dispossession was sufficient to constitute undue hardship, the operation of the Act would effectively be frustrated. (at [77]–[78])

Failure to identify correctly the 'property' that is the subject of an order

The schemes in all three jurisdictions define 'property' as meaning 'any legal or equitable estate or interest in property' (CARA NSW ss 4, 7 & CPCA NSW s 4; CPCA Qld ss 3, 19, dictionary; CPCA WA s 3, glossary). Nonetheless, simply including 'estate' and 'interest' in property in the definition has failed to prevent the detrimental impact of the restraint and confiscation provisions on the proprietary rights and interests of third parties. The reasons for this failure are threefold.

First, the legislation reveals little conceptual understanding of the legal understanding of 'property'. In *Yanner v Eaton* (1991) 201 CLR 351, a majority of the High Court of Australia (Gleeson CJ and Gaudron, Kirby and Hayne JJ) distinguished between a property right and the thing that is the subject of a property right: 'property' does not refer to a thing but, rather, 'it is a description of a legal relationship with a thing' (see at 365–6). Although trite to say, it is also the case that 'any particular thing can be subject to a number of [legal and equitable] property rights at any given time' (Tarrant 2005: 234).

Second, establishing an equitable interest in property can be difficult. For example, in *Smith v Western Australia* [2009] WASC 189 the plaintiff was declared a drug trafficker. This resulted in the automatic confiscation of all his property, including his share in real property he co-owned with his wife. The plaintiff's mother and sister claimed to have lent the plaintiff money in circumstances that meant they also had an equitable interest in the property. McKechnie J dismissed their claim, doubting that they had an equitable interest in the property.

Third, while the statutory definitions of 'property' restrict the application of the restraint and confiscation provisions to interests in property held by defendants, the operative sections of the statutes are unclear as to whether restraining and confiscation orders apply to the 'thing' or the defendant's interest in the 'thing'. For example, in *White v Director of Public Prosecutions (Western Australia)*, French CJ, Crennan and Bell JJ said of the definition of 'property' in the CPCA WA that '[t]he definition is more limited than the usage of the term "property" in parts of the Act where it plainly refers to the land or things which are the subject of property interests' (at [5]).

This lack of clarity means that any and all persons who have an interest in any restrained and/or confiscated 'thing' will be adversely affected by the restraint or confiscation.

The uncertainty is exacerbated by s 9 of the CPCA WA, which provides in relation to land that, once confiscated, the land vests in the state '…free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights of way, easements and restrictive covenants)…'. This provision was described by one interviewee as 'extraordinary and draconian'. In *Smith v Western Australia*, McKechnie J stated that even if the mother and sister had succeeded in proving that they did have an equitable interest in the property, such an interest would be extinguished by the operation of s 9.

One interviewee provided further illustrations of the difficulties with this provision: if a person holds registered property as trustee and is declared a drug trafficker, all of the trust beneficiary's rights in the property are extinguished. So, too, if the defendant borrows money from a bank on security of a mortgage. On confiscation of the property, the mortgage is extinguished and the bank is left without any security for the loan.

Adequate protection of the property rights of innocent third parties requires clear and accurate identification and definition of the restrained or confiscation property. That property must be identified and defined as consisting of the defendant's proprietary interests in the physical item/s of property concerned, rather than as the physical thing itself.

Recommendations:

Include effective and appropriate third party interest exclusion provisions that apply across the board to all types of restraint and confiscation.

Allow for a guided judicial discretion which can take into account hardship to third parties and the impact of the order on third party property rights.

Accurately define the property targeted by the legislation as being interests in property rather than the item of property itself, and clearly and correctly identify it as such throughout the operative sections of the legislation.

Release of property to cover legal costs

The use of restrained funds for engaging legal representation has been an ongoing concern in the literature (eg Fisse 1989a; Freiberg 1992; Carew & Ollenburg 2006; Edwards 1999; Temby 1989; Thornton 1992). This was concern was reflected in the present empirical study, where it was considered by some to be 'a hugely vexed issue'.

Each confiscation regime studied differs in its approach on this issue. However, all require court proceedings to release restrained property to cover legal expenses (eg CPCA NSW s 43(6); CPCA Qld s 93V(f)). A similar provision to s 43(6) of the CPCA NSW existed in Western Australia's first proceeds of crime legislation (see *Silbert* discussed above), but was not retained in the current CPCA WA. However, in *Mansfield v Director of Public Prosecutions (Western Australia)* (2006) 226 CLR 486, the High Court held that a court, when making or varying a freezing order, may provide that certain property is exempt from a freezing order on condition it is used for legal expenses (at [53]-[54]). In practice, however, this approach has proven problematic. As one interviewee observed:

> Under *Mansfield*, if it's frozen under a freezing order, the court has to make an assessment. That is an awful position for any judge to be in. It's often dealt with by a judge other than the trial judge …and I will say to the judge, "Look, it's gonna cost this much and broadly it's gonna cost this much on this, this, and this "…sometimes that can leave the judge feeling, "I haven't really got…an explanation or a justification for why this figure is as high as this. I don't really know". But anything you tell the judge, you've gotta tell the other side as well.

One interviewee endorsed the federal legal aid mechanism over the state approaches of releasing property for legal costs:

> The federal approach to it…is the better one…what happens is you apply to Legal Aid…to be represented both in the proceeds of crime matter and in your criminal matters. They make an assessment of whether you satisfy the means test, disregarding the restrained property, and if you satisfy the means test, they then give you representation…I can tell Legal Aid anything including LPP [legal professional privilege] material, tell them exactly what's happening, what the advice to the client is, what the risks of the application are, prospects of success are…and it's all quarantined between me and Legal Aid. I give Legal Aid a fully itemised invoice and if they've got a problem with it, they'll ask me and have a discussion about it. Legal Aid then, at the end of a matter, write to the Attorney-General's department in Canberra and say, 'We expended $83,112.56 on Supreme Court matter, CIV, blah, blah—please pay us'. The Attorney-General's department gets no itemisation. It's a trust thing Legal Aid will do the right thing by them and it insulates the Commonwealth Government.

Other interviewees expressed further concerns with costs in the confiscation regimes:

> One of the other issues I think is very punitive about the system, is the costs regime, the fact that at least here it runs on a civil cost basis, so costs follow the event… for the same reason the government doesn't get its costs in criminal prosecution, I don't think they should get their costs [in confiscation matters]. I think that's prohibitive…I mean it's just straight out access to justice, that's why everyone is settling. They can't afford the litigation. So they've got no choice. And when you're seizing the smaller assets, cars and things like that, even if you do have the money, why would you risk it?

Another interviewee raised concerns about the implications of the costs regime on innocent third parties and about their ability to bring applications:

> I think a difficulty that perhaps politicians don't necessarily appreciate is that it's very difficult for someone with limited resources to slow down the confiscation machinery once it gets rolling. Because it's civil litigation which is expensive, basic things like filing things if you want to contest it; you've got to pay solicitors or barristers or find someone who's willing to do it pro bono or on spec. And there can be plenty of cases where there are meritorious claims for exclusion or hardship if those sorts of provisions are available, which might not be able to proceed simply because the relevant parties don't have the resources to pursue them.

Recommendation:

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

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Appendix A: Detailed legislative mapping

Table A1: Australian proceeds of crime legislation		
Jurisdiction	**Initial legislation**	**Current legislation**
Cth	*Proceeds of Crime Act 1987* (Cth)	*Proceeds of Crime Act 2002* (Cth)
NSW	*Crimes (Confiscation of Profits) Act 1985* (NSW))	*Confiscation of Proceeds of Crime Act 1989* (NSW) *Criminal Assets Recovery Act 1990* (NSW)
Vic	*Crimes (Confiscation of Profits) Act 1986* (Vic)	*Confiscation Act 1997* (Vic)
Qld	*Crimes (Confiscation of Profits) Act 1989* (Qld)	*Criminal Proceeds Confiscation Act 2002* (Qld)
WA	*Crimes (Confiscation of Profits) Act 1988* (WA)	*Criminal Property Confiscation Act 2000* (WA)
SA	*Crimes (Confiscation of Profits) Act 1986* (SA)	*Criminal Assets Confiscation Act 2005* (SA) *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA)
Tas	*Crime (Confiscation of Profits) Act 1993* (Tas)[a]	
ACT	*Proceeds of Crime Act 1991* (ACT)	*Confiscation of Criminal Assets Act 2009* (ACT)
NT	*Crimes (Confiscation of Profits) Act 1988* (NT)	*Criminal Property Forfeiture Act 2002* (NT)

a: Still in force

New South Wales

Confiscation of Proceeds of Crime Act 1989 (NSW) (CPCA NSW)

The CPCA NSW establishes a comprehensive regime for conviction-based crime-used, crime-derived, and drug trafficker confiscations. The principal objects are set out in s 3:

(a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State, and

(b) to provide for the forfeiture of property used in or in connection with the commission of such offences or substitutable tainted property, and

(c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property, and

(d) to provide for the enforcement in the State of forfeiture orders, pecuniary penalty orders and restraining orders…

The provisions of the Act are enlivened when a person is convicted of a 'serious offence' or a 'drug trafficking offence'. The Act defines 'conviction of serious offence' to include where a person has absconded in connection with the offence (s 5). Where a person has been convicted of either category of offences, the New South Wales Director of Public Prosecutions (NSW DPP) may apply to a court for a confiscation order against 'tainted property' or the benefits derived from the commission of such offences (CPCA NSW ss 13, 24, 29).

'Tainted property' is defined in s 4 as property that:

(a) was used in, or in connection with, the commission of a serious offence, or

(b) was substantially derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence, or

(c) was substantially derived or realised, directly or indirectly, by any person, as a result of the commission of a serious offence, or

(d) was substantially derived or realised, directly or indirectly, by any person for the depiction of a serious offence, or the expression of the offender's thoughts, opinions or emotions regarding the offence, in any public promotion.

A 'serious offence' is defined in s 7 as any indictable offence, the offence of supplying a prescribed substance under s 18A(1) of the *Poisons and Therapeutic Goods Act 1966* (NSW), or a prescribed offence, which includes the offence of publishing indecent articles. A 'drug trafficking offence' is defined as including the indictable offences of supplying prohibited drugs on an ongoing basis, possession of precursors for making prohibited drugs, and other specified drug-related (s 7). Drug trafficking offences are indictable offences and so fall within the definition of 'serious offences'.

Confiscation orders

The Act provides for three types of confiscation order: forfeiture orders, pecuniary penalty orders, and drug proceeds orders (s 13). An application for a confiscation order must be made within six months of conviction, except with leave of the Supreme Court (s 13(3)). Written notice of an application for a confiscation order must be given to all persons reasonably believed to have an interest in the targeted property, each of whom may be heard in relation to the application (s 14(1)).

Under s 16, the property of a person who has absconded may be confiscated if the court is satisfied, on the balance of probabilities, that the person has absconded and they have either been committed for trial for the offence or—having regard to all the evidence before it—a reasonable and properly instructed jury could lawfully find the person guilty of the offence. Despite being ostensibly conviction-based, it is clear that there are circumstances where there may be confiscation of the property of a person who has not actually been found guilty and convicted of an offence.

Forfeiture orders: Tainted property

Where a person has been convicted of a serious offence, the court may order that specified property be confiscated by the state, if satisfied that it is 'tainted property' and, having regard to the information before it, taking into account the ordinary use of the property and 'any hardship' that is reasonably likely to be caused to any person by making the order (ss 18(1)(a) and (b)). That is, the court must have regard to any inferences properly drawn about potential hardship in the context of the use of the property (see particularly *New South Wales Crime Commission v Hayward* [2018] NSWSC 571, at [18]; *Zahrooni v R; Director of Public Prosecutions (New South Wales) v Zahrooni* [2010] NSWCCA 252, at [61]). In determining whether property is tainted, the court is to consider 'the extent to which the property was used in or in connection with the commission of the crime' (see *Hayward; Zahrooni* at [60]; see also *R v Lake* (1989) 44 A Crim R 63; *R v Bolger* (1989) 16 NSWLR 115). In relation to criminal benefits, the court may also have regard to the public interest and the nature and purposes of the public promotion, including the social or educational value and research and rehabilitative purposes (s 18(1A)).

In *R v Hadad* (1989) 16 NSWLR 476, 484, McInerney J considered the court's discretion sufficiently wide to take into account any hardship occasioned to an innocent third party owner of crime-used property that may be affected by the legislation. While the forfeiture provisions are 'designed to cause a measure of hardship' (*R v Wealand* [2002] NSWCCA 471, at [28]; *R v Lake*), proportionality is a relevant consideration in the exercise of the discretion (*Hayward; Zahrooni* at [60]; *R v Lake*; *R v Bolger*). Debelle J in *Taylor v Attorney-General (South Australia)* (1991) 55 SASR 462 explained in relation to the South Australian equivalent:

> …broadly speaking, in the exercise of its discretion, the court will have regard to the circumstances of the offence, the extent to which the property was connected with the commission of the offence, the seriousness of the offending, the value of the property in relation to the offence and the likely consequences of an order for forfeiture upon the offender and others who might be affected by the order. (at 475)

In relation to the likely consequences of a forfeiture order on the offender, McCallum J in *Hayward* considered that it is not a purpose of confiscation legislation 'to inflict such hardship on offenders as to leave them in a position where rehabilitation upon release from custody is a virtual impossibility' (see at [26]). Under s 18(2A), when considering any hardship that may arise in relation to a respondent who is an Aboriginal person or a Torres Strait Islander, the court is mandated to take into account the responsibilities arising from the respondent's ties to extended family and kinship.

On the making of a forfeiture order, the property specified in the order automatically vests in the state (s 19(1)(a)). If the order relates to land, the respondent's estate or interest in that land must be specified in the order (s 18(5)). Under ss 19(1)(a) and (b), forfeited confiscated property vests in the state only to the extent of the estate, interest, or rights specified in the order and subject to all encumbrances to which the property was subject when the confiscation order was made. Where the property is land, it vests 'subject to every mortgage, lease or other interest recorded in the Register kept' under the *Real Property Act 1900* (NSW) (see s 19(1)(a)). While existing registered interests over the land are protected, registration of the state as proprietor of the land operates to automatically extinguish any unregistered interests in the confiscated property. In *Leros Pty Ltd v Terrara Pty Ltd* (1992) 174 CLR 407 the High Court of Australia held unanimously that an unregistered and uncaveated interest will be defeated and extinguished on the registration of a subsequent inconsistent dealing (418).

Within six months from the making of a forfeiture order, a third party may apply to the court for an order declaring their interest in the confiscated property and directing the state to transfer the property to the third party or to pay to the third party the declared value of their interest in the property (s 20). Under s 20 the court is required to make the order if the third party (1) was not a party to the commission of the relevant offence; and (2) acquired the interest either before the commission of the offence or for sufficient consideration and without actual or constructive knowledge that it was tainted property. A forfeiture order can be appealed by any person with an interest in the property, and may on appeal be confirmed, varied, or discharged (s 92).

Substituted tainted property declarations

The NSW DPP may apply to the court for a declaration that property, an interest in property, or combination of these, of a person who has been convicted of a serious offence is available for forfeiture. Written notice must be given to the person and any other person reasonably believed to have an interest in the property, who may then be heard in the application proceedings (s 33(4)). The court must make a substituted tainted property declaration if satisfied (under s 33(5)) that:

(a) the person has been convicted of a serious offence, and

(b) particular property became tainted property because it was used in, or in connection with, the commission of the serious offence, and

(c) the tainted property is not available for forfeiture because:

  (i) the person does not own, and does not have effective control of, the property, or

  (ii) the property has been sold or otherwise disposed of or cannot be found for any other reason.

Once the court makes a declaration, the property and/or interest in property is treated as tainted property available for forfeiture (s 33(9)).

Pecuniary penalty orders: Criminal benefits

Where a person has been convicted of a serious offence other than a drug trafficking offence, on the application of the NSW DPP, the court may assess the value of the benefits the person derived from the offence and may order that the person pay the state a pecuniary penalty of that value (s 24(1)). 'Benefits' are defined in s 4 as including a service or advantage. In considering whether to treat a benefit as a criminal benefit, the court may have regard to any matter it thinks fit, including, in the case of benefits derived from the commercial exploitation of one's criminal notoriety, the public interest and the nature and purposes of the public promotion of one's criminal notoriety; research and rehabilitative purposes; and social or educational value (s 25(2A)). The relevance of hardship to deciding whether or not to impose a pecuniary penalty is not settled in the case law (see *R v Fagher* (1989) 16 NSWLR 67; *R v Desire Patrick Pepin* [1996] NSWSC 345).

To assess benefits the court may consider, among other things, the value of any benefit or the money or property that came into the possession or control of the defendant or 'another person at the request or by the direction of the defendant' because the defendant committed the offence/s (ss 25(2)(a)–(c)). If evidence is led about the value of the defendant's property after the serious offence was committed, and that value exceeds the value of the defendant's property prior to the serious offence, then the court must treat the value of the benefits derived as being not less than the amount in excess. This is unless 'the defendant satisfies the court that the whole or a part of the excess was due to causes unrelated to the commission of the offence or offences' (ss 25(3) and (4)).

A pecuniary penalty order is enforced as a civil debt owed to the state (s 24(4), (5)). The provisions relating to pecuniary penalty orders apply irrespective of when or where the property or benefit was acquired (s 28). A pecuniary penalty order can be appealed as if it was, or was part of, the sentence imposed for the serious offence (s 93(2)). On appeal, the court may confirm, vary, or discharge the order (s 92(3)).

Drug proceeds orders: Criminal benefits

Where a person has been convicted of a drug trafficking offence, on the application of the NSW DPP the court must determine whether the person derived any benefit in connection with drug trafficking at any time and, if the court believes they did, it must assess the value of the benefit and order the person pay the state a pecuniary penalty of that value (s 29(1); *R v Hall* [2013] NSWCCA 47). 'Benefit' is defined in s 4 to include a service or advantage, and is taken to mean the 'net gain' as calculated through s 30 (see *Director of Public Prosecutions (New South Wales) v Colakoglu (Colakoglu); Director of Public Prosecutions (New South Wales) v Dodd; Director of Public Prosecutions (New South Wales) v Whitby; Director of Public Prosecutions (New South Wales) v EC [2015] NSWCCA 301)*. The calculation should be made 'by reference to the monetary sum actually derived by a particular person' not from the sum paid as the sale price to the person for drugs (see *Colakoglu* at [33]–[34]). A drug proceeds order is enforced as a civil debt owed to the state (s 29(4)).

To assess benefits, the court is to have regard to the information before it concerning matters in s 30(1). These include the value of the person's property at the time of conviction and of any property transferred to the person in the past six years; money received in connection with drug trafficking; and the market value of the drugs, disregarding expenses incurred in the commission of the offence/s (ss 30(1)(a),(d),(f); 30(6)). It is recognised that this is a difficult task, normally undertaken without audited accounts or documentary evidence, and of questionable reliability if based on evidence of participants (see *R v Fagher; R v Hall*). The decision in *Colakoglu* indicates that reasonable estimates need to be made.

Importantly, in assessing benefits, 'the court may also treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant' (s 32(1)). Section 10 provides that:

(1) Property, or an interest in 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.

To determine whether or not a property or an interest in property is in the effective control of a person, or there are reasonable grounds to so believe, the court may have regard to, among other things 'family, domestic or business relationships between persons having an interest in the property' (s 10).

A drugs proceeds order can be appealed as if it was, or was part of, the sentence imposed for the drug trafficking offence (s 93(2)). On appeal, the court may confirm, vary or discharge the order (s 92(3)).

Seizure, freezing notices and restraining orders

Short-term preservation of tainted property can be achieved through seizure. Seizure aims to prevent property reasonably believed to be tainted property from being concealed, lost or destroyed, or used in committing a serious offence (ss 36–7). Suspected tainted property may be seized provided charges in respect of the relevant confiscation offence have been laid or are likely to be laid within 48 hours (s 39).

The Act also provides for the making of both freezing orders and restraining orders in respect of tainted property. A freezing order may be made by an authorised officer, and confirmed by a court (ss 42C, 42L). A court may restrain the property of a person charged, to be charged, or convicted of a serious offence or of any other person (ss 43–4). An application for a restraining order may be made *ex parte*. Once an application has been made, the court may require the applicant to give notice to a person reasonably believed to have an interest in the property or part thereof, who is entitled to be heard in the restraint proceedings (s 44(1)). Where notice is not given and an order is made, the applicant must give notice of the making of the order to the person (s 44(2)). Once property is restrained, it is an offence for any person to knowingly deal with that property, punishable by either a fine equivalent to the assessed value of the property or up to two years imprisonment, or both (s 45A).

A court may not restrain the property of a person who was not involved in the commission of an offence, unless there are reasonable grounds for believing the property is tainted property or is subject to the exclusive control of a person who derived a benefit from the commission of the offence (s 43(4)(a)). Under s 43, provided the court is satisfied that there are reasonable grounds for the applicant's belief on which the application is based, the court has a general residual discretion to make a restraining order. The court may make a restraining order subject to any conditions, for example, that the defendant's reasonable living expenses, including those of dependants, and reasonable business expenses be met out of the property (s 43(6)).

Criminal Assets Recovery Act 1990 (NSW) (CARA NSW)

The CARA NSW contains non-conviction-based confiscation provisions relating to: property of a person suspected of engaging in serious crime related activity, property or proceeds derived from serious crime related activity, and unexplained wealth. The principal objects of the CARA NSW are set out in s 3 and, in addition to providing for confiscation without conviction, include 'to enable law enforcement authorities effectively to identify and recover property'. Confiscation proceedings under the CARA NSW are civil proceedings and the rules of evidence applicable to civil proceedings apply (s 5).

The Act applies to 'serious crime related activity' which is defined in s 6 as anything done by the person that was at the time a 'serious criminal offence'. It applies whether or not the person has been charged with the offence or, if charged, tried and acquitted or tried and convicted. This includes where the conviction has been quashed or set aside. A 'serious criminal offence' is defined in s 6 to include a drug trafficking offence (defined in similar terms to the CPCA NSW but including small quantities of a prohibited drug) and similar offences under the pre-existing *Poisons Act 1966* (NSW) and under other Commonwealth, state or territory laws. The definition also includes offences punishable by at least five years imprisonment involving 'theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide', as well as firearms offences, drug premises offences, and, among other things, destruction of or damage to property valued at over $500.

In 2016, the Act was amended to enable the non-conviction-based confiscation of crime-used property. This was to target '[o]rganised criminals who use intermediaries to distance themselves from their crimes' (Grant 2016: 8036). The Act now also applies to 'serious crime used property', which is, 'property that was used in, or in connection with, a serious crime related activity' (s 9B(1)). The Act now makes provision for the making of 'substituted serious crime use property declaration'. This is a 'declaration to the effect that an interest in property (or a combination of interests in properties) of a person who has engaged in serious crime related activity is available for forfeiture instead of serious crime use property that was used in, or in connection with, that activity' (s 22AA(2)).

Confiscation orders

The Act provides for three types of confiscation order: an assets forfeiture order, a proceeds assessment order, and unexplained wealth order.

Asset forfeiture orders: Interests in property

Under s 22, the New South Wales Crime Commission (NSW CC) may apply for an assets forfeiture order in respect of an interest/interests in property if:

- the interest/s in property are held by a person suspected of having engaged in serious crime related activity/ies;
- the interests are suspected crime-derived property resulting from a person's serious crime related activity/ies;
- the interest is held in a false name suspected to be fraudulently acquired property that is illegally acquired property; or
- an interest is suspected of being an available interest relating to serious crime use property or capable of being the subject of a substituted serious crime use property declaration.

The court must make an assets forfeiture order if the court finds it to be more probable than not:

- that a person did engage in serious crime related activities involving an indictable quantity or an offence punishable by five years of imprisonment or more in the six years preceding the making of the forfeiture application; or
- that the interests are fraudulently acquired property that is illegally acquired property; or
- that the interest is an available interest relating to 'serious crime use property' (see ss 22(2), 22(2A), 22(2B)).

'Illegally acquired property' is defined in s 9 as the proceeds of illegal activity (which includes serious crime related activity), the proceeds of the disposal of such property, or property acquired using illegally acquired property.

The order is to be made in respect of a specified interest/s in property and operates in rem against the specified interests, regardless of who owns or has effective control of the interest/s (s 22(4); see also *Hriss v New South Wales Crime Commission* [2002] NSWSC 23). Any interest in property that is the subject of an assets forfeiture order is forfeited to, and vests in, the Crown (s 23(1)(a)). It is an offence (punishable by a fine equivalent to the value of the interest concerned or up to two years imprisonment or both) to dispose of or otherwise deal with an interest in property that is the subject of an assets forfeiture order. That is unless the person can show they had no notice that the interest was subject to the order and no reason to suspect it was (s 23A).

The CARA NSW extends limited financial relief to the innocent dependants of a person whose interests in property are confiscated, where the dependants will suffer hardship as a result of the confiscation. This is achieved by permitting a court to order that the dependants be paid a specified amount from the proceeds of the sale of the interest/s (s 24). While the protection of innocent third parties is both justified and necessary, this protection may be inadequate if the interest is sold at undervalue. Further, no protection will be afforded in the event of the confiscated interest not being sold.

Notwithstanding, certain additional protections are afforded to innocent third parties. Under s 9(5)(a), an interest in property ceases to be crime-derived or illegally acquired—and therefore is no longer amenable to restraint and confiscation—when it is acquired by a bona fide purchaser for value without actual or constructive notice that it was crime-derived or illegally acquired (*Shields v New South Wales Crime Commission* [2007] NSWCA 309). The application of the 'bona fide purchaser without notice' principle in these circumstances ensures that an innocent third party who unknowingly purchases crime-derived property for sufficient consideration does not risk the confiscation of that property (*New South Wales Crime Commission v Mahoney* [2003] NSWSC 1030). No protection is afforded by the statute to bona fide volunteers who may not have given adequate consideration for their interest in the confiscated property.

Section 25 allows a court to make an order to exclude a proprietary interest from the operation of an assets forfeiture order on application by the owner or holder of the specified interest. A s 25 application will only succeed if the interest sought to be excluded was actually specified in the assets forfeiture order. It is not sufficient that an interest may be affected by the order (see generally *Hriss*). The court must not make the exclusion order unless the applicant demonstrates that the interest in question is not illegally acquired property (s 25(2)(b); see also *Mahoney*). The court is to declare the nature and extent of the excluded interest in the order (s 25(3)).

Under s 26, a court may declare that a specified proportion of the value of a confiscated interest in property that is not attributable to the proceeds of an illegal activity be excluded from an assets forfeiture order and, further, may order that the applicant be paid that specified proportion of the proceeds from the sale of the interest. It follows, therefore, that where an interest in property was acquired partly with the proceeds of illegal activity and partly from legitimately acquired funds, only that proportion of the interest that was illegally funded will be confiscated.

Section 57 allows for an order in relation to an interest in property to be extended to other interests in the property including lawfully acquired interests and interests held by innocent third parties. This extension is permitted if the proceeds from the disposal of the combined interests are likely to be greater than the disposal of the illegally acquired interest alone, or where the disposal of the illegally acquired interest alone would be impracticable or significantly more difficult (s 57(1)). In making such an order, a court may make other orders necessary for the protection of innocent third parties whose interests may be affected. Such orders may include a declaration that a specified amount be paid to the third party to compensate for the value of the interest confiscated (s 57(3)(a)). The potential impact of s 57 on the proprietary rights of innocent third parties is both clear and unjustified.

Substituted serious crime use property declarations

The NSW CC may apply for a 'substituted serious crime use property declaration', which is a declaration that an interest/s in property of the person is available for forfeiture 'instead of serious crime use property that was used in, or in connection with, that activity' (s 22AA(2)). The NSW CC must give written notice to the person and any other person reasonably believed to have an interest in the property, who may appear and be heard at the application hearing (s 22AA(4)). Under s 22AA(5), the Supreme Court must make a declaration if the court is satisfied that it is more probable than not that:

(a) the person has engaged in serious crime related activity, and

(b) the activity has resulted in particular property becoming serious crime use property for the purposes of this Act, and

(c) the serious crime use property is not available for forfeiture as referred to in s 9B(3).

Proceeds assessment orders: Illegal activity

The NSW CC may apply for a proceeds assessment order 'requiring a person to pay to the Treasurer an amount assessed by the court as the value of the proceeds derived by the person from an illegal activity, or illegal activities, of the person or another person that took place not more than six years before the making of the application for the order'. This is so whether or not any such activity is an activity on which the application is based (s 27).

The Supreme Court must make a proceeds assessment order if it finds that it is more probable than not that the person did, in the six years preceding the making of the application, engage in serious crime related activities involving an indictable quantity of prohibited drugs/plants or an offence punishable by five years imprisonment or more (s 27(2)). The court must make a proceeds assessment order if the court finds it to be more probable than not that the person derived proceeds from an illegal activity or such activities of another person, and knew or ought to have known the proceeds derived from illegal activity and the other person was, in the six years preceding the making of the application, engaged in serious crime related activities involving an indictable quantity or an offence punishable by five years imprisonment or more (s 27(2A)).

The amount assessed as the respondent's illegal activity proceeds in a proceeds assessment order is a civil debt due by the respondent to the state and is enforced through the usual civil enforcement processes. As a result, property available to be taken in satisfaction of the debt is limited to property or interests in property owned or effectively controlled by the respondent. The CARA NSW defines 'effective control of an interest in property' to include where a person 'does not have a legal or equitable estate or interest in the property, or…the person has no direct or indirect right, power or privilege in connection with the interest' (s 8). On the NSW CC's application, if the Supreme Court is of the opinion the property is effectively controlled by a person subject to a proceeds assessment order, the court must declare that the interest is available to satisfy the order to the extent other property is not available (s 29). The proceeds assessment order may then be enforced against the property (s 29(2)).

Unexplained wealth orders

In New South Wales, a person's unexplained wealth is the whole or any part of their current or previous wealth 'that the Supreme Court is not satisfied is not or was not illegally acquired property or the proceeds of an illegal activity' (s 28B(2)). The 'current or previous wealth' of a person is defined in s 28, and includes all interests in property owned, effectively controlled, 'expended, consumed or otherwise disposed of' at any time and 'any service, advantage or benefit provided' for the person or to another at their request. The respondent bears the burden of proving on the balance of probabilities that their current or past wealth is not or was not illegally acquired or the proceeds of an illegal activity (ss 28B(2), (3)).

The Act provides further that, on application for an unexplained wealth order, the court must make the order if it has a reasonable suspicion that the respondent has either engaged in a serious crime related activity or activities or has acquired property derived from the 'serious crime related activity' of another person (s 28A(2)). This feature, also adopted in the CPCA Qld, should operate to ensure that only those targeted by the unexplained wealth regime—that is, 'serious criminals' (Daley 2010: 24497)—will be caught by the legislation. A scheme which is—as is the case in Western Australia—reliant simply on a respondent having to prove on the balance of probabilities that their wealth was not unlawfully acquired carries the risk that a respondent who, for a variety of reasons, may not have retained accurate records relating to their property may not be able to prove that their wealth was lawfully acquired. Thus, despite not having engaged in serious crime or having acquired property from a person who engaged in serious crime, the respondent may nonetheless be caught by the scheme and deprived of legitimately acquired property. This is less likely to occur under the NSW and Queensland schemes.

Under s 28A(4), the court may refuse to make, or may reduce the amount payable under, an unexplained wealth order if 'it is in the public interest to do so'. In introducing the related Bill, then NSW Minister for Police, Mr Michael Daley, indicated that the public interest requirement is:

> a critical safeguard to the regime…the Court may exclude a portion of the wealth from the order to provide for dependents and ensure that they do not suffer any undue hardship as a result of the confiscation. (Daley 2010: 24497)

The concept of public interest is 'very broad' and 'multi-faceted' (see *Ruddock v Vadarlis (No 2*) (2001) 115 FCR 229 at [14], [19]) and would allow a court to take account of potential adverse proprietary implications for other third parties in determining whether or not to make an unexplained wealth order. In civil proceedings, where the evidentiary onus is cast upon the respondent through the imposition of the statutory presumption that wealth is unlawfully acquired, judicial discretion—albeit strictly prescribed—is entirely appropriate.

The amount assessed as the respondent's unexplained wealth in an unexplained wealth order is a civil debt due by the respondent to the state and is enforced through the usual civil enforcement processes. As a result, property available to be taken in satisfaction of the debt is limited to property or interests in property owned or effectively controlled by the respondent. Proprietary interests of third parties will not be affected by such taking. On the NSW CC's application, if the Supreme Court is of the opinion the property is effectively controlled by a person subject to an unexplained wealth order, the court must declare that the interest is available to satisfy the order to the extent other property is not available (s 29). The unexplained wealth order may then be enforced against the property (s 29(2)). Property available to satisfy the debt may be restrained to ensure its availability.

Seizure and restraining orders

The CARA NSW contains a number of information-gathering powers, including production and monitoring powers and search powers that authorise the seizure of certain property (s 39). The NSW CC may apply to the Supreme Court *ex parte* for a restraining order in respect of interests in property of any person or that are held in a false name (s 10A(1)(2)). Subject to undertakings as to damages and/or costs being given as required by the court, the court must make the order if satisfied that there are reasonable grounds for suspecting that the person engaged in serious crime related activity/ies or that the property is crime-derived or fraudulently acquired property that is illegally acquired property (s 10A(5)).

A restraining order is to be applied for and made in respect of specified interests, specified classes of interest, or all the interests in the subject property (s 10A(1)). In *Shields*, Beazley JA, with whom Hodgson and Tobias JJA agreed, considered that a restraining order made in respect of '[a]ll interests acquired by [a person]…using funds directly or indirectly sourced from…funds provided by [another person]' is sufficient identification of a 'specified class of interests in property' (at [100], [130]). The lawfully acquired interests of innocent third parties are protected by requiring a restraining order to specify the interests in property to which it applies.

A restraining order only remains in place for two working days unless there is an application for an assets forfeiture order pending in respect of the relevant interest (s 10D(1)(a)). Dealing with an interest in property with actual or constructive notice that the interest is the subject of a restraining order is an offence that carries a fine equivalent to the value of the interest dealt with or possible two years imprisonment (s 16(1)). A restraining order may, however, be set aside if there are no reasonable grounds for suspecting either that the restrained property was crime-derived or the person engaged in serious crime related activity/ies, or if the restraining order was obtained illegally or against good faith (s 10C(1)). A restraining order in respect of an interest in Torrens title real property may be registered or caveated under the *Real Property Act 1900* (NSW) (see ss 15(1), (3)).

Queensland

Criminal Proceeds Confiscation Act 2002 (Qld) (CPCA Qld)

Section 4 sets out the objects of the CPCA Qld, the principal of which is to 'remove the financial gain and increase the financial loss associated with illegal activity'. The Act creates three separate schemes to achieve its objects (s 4):

- a non-conviction-based scheme contained in chap 2—this is administered by the Queensland Crime and Corruption Commission (Queensland CCC) and provides for the confiscation of crime-used and crime-derived property and unexplained wealth. For chapter 2 confiscation orders, it is not necessary to demonstrate 'a connection between the property and the illegal activity' (Qld ODPP 2016: 21);
- a conviction-based serious drug offender confiscation scheme in chapter 2A—this is administered by the Queensland CCC and provides for the forfeiture of property of a convicted drug offender. For chapter 2A confiscation orders, it is not necessary to demonstrate 'a connection between the property and the criminal charges' (Qld ODPP 2016: 21); and
- a conviction-based scheme contained in chapter 3—this is administered by the Queensland Office of the Director of Public Prosecutions (Queensland ODPP) and provides for the confiscation of crime-used and crime-derived property. For chapter 3 confiscation orders, it is necessary to demonstrate a 'direct connection between the property and the criminal charges' (Qld ODPP 2016: 21).

Proceedings under the Act are civil proceedings, attracting the civil standard of proof and rules of evidence (s 8). The Act expressly provides that any penalties, restraining orders, or forfeiture orders imposed pursuant to the CPCA Qld do not amount to punishment or a sentence for any offence (s 9). Each chapter contains provisions for preservation of property by seizure and restraint and for related powers of the court to conduct examinations. An appeal lies to the Court of Appeal against an order made pursuant to the Act or against a refusal to make an order (s 263).

Chapter 2: Non-conviction-based confiscation scheme

Chapter 2 provides a comprehensive non-conviction-based regime for crime-used, crime-derived and unexplained wealth confiscation (see s 13). It provides for three types of confiscation order: forfeiture orders, proceeds assessment orders and unexplained wealth orders.

Chapter 2 targets 'serious crime related activity'. This is defined in s 16 to mean 'anything done by a person that was, when it was done, a serious criminal offence', whether or not the person has been charged, tried, acquitted, or had the conviction quashed or set aside. A 'serious criminal offence' is an indictable offence carrying a maximum penalty of five years or more imprisonment and also includes certain prescribed offences relating to prostitution (s 17). 'Serious crime related activity' can form the basis of several confiscation orders (s 90). However, the state is precluded from applying for a proceeds assessment order against a person if it has unsuccessfully applied for an unexplained wealth order on the basis of the same serious crime related activity, and vice versa (s 90(5)). The quashing of a conviction for a serious crime related activity does not affect the validity of a confiscation order based on that activity (ss 61, 89, 89P).

'Serious crime derived property' is defined as property that is all or part of the proceeds of a serious crime related activity, including property acquired using serious crime derived property (s 23). 'Illegally acquired property' is defined as 'all or part of the proceeds of an illegal activity' (s 22; see further *State of Queensland v Brooks* [2006] QCA 431). 'Illegal activity' means serious crime related activity, an offence against the law of Queensland or the Commonwealth, or any act or omission committed outside of Queensland that is a crime either in Queensland or where it was committed (s 15). The Act outlines circumstances in which property ceases to be illegally acquired or serious crime derived, including when it vests in a person on the distribution of a deceased estate, is acquired by Legal Aid Queensland as payment of reasonable legal expenses, or is acquired for sufficient consideration without actual or constructive knowledge of its character (s 26).

Restraining orders

The state may apply to the Supreme Court for a restraining order to preserve property of a prescribed respondent (s 28(1)). A prescribed respondent for the purposes of chapter 2 is a person suspected of having engaged in one or more serious crime related activities. A restraining order application must be supported by an affidavit of an authorised Queensland CCC officer or police officer stating the reason for their suspicion that the respondent has engaged in serious crime related activity or that the property is serious crime derived property (s 29). The court must not hear an application unless reasonable notice has been given to the person whose property is subject to the application, except where asked to do so by an appropriate officer (ss 30A(2), s 9). Those with an interest in the property subject to the restraining order application may be heard (s 30A(4)). Where no notice has been given, a person may apply to the Supreme Court for revocation of the order (s 50A).

If 'satisfied there are reasonable grounds for the suspicion on which the application is based', the court must make an order unless the it is satisfied this is not in the public interest (s 31). A restraining order remains in force for 28 days, except where: an application is on foot for a chapter 2 confiscation order; there are outstanding proceeds assessment or unexplained wealth orders against the person; or the Supreme Court extends the order (s 36). Contravention of a restraining order is a criminal offence. The offence is punishable for an individual by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment. It is a defence to show no actual or constructive knowledge of the order (s 52).

The court may order that reasonable living and business expenses of the respondent or dependants and/or debt incurred in good faith be paid out of restrained property, where the expenses and debt cannot otherwise be paid and the property is not illegally acquired (s 34). The court may not impose a condition providing for the payment of legal expenses related to proceedings under the Act or criminal proceedings in which the person is a defendant (s 34(4)) except where the court, on application, makes an administrative order for the payment of legal aid from restrained property under s 38(1)(f). However, a person is not prevented from giving Legal Aid Queensland a charge over restrained property for legal assistance (s 31(5)).

Property may be excluded from a restraining order where it is in the public interest to do so (s 48(2); s 50(3)). The court may exclude the property of a prescribed respondent if satisfied that it is 'more probable than not' that the property is not illegally acquired property and 'the property is unlikely to be required to satisfy a proceeds assessment order or unexplained wealth order' (s 48(1)). The court may exclude the property of any other person if satisfied the property was acquired in good faith, for sufficient consideration, and without knowledge that that the property was illegally acquired and 'in circumstances not likely to arouse a reasonable suspicion' (s 50).

Forfeiture orders

The state may apply to the Supreme Court for an order forfeiting restrained property (s 56). Written notice must be given to each person whose property is subject to the restraining order and to anyone who has an interest in the property, all of whom may appear at the hearing (s 57).

Under s 58, the court must make a forfeiture order if the court finds that it is more probable than not that:

- for a person suspected of engaging in serious crime related activity—the person engaged in serious crime related activity in the six years prior to the day the application was made; or
- for property suspected of being crime-derived—the property is serious crime derived property because of a serious crime related activity that happened during the six years prior to the application being made.

Property subject to a forfeiture order is forfeited to and vests absolutely in the state (s 59). It is an offence to knowingly deal with forfeited property. The offence is punishable for an individual by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment (s 60). A dealing in forfeited property will be void unless the dealing was in favour of a person who had no actual or constructive knowledge the property was forfeited, who acted in good faith, and who provided sufficient consideration (s 60(5)).

Proceeds assessment orders

The state may apply to the Supreme Court for a proceeds assessment order requiring a person to pay to the value of the proceeds derived from illegal activity that occurred in the six years leading up to the application (s 77(1)). Notice must be given to the person against whom the order is sought, as well as to anyone reasonably suspected of being affected by the order, all of whom may appear at the hearing (ss 77(2)–(3)).

The court must make a proceeds assessment order against a person if the court makes a finding of serious crime related activity—that is, the court finds it is more probable than not that during the six years before the application was made, the person engaged in serious crime related activity (s 78(1)). The court has discretion to refuse to make an order where it is not in the public interest (s 78(2)). A finding of serious crime related activity need not be based on 'a finding about the commission of a particular offence' but rather may be based on a finding that 'some offence that is serious crime related activity was committed' (s 78(3)).

The court must assess the value of the proceeds derived from the person's illegal activity. In doing so, the court must assess the value of any illegal activities of the person during the relevant period, not simply the value derived from the serious crime related activity that formed the basis of the application (s 79(4)). The amount payable under the proceeds assessment order is recoverable as a debt payable to the state (ss 13(7), 86).

The Queensland CCC must, within 28 days of the making of the order, provide a copy of the proceeds assessment order and written notice of the hardship provisions to all known dependants of the person against whom the order was made and to anyone else reasonably suspected of being affected by the order (s 80A).

Where a court makes a finding of serious crime related activity and evidence is led that the value of the person's property at the end of the six-year period exceeded the value at the beginning of the period, the court must treat the difference as proceeds derived from illegal activity, 'other than to the extent the court is satisfied the reason for the difference was not related to illegal activity' (ss 83(1)–(2)). Where a court makes a finding, and evidence is led about the person's expenditure in the six-year period, the court must treat the amount as proceeds derived from illegal activity, except to the extent it is satisfied the expenditure was funded from sources not related to illegal activity (s 83(1)(3)). In assessing the value of proceeds derived, the court must disregard any expenses incurred by the person in relation to the illegal activity (s 84).

A court may order that property under the 'effective control' of a person is available to satisfy a proceeds assessment order (s 87). To secure payment, once a proceeds assessment order is made and while the debt is outstanding, all of the interests of the person in property are charged in favour of the state (s 88).

Unexplained wealth orders

A person's unexplained wealth is regarded as (see ss 89L(2)–(3)):

- the person's current or previous wealth of which the state gives evidence, less the amount the person proves is lawfully acquired; or
- the person's expenditure for a period of which the state has given evidence, less the income for that period that the person proves was lawfully acquired.

The 'current or previous wealth' of a person is defined in s 89E. It is the total value of all of the person's property, including property 'disposed of' at any time, and 'all benefits provided to and benefits derived by the person' at any time, 'whether within or outside Queensland'.

The Supreme Court *must*, on the state's application, make an unexplained wealth order if satisfied that there is a reasonable suspicion that the person has engaged in one or more serious crime related activities, or has acquired without sufficient consideration serious crime derived property, and any of the person's current or previous worth was unlawfully acquired (s 89G). The court may refuse to make or may reduce the amount payable under an unexplained wealth order if 'it is in the public interest to do so' (ss 89G(2), 89H(3)).

Within 28 days of the making of the order the Queensland CCC must provide a copy of the unexplained wealth order, along with written notice of the hardship provisions, to all known dependants of the person against whom the order was made and to anyone else reasonably suspected of being affected by the order (s 89J).

The amount payable under the proceeds assessment order is recoverable as a debt payable to the state (ss 13(7), 89M). A court may order that property under the effective control of a person is available to satisfy an unexplained wealth order (s 89N). To secure payment, once an unexplained wealth order is made and while the debt is outstanding, all of the person's interests in property are charged in favour of the state (s 89O).

Chapter 2: Hardship and exclusion orders

Forfeiture orders

Where the Supreme Court is satisfied that hardship will be caused to a dependant of a person whose property is to be forfeited under a forfeiture order, the court may order the state pay the dependant out of the proceeds of the sale of the property the amount necessary to prevent hardship (s 62). An adult defendant must have had no knowledge of any serious crime related activity (s 62(2)).

The court is also empowered to make any orders it considers appropriate about an encumbrance over forfeited property if satisfied the encumbrance was taken in good faith, for valuable consideration, and in the ordinary course of business, and further, if the state undertakes to apply the proceeds towards discharging the encumbrance (s 63). 'Encumbrance' is defined in the dictionary in schedule 6 to the CPCA Qld as including 'any interest, mortgage, charge, right, claim or demand in relation to the property'. The court may release an interest in forfeited property from a forfeiture order on 'payment to the state of the amount the court decides is the value of the interest' where it is not against the public interest or where there is another reason not to release the interest (s 64).

A person who claims an interest in property subject to an application for forfeiture may apply for an order excluding property from forfeiture while the application is on foot (ss 65–6). Once an order is made, a person claiming an interest in forfeited property may apply for an 'exclusion order' or 'innocent interest exclusion order' within six months of the making of the order unless the person was given notice of or appeared at the application hearing, or, alternatively, with leave of the court (ss 66, 72).

The court 'must, and may only' make an exclusion order if satisfied that the applicant has an interest in the property and that it is more probable than not that the property is not illegally acquired (s 68). The court 'must, and may only' make an innocent interests exclusion order if the applicant establishes that it is more probable than not that the claimed portion of the value of the forfeited property was not the proceeds of an illegally activity (s 68). The Act also provides for the release and buying out of interests in forfeited property in ss 75–76.

Proceeds assessment orders and unexplained wealth orders

A dependant may apply to the Supreme Court for a hardship order within three months of the making of a proceeds assessment order, an unexplained wealth order or an order placing a charge over property, or after that time with leave of the court (ss 89A–89B; s 89Q). The dependant must give the state and anyone else with an interest in the property written notice of the application and the facts and grounds relied upon at least 28 days before the hearing date (ss 89A, 89Q).

The court may make a hardship order excluding 'special property' from a proceeds assessment order, an unexplained wealth order or an order placing a charge over property. 'Special property' is defined as property given under a will, or property that is or was the dependant's principal place of residence, providing the last change of ownership was more than six years before the serious crime related activity and the defendant occupied the property for two consecutive years as their primary place of residence in those preceding six years (ss 89C(3), 89S(3)). The court may make a hardship order if satisfied that the applicant is a dependant and that the operation of the order or charge would cause hardship to the defendant (ss 89C(1), 89S(1)). An adult defendant must have had no knowledge of any serious crime related activity (ss 89C(2), 89S(3)).

The state must not, without leave of the court, dispose of any property subject to an order or charge in the three months following the making of the relevant order or the hardship proceedings being decided (ss 89D, 89T).

Chapter 2A: Serious drug offender confiscation scheme

Chapter 2A provides for the restraint and forfeiture of property held by, or gifted from, a person convicted of a qualifying offence and in respect of who a serious drug offender certificate is in force (s 93A). A 'qualifying offence' is the offence of trafficking in dangerous drugs under the *Drugs Misuse Act 1986* (Qld), and certain supply, production, and possession of dangerous drug offences where committed within seven years of relevant pre-qualifying offences (s 93F).

Restraining orders

The state may apply to the Supreme Court for a restraining order in relation to property of a prescribed respondent or any other stated person (s 93H). A prescribed respondent for the purposes of the serious drug offender confiscation scheme is a person who has been convicted of a qualifying offence or has been, or is about to be, charged with a qualifying offence to which a restraining order application relates (s 93G). The provisions relating to the supporting documentation, notice, and rights to appear at an application are identical to chapter 2 restraining order applications (ss 93I-L; s 93ZQ).

The court must make an order if satisfied the application relates to the prescribed respondent and 'there are reasonable grounds for the suspicions on which the application is based', unless the court is satisfied it is not in the public interest (s 93M). The period of time that a restraining order remains in force depends on the circumstances in or the reasons for which it was made. Where made without notice to the prescribed respondent, this is for seven days; where made on the basis the respondent is about to be charged, for 48 hours. Otherwise it is for the period stated in the order or 12 months if no period is stated (s 93S). Contravention of a restraining order is an offence attracting the same penalties as chapter 2 offences (s 93ZT). In contrast to chapter 2 and 3 restraining orders, the court may order payment to Legal Aid Queensland from restrained property for expenses payable by the person for proceedings under the Act or as a defendant in criminal proceedings (s 93V(f)).

Property may be excluded from a restraining order under ss 93ZK–93ZN where it is in the public interest to do so. The court may exclude the property of a person other than a prescribed respondent from restraint if satisfied the property is not under the effective control of the prescribed respondent and was not a gift from the prescribed respondent that was given within six years from the charged offences (s 93ZN(1)). A restraining order over Torrens title property is to be registered and the Queensland CCC may lodge a caveat over restrained land (s 93ZS).

Serious drug offender confiscation order

A serious drug offender confiscation order (SDOCO) forfeits property held by or gifted from a prescribed respondent in the six years prior to being charged with a qualifying offence (s 93ZY). Property is not forfeited if it was acquired by a person for sufficient consideration and without actual or constructive knowledge that the prescribed respondent had committed a relevant offence (s 93ZY(2)). Property forfeited under an SDOCO vests absolutely in the state (s 93ZZF).

The state may apply to the Supreme Court for a SDOCO. Reasonable notice must be given to the prescribed respondent and to anyone else reasonably suspected of having an interest in the property subject to the SDOCO (s 93ZZ(5)). The prescribed respondent may file a response and must do so at least 14 days before the application hearing (s 93ZZA). The response must outline the details of the property, reasons for arguing the property is protected, and any public interest grounds (s 93ZZA).

The Supreme Court must make a SDOCO if satisfied that:

- the prescribed respondent has been convicted of a qualifying offence and a serious drug offender certificate has been issued and is in force; and
- the application was made within six months of the date of issue of the serious drug offender certificate.

The court may refuse to make an order if satisfied that making the order is not in the public interest (s 93ZZB).

An SDOCO may not be made if a chapter 2 confiscation order has been made on the basis of the illegal activity that constitutes the qualifying offence (s 93ZZB(3)). Property of a person other than the prescribed respondent that is under the effective control of the prescribed respondent may be forfeited if listed in the order (s 93ZZC). Any act or omission that defeats the operation of a SDOCO is an offence that is punishable, for an individual, by the value of the retained property or 1,000 penalty units (whichever is higher) or seven years imprisonment (s 93ZZH). A dealing in forfeited property will be void unless it was in favour of a person who had no actual or constructive knowledge the property was forfeited, who acted in good faith, and who provided sufficient consideration (s 93ZZH(5)).

Within 28 days of the making of the order, the Queensland CCC must provide a copy of the SDOCO and written notice of the right to apply for a hardship order to all known dependants of the person against whom the order was made and to anyone else considered to have an interest in the property (s 93ZZE).

Chapter 2A: Hardship and discharge orders

Where the Supreme Court is satisfied that the SDOCO will cause hardship to a dependant of a person whose property is to be forfeited, the court may order that the state either pay the dependant the amount necessary to prevent hardship out of the proceeds of the sale of the property or transfer the property to the dependant (s 93ZZR). An adult defendant must have had no knowledge of the relevant offence (s 93ZZQ). The court may make a hardship order excluding 'special property' from a SDOCO. 'Special property' is defined in the same terms as in chapter 2 (s 93ZZQ(3)).

A SDOCO is discharged if, among other reasons, the offence on which the order is based is quashed (s 93ZZS). A person whose property has been discharged may request, in writing, that the Attorney-General return the property and the Attorney-General must do so as soon as practicable after receiving the notice (s 93ZZU). Where property is no longer vested in the state, a person may seek an order from the Supreme Court declaring the value of property forfeited pursuant to a SDOCO, which the court must make (s 93ZZV). The applicant may then request, in writing, payment of the declared value from the Attorney-General—who, on receiving the notice, must arrange payment (s 93ZZV).

Chapter 3: Conviction-based confiscation scheme

This scheme provides for the confiscation of 'tainted property'—that is, property used in or derived from the commission of a 'confiscation offence', or any other benefit derived from the tainted property. Importantly, unlike non-conviction-based orders, confiscation can only occur after a person has been charged with or convicted of the offence (ss 94, 104). Queensland (like Western Australia) has a broader definition of 'tainted property' which includes 'property intended to be used, by a person in, or in connection with, the commission of an offence' (s 104(1)(a)).

A 'confiscation offence' is defined to include an indictable offence, an offence against the CPCA Qld punishable by imprisonment, a scheduled offence, or a prescribed offence, which includes the offence of public soliciting for prostitution (s 99). The definition of 'convicted' in s 106 includes (like in New South Wales) a person who has absconded in connection with the offence. However, a person will also be taken to have been convicted of a confiscation offence if they are acquitted of the offence because of unsoundness of mind or if the person is not amenable to justice for the offence because, for instance, they have absconded, are dead, or are found unfit to stand trial (ss 106(1)(c), (d), 110–12). Chapter 3 applies to convictions for confiscation offences secured on or after 12 May 1989 (ss 95–6).

Restraining orders

The state may apply to the Supreme Court for a restraining order in relation to property of a prescribed respondent or any other stated person (s 117). A prescribed respondent for the purposes of chapter 3 is a person who has been convicted of a confiscation offence or has been, or is about to be, charged with the confiscation offence to which a restraining order application relates (s 116). The provisions relating to the restraining order applications and notice are identical to the corresponding provisions in chapters 2 and 2A (ss 117–121).

Where the confiscation offence is a serious criminal offence—that is, publishable by more than five years imprisonment—and the court is satisfied that there are reasonable grounds for the applicant's suspicion on which the application is based, the court must make the restraining order unless it is not in the public interest to do so (s 122(2)). For all other confiscation offences, the court has residual discretion (see s 122(1)). The provisions relating to payment of expenses out of restrained property are the same as those relating to a chapter 2 restraining order (ss 122–30).

The Supreme Court may exclude property of the respondent or another person from a restraining order if it is in the public interest to do so, having regard to all the circumstances, including any 'financial hardship or other result of the property remaining restrained under the order' (ss 139(3), 140(5)). In addition, the court may exclude the property of a prescribed respondent from restraint if satisfied that the property is neither tainted nor available substitute property, that the relevant offence is not a serious offence, and that a pecuniary penalty order cannot be made (s 139(2)).

Property of another person may also be excluded on a number of grounds, including where the court is satisfied the applicant was not involved in the offence and the property was acquired after the offence and obtained in good faith, for sufficient consideration, and without actual or constructive knowledge it was tainted (s 140(4)). Where a prescribed respondent has been charged with a serious criminal offence, they may apply to the court for a declaration that property is not subject to automatic forfeiture. The court may make such a declaration if satisfied the property is not tainted and was lawfully acquired (s 141).

The period of time that a restraining order remains in force depends on the circumstances in which it was made. Where made without notice to the prescribed respondent, this is for seven days; where made on the basis the respondent is about to be charged, for 48 hours. Otherwise, this is for the period stated in the order or 12 months if no period is stated (s 128). The court is empowered to extend and set aside a restraining order, and to direct the sale of restrained property (ss 136–8). A restraining order over real property is to be registered, and the Queensland Office of the Director of Public Prosecutions (Queensland ODPP) may lodge a caveat over restrained land (s 142). Contravention of a restraining order is an offence attracting the same penalties as those prescribed under chapters 2 and 2A.

Forfeiture orders

The Queensland ODPP may apply for a forfeiture order within six months of a person being convicted of a confiscation offence, or thereafter with leave of the court (s 146). Written notice must be given to the person and to anyone else with an interest in the property, each of whom may appear at the hearing (s 147). Forfeited property vests absolutely in the state (s 153). A forfeiture order is discharged if the conviction is quashed or for other reasons (s 160).

The court has a wide discretion in assessing whether to make a forfeiture order. Under s 151(1), the court may make a forfeiture order if satisfied that:

(a) a person is convicted of a confiscation offence; and

(b) the conviction is the basis for the application for the forfeiture order against the property; and

(c) the court is satisfied the property, or an interest in the property, is tainted property; and

(d) the court, having regard to subsection (2), considers it appropriate to make the order.

The court must presume property is tainted if evidence is led that the property was in the person's possession when the offence occurred or immediately thereafter, and no evidence is presented tending to show it is not tainted (s 151(3)).

In considering whether it is appropriate to make the order, the court may have regard to an 'extremely broad' range of matters (see *Queensland v Noble* [2018] QSC 59 at [19]) as listed in s 151(2):

(a) any hardship that may reasonably be expected to be caused to anyone by the order; and

(b) the use that is ordinarily made, or was intended to be made, of the property; and

(c) the seriousness of the offence concerned; and

(d) anything else the court considers appropriate.

In determining appropriateness, Queensland courts have taken into account a variety of matters, including the value and use of the property, its utility to the offender, the extent of the connection of the property to the offence, the seriousness of the offending, the length of ownership, and the interests of innocent third parties in the property (see also *State of Queensland v Statham* [2016] QSC 189 at [28]). In relation to hardship in particular, Chesterton J stated in *Director of Public Prosecutions (Queensland) v Gadaloff* [1999] QSC 151:

> The authorities make it clear that the hardship referred to is something other than the consequence of the forfeiture order. Were it otherwise, the operation of the Act would be severely circumscribed (at [18]).

As with chapter 2, the court is empowered to make appropriate orders relating to the state's undertaking to apply the proceeds from the disposal of confiscated property towards discharging any encumbrances taken over that property in good faith, for valuable consideration, and in the ordinary course of the encumbrancee's business (s 152(1)). Section 152(1) provides extensive protection to a wide range of third parties who may hold an interest in the property, albeit that the protection afforded by the section is dependent upon the state volunteering to, effectively, pay out the title holder for the loss of their interest.

Tainted property substitution declarations

In the event of crime-used property being unavailable for forfeiture, the Act provides for the discretionary *in personam* confiscation from the convicted person of property in which they do have an interest and which is of the same nature or description as the unavailable property, regardless of its comparative value (s 153A-D). This confiscation is achieved by way of a 'tainted property substitution declaration' (s 153C).

Third party protections: Forfeiture

A court may order that a stated interest in the property of a stated person be released from forfeiture on the payment to the state of the court-assessed amount of the interest, where the court is satisfied that the transfer is not against the public interest or that there is any other reason not to release the interest (s 154).

A third party with an interest in property subject to a forfeiture application may apply for an 'innocent interest exclusion order'. A court must and may only make an innocent interest exclusion order if three criteria are satisfied. First, the applicant would have an interest in the property but for the confiscation. Second, the applicant was entirely innocent in relation to the confiscation offence. Third, the applicant acquired the interest in the confiscated property in good faith, for sufficient consideration, and without actual or constructive knowledge that the confiscated property was tainted (ss 155–7). An innocent interest exclusion order may be made before the confiscation by, and consequent vesting of tainted property in, the state. However, if the order is made after vesting, the state must transfer the excluded interest to the applicant or, if the state has disposed of the confiscated property, the state is required to pay the value of the excluded interest to the applicant (s 159).

Automatic forfeiture orders

There are circumstances in which property is automatically confiscated by and vested in the state without the need for a court order. Generally, specified property restrained on the grounds of a person being convicted of, or charged with, a serious criminal offence is automatically confiscated by the state either six months after the relevant conviction or on the finalisation of the person's appeal against the conviction, whichever is the later (ss 161–3). This period may be extended by a court by up to three months (ss 161, 163(5); see also *Queensland v Lindsay* [2005] QSC 166).

Third party protections: Automatic forfeiture

A third person claiming an interest in automatically confiscated property can apply to the court for either a 'third party order' or a 'buy-back order' (s 165). A third party order directs the state to return confiscated property that is still vested in the state—or its money equivalent if it is no longer vested in the state—to the third party (s 168; see also *Gadaloff*). A court may grant a third party order if four criteria are satisfied. First, the third party applicant would have an interest in the property but for the confiscation. Second, the applicant was entirely innocent in relation to the confiscation offence. Third, the applicant acquired the estate or interest in the confiscation property in good faith, for sufficient consideration, and without actual or constructive knowledge that the confiscated property was tainted. Fourth, the applicant's interest in the property was not under the effective control of the convicted or charged person before its confiscation (s 167(2)). Alternatively, a court may grant a third party order if satisfied that the property in question was not tainted property and the third party applicant's interest in that property was lawfully acquired (s 167(3)).

By contrast, a buy-back order permits a person to buy back their interest in confiscated property from the state. This may be granted where the applicant would have an interest in the property but for the confiscation, where it is not against the public interest to return the interest in the confiscated property to the applicant, and where there is no other reason why the interest should not be transferred back to the applicant (ss 169–170).

Finally, the CPCA Qld permits an innocent third party interest holder who is entitled (pursuant to an innocent interest exclusion order or a third party order) to the return transfer of their interest in the confiscated property to buy out any other interests in the confiscated property. The third party must give notice as prescribed and pay the value of any other interests to the state (s 173). This enables an innocent third party with a limited interest in confiscated property to acquire absolute title to the property through buying out all the other interests in the property.

Pecuniary penalties and special forfeiture orders

Within six months of the conviction or thereafter with leave, the state may apply to a court for an order that a person convicted of a confiscation offence pay the state the value of the benefits derived from that offence (s 178). The court may—or, if the offence is a major drug offence, must—assess the value of the benefits derived and order the person pay that amount to the state as a pecuniary penalty (s 184). Section 190 introduces a rebuttable presumption that certain property came into a person's possession or control because of the commission of the offence/s—that is, all property of the person when the application was made, and all property of the person in the five years before the application was made or between the offence and the application, whichever is shorter.

The Supreme Court may make a special forfeiture order if satisfied that the prescribed respondent 'has derived, is deriving or will derive benefits' under a contract made after 12 May 1989 in relation to the depiction of the offence in any media, electronic or entertainment form, or an expression of the person's 'thoughts, opinions or emotions' about the offence (s 200).

For both types of orders, the court may declare that certain property is under the 'effective control' of a person and available to satisfy the order (ss 198, 208).

Western Australia

Criminal Property Confiscation Act 2000 (WA) (CPCA WA)

This Act provides for the confiscation of the property of a declared drug trafficker, unexplained wealth, criminal benefits and crime-derived property, and crime-used property. Such property is termed 'confiscable property' (s 4). The Act targets 'confiscation offences' defined as including 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more' (s 141). The WA statute retrospectively targets crime-used and crime-derived property and criminal benefits regardless of when the alleged crime in respect of which the property was used was committed. It also targets unexplained wealth acquired at any time (s 5). Proceedings under the Act are classified as civil proceedings, with a civil standard of proof (on the balance of probabilities) and civil rules of evidence (ss 5(1), 102(2)(b), (d)). Notwithstanding ordinary rules of evidence, the CPCA WA permits receipt by the court of opinion and hearsay evidence on behalf of the state in certain circumstances (ss 105, 109).

Confiscation of property

The Act provides for the confiscation of property in satisfaction of a person's liability under an unexplained wealth declaration, a criminal benefits declaration, or a crime-used property substitution declaration (s 6). The Act also provides for the automatic confiscation of specified property of a declared drug trafficker and of property subject to a freezing notice (ss 7–8).

Declared drug trafficker confiscation

Under s 8 of the CPCA WA, all property owned, 'effectively controlled', or given away by a person who has been convicted of a confiscation offence and who is, therefore, declared to be a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (WA) (MDA WA) is confiscated. Under s 32A of the MDA WA, a person must be declared a drug trafficker by the court on application by the Director of Public Prosecutions for Western Australian (WA DPP) in three circumstances. First, if they have been convicted of a serious drug offence which is the third relevant offence in three years; second, if they have been convicted of a serious drug offence in respect of a prohibited drug or plant of a specified quantity; or, third, if they have been convicted of a relevant drug offence and were a member of a declared criminal organisation when the offence was committed. A 'serious drug offence' is defined in the MDA WA as the offences of: possessing a prohibited drug or plant with intent to sell; selling or supplying, or offering to sell or supply, a prohibited drug or plant; manufacturing or preparing a prohibited drug; cultivating a prohibited plant; or attempting or conspiring to commit any of these offences (see also *Palfrey v MacPhail* [2004] WASCA 257).

Section 159 defines a 'declared drug trafficker' to mean a person declared to be a drug trafficker under s 32A(1) of the MDA WA or 'taken to be' a declared drug trafficker. A person may be taken to be a declared drug trafficker if the person is charged with a serious drug offence under the MDA WA where conviction could result in them being declared a drug trafficker, and the person 'absconds in connection with the offence' or dies before the charge is disposed of or finally determined (ss 159–160). A person absconds in connection with an offence where the person has been arrested or a warrant for their arrest has been in force for at least six months in respect of the offence, the charge has not been disposed of or finally determined, and the person cannot be found or dies (s 160).

Once a person is declared a drug trafficker (or is declared as taken to be a declared drug trafficker), all their property is automatically confiscated by the state (s 8). The Act provides that all of the property owned or effectively controlled by the person when the declaration is made or when they absconded, as well as all of the property given away at any time, is confiscated (s 8(1)). A person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person' (s 156).

The confiscation in these circumstances is automatic. That is, there is no need for an application to be made to effect the confiscation. Under s 9, registrable real property vests absolutely in the state when the court makes a declaration under s 30 that the property has been confiscated. On application by the WA DPP for a declaration that property has been confiscated under s 30, a court must make the declaration. In *Director of Public Prosecutions (Western Australia) v Roth-Beirne* [2007] WASC 91, Hasluck J noted that 'the obligation imposed upon the Court [in this regard] is mandatory. Once the Court is satisfied that the statutory requirements have been met the Court must make a declaration' (see at [20]).

Unexplained wealth declaration

A person is regarded as having unexplained wealth for the purposes of the CPCA WA where the value of their wealth exceeds the value of their lawfully acquired wealth (s 144). 'Wealth' is defined in s 143 and includes all property owned, effectively controlled, acquired, or given away by the person at any time and any services, advantages and benefits acquired by the person.

The WA DPP or the Western Australian Corruption and Crime Commission (WA CCC) may apply to the court for an unexplained wealth declaration (s 11). If it is more likely than not that the respondent has unexplained wealth, the court must make the declaration sought (s 12(1)). The state is not required to establish that the respondent's wealth was not lawfully acquired. Rather, it is presumed that the wealth was not lawfully acquired, unless the respondent can prove the contrary (s 12(2)). The CPCA WA thereby effectively shifts the onus onto the respondent to prove that their wealth was lawfully acquired, potentially in the face of both hearsay and opinion evidence led by the state. It is sufficient that the respondent in unexplained wealth proceedings is unable to prove that it is more probable than not that they acquired property lawfully (s 12(1)). This is a low threshold for law enforcement agencies. The effect of an unexplained wealth declaration is that the respondent becomes liable to pay the state the amount the court assesses as their unexplained wealth (s 14). A debt arising under an unexplained wealth declaration is recoverable by the Crown through the restraining and confiscation of property that is owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Criminal benefits declaration

The WA DPP or WA CCC may apply to the court for a criminal benefits declaration for the recovery of criminal benefits. 'Criminal benefit' is defined as any property, service, advantage or benefit that a person has acquired, lawfully or not, because they were involved in a confiscation offence or any unlawfully acquired property, service, advantage, or benefit of a person who was involved in a confiscation offence (s 145).

Under s 16(1), a court must declare that a respondent has acquired a criminal benefit if it is more likely than not that:

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and

(b) the respondent is or was involved in the commission of a confiscation offence; and

(c) the property, service, advantage or benefit was wholly or partly derived or realised, directly or indirectly, as a result of the respondent's involvement in the commission of the confiscation offence, whether or not it was lawfully acquired.

Unless the respondent establishes the contrary, s 16(3) presumes that the property, service, advantage or benefit was acquired because of the involvement in the offence. Under s 17(1), a court must also declare that a respondent has acquired a criminal benefit if it is more likely than not that:

(a) the property, service, advantage or benefit described in the application is a constituent of the respondent's wealth; and

(b) the property, service, advantage or benefit was not lawfully acquired.

Unless the respondent establishes the contrary, s 17(2) presumes that the property, service, advantage or benefit was not lawfully acquired where the respondent has been convicted of, or it is more likely than not they were involved in, a confiscation offence.

Section 157 stipulates when a person is taken to be convicted of a confiscation offence, which includes when a person has been charged with a confiscation offence but has absconded. A person 'absconds in connection with an offence' where the person has been arrested or a warrant for their arrest has been in force for at least six months in respect of the offence, the charge has not been disposed of or finally determined, and the person cannot be found or dies (s 160).

The effect of a criminal benefits declaration is that the respondent becomes liable to pay the state the amount the court assesses as the criminal benefit they acquired (s 14). A debt arising under a criminal benefits declaration may be recovered by the Crown through the restraining and confiscation of property owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Crime-used property confiscation

The crime-used property confiscation scheme embedded in the CPCA WA is solely non-conviction-based. That is, crime-used property is confiscable property whether or not any person has been charged with or convicted of a confiscation offence (see ss 4(c), 5; 146(2)(d)). Crime-used property is defined in s 146 to include property that is or was used in, or intended for use in, in connection with, or in facilitation of, a confiscation offence (s 146(1)). To establish that property was 'used', there must be sufficient proximity between the act or omission and the commission or facilitation of the offence (*Director of Public Prosecutions (Western Australia) v White* (2010) 41 WAR 249, at [30]; *Director of Public Prosecutions (Western Australia) v Sokmas* [2018] WASC 269, at [49]).

Where crime-used property is unavailable for confiscation, the WA DPP may apply to a court for a crime-used property substitution declaration against a person (s 21). The court must make an order declaring that other property owned by the respondent is available for confiscation if it is satisfied that the crime-used property is not available for confiscation and that the respondent made criminal use of the unavailable property (s 22). If the respondent has been convicted of the relevant offence, or if the WA DPP establishes that it is more likely than not that the crime-used property was in the respondent's possession at the time or immediately after the offence was committed, then the onus lies with the respondent to prove that they did not make criminal use of the property (ss 22(3), (4)). As noted, the Act outlines the circumstance in which a person will be taken to be convicted of a confiscation offence, including where a person has absconded after being charged with a confiscation offence (s 157).

The effect of a crime-used property substitution declaration is that the respondent becomes liable to pay to the state the value of the crime-used property as assessed and specified by the court (s 24). The value of crime-used property for the purposes of a substitution declaration is the 'full value' of the property irrespective of the amount, if any, the respondent outlaid (s 23). A debt arising under a substitution declaration may be recovered by the Crown in the same way as a debt arising under an unexplained wealth or criminal benefits declaration, including through the restraining and confiscation of property owned, effectively controlled, or at any time given away by the respondent (ss 26(2), 28(1)).

Recovery and restraint

Property owned by a respondent may be restrained and/or confiscated to satisfy a debt due under the Act (ss 6, 26). In addition, other 'confiscable property' the subject of a confiscable property declaration may be restrained and/or confiscated (ss 6, 26). Part 6 of the CPCA WA contains a number of grounds on which a person may object to the restraint and confiscation of property.

Restraining orders

Restrained property is automatically confiscated if an objection to its confiscation is not filed within the prescribed time or, if an objection is filed, if the objection is finally determined and the order restraining the property is not set aside (s 7; see further *White* at [50]; *Centurion Trust* at [217], [239]). On application by the WA DPP or WA CCC, the court must declare that the property has been confiscated (s 30).

The WA DPP or WA CCC may apply to the court, ex parte, for a freezing order restraining dealings in property (s 41). 'Property' is defined in the glossary to the CPCA WA as 'real or personal property of any description, wherever situated, whether tangible or intangible' and includes a legal or equitable interest in property. Among other things, the court may make a freezing order for all or any property 'owned or effectively controlled by the person or that the person has at any time given away' if either of the following are satisfied:

- 'an application has been made against the person for an unexplained wealth declaration, criminal benefits declaration, crime-used property substitution declaration or production order' (s 43(3)(b)); or
- the person has been charged with an offence, or is likely to be charged with an offence within 21 days, and, if convicted, the person could be declared to be a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (ss 43(5)(a), (b)).

Under s 156, a person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person.'

The court may also make a freezing order 'if there are reasonable grounds for suspecting that the property is crime-used or crime-derived' (s 43(8)). A finding that there are reasonable grounds for suspecting that property is crime-used or crime-derived is not dependent on a finding that a particular confiscation offence has been committed but rather on a finding that, on the balance of probabilities, some confiscation offence has been committed. This is regardless of whether anyone has been charged with or convicted of the offence (ss 102(2)(d), 106(a)–(b)). A confiscation offence, is defined in s 141 as including 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more'. More significantly, property may be found to be crime-used or crime-derived whether or not the identity of the person who owns or effectively controls the property is known (s 106(c)).

It is an offence to deal with restrained property with actual or constructive knowledge that it is restrained (ss 50(1), 50(3)). In the case of registered Torrens title property, notice is presumed following the registration of a restraining order (s 115(1)).

Objections to a restraining order

A person may object to the confiscation of frozen property. An objection must be brought within 28 days of receipt of notice of the restraining order, or of becoming aware—or from the day the objector could reasonably have been expected to have become aware—that the property has been restrained, or within any further time allowed by the court (s 79). The court may set aside the freezing notice or order on a number of grounds set out in ss 82–84. For example, property may be released from restraint if the objector establishes on the balance of probabilities that the property is not crime-used or crime-derived, or that frozen property is not effectively owned or controlled by the respondent (ss 82–84). Alternatively, a court may release restrained crime-used real property if the objector establishes, again on the balance of probabilities, that (under s 82(3)):

(a) the objector is the spouse, a de facto partner or a dependant of an owner of the property;

(b) the objector is an innocent party, or is less than 18 years old;

(c) the objector was usually resident on the property at the time [of the relevant offence];

(d) the objector was usually resident on the property at the time the objection was filed;

(e) the objector has no other residence at the time of hearing the objection;

(f) the objector would suffer undue hardship if the property is confiscated; and

(g) it is not practicable to make adequate provision for the objector by some other means.

The requirements of s 82(3) are onerous and have been strictly interpreted and applied (see eg *Lamers v the State of Western Australia* [2009] WASC 3). The protection it affords should be extended to applications for release from confiscation as well as release from restraint. They should also apply to all categories of restraint and confiscation.

Crime-used and crime-derived property may also be released from restraint if the court is satisfied on the balance of probabilities that three requirements are satisfied: first, the objector is the or an owner of the property; second, the person who made criminal use of, or benefit from, the property is not in effective control of the property; and, third, the objector and all other owners were innocent parties in relation to the relevant confiscation offence (ss 82–3). An innocent party is comprehensively defined in s 153 and includes a person who was not in any way involved in the commission of the confiscation offence, did not have actual or constructive knowledge of or took all reasonable steps to prevent its commission, and had no actual or constructive knowledge that—or took all reasonable steps to prevent—the property being used in connection with the commission of a confiscation offence.

Confiscable property declarations

Under s 27, the WA DPP or the WA CCC can apply for a confiscable property declaration—either at the time of applying for the unexplained wealth declaration, criminal benefits declaration or crime-used property substitution declaration, or at any other time. On hearing an application for a confiscable property declaration, the court may declare that property that is not owned by the respondent is available to satisfy the respondent's debt in two circumstances. First, if it is more likely than not that the respondent effectively controlled

the property at the time that the application for the unexplained wealth declaration was made or at the time a freezing notice was issued or made for the property. Second, if it is more likely than not that the respondent gave the property away at an earlier time (s 28(1)). Property declared to be confiscable is available to be given or taken in satisfaction of a debt arising under the Act if property owned by the respondent is insufficient to discharge the debt (s 29(2)).

A person has 'effective control' over property if the person 'does not have the legal estate in the property, but the property is directly or indirectly subject to the control of the person, or is held for the ultimate benefit of the person' (s 156). In determining whether a person effectively controls property, any directorships, trusts, and family, domestic and business relationships may be relevant (s 156(2)). It follows that in the case of trust property—for example, where a trustee is declared a drug trafficker or is taken to be a declared drug trafficker—the property, being under the effective control of the trustee, is liable to automatic confiscation despite such property being held for the ultimate benefit of the beneficiaries.

The CPCA WA provides further that, following confiscation, title to real property registrable under the Torrens statute vests absolutely in the state on declaration by the court that the property has been confiscated and on registration of a memorial of the declaration. It follows, therefore, that property—including land registered under the *Transfer of Land Act 1893* (WA) (TLA land)—may be confiscated to satisfy an unexplained wealth declaration, a criminal benefits declaration, or a crime-used property substitution declaration against a respondent even though the respondent is not the owner—or the registered proprietor, in the case of TLA land—of the property. Clearly, this provision may have a significant impact on the rights and title of the owner (or registered proprietor) of property that is the subject of a confiscable property declaration.

The second category of confiscable property not owned by the respondent is somewhat remarkable. The CPCA WA does not specify what is meant by 'an earlier time'. Elsewhere in the CPCA WA there is reference to the property having been given away by the respondent 'at any time' (see, for example, s 84(1)). These terms would seem to suggest that property may be confiscated provided it has been, at some time in the past, given away by the respondent, regardless of whether the property was given away many years before the respondent began accumulating unexplained wealth and therefore lawfully acquired by the respondent. These provisions have the potential to deprive an entirely innocent person of lawfully acquired wealth.

The concerns surrounding the confiscable property provisions are further exacerbated by the presumption raised in s 28(2) of the CPCA WA that 'the respondent effectively controlled the property at the material time, or gave the property away, unless the respondent establishes the contrary'. This is a curious provision. It is not clear precisely what 'property' is presumed to be effectively controlled or given away by the respondent. Without any guidance from the explanatory memorandum or second reading speech of the CPCA WA, it is assumed that any property included by the WA DPP in the confiscable property declaration application is subject to the presumption. The onus rests with the respondent to establish that property was not under their effective control or was not given away by them at any time.

Release of confiscated property

Under s 85 a person may apply to the court for release of confiscated property within 28 days of them becoming aware, or being reasonably expected to have been aware, that the property was confiscated. Under s 87(1) the court may release property if satisfied that it is more likely than not that:

- immediately before the confiscation, the applicant was an owner or part-owner of the property; and
- the property is not effectively controlled by 'a person who made criminal use of the property, or by a person who…derived or realised the property…from the commission of a confiscation offence'; and
- the applicant was not aware, or cannot reasonably be expected to have become aware, that the property was liable to be confiscated until after the fact; and
- the applicant, and each other owner, is an innocent party in relation to the property.

'Innocent party' is defined in the glossary and in s 153 of the CPCA WA only with reference to 'crime-used' and 'crime-derived property'. There is no definition of 'innocent party' in relation to unexplained wealth. As noted by the court in *Bennett & Co (a firm) v Director of Public Prosecutions (Western Australia)* [2005] WASCA 141 (see at [61]), '[i]t can be seen, then, that an [applicant] is only able to establish that they fall within the definition of "innocent party" where the property is either crime-used or crime-derived'. Similarly, there is no reference to property not being effectively controlled by the person declared to have unexplained wealth. If the absence of any reference to unexplained wealth confiscations in these two conditions is deliberate, it means that obtaining a release of property confiscated pursuant to an unexplained wealth declaration is far easier than obtaining the release of property otherwise confiscated under the Act. Not only would the applicant not have to be an innocent party but the property may be released despite being in the effective control of the person declared to have unexplained wealth. This is unlikely to have been the intention of the legislature. It follows that such absence must be the result of a drafting oversight. This oversight leaves unclear which conditions need to be satisfied for the release of property from confiscation pursuant to the unexplained wealth declaration. It is submitted that it must have been the intention of the legislature that all the conditions of s 87(1) should apply to any application for the release of property from confiscation, regardless of the basis for the confiscation.

For innocent parties who have sustained a loss as a result of the operation of the Act, there are no provisions requiring adequate compensation.

Appendix B: Empirical study

Table B1: Interviewees by jurisdiction and category					
	NSW	Qld	WA	National	International
Senior police officers and/or ODPP	2	0	3		
Judges and legal practitioners	3	2	10		
Government and relevant crime commissions	1	2	4		
Non-governmental organisations				1	
Politicians	0	0	3		
Academics	0	2	0		1
Members of the public	0	0	6		
Total	6	6	26	1	1
Total number of interviewees					40

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Participant Information Form

Project title: *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences.*

Name of Researchers: Associate Professor Natalie Skead , Associate Professor Hilde Tubex, Associate Professor Sarah Murray and Dr Tamara Tulich.

Invitation:

You are invited to participate in an interview as part of a study conducted by researchers at the University of Western Australia and funded by the Australian Institute of Criminology investigating the impact of and the attitudes towards proceeds of crime confiscation legislation.

You have been invited because you are an expert working in this area.

What is the project about?

Legislation confiscating the proceeds of crime is increasingly seen as an important tool in the global fight against organised crime, disrupting criminal activity and impeding the financing of terrorism. Appropriately framed proceeds of crime legislation can deter and prevent crime, offset the costs of crime prevention and policing, and recompense victims of crime and the community more broadly.

In this project we are examining confiscation legislation from a legal and criminological perspective, investigating the impact of and attitudes towards the legislation. This aim will be achieved through a comparative criminological and legal analysis of Australian proceeds of crime legislation in three Australian jurisdictions - New South Wales, Queensland and Western Australia – and a series of semi-structured interviews with a range of stakeholders with relevant expertise and/or experience with the jurisdictional/federal legislation. The project runs from March 2017 to September 2018 and the results of the research will be reported to the Australian Institute of Criminology and, with their approval, published in academic journals.

What does participation involve?

We anticipate that the semi-structured interviews will run for one hour. The interviews will be recorded and professionally transcribed. Transcription will be provided to you for review and amendment if needed. While we will have general points to discuss regarding proceeds of crime legislation, you will have the opportunity to develop and qualify your views, and to frame the agenda for discussion. Questions you might be asked are:

- What issues do you see regarding the proceeds of crime legislation? Are there any challenges related to proceeds of crime legislation from your perspective?
- What areas, if any, need to be reformed?
- What is your experience with proceeds of crime legislation?

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Voluntary participation and withdrawal from the study

Your participation in this study is voluntary. You are entirely free to refuse to take part, withdraw your consent or discontinue your participation at any time without reason and you can decline to discuss particular topics. If you withdraw or discontinue your participation, any information you provided will be destroyed, unless you agree that the researchers may retain and use the information obtained prior to your withdrawal. We respect your right to withdraw and a decision to do so will not impact negatively on you in any way.

Your privacy

The information collected will be de-identified before being used for reporting to the Australian Institute of Criminology and academic publications. In case participants are quoted in reports and publications, the quotes will be anonymised and you will be given an opportunity to review and approve the quote in advance. Any information provided will be treated in confidence; all data from this project will be stored on a password protected computer. Any information that is obtained in connection with this study and that can be identified will remain confidential and will be disclosed only with your permission, except as required by law.

Benefits

This study has the potential to provide benefits to the Australian community by developing recommendations for law and policy reform with a view to equipping Australia to tackle transnational and domestic serious, organised and drug-related crime and terrorism, through robust and effective legislative regimes.

Contacts

If you would like to discuss any aspect of this study, please feel free to contact Hilde on 0438913542, or by email at Hilde.tubex@uwa.edu.au.

Sincerely,

Associate Professor Hilde Tubex

Chief Investigator

Approval to conduct this research has been provided by the University of Western Australia with reference number RA/4/1/8869, in accordance with its ethics review and approval procedures. Any person considering participation in this research project, or agreeing to participate, may raise any questions or issues with the researchers at any time. In addition, any person not satisfied with the response of researchers may raise ethics issues or concerns, and may make any complaints about this research project by contacting the Human Ethics office at UWA on (08) 6488 4703 or by emailing to humanethics@uwa.edu.au. All research participants are entitled to retain a copy of any Participant Information Form and/or Participant Consent Form relating to this research project.

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Participant Consent Form

Project title – *Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences.*

I, _____ have read the information provided and any questions I have asked have been answered to my satisfaction. I agree to participate in this research project, realizing that I may withdraw at any time without reason and without prejudice.

I understand that all identifiable information that I provide is treated as confidential and will not be released by the investigator in any form that may identify me unless I have consented to this. The only exception to this principle of confidentiality is if this information is required by law to be released.

I agree to have my conversation audiotaped and transcribed ☐

_____ _____
Participant signature Date

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Appendix G

Marcus Smith & Russell G Smith, *Exploring the Procedural Barriers to Security Unexplained Wealth Orders in Australia* (Canberra: Australian Institute of Criminology, 2016).

Exploring the procedural barriers to securing unexplained wealth orders in Australia

Marcus Smith, Russell G Smith

Report to the Criminology Research Advisory Council
Criminology Research Grant

December 2016

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The views expressed are the responsibility of the author and are not necessarily those of the Council.

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This study would not have been possible without the participation of the staff of the Commonwealth, state and territory agencies who agreed to be interviewed and who candidly described how unexplained wealth provisions operate throughout Australia. For confidentiality reasons, interviewees have not been named in this report and agencies have been identified only in connection with public-source material. The authors thank James Hume, former Research Officer at the AIC, for his assistance with research and interviewing.

Acronyms

ACC	Australian Crime Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAB	Criminal Assets Bureau (Ireland)
CACT	Criminal Assets Confiscation Taskforce
CARIN	Camden Asset Recovery Interagency Network
CDPP	Commonwealth Director of Public Prosecutions
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJC-LE	Parliamentary Joint Committee on Law Enforcement
PoCA	Proceeds of Crime Act 2002 (Cth)
RICO	Racketeer Influenced and Corrupt Organizations (US)
SOCA	Serious and Organised Crime Agency (UK)
UK	United Kingdom
UK-POCA	Proceeds of Crime Act 2002 (UK)

Executive summary

There has been considerable discussion over the past three decades concerning the prevalence of serious and organised crime in Australia. To varying degrees state, territory and Commonwealth governments have developed legislative responses to organised crime that include proscribing new forms of crime, limiting the membership of organised crime groups and confiscating the proceeds of crime. Further policy responses to serious crime in Australia have been considered at all levels of government since fieldwork for the current study was completed.

Confiscation legislation aims to undermine the business model of organised crime by:

- removing the financial benefits of economic crime;
- punishing offenders for their wrongdoing and compensating society;
- preventing criminal assets from being used to fund future crime; and
- deterring potential and repeat offenders from engaging in crime.

Official statistics indicate approximately $800m in proceeds of crime were recovered under Commonwealth, state and territory legislation between 1995 and 2014. While large, this amount is small in comparison with the Australian Crime Commission's (ACC's) estimate of the total cost of serious and organised crime, which was $36b in 2013–14 (including prevention and response costs; ACC 2015).

One of the most substantial changes brought about by the enactment of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) was the introduction of unexplained wealth provisions at the Commonwealth level. These are an innovation in the realm of proceeds of crime orders, and Australia is one of the few countries to have introduced them to date. Elements of unexplained wealth legislation have been developed in a number of countries, although their scope and operation differ considerably.

Although unexplained wealth provisions have only recently been introduced at the Commonwealth level, similar provisions have been in force in Western Australia since 2000 and in the Northern Territory since 2003. Since the introduction of the Commonwealth legislation, similar laws have been enacted in Queensland, South Australia, New South Wales, Victoria and Tasmania, with the Australian Capital Territory currently considering legislation. The laws differ between jurisdictions, however, especially in relation to whether some connection to criminal conduct is required. Although unexplained wealth provisions have led to the restraint of assets in a relatively small number of cases, a number of legal and procedural barriers prevent successful orders being made.

This report examines how unexplained wealth orders are obtained and suggests how impediments to their success might be ameliorated through legislative or procedural reform.

Comparable systems in other countries have also been considered, to determine what best-practice approaches to unexplained wealth laws and processes should apply throughout Australia.

Information was sourced from published academic and policy literature and from 20 interviews with principal stakeholders working in police, prosecution and policy organisations throughout Australia, as well as a small number of academics. Interviews were conducted between August and September 2014 and the research was approved by an institutional Human Research Ethics Committee. All personally identifying information has been withheld for reporting purposes.

Australia's legislative regime

Different laws and procedures relating to the confiscation of assets, including unexplained wealth, exist across Australia. In some jurisdictions police and Crown solicitors collaborate on unexplained wealth cases, while in others police and the Office of the Director of Public Prosecutions work together. In New South Wales and in Queensland, the state Crime Commission is the sole agency involved. New South Wales and the Northern Territory are the only jurisdictions that indicated satisfaction with their current unexplained wealth legislation.

Western Australia was the first Australian jurisdiction to enact unexplained wealth provisions in 2000. This model does not require that reasonable grounds for suspecting the subject of the inquiry has committed an offence be demonstrated; the police and the Director of Public Prosecutions collaborate to investigate and obtain unexplained wealth orders. It has been reported that Western Australia's unexplained wealth legislation is not effective due to legal costs, difficulties in obtaining examination and production orders, complexities around financial analysis and problems with liaison between police and prosecutors.

The Northern Territory's unexplained wealth processes have been relatively successful in recovering funds. The legislation was introduced in 2003 and was modelled on the Western Australian provisions. While the working relationship between the Solicitor for the Northern Territory and the police appears effective, this is arguably due to the small size of the jurisdiction, as problems with a dual-agency model were identified in all other jurisdictions. The Territory's geographic isolation from the east coast of Australia may contribute to the perception of a lack of assistance from Commonwealth agencies and the private sector.

In New South Wales, the New South Wales Crime Commission recovers assets and has developed an efficient model, which was praised by representatives of other jurisdictions in the consultation interviews. Unexplained wealth is identified and settlements made using coercive powers, with litigation rarely necessary.

The Crime and Corruption Commission in Queensland adopted the New South Wales model when it implemented unexplained wealth legislation in 2013. Unexplained wealth legislation in South Australia has been in place since 2009 but, until very recently, legislative issues limited the use of certain types of evidence, and the South Australian legislation has not yet led to the successful recovery of any unexplained wealth.

Legislation was enacted in Victoria and Tasmania in 2014 but remains in an early stage of development in both states. The Australian Capital Territory is currently developing unexplained wealth legislation.

Unexplained wealth orders were introduced at the Commonwealth level in 2010. Responsibility was initially shared between the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions, but in 2012 the AFP became exclusively responsible for the orders. While amendments to the legislation are currently before Parliament, it is unclear whether these will satisfactorily resolve the problems experienced and allow the successful recovery of unexplained wealth in the future.

Overall, the recovery of unexplained wealth has a strong legislative foundation in Australia, although a number of barriers to the successful recovery of funds from those suspected of possessing the proceeds of crime remain.

Overseas legislative regimes

While Australia has some of the most extensive unexplained wealth legislation in the world, a number of other countries also have well-developed legislative regimes. Key legislation and case law relating to the civil recovery of unexplained wealth in Italy, Ireland, Canada, the United Kingdom, the United States and France has been reviewed. These international models and the issues experienced in overseas jurisdictions provide useful perspectives to inform future reform in Australia.

Italy introduced unexplained wealth laws in the 1950s to deal with their enduring problem with organised crime. Italy is the only jurisdiction in which a law imposing both imprisonment and the confiscation of assets has been enacted in this context. However, this law was only in force between 1992 and 1994, before being declared unconstitutional and repealed. Such an approach would also be highly controversial in Australia.

Unexplained wealth laws were introduced in the Republic of Ireland in 1994. As has been the case in many jurisdictions, these have been challenged as unconstitutional on several occasions. The Irish Criminal Assets Bureau contributed significantly to the establishment of the Camden Asset Recovery Interagency Network (CARIN), which facilitates the sharing of information across a number of countries, including Australia.

France has adopted novel procedural reforms for managing confiscated assets. Their approach provides investigation and litigation agencies with greater confidence they will not be held liable for losses suffered by respondents whose restrained assets are not subsequently confiscated, an issue that also has relevance for Australian jurisdictions.

The United States' civil forfeiture legislation was enacted in 2000. It is not as stringent as the unexplained wealth legislation of the other countries considered. Unlike the unexplained wealth approach, the burden of proof lies with the government rather than the respondent, and they must establish a substantial connection between the property to be restrained and any underlying crime. Other measures such as hardship provisions and time limits also apply. In

contrast, Canada's unexplained wealth legislation has been in place since 2001 and continues to be applied, despite having been subject to significant litigation around constitutional issues.

In the United Kingdom, the Proceeds of Crime Centre (PoCC) within the Economic Crime Command of the National Crime Agency is responsible for administering the *Proceeds of Crime Act 2002,* which governs the recovery of property obtained through unlawful conduct. Where an investigation by specialist police finds there is insufficient evidence to pursue criminal charges, or such charges are not made for public interest reasons, confiscation of assets orders can be obtained in the Crown Court. There have been a number of legal challenges to the civil recovery provisions on the basis that they reverse the presumption of innocence; in addition, the provisions have led to the recovery of the amount of funds initially anticipated (Bullock & Lister 2014).

These approaches to unexplained wealth and civil asset recovery provide an opportunity to reflect on potential options for Australian reform. Given the global nature of organised crime, the Australian approach to unexplained wealth and civil asset recovery must be seen as strong, relative to other countries, to ensure Australia is not viewed by individuals or groups as a favourable jurisdiction in which to undertake criminal activities.

Application of unexplained wealth legislation in Australia

Since unexplained wealth legislation was first introduced in Australia in 2000 a small number of orders and settlements have been made, with approximately $9m restrained through unexplained wealth procedures and a further $32.3m restrained through drug-trafficker declaration procedures. No proceedings, orders or settlements have yet been obtained at the Commonwealth level, or in Victoria or Tasmania. In New South Wales, $2.6m has been confiscated through unexplained wealth proceedings and a further $11.8m using other assets confiscation procedures (but which commenced as unexplained wealth applications). The total value of assets confiscated in Australia between 1995–96 and 2013–14 through all types of confiscation procedures is $796,677,166—including amounts restrained using unexplained wealth procedures and drug-trafficker declarations. These statistics are, however, incomplete, as full data could not be obtained from some jurisdictions. There are no national statistics available on how successful unexplained wealth orders have been in recovering funds from those subject to such proceedings.

Procedural and evidentiary barriers in Australia

Unexplained wealth investigations are complex and difficult because they require swift action and specialist financial expertise. In jurisdictions where unexplained wealth legislation has been relatively successful, almost all recoveries of cash and assets have been made through settlement of cases prior to reaching trial, rather than as a result of finalised court proceedings.

More efficient and effective processes for confiscating unexplained wealth are needed at the state and territory level, including improved intelligence sharing and expertise and better collaboration between specialist Commonwealth entities and those of the states and territories.

During stakeholder interviews, a number of law enforcement agencies identified the crime commission model as the most desirable and effective of Australia's current approaches to unexplained wealth. This approach addresses procedural difficulties by integrating all functions into a single agency; it deals with evidentiary barriers by using coercive powers to obtain evidence and moving quickly to restrain unexplained wealth.

The crime commission model also acknowledges that unexplained wealth matters entail highly complex financial investigations of individuals, many of whom can afford to seek professional legal and financial advice on how to circumvent traditional investigations. Unexplained wealth cases need to be undertaken as efficiently as possible so assets can be identified and restrained before they are moved beyond the reach of law enforcement. Traditional police investigations and financial/legal proceedings have been so far ineffective in Australia as an approach to most cases involving unexplained wealth.

The way forward

Australia needs a coherent national approach to the confiscation of unexplained wealth. The majority of the state and territory representatives interviewed indicated they would prefer an approach that would allow state, territory and Commonwealth legislation to coexist. They identified the text-based referral of legislative power, which would permit the application of Commonwealth legislation within the states and territories, as the most suitable and effective approach to adopt. Harmonised mirror legislation was generally considered a less acceptable alternative due to the difficulty of enacting uniform national legislation.

Most of the stakeholders consulted believed the New South Wales Crime Commission embodies the most effective approach to the confiscation of unexplained wealth of any approach currently taken in Australia. The New South Wales Crime Commission uses coercive powers to obtain information early in investigations, and cases are:

- dealt with by experienced financial intelligence analysts within a single agency; and
- settled in almost all cases without the need for costly court proceedings and for the amount
  determined to be unexplained.

The Crime and Corruption Commission in Queensland has already adopted the New South Wales model, and Western Australia is also considering doing so.

Most agencies supported achieving reform by amending Commonwealth legislation to incorporate elements of the New South Wales Crime Commission model. This approach would require broad consultation with agencies, followed by the text-based referral of powers to the Commonwealth to allow the amended legislation to be applied across all jurisdictions. Existing state and territory legislation would remain or be amended over time, but the aim would be to increase the Commonwealth's responsibility for unexplained wealth proceedings that extend across state and territory borders.

Many of those interviewed were concerned about how proceeds of crime recovered under a better-coordinated unexplained wealth regime would be shared. This was particularly of concern to those jurisdictions where unexplained wealth legislation has been most successful.

Representatives of these jurisdictions expressed concerns that their success in restraining assets would not be adequately recognised by the Commonwealth, and that they may not be able to access any proceeds recovered. Participants considered various models, based on jurisdictions' contributions to securing a successful outcome, for ensuring the fair distribution of recovered proceeds of crime. Ideally, the question of how recovered proceeds of crime are to be shared would be resolved in any agreement between the states and territories and the Commonwealth, when the text-based referral of powers is undertaken.

Finally, Australia needs national uniform data-collection procedures to allow assets confiscation proceedings to be monitored. These procedures could include the collection and analysis of discrete data on unexplained wealth proceedings, the value of assets restrained and/or confiscated and the value of funds recovered through court orders and/or negotiated settlements. Such data should be held in statistical collections that allow annual disaggregation across jurisdictions and agencies.

Introduction

Background

Australia's unexplained wealth laws form part of a range of measures introduced in response to growing concern about the prevalence of serious and organised crime. Other measures adopted (to varying degrees) by Commonwealth, state and territory governments include proscribing emerging crime types, criminalising membership of groups like outlaw motorcycle gangs and other legislation directed at confiscating the proceeds of crime, such as drug-trafficker confiscation laws. Further policy responses to serious crime in Australia have been considered at the Commonwealth, state and territory level since the completion of fieldwork for this study. Unexplained wealth laws and the confiscation of assets undermine the business model of organised crime by removing its financial benefits and preventing the use of such assets to fund future crime; they also allow society to be compensated and offenders to be punished, and deter people from engaging in crime (Bartels 2010a).

The ACC estimates serious and organised crime cost Australia $36b in 2013–14, including prevention and response costs (ACC 2015).This estimate does not include the cost of other types of crime that do not involve serious and organised crime (Smith, Jorna, Sweeney & Fuller 2014). According to published national statistics, however, the total value of assets confiscated in Australian jurisdictions between 1995–96 and 2013–14 was approximately $800m, averaging around $44m annually. It is clear more must be done to target the profits of organised crime and that approaches such as unexplained wealth laws must be effective if they are to have any impact on organised crime (ACC 2013).

Unexplained wealth laws are a relatively new approach to the confiscation of proceeds of crime and provide a means of securing assets that cannot be recovered using traditional conviction-based legislative means. In contrast to traditional approaches to confiscation, the state need not prove the property owner has committed a criminal offence; the burden of proof is reversed so that the property owner bears the onus of proving the property was acquired legitimately. Unexplained wealth laws are designed to target those senior figures in criminal organisations who do not commit crimes themselves but who play a key role in planning, financing and directing criminal operations. Only a small number of countries, including Australia, Ireland and Columbia, have unexplained wealth laws, with variants in force in the United Kingdom, Italy, France and Canada (Booz Allen Hamilton 2012).

Australia's first unexplained wealth laws were introduced in Western Australia in 2000, followed by the Northern Territory in 2003 and the Commonwealth in 2010. New South Wales, Queensland and South Australia all introduced legislation after 2010, and Victoria and Tasmania only in 2014. The Australian Capital Territory is the only jurisdiction without unexplained wealth laws, but is currently developing them. These laws require individuals to justify their financial situation or forfeit that portion of their wealth they are unable to demonstrate was legitimately acquired.

Australia's unexplained wealth laws have been criticised by some legal academics concerned about the reversal of the burden of proof and, in some cases, the diminished right to silence. The necessity of the laws, and whether the relatively small amounts recovered under them outweigh their negative aspects, has also been questioned (Croke 2010). They are, however, one of a range of approaches to confiscation that can be applied to suit the circumstances of a particular case; in most cases they are employed as a last resort where there is insufficient evidence to link an individual to criminal activity (where such a link clearly exists).

Legislative approaches

Australia's first unexplained wealth provisions, implemented in Western Australia in 2000, have a number of characteristics. The *Criminal Property Confiscation Act 2000* (WA) requires that the court make an order if it is satisfied a person's total wealth is greater than their lawfully acquired wealth. The judge has minimal discretion in making the order; the onus of proof is reversed in favour of the Crown and any property, service, advantage or benefit that constitutes part of the respondent's wealth is presumed to have been unlawfully acquired unless the respondent establishes otherwise. The Western Australian Director of Public Prosecutions can apply to a court for a production order that requires an individual (and the individual's financial institution) to produce documents justifying their wealth, as well as a restraining order that prevents the use of their property and assets for a specific period. The Western Australian law was the model for legislation adopted in the Northern Territory in 2003, although there are subtle differences between the jurisdictions.

The next major development in Australian law occurred in 2010, when unexplained wealth legislation was introduced at the Commonwealth level. The Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* requires an unexplained wealth order be made where a court is not satisfied that the total wealth of the person was not derived from one or more of the following:

- an offence against a law of the Commonwealth;
- a foreign indictable offence; and/or
- a state offence that has a Commonwealth aspect.

Under the initial arrangement, the AFP was responsible for investigating unexplained wealth orders and the Commonwealth Director of Public Prosecutions for litigation.

The unexplained wealth laws adopted by Australian jurisdictions differ in a number of ways, including in the level of discretion a judge has in making an unexplained wealth order, whether

hardship is taken into account in determining the value of an order, the degree of connection to criminal conduct that is required and the agency that is responsible for applying to a court for an unexplained wealth order. Given criminals tend to exploit lax regulatory environments, the inconsistencies between legislation across Australian jurisdictions raises questions about the overall effectiveness of the current regime.

Prior evaluations and reviews

Unexplained wealth laws are relatively recent and little prior research or evaluation has examined them, but publicly available data such as annual agency reports indicate that, in most jurisdictions, unexplained wealth laws have not led to the recovery of significant amounts of money. The AIC undertook a review of Australian legislation when unexplained wealth laws were enacted at the Commonwealth level in 2010 (Bartels 2010a, 2010b). There have also been a number of federal parliamentary reviews.

The Commonwealth's unexplained wealth legislation was developed in line with the recommendations of the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) which, in 2009, examined proposed legislation to outlaw serious and organised crime groups. In 2012, an inquiry by the Parliamentary Joint Committee on Law Enforcement (PJC-LE) into unexplained wealth laws made recommendations on the further development of unexplained wealth legislation. In 2014, the Senate Standing Committee on Legal and Constitutional Affairs (SSCLSA) tabled the report of their inquiry into a bill to amend unexplained wealth legislation, which was later passed by the parliament as the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015 (Cth)*.

Key stakeholders offered their general views on unexplained wealth laws, the relevant short- to medium-term issues and areas needing further reform in submissions to the 2012 and 2014 Senate committee reviews of unexplained wealth laws.

Study scope and objectives

This study sought to identify the legal, procedural and evidentiary barriers to obtaining successful unexplained wealth orders and how these could be addressed. The authors consulted with all agencies involved in investigating unexplained wealth and applying to courts for unexplained wealth orders, as well as with associated Commonwealth agencies such as the ACC, the Australian Taxation Office (ATO) and the Australian Securities and Investments Commission (ASIC). AUSTRAC was the only relevant agency that declined to participate as, for security reasons, the agency did not wish to discuss its operational methodology. This was unfortunate, as financial intelligence is critically important in initiating and undertaking unexplained wealth investigations.

Issues discussed during interviews included:

- how investigations are conducted;
- the value of funds and/or assets recovered;

- practical issues contributing to success or failure;
- how respondents are identified;
- interagency cooperation and communication at the state, territory and Commonwealth levels;
- cooperation with private-sector stakeholders such as financial institutions;
- evidentiary issues, including obtaining information through the use of coercive powers;
- the circumstances of case settlement;
- court discretion;
- geographical constraints; and
- international cooperation.

The research will assist in the use of unexplained wealth orders in Australia by considering the views of relevant Australian agencies on the practical issues associated with obtaining unexplained wealth orders and recovering proceeds of crime. It examines the issues from state and territory and Commonwealth levels. Further context is provided by an examination of overseas approaches that identifies potential options to explore. A key objective of the study is to make recommendations that will ultimately result in more efficient and effective unexplained wealth investigations, and lead to the recovery of more confiscated assets.

The study's findings can be applied by individual agencies involved in investigating and prosecuting unexplained wealth matters at state, territory and Commonwealth level. It provides options the Commonwealth government can consider and discuss with stakeholders to determine the best way to move forward.

Method

Research design

This project examined the processes involved in obtaining unexplained wealth orders in Australian jurisdictions and sought to determine how barriers to obtaining orders could be removed through legislative or procedural reform. It also reviews comparable systems in other countries to determine best-practice approaches to unexplained wealth investigations.

Legislation was analysed and police, lawyers and relevant government agencies interviewed to evaluate the effectiveness of the current legislative framework and identify barriers to the successful recovery of unexplained wealth. As the agencies involved refused the project's request to review case files, interviews were its only source of information about the investigation and prosecution of unexplained wealth orders.

The academic literature on the comparable unexplained wealth laws of the United Kingdom, the United States, Canada, France, Ireland and Italy—and, where possible, the legislation—was reviewed.

Police commissioners and chief executives of relevant Australian agencies were advised of the study, and senior staff with experience in investigating, settling and litigating unexplained wealth cases were identified in each organisation and contacted with a request for a face-to-face interview. The interviewees were informed no personally identifying information would be recorded and that the views of specific individuals and agencies would not be directly quoted in the final report.

Interviews with senior police, prosecutors and government agency staff involved in unexplained wealth proceedings were conducted in Canberra, Sydney, Brisbane, Perth, Darwin and Adelaide. A small number of leading academics in the field were also consulted. The interviews were recorded, transcribed and analysed to identify issues relating to unexplained wealth legislation and procedures in Australia and potential solutions. The information obtained from these interviews was analysed in conjunction with legislation, judicial decisions, statistical data, academic literature and policy on unexplained wealth laws from Australia and overseas jurisdictions. The report has been reviewed and edited by the AIC.

At the project design stage, a number of research questions were developed to guide the research.

- How many unexplained wealth applications have been made at the Commonwealth level and at the state and territory levels since their introduction in 2000, and what have been the outcomes of applications?
- What legal, procedural and evidentiary barriers exist to obtaining successful unexplained wealth orders in Australian jurisdictions, and how might these be overcome?
- To what extent are respondents subject to detention by police for refusing to produce documents or evidence in connection with unexplained wealth proceedings?
- In what proportion of cases does a court exercise its discretion not to make an unexplained wealth order and on what grounds?
- In what proportion of cases does a court determine that part of the assets the subject of an unexplained wealth order should be excluded from an order, and on what grounds are such determinations made?
- To what extent and on what grounds are unexplained wealth orders discounted or dismissed by reason of potential hardship to the respondents' dependants?
- To what extent do successful unexplained wealth orders result in the actual recovery of funds from those the subject of proceedings?
- What comparable systems for the recovery of proceeds of crime exist in other countries?
- What legal, procedural and evidentiary barriers exist to obtaining successful unexplained wealth orders in overseas jurisdictions, and how have these been addressed?
- Which laws and procedures governing unexplained wealth proceedings in overseas countries could be applied to Australian jurisdictions to make Australian laws and procedures more effective in permitting the proceeds of crime to be confiscated?

Because it was not possible to obtain access to and examine case files, and due to a lack of available data, the study was unable to address some of the original research questions. It also became apparent that the vast majority of cases were settled before judicial proceedings commenced, which limited the amount of information on litigation and procedural issues available for examination. These limitations have no substantial impact on the value of the research and the conclusions drawn.

Ethical considerations

The study involved ethical issues related to the confidential and sensitive nature of information provided by interviewees.

Interviews with government employees and academics were between one and two hours in length. All participants were over 18 years of age. Interviewees were asked to discuss matters associated with unexplained wealth cases and associated policy issues. They were not asked to reveal information about themselves, their agencies or the subjects of unexplained wealth investigations.

This research posed a low risk to human participants. Information was provided to AIC research staff securely, and the interviewees were adults who consented to interview. Where interviews were, on the whole, digitally recorded, interviewees were notified in advance of how they would be recorded and offered the option of being recorded by a scribe only, if they so preferred.

Interviews

Interviews were key to this project. They were conducted to gain an understanding of views on the effectiveness of current Australian legislation and how potential issues could be resolved. Nominated personnel were provided the questions, along with a plain language information sheet describing the purpose of the research and inviting them to participate, prior to interview. These documents are at *Appendix 1* of this report.

In all, 20 interviews were conducted across Australia. Participants responded positively to the opportunity to share their views. The interviews were successful in eliciting information from participants about current issues in their jurisdiction. Individuals from the following agencies and universities were interviewed for this research project:

- the Australian Government Attorney-General's Department (AGD);
- the ACC;
- the AFP;
- the Australian Securities and Investments Commission;
- the ATO;
- Flinders University;
- Griffith University;
- the New South Wales Crime Commission;
- the New South Wales Police Force;
- the Northern Territory Police Force;
- the Office of the Director of Public Prosecutions for Western Australia;
- the Queensland Crime and Corruption Commission;
- the Solicitor for the Northern Territory;
- the South Australia Crown Solicitor's Office;
- South Australia Police;
- the University of Sydney; and
- Western Australia Police.

Limitations

One of the study's main limitations was that researchers were unable to obtain access to unexplained wealth case files. The research proposal anticipated that researchers would

examine all administrative records and case files relating to unexplained wealth cases held by police and prosecution agencies. The participating agencies, though, did not agree to this request, citing privacy and confidentiality issues, operational sensitivity and the amount of time required to redact personal details from case files. However, all agencies (with the exception of AUSTRAC) were willing to participate in interviews and, in most cases, appreciated the opportunity to provide detailed descriptions of their most significant unexplained wealth cases and associated issues, and their views on how these problems could be resolved. Agencies also provided updated case statistics and statistics on funds recovered through unexplained wealth proceedings. The professional opinions of a wide range of people across all relevant jurisdictions in Australia on unexplained wealth cases were collated and analysed. Many of those interviewed had several years of relevant experience in the field. The lack of access to case files was, therefore, not a major limitation.

Judicial decisions relating to unexplained wealth cases were also examined. In many cases, these contained details that would otherwise have been drawn from the case files. To date, however, the vast majority of unexplained wealth cases in Australia have been settled out of court and have not proceeded to trial. The information obtained through interviews provided important insights into all matters dealt with.

Prior research

The project examined prior reviews of unexplained wealth laws and procedures, including parliamentary reviews and papers published by the AIC while the Commonwealth legislation was being developed (Bartels 2010a, 2010b). Prior research on unexplained wealth laws and procedures is limited, although some high-quality analysis of Australian criminal-asset recovery systems has included discussion of unexplained wealth laws (Goldsmith et al. 2014). Past academic commentary on unexplained wealth legislation has predominantly involved critiques of aspects of the laws, such as the reversal of the burden of proof, that are controversial from an individual rights perspective (Gray 2012).

Unexplained wealth laws have been widely enacted in Australia; they have been accepted and integrated into the legal system. What has not previously been examined to any great extent is whether these laws achieve their objectives—in particular, whether they are widely used, what value of assets have been confiscated, and whether they effectively deter organised and other crime.

This study focused on the legal and procedural barriers to obtaining unexplained wealth orders in Australia. This included an examination of the processes involved in identifying those alleged to be in possession of unexplained wealth, obtaining evidence, undertaking litigation, obtaining unexplained wealth orders and recovering assets. Whether unexplained wealth laws are effective in terms of general deterrence is a wider question and beyond the scope of this study.

Overseas approaches

Australia has some of the most developed unexplained wealth legislation in the world, but it is not the only country to have introduced such laws. Overseas legislation and the issues foreign jurisdictions experience can provide context to inform the further development of Australian laws. This section examines the legislative approaches of Italy, Ireland, Canada, the United Kingdom, the United States and France. Data and/or information on some of the overseas approaches, particularly those of jurisdictions where government documents are not in English, was limited. It was decided to include these as they offer valuable perspectives and provide context for the consideration of current and potential future Australian reforms.

Italy

Italy has some of the longest-standing civil asset confiscation provisions in the world. These were first introduced in 1956 and directed at mafia-related organised crime groups. The Italian non-conviction-based asset confiscation regime has a crime prevention rationale and operates alongside conviction-based measures that can be used in criminal proceedings.

While non-conviction-based measures in Italy are directed at individuals suspected of being associated with drug trafficking, gambling, human trafficking and prostitution, these provisions are preventative in nature. They do not require a conviction and have been established outside criminal proceedings and associated judicial supervision.

The Italian legislation has been amended several times since it was first introduced. In 1982 it was amended to apply to any 'suspects belonging to mafia type associations' and, if the lawful origin of the assets could not be established, the property and assets of those suspects could be confiscated. Italian *Law No. 356* was enacted in 1992; it required individuals convicted of mafia-associated offences to demonstrate the lawful source of their income or potentially be imprisoned and have their assets confiscated. This law was declared unconstitutional in 1994 on the basis that it contravened the presumption of innocence (Paoli 1997).

Under Italian law, the individual's financial affairs, as well as those of their family members and associated legal entities such as companies, must be investigated. To be confiscated, the assets must firstly be (either directly or indirectly) at the suspect's disposal and, secondly, there must be evidence that the assets are proceeds of crime. The suspect's legitimate income must also be inconsistent with their total wealth. The burden of proof is reversed and the suspect must prove their assets have been lawfully acquired, or the court will issue a confiscation order.

In addition to these civil measures, Article 240 of the Italian Criminal Code states that, when a criminal conviction has been recorded, the judge may order the 'forfeiture of the things that were used or were intended to accomplish the crime or of the things that were the product or the profit'. This use or intended use must be proved beyond reasonable doubt. Confiscation provisions are either optional or mandatory depending on the offence type. The judge is required to impose confiscation provisions for a number of mafia-related crimes such as drug trafficking, extortion, loan sharking, money laundering and kidnapping (Paoli 1997).

Ireland

Ireland's civil forfeiture laws are the *Proceeds of Crime Act, 1996* and the *Criminal Asset Bureau Act, 1996*. As other unexplained wealth legislation does, these laws shift the burden of proof to the respondent. The laws were criticised by academics and lawyers when they were first introduced and have been unsuccessfully challenged several times on constitutional grounds (McKeena & Egan 2009). The civil confiscation provisions of the Irish *Proceeds of Crime Act, 1996* shift the burden of proof to the respondent, who must establish the property was obtained legitimately; there is no requirement to demonstrate a link between the property and a specific crime, and belief (ie hearsay) evidence is admissible in establishing reasonable grounds for believing the persons possesses property that is the proceeds of crime. The introduction of civil-based asset confiscation legislation in the 1990s was a response to a number of high-profile Irish crimes and a significant increase in organised crime. Among other objectives, it sought to address the perception that only lower-level members of criminal syndicates were being prosecuted while the leaders of organised crime escaped prosecution (McKeena & Egan 2009). The Irish police view the implementation of the Irish legislation as a success and it is credited with reducing crime rates by influencing organised criminals to move to other jurisdictions. The Irish *Proceeds of Crime Act, 1996* is implemented by the Criminal Asset Bureau (CAB), a multidisciplinary agency staffed by the Irish police, the social welfare department and the revenue services agency. The CAB played a key role in establishing the CARIN, which facilitates information sharing across a number of countries including Australia, and is highly regarded internationally.

Under the Irish *Criminal Justice Act, 1994*, property can be confiscated following a conviction if, on the balance of probabilities, it is associated with a crime. In the case of drug-trafficking offences, there is a rebuttable presumption that all property received within six years of the day proceedings were commenced is the proceeds of drug trafficking. For all other offences, only benefits considered to be derived from the specific offence can be confiscated. Other provisions allow a defendant's assets to be restrained pending a criminal trial, to ensure they are available if a conviction is obtained. Persons who fail to make a court-ordered payment are liable to imprisonment for up to 10 years.

Canada

Canada's non-conviction-based asset forfeiture legislation operates alongside conviction-based legislation. Non-conviction-based asset forfeiture was first established in Ontario's *Remedies*

for Organized Crime and Other Unlawful Activities Act, 2001, and applies in most provinces. Civil asset forfeiture in Canada is governed by provincial legislation, while the conviction-based legislation is governed by the federal criminal code. Under the Canadian constitution, provincial legislatures can enact civil laws, while the federal parliament has jurisdiction over criminal law. The Ontario legislation targets property, and contains a presumption in favour of forfeiture of the 'instrumentalities of crime'. Directly recovered funds are used to compensate victims of the associated criminal activity. All non-conviction-based legislation in the Canadian provinces allows the use of confiscated funds to compensate victims of crime and fund law enforcement (McKeachie & Simser 2009).

Three types of assets can be confiscated under the Ontario legislation: proceeds of unlawful activities, instruments of unlawful activities and instruments of conspiracies that injure the public. If the court is satisfied there are reasonable grounds to believe the property in question is the proceeds of crime or an instrument of unlawful activity, a restraining order can be made; it must be in the interest of justice to make such an order. Property forfeited under these provisions is held in a consolidated revenue fund and the finance minister may use it to pay compensation, assist victims or prevent unlawful activities, or to reimburse public bodies involved in bringing proceedings under the legislation (McKeachie & Simser 2009).

Canada's civil forfeiture legislation is controversial and has been criticised on the grounds that it amounts to criminal proceedings in the guise of civil proceedings. However, the Canadian judiciary has found confiscation proceedings are in rem and focus on property obtained through crime, rather than a person. In 2005, the Supreme Court of Canada upheld the legislation in the case *Attorney General of Ontario v $29,020 in Canadian Currency et al.* [2005] CanLII 24251. This case centred on whether the Ontario Government's civil forfeiture provisions encroached on the federal government's authority in relation to criminal law. The court upheld the constitutionality of the legislation and found the laws were within the provincial legislature's jurisdiction.

In *Canadian Western Bank v Alberta* (2007) 2 SRC 3 the Supreme Court of Canada found the civil forfeiture law sought to deter crime and compensate the victims of crime. The court found it differed from criminal law, which involves not just a prohibition but a penalty and, further, does not involve an allegation that a person committed an offence in respect of which a penalty, punishment or imprisonment could be imposed.

United Kingdom

The United Kingdom's *Proceeds of Crime Act 2002* governs criminal asset confiscation in the United Kingdom. This legislation was developed following a review by the Cabinet Office, initiated in response to the country's poor record of asset confiscation. While the review was being conducted the Asset Recovery Agency was created, non-conviction-based asset recovery legislation was introduced and a more effective taxation regime focused on suspected criminal

gains was implemented. Under the *Proceeds of Crime Act 2002 (UK),* those in possession of the proceeds of crime can also be prosecuted for money laundering:

> Section 329 of the Act states that a person commits a money laundering offence if he acquires criminal property, uses criminal property, or has possession of criminal property. This wide definition allows law enforcement agencies to bring charges of money laundering where an offender has assets that cannot be shown to have come from legitimate sources…The ability to demonstrate unexplained wealth would appear to provide an important avenue for potentially disrupting organised crime groups in cases where it has been impossible to establish a direct evidential link with criminality (Brown 2013: 264–265).

Since the review, the Asset Recovery Agency's functions have been taken over by the National Crime Agency.

Civil Recovery and Tax (CRT), a specialist department of the Economic Crime Command within the National Crime Agency, recovers property obtained through unlawful conduct in the United Kingdom. Cases are referred where there is insufficient evidence to pursue criminal charges, where criminal charges are not made for public interest reasons, if confiscation proceedings fail, when the defendant has absconded from the jurisdiction and there is no reasonable prospect of obtaining their extradition, or if the defendant is deceased (Bullock & Lister 2014). Five criteria must be satisfied:

- the case must be referred by a law enforcement or prosecution agency;
- the value of the property concerned must be at least £10,000;
- the property concerned must have been obtained within the last 12 years;
- there must be a significant local impact on communities; and
- there must be evidence of criminal conduct on the balance of probabilities.

If it can be argued the property concerned is 'recoverable property', the respondent must prove the property has a lawful source and produce evidence to rebut the allegation that the property is recoverable. The National Crime Agency can apply to the High Court for an interim receiving order for the detention, custody or preservation of property, and freezing injunctions where there is an imminent risk of dissipation. If the court considers the property to be recoverable, it must issue a recovery order and appoint a trustee to secure the property and realise its benefit.

Under the *Proceeds of Crime Act 2002 (UK)*, a confiscation order can be obtained within two years of a conviction if it can be demonstrated the defendant benefited from a crime. Criminal benefit is defined as the benefit obtained from particular criminal conduct or from general criminal conduct resulting from a criminal lifestyle; it is not necessarily equivalent to an

offender's realisable assets. Specific criminal benefits are those arising from a particular offence, while general lifestyle benefits arise from drug trafficking, money laundering, terrorism, people trafficking and a number of other offences detailed in the Act. Criminal lifestyle provisions may also apply if the offender has been convicted in the same proceedings of:

- three or more offences;
- two offences in the previous six years from which they benefited by more than £5,000; or
- an offence from which they benefited by more than £5,000 in six months.

In the United Kingdom, the state does not necessarily sell confiscated assets unless the offender is unable to satisfy the order.

The United Kingdom provisions have not recovered the amount of funds anticipated when they were introduced. The civil recovery provisions have been legally challenged on the basis that they reverse the presumption of innocence and are really criminal, rather than civil, proceedings (Bullock & Lister 2014); these appeals were dismissed by the High Court. For example, *Walsh v Director of the ARA* [2005] NICA 6 found they are civil proceedings that seek to recover unlawfully obtained property, rather than impose a penalty. For this reason the provisions are not subject to established criminal law principles and cannot be appealed in the European Court of Human Rights on that basis.

United States

There are a number of asset forfeiture laws in the United States; however, these have not been developed in an integrated way. These US laws include the *Racketeering and Influenced and Corrupt Organizations (RICO) Act 1970*, the *Comprehensive Drug Abuse Prevention and Control Act 1970* and the *Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act 2001*, which provides for the confiscation of all assets held by a person engaged in terrorism.

There are three kinds of non-conviction-based forfeiture in the United States.

- Summary forfeiture allows police to seize unclaimed property on the spot, without the necessity for legal proceedings. This is most often applied to contraband such as illicit drugs, as ownership cannot be claimed for illegal property.
- Administrative forfeiture allows police to seize an individual's property on the basis of probable cause that the property would be subject to forfeiture. The individual may contest the forfeiture by a set date; if it is not contested by that date, a declaration (with the authority of a judicial order) is issued.
- Civil proceedings are used in relation to real estate and involve an in rem proceeding against the property. Unlike the other jurisdictions that have been discussed, a link must be established between the property in question and a specific offence and the government bears the civil burden of proof (the preponderance of evidence, in the United States) to establish that the property is tainted (Cassella 2003).

The *Civil Asset Forfeiture Reform Act of 2000* (US; the CAFRA) establishes a uniform civil forfeiture procedure at the federal level in the United States. This legislation applies to federal offences including theft, fraud and bribery, and authorises the seizure of forfeited proceeds and instruments of crime related to state offences including murder, robbery and drug trafficking.

Prior to the enactment of this statute, US federal legislation allowed forfeiture of property where the government or law enforcement could show probable cause the property was used to commit or facilitate a crime. Once the property had been forfeited, its owner was required to demonstrate it was not used to commit an offence or was proceeds of crime.

The CAFRA addresses some controversial aspects of earlier laws and places the burden of proof—to demonstrate seized property is the proceeds or an instrument of crime—on the government rather than the respondent. It also prevents the admission of hearsay evidence at trial and includes an 'innocent owner' provision that allows the respondent to recover legal fees and claim damages in appropriate instances. The Act also requires proof of a substantial connection between the property and underlying crime, and includes hardship provisions and time limitations. It was introduced following several years of lobbying by middle-class property owners for what they considered to be more just civil forfeiture legislation (Booz Allen Hamilton 2012).

France

The Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) was established in France in 2010 to recover criminal assets and prevent the commission of further offences, through the seizure, management and confiscation of criminal assets and by providing assistance to prosecutors and the judiciary. The agency is supervised jointly by the Ministry of Justice and the Ministry of Budget and staffed by 18 officers from these ministries. It is designed to be a self-financing agency and draws funds from confiscated monies and assets. The agency has five key functions:

- the sale of assets seized in cases that have reached trial (when they are no longer required as evidence in the case);
- the centralised management of funds seized in criminal proceedings;
- the management of assets requiring administration;
- ranking civil claimants in criminal matters and compensating them; and
- informing public creditors to ensure debts are paid (AGRASC 2012).

AGRASC requests criminal courts make orders in appropriate cases and provides the courts with control over the restrained assets. The agency has the power to sell the assets and deposit the money in an interest-bearing account. If a person is acquitted, they are given the value of the asset in cash with no interest.

The management of restrained assets is a critical component of proceeds of crime litigation. In Australia, when an order to restrain a respondent's assets is sought, an undertaking must be given regarding the value of the damages if the respondent suffers economic loss because their

assets have been restrained. Many cases involve bank accounts, houses and motor vehicles, and more significant cases often involve ongoing businesses or share portfolios.

Summary

While Australia has some of the most extensive unexplained wealth legislation in the world, a number of other countries also have well-developed legislative regimes. Key legislation and case law relating to the civil recovery of unexplained wealth in Italy, Ireland, Canada, the United Kingdom, the United States and France has been reviewed. The models adopted and issues experienced in overseas jurisdictions offer useful perspectives that could inform future reform in Australia.

Italy introduced unexplained wealth laws in the 1950s to deal with their enduring problem of organised crime. Italy is also the only jurisdiction in which a law imposing both imprisonment and confiscation of assets has been enacted in this context. However, that law was only in effect between 1992 and 1994, before being declared unconstitutional and repealed. Such an approach would also be highly controversial in Australia.

Ireland introduced unexplained wealth laws in 1994 and, as is the case in many jurisdictions, these have been challenged as unconstitutional on several occasions. The Irish Criminal Asset Bureau contributed significantly to the establishment of CARIN, a network which facilitates information-sharing across a number of countries including Australia. Canada has had unexplained wealth legislation since 2001, which remains in place despite having been subject to significant litigation related to constitutional issues.

In the United Kingdom, the Economic Crime Command of the National Crime Agency can seek the civil recovery of property obtained through unlawful conduct. Cases are referred to the agency for a number of reasons—for example, where there is insufficient evidence to pursue criminal charges or criminal charges are not made for public interest reasons. A specialist department, Civil Recovery and Tax (CRT), conducts proceedings when it is not feasible to secure a criminal conviction, when a conviction is obtained but a no confiscation order is made, or if a relevant authority is of the view the public interest would be better served by using those powers rather than seeking a criminal disposal. There have been a number of legal challenges to these civil recovery provisions on the basis of the reverse presumption of innocence and, additionally, the UK provisions have not recovered the amount of funds initially anticipated.

The United States civil forfeiture legislation was enacted in 2000 and is not as stringent as the unexplained wealth legislation of the other countries considered. In contrast with the unexplained wealth approach, the burden of proof is on the government rather than the respondent. A substantial connection between the property to be restrained and underlying crime must also be established and other measures like hardship provisions and time limits also apply. Canada, however, has had unexplained wealth legislation since 2001, which remains in place despite having been subject to significant litigation related to constitutional issues.

France has adopted novel procedural reforms for managing confiscated assets. Their approach gives investigation and litigation agencies greater confidence they will not be held liable for losses suffered by respondents whose restrained assets are not subsequently confiscated. This issue also has relevance for Australian jurisdictions.

These overseas approaches to unexplained wealth and civil asset recovery provide an opportunity for Australia to reflect on a number of potential options for reform. Given the global nature of organised crime, the Australian approach to unexplained wealth and civil asset recovery must be strong relative to other countries, to ensure individual criminals and groups do not see Australia as a favourable jurisdiction in which to undertake criminal activities.

Australian approaches

Unexplained wealth legislation forms part of a body of law that allows illegally obtained assets to be confiscated to undermine profits and prevent the use of such assets to fund crime. The underlying objective of such legislation is to deter crime, particularly organised crime, by removing the principal financial motivation for it. There are a range of conviction-based, civil forfeiture and unexplained wealth laws available to fulfil these purposes in Australian jurisdictions. This section outlines Australia's unexplained wealth laws and briefly describes associated conviction-based and civil forfeiture legislation. Conviction-based legislation allows confiscation orders to be made based on a criminal conviction, while civil forfeiture laws rely on a court's civil jurisdiction to confiscate criminal assets in accordance with the civil standard of proof, with no need to prove criminal conduct to the criminal standard of proof. Unexplained wealth laws go further, reversing the onus of proof by requiring respondents to prove their assets were lawfully obtained in specified circumstances.

Western Australia

The Western Australia *Criminal Property Confiscation Act 2000* facilitates the confiscation of proceeds of crime in Western Australia. Proceeds of crime actions are initiated to deter illegal activities and deprive criminals of the proceeds of illegal activity. The Western Australia Police initiate most confiscations by obtaining a freezing notice on crime-used, crime-derived or drug trafficker grounds under section 34 of the Act.

The legislation allows the following confiscation orders:

- unexplained wealth declarations;
- criminal benefits declarations; and
- crime-used property substitution declarations.

Unexplained wealth declarations

Western Australia became the first Australian jurisdiction to enact unexplained wealth provisions in 2000. The Western Australia Police investigate unexplained wealth declarations and the Director of Public Prosecutions applies to the Supreme Court of Western Australia for an unexplained wealth declaration if the DPP considers it is more likely than not that the person's total wealth is greater than their lawfully acquired wealth. Applications for

unexplained wealth declarations can be made without the need to demonstrate reasonable grounds for suspecting the person committed an offence. Under these provisions, the respondent bears the onus of proof and all their assets are presumed to be unlawfully acquired unless they can establish otherwise. The Court has minimal discretion in this jurisdiction when making an unexplained wealth declaration; they must make a declaration if it is more likely than not the respondent's total wealth is greater than that they acquired legally.

Criminal benefits declarations

The Western Australia Supreme Court can also make a criminal benefit declaration, which requires the respondent to pay a specified amount to the state. Criminal benefits declarations can be made in relation to crime-derived property or in relation to unlawfully acquired property. Crime-derived property is property that is more likely than not to be derived from a specific offence committed by the suspect, including through the commercial exploitation of criminal activities—for example, literary proceeds of crime. A criminal benefits declaration order is granted if it is established, on the balance of probabilities, that the property was unlawfully acquired.

Crime-used property substitution declarations

A crime-used property substitution declaration can be made where property is used in the commission of an offence but cannot be confiscated by the state because it is not owned by the offender. This, for example, would prevent an individual from circumventing the legislation by using a rented, stolen or borrowed car to commit a robbery. The legislation requires the subject of a declaration pay an amount equal to the value of the property used in the commission of the crime.

Automatic confiscation of declared drug traffickers' assets

If a convicted offender is a declared drug trafficker the offender's entire property is forfeit, even that which was legally acquired. Western Australia and the Northern Territory are the only Australian jurisdictions where all property owned by declared drug traffickers is forfeit, even if it can be demonstrated the property was not derived from criminal activity or used in an offence.

Statistics on the use of assets confiscation orders in Western Australia and the amounts recovered are presented in Table 1. During the years 2008–09 to 2012–13 there was a decline in both the number and value of confiscations, although the number of applications and declarations each year has been very low. In total, crime-used property substitution declarations, unexplained wealth declarations and criminal benefits declarations have recovered $2.65m. Most declarations were unexplained wealth declarations.

Table 1: Western Australian assets confiscation statistics, 2008–09 to 2012–13 (number of proceedings)						
Other confiscation proceedings		2008–09	2009–10	2010–11	2011–12	2012–13
Crime used substitution	Application	3	4	1	0	0
	Declaration	0	1	2	3	1
Unexplained wealth	Application	5	3	0	0	1
	Declaration	1	1	5	0	2
Criminal benefits	Application	1	0	1	0	0
	Declaration	0	2	1	2	0
Amount recovered		$0.52m	$0.18m	$0.60m	$0.75m	$0.6m

Source: Western Australia Director of Public Prosecutions *Annual Report* 2013.

Statistics related to the automatic confiscation of declared drug traffickers' assets are presented in Table 2. Considerably more of these declarations were made and greater amounts recovered than for the proceedings shown in Table 1. In all, Western Australia recovered

$32.31m through drug trafficker declarations and a total of $34.96m for all types of confiscation proceedings.

Table 2: Western Australian drug trafficker declarations, 2008–09 to 2012–13					
	2008–09	2009–10	2010–11	2011–12	2012–13
Number of declarations	120	111	83	68	89
Amount recovered	$6.07m	$10.05m	$5.19m	$5.23m	$5.77m

Source: Western Australia Director of Public Prosecutions *Annual Report* 2013.

Unexplained wealth procedures in Western Australia

Unexplained wealth investigations in Western Australia are initiated in the course of crime-used and crime-derived proceeds of crime investigations, rather than investigations in their own right. The primary target of unexplained wealth investigations in Western Australia is organised crime, and the supporting rationale is the public interest in disrupting organised crime. Western Australia's preferred approach to civil confiscation matters is for the Director of Public Prosecutions to settle the case out of court rather than litigate; however, actions are taken to trial where appropriate.

The Western Australia Police's specialist confiscation team includes an in-house lawyer to provide advice on questions of law (such as property law, trust law and corporations law) and legislative compliance, and to assist in preparing investigation reports for the Director of Public Prosecutions.

There have been 28 applications for unexplained wealth declarations in Western Australia since 1 January 2001; 24 were successful, three unsuccessful and one is pending. A total of $6.9m has been paid into the Confiscation Proceeds Account from unexplained wealth investigations, representing 8.8 percent of its total funds.

The Western Australia Police refer cases to the Director of Public Prosecutions, but investigations may also be initiated based on information provided by other agencies including the Western Australia Crime and Corruption Commission and the ACC. When police refer a matter, the Director of Public Prosecutions decides whether unexplained wealth proceedings should be initiated. In making this decision, they consider factors including the likelihood of success, whether there is property available to satisfy an unexplained wealth declaration if one were issued, how much unexplained wealth could potentially be recovered, the target's significance, any potential impact on third parties, the public interest and the available resources. Where other confiscation orders like drug trafficker declarations are relevant, the decision of which to pursue is based on which would recover the greatest amount.

Legal and procedural issues in Western Australia

Individuals who have no identifiable connection with criminal conduct but are suspected of holding unexplained wealth can be pursued under the Western Australian legislation.

Unexplained wealth confiscation action can be taken against those who, although not personally engaged in criminal activity, are associated with suspected criminals. In Western Australia, the Director of Public Prosecutions applies for orders rather than the police—a slightly unusual procedure, given the traditional role of the police in criminal matters.

Only a small number of cases have been pursued to date. One factor that might explain why is the risk of losing a case at trial and being required to pay court costs and damages. The time it takes to obtain examination orders in unexplained wealth cases is a further barrier. The Western Australian legislation empowers the Director of Public Prosecutions to seek examination orders; the police may seek these early in an investigation, while the Director of Public Prosecutions may prefer to apply at a later stage. The issue for police is that such orders can take up to three months to obtain and implement, and this delay gives the respondent time to devise an explanation for their wealth or rearrange their financial affairs for an appearance of legitimacy.

Another issue is that the legislation contains no method for calculating unexplained wealth, despite there being a number of accepted ways of conducting a financial analysis. The ATO, for instance, uses the asset betterment method. This approach starts at a point in time (eg seven years prior to the start of the investigation) and works forward from that point to establish the sources of an individual's wealth. Another approach is to begin at the present and work

backwards. This could address the issue of criminals legitimising their assets over time, and the onus would be on the individual to demonstrate legitimate sources for their funds and assets.

There may also be communication difficulties between the police and the Director of Public Prosecutions. The Director of Public Prosecutions must satisfy model litigant requirements, which limits the extent of the advice it can provide.

Western Australia Police records show only two production orders have been issued in 14 years, and no monitoring orders have been made. The police do not have the power to issue orders; this function sits with the Director of Public Prosecutions, and orders must be obtained in the Supreme Court or the District Court of Western Australia. Obtaining orders is an investigative role that presents difficulties for the Director of Public Prosecutions, being outside the normal functions of the agency. The police require the support of the Director of Public Prosecutions to pursue unexplained wealth orders; they rely upon the DPP to conduct examinations and obtain monitoring orders. As a result, the police and the DPP must make these decisions in partnership.

Once the Director of Public Prosecutions establishes a person's wealth, it is that person's responsibility to discharge the onus of proof. However, this reversal of the onus of proof is only helpful to a certain extent. If a respondent, without producing documents, states that they obtained their wealth legally, and the court accepts their statement, then the onus is discharged, subject to the availability of evidence discrediting the witness. In one such case, *Director of Public Prosecutions v Morris* [2010] WADC 148, the judge deemed the respondent's evidence credible.

In contrast with other jurisdictions like New South Wales, cases in Western Australia are unlikely to be settled early in the process. Where they are settled, this is often a drawn-out process following litigation. There is a perception that Western Australian courts are more conservative than courts elsewhere, and that respondents are more likely to litigate than to settle. Interviewees reported the judiciary views the legislation unfavourably, which may influence the likelihood of future government efforts to reform this legislation. The legislation in Western Australia is also highly complex and politically sensitive, and thus difficult to amend.

Another significant problem—one not unique to Western Australia—concerns the use of professional privilege by lawyers and accountants. If individuals lodge all their business records with their lawyers, it can be very difficult for the police to investigate. Australian trust arrangements can also make it difficult to establish the true ownership of property and who has effective control of it. Changes to allow Commonwealth information, such as that relating to welfare benefits or taxation, to be used in state-based proceedings could also improve the efficacy of unexplained wealth legislation in Western Australia.

There appears to be cautious support in Western Australia for the introduction of national laws on unexplained wealth, to the extent that this would help limit the activities of organised crime. For this to be effective, however, it would be necessary to be sure such centralisation did not affect the legislation's effectiveness and benefits at a local level.

Northern Territory

The Northern Territory's assets confiscation and forfeiture regime is governed by the *Criminal Property Forfeiture Act 2002* and the *Misuse of Drugs Act 1990.* Under this legislation, the property of a person associated with a relevant forfeiture offence is forfeit to the Northern Territory government, to compensate the community for the costs of detecting and dealing with criminal activity, and prevent the enrichment of individuals engaged in criminal activity.

The Northern Territory legislation distinguishes between crime-used property and crime-derived property. Property is crime-used if the property is or was used, or was intended for use, in the commission of a forfeiture offence. Crime-derived property is property derived, directly or indirectly, from the commission of a forfeiture offence. The Northern Territory legislation also allows the following confiscation orders:

- unexplained wealth declarations;
- restraining orders; and
- drug trafficker declarations.

Unexplained wealth declarations

Unexplained wealth legislation modelled on the Western Australian provisions was introduced in the Northern Territory in 2003. The key difference is the Western Australian legislation's 'one-strike' approach, with respect to individuals who have committed a defined 'serious drug offence'. The Northern Territory's *Criminal Property Forfeiture Act 2002* refers to 'prescribed offences' but contains no reference to serious drug offences. The Director for Public

Prosecutions is the statutory applicant for all matters involving declarations concerning real and other types of property valued over $100,000. Applications are made in the Supreme Court of the Northern Territory. The Solicitor for the Northern Territory acts on instructions for the Director for Public Prosecutions and may apply to the Supreme Court for an unexplained wealth declaration against a person.

As in Western Australia, there is no requirement to show reasonable grounds for suspecting the person has committed an offence. The Northern Territory legislation allows a judge minimal discretion when making an unexplained wealth declaration, as an unexplained wealth order must be made if the value of a person's total wealth exceeds their lawfully acquired wealth.

The onus of proof is on the respondent and any property, service, or advantage that forms part of the person's wealth is presumed to have been unlawfully obtained unless the respondent can establish the contrary. There is no need to establish a link to a criminal offence under the Northern Territory legislation.

Restraining orders

A restraining order is a threshold requirement to commence proceedings under the *Criminal Property Forfeiture Act 2002* (NT). A person may apply to the court that issued the restraining order for the release of some of the property to meet reasonable living and business expenses;

however, this does not extend to legal expenses. Under section 59 of the Act a respondent can file an objection to the restraint of property within 28 days of the order being served.

Drug trafficker declarations

The *Misuse of Drugs Act 1990 (NT)* requires the Supreme Court to declare a person a drug trafficker if they have three or more convictions for prescribed offences in the previous 10 years. Once the declaration is made that person's entire property is forfeit—even property that has been legally acquired.

In *Attorney General (NT) v Emmerson* [2014] HCA 13, the High Court upheld the Northern Territory's criminal forfeiture legislation requiring the confiscation of property regardless of whether there a connection with the commission of a crime is established. Emmerson was convicted of drug-related offences between 2007 and 2011, including the supply of more than 18 kilograms of cannabis. Although the majority of Emmerson's property was not related to his criminal conduct, all of it was confiscated. Emmerson challenged the forfeiture on the basis that the legislation violated the separation of judicial and executive power under the *Commonwealth of Australia Constitution Act 1900* (Cth), that the property was not acquired on just terms, and that this contravened section 50 of the *Northern Territory Self-Government Act 1978* (Cth). The challenge was rejected by a six-to-one majority of the High Court.

Unexplained wealth procedures in the Northern Territory

While one early unexplained wealth case pursued in the Northern Territory was unsuccessful, all eight subsequent cases have been successful. All the successful cases were settled out of court and did not reach trial.

The total value of property forfeited to the Northern Territory Government as a result of these cases is approximately $3.5m, including one large settlement of $968,000.

Legal and procedural issues in the Northern Territory

Northern Territory interviewees expressed the view that a national approach to unexplained wealth was the approach most likely to improve the targeting of criminal assets. There was, however, a view that existing Northern Territory laws were generally effective and should continue to operate alongside any new national approach that might be adopted.

Collaboration with Commonwealth law enforcement agencies appears to be a more significant issue in the Northern Territory than in other jurisdictions, partly owing to the unique nature of the relationship between the Commonwealth and the Territory. Interviewees noted that matters of importance to agencies in the Northern Territory are not sufficiently important in dollar terms to warrant the investment of time by Commonwealth agencies. This is frustrating when considerable time has been invested by Northern Territory authorities who have provided the evidence and documentation necessary for action to be taken. While there may

be political or legislative issues associated with assets held offshore in cases where the asset value is over $100,000, the lack of cooperation was difficult to understand.

Geographic isolation may also contribute to reduced levels of cooperation with financial institutions, as most have head offices located in south-eastern Australia. The legislation does not compel financial institutions to provide information if there is no branch of the institution located in the Northern Territory, which may compound this isolation. This is an example of a situation in which national unexplained wealth legislation could make proceedings easier to conduct.

Issues associated with the definition of unexplained wealth were also identified as an impediment. According to the legislation, a person's unexplained wealth is the difference between their total wealth and their lawfully acquired wealth. As it is generally not possible to account for an individual's wealth from their birth due to a lack of records, the Northern Territory uses the asset betterment accounting system. Tracking may start, for example, at a point five years prior to the investigation, and what a person owns is determined by calculating their assets less their liabilities at that time. Asset growth and expenditure are assessed across the five years. All lawfully derived income is then deducted from the total, leaving a net amount of unexplained wealth.

This process is very time-consuming. All of an individual's bank accounts, and other financial evidence across a five-year period, must be identified and analysed. As all unexplained wealth cases in the Northern Territory have so far been settled or failed to proceed to trial, this accounting approach has not been tested in court, and no judicial directions have been made which determine if the approach is acceptable.

Interviewees described a close working relationship between the Northern Territory Police and the Solicitor for the Northern Territory. Specialised financial investigators embedded in the drug squad help to ensure that any searches obtain the evidence necessary for asset confiscation proceedings (eg notebooks containing coded records of drug deals) and the chain of evidence is secured.

While the details require further investigation, this approach is likely to improve cooperation and mutual support, increase intelligence sharing, and simplify access to information held by agencies such as the ATO and AUSTRAC. Asset-sharing arrangements (to allow other agencies to be compensated for resources used in joint investigations) would be one of the more complex details to be negotiated.

New South Wales

The restraint and confiscation of crime-derived assets in New South Wales is governed by the *Criminal Assets Recovery Act 1990 (NSW)* and the *Confiscation of Proceeds of Crime Act 1989 (NSW)*. The former is a civil scheme, while the latter requires a conviction. The latter scheme empowers a court, on conviction, to make orders for the confiscation of property derived from or used to commit a 'serious offence' within the meaning of the Act. The New South Wales

Crime Commission recovers assets under the provisions of the *Criminal Assets Recovery Act 1990 (NSW)*.

A range of orders can be made in New South Wales:

- unexplained wealth orders;
- restraining orders;
- assets forfeiture orders; and
- proceeds assessment orders.

Unexplained wealth orders

Unexplained wealth provisions were introduced in New South Wales in 2010 through an amendment to the *Criminal Assets Recovery Act 1990* (NSW). These provisions enable the New South Wales Crime Commission to apply to the Supreme Court for an unexplained wealth order. The order requires a person to pay the New South Wales Government the amount assessed as the value of the person's unexplained wealth. The New South Wales Supreme Court must make an unexplained wealth order if it finds there is a reasonable suspicion a person has engaged in serious crime-related activity or has acquired unexplained wealth from the serious crime-related activity of another person. Serious crime-related activity is defined as including offences related to the manufacture, supply and cultivation of prohibited drugs and certain other types of offences punishable by at least five years imprisonment. Once the Court is satisfied there is a reasonable suspicion, and the individual has or had unexplained wealth, the onus is on the individual to prove their wealth was not illegally acquired. The Court may refuse to make an unexplained wealth order, or make an order of an amount less than would otherwise be payable, only if it is in the public interest to do so.

Restraining orders

The New South Wales Crime Commission can apply to the Supreme Court for a restraining order under the *Criminal Assets Recovery Act 1990* (NSW) to prevent a person from disposing of property pending the outcome of confiscation proceedings. Along with the provisions of the *Confiscation of Proceeds of Crime Act 1989 (*NSW), administered by the Director of Public Prosecutions, restraining orders prevent dealings with the property of persons convicted or charged with an indictable offence or suspected of committing a serious offence, and with property suspected of being the proceeds of an indictable offence.

Assets forfeiture orders

Under the *Criminal Assets Recovery Act 1990* (NSW), an assets forfeiture order can be made in relation to interests in property of a person who is proved, on the balance of probabilities, to have engaged in a serious crime-related activity. It can also be made with respect to an interest in property that an authorised officer suspects was derived from the serious crime-related activity of another person if that other person is proved, on the balance of probabilities, to have engaged in a serious crime-related activity.

The interest in property subject to this order is usually the subject of a restraining order prior to its forfeiture. The Court has no discretion in making the assets forfeiture order. Once an assets forfeiture order has been made, the person whose interest has been forfeited may make an application for part or all of the forfeited interest to be excluded from the operation of the forfeiture order. The only basis for exclusion is if the person can prove, to the civil standard, that part or all of the interest in property was not the proceeds of an illegal activity.

Proceeds assessment orders

A proceeds assessment order compels a person to pay the New South Wales Government the proceeds they have derived from illegal activity. The New South Wales Crime Commission applies for an order that requires the person to pay the amount the Supreme Court assesses to be the value of the proceeds from illegal activities within the previous six years. Proceeds assessment orders can also be made against a person who has derived proceeds from the illegal activities of another person in the previous six years. The order can only be made if the person knew, or ought reasonably to have known, that the proceeds were derived from an illegal activity. Table 3 compares the orders available under the *Criminal Assets Recovery Act 1990* (NSW).

Table 3: Comparison of the three types of confiscation orders in New South Wales under the provisions of the *Criminal Assets Recovery Act 1990* (NSW)

Feature	Assets forfeiture order	Proceeds assessment order	Unexplained wealth order
Requires conviction	No	No	No
Serious crime-related activity (SCRA) must be:	Proved to the civil standard	Proved to the civil standard	Reasonably suspected
Standard of proof imposed on the defendant	Civil	Civil	Civil
Period within which the Commission is required to prove engagement in SCRA	6 years preceding date of application	6 years preceding date of application	Life of the defendant
Period over which proceeds of crime are assessed by the order	Unlimited	6 years preceding application	Unlimited
Provision can be made for hardship of dependants	Yes	No	Yes, if the Court considers it in the public interest
Judicial discretion to decline to make an order or to make an order of an amount less than would otherwise be made	No	No	Yes, if the Court considers it in the public interest

Source: New South Wales Crime Commission *Annual Report* 2012–13.

Unexplained wealth procedures in New South Wales

The *Criminal Assets Recovery Act 1990* (NSW) provides the legislative basis for unexplained wealth orders in New South Wales. The inclusion of unexplained wealth provisions provides the New South Wales Crime Commission with another option in cases where existing confiscation orders are unlikely to be effective. In this jurisdiction more than 95 percent of unexplained wealth matters are finalised through negotiated settlement, rather than by litigating the matter at trial. In practice, when considering whether to proceed with an unexplained wealth case, the evidence is weighed and a range of issues are assessed, including the likely success of refuting the respondent's argument to discharge their onus of proof, the cost of ongoing litigation and to what extent those costs and any confiscation proceeds are likely to be recoverable.

Substantial amounts have been recovered through unexplained wealth orders in New South Wales in recent years. In 2012, two unexplained wealth orders recovered approximately

$154,000; in 2013, three orders recovered approximately $1,250,000; and in 2014, five orders recovered approximately $1,225,000. It should be noted there were many cases which commenced as unexplained wealth proceedings but were finalised using other asset confiscation orders. The precise procedures to be used are negotiated as part of the settlement.

In many such cases, it would not have been possible to commence these matters if unexplained wealth provisions were not available. If the value of these outcomes is added to that of the confiscation orders listed above, the total value obtained increases substantially. In 2012, due to an additional three unexplained wealth orders that were finalised as another order, the increase would be $771,530. In 2013, due to an additional 17 unexplained wealth orders that were finalised as another order, the increase would be $6,299,764. And in 2014, due to an additional 14 unexplained wealth orders that were finalised as another order, the increase would be $4,735,802. These figures highlight that the overall value of unexplained wealth orders may not always be apparent from statistics alone.

Legal and procedural issues in New South Wales

For a restraining order to be granted under the *Criminal Assets Recovery Act 1990* (NSW), the Supreme Court must be satisfied there are reasonable grounds to suspect that a person has engaged in a serious crime-related activity or that a person has acquired serious crime-derived property from the serious crime-related activity of another person. In New South Wales, it is not necessary to demonstrate prima facie at a preliminary stage that an individual has unexplained wealth; and, indeed, in most cases this would be difficult owing to the need to review the respondent's financial history in some detail. In most cases it is far less difficult for the New South Wales Crime Commission to satisfy the Court that an individual has engaged in a serious crime-related activity or has acquired serious crime-derived property from the serious crime-related activity of another person. There are also provisions in the legislation to restrain property held in other people's names if there is a suspicion they have acquired property from the serious crime-related activity of another person. While the judicial discretion available in relation to unexplained wealth orders appears to be a significant departure from the lack of

discretion available under existing confiscation orders (because the vast majority of cases are settled without reaching trial), in practice this is not an issue.

The New South Wales Crime Commission has been proactive in taking action to restrain property as soon as possible in an investigation. Their capacity to restrain assets swiftly is vital to the success of the legislation in New South Wales. Experience has shown that if the assets are not restrained as swiftly as possible, they quickly disappear and cannot be recovered. Cases are also settled in a manner that the Commission considers maximises the outcome to the Crown (measured not only by the absolute value of the confiscation order involved but also such factors as the commerciality of, and risks associated with, continued litigation).

A further reason for the success of the unexplained wealth legislation in New South Wales is that the *Criminal Assets Recovery Act 1990* (NSW) is administered by the New South Wales Crime Commission, and all work on these investigations is carried out by specialists within the Crime Commission. The only element of the process undertaken outside the Commission is the referral of cases in the case identification phase. There are between 400 and 500 referrals each year, predominantly from New South Wales Police but also from organised crime investigations involving the New South Wales Crime Commission and Commonwealth agencies. In the rare cases that proceed to hearing, independent barristers are briefed. At the end of the process, the New South Wales Trustee and Guardian takes control and disposes of forfeited assets; however, the Crime Commission remains responsible for the collection of debts arising from unexplained wealth orders.

The New South Wales Crime Commission approaches unexplained wealth matters differently to agencies in other jurisdictions. Its approach is to treat these matters as financial investigations that can lead to and support legal proceedings, rather than legal proceedings which have a financial aspect. Forensic accountants are allocated a case load and manage confiscation proceedings from the beginning to the end of the process. This has advantages over an approach in which lawyers or police with no financial training and a limited understanding of financial investigation are tasked with complex unexplained wealth casework.

The New South Wales Crime Commission has very effective collaborative relationships with other state, territory and Commonwealth agencies, particularly through joint agency taskforces. Since 2009, the New South Wales Crime Commission has recommended the New South Wales Government share an estimated $7m recovered through confiscation proceedings arising from joint investigations with Commonwealth agencies with the Commonwealth.

A number of issues were apparent in New South Wales in relation to collaboration with other agencies in unexplained wealth cases.

- The Commonwealth Attorney-General's Department is very helpful in processing overseas liaison requests; however, the processing time is usually substantial.
- AUSTRAC offers an important service, providing financial intelligence that is used extensively in investigations. They also provide liaison officers who facilitate access to their intelligence.

- In general, banks are helpful in providing information, although the extent of cooperation varies between institutions. Assisting law enforcement is a costly function for banks and poorly resourced.
- Unexplained wealth remains a politically contentious topic for political stakeholders due to the combination of the definitional ambiguity associated with unexplained wealth and political sensitivities.
- There is a strong desire for cooperation but jurisdictional issues, logistic problems, different security clearance processes and classifications, information and data-management systems and different agency priorities all create obstructions and inhibit collaboration.

There are a range of other barriers to successful unexplained wealth proceedings in New South Wales, including:

- millions of dollars being sent offshore in other people's names;
- company labyrinths and the continual moving of money through corporate structures and trusts;
- solicitors holding assets in trust accounts; and
- money being laundered through real estate, particularly property developments.

Although these are operational issues that could be resolved through improved information sharing and multi-party agreements on procedures to be adopted, harmonising state and Commonwealth law is likely to remain an important issue. One contentious issue relates to how the proceeds of confiscation proceedings would be divided between the Commonwealth, states and territories. Interviewees expressed concern about the level of resources the states would need to contribute and how confiscated funds would be shared. From a New South Wales state perspective, the AFP already have a heavy caseload and might have difficulty handling an additional caseload associated with joint unexplained wealth operations.

Queensland

The *Criminal Proceeds Confiscation Act 2002* (Qld), as amended, governs confiscation schemes targeting financial gains obtained through illegal activity in Queensland. The civil-based recovery system is administered by the Queensland Crime and Corruption Commission, which can apply to the Supreme Court to confiscate assets on the basis of their suspected criminal origin through forfeiture orders, proceeds assessment orders and unexplained wealth orders, without requiring a prior conviction. The Queensland Crime and Corruption Commission also administers the serious drug offender confiscation order scheme (SDOCO). This is a conviction-based scheme whereby a person's property is liable to forfeiture once they have been convicted of a serious drug offence. The conviction-based regime is administered by the Queensland Director of Public Prosecutions and allows assets to be recovered where there is a direct connection between 'tainted property' and an offence. This regime includes unexplained wealth orders, restraining orders, forfeiture orders and pecuniary penalty orders.

Unexplained wealth orders

The Queensland unexplained wealth provisions were established through the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013*. Under this legislation, the Supreme Court must make an unexplained wealth order if it is satisfied there is a reasonable suspicion the individual has engaged in serious crime-related activities or acquired serious crime-derived property, or that any of their current or previous wealth was acquired unlawfully. As with legislation in other jurisdictions, the unexplained wealth provisions reverse the onus of proof and require the respondent to demonstrate that their wealth was lawfully acquired.

Restraining orders

Restraining orders under the civil scheme in Queensland are included in Chapter 2.3 of the *Criminal Proceeds Confiscation Act 2002* (Qld). The Supreme Court must be satisfied there are reasonable grounds to suspect that the person whose property is sought to be restrained has engaged in a serious offence, or that specific property is suspected of being derived from serious crime even if no offender can be identified. The application must be supported by an affidavit of an authorised officer of the Queensland Crime and Corruption Commission or the Queensland Police.

Restraining orders under the conviction-based scheme are also included in Chapter 3.3 of the Act. The Supreme Court can issue a restraining order if an individual's property (or that of another person) is suspected of being tainted property or 'benefit derived property', provided the person has been convicted of a confiscation offence. Restraining orders under the SDOCO regime are included in Chapter 2A.3 of the Act. The Supreme Court may grant a restraining order if there are reasonable grounds to suspect a person has committed a serious drug offence. Restraining orders apply to property held in Queensland or elsewhere.

Under all schemes, the Supreme Court may consider public interest considerations when deciding to make the order. The Court may make funds from the sale of restrained property available for the respondent's reasonable living and business expenses or to satisfy the respondent's debts.

Forfeiture orders

Forfeiture orders are included in Chapter 2.4 of the *Criminal Proceeds Confiscation Act 2002* (Qld). Property must be forfeited if the Supreme Court is satisfied it is more probable than not that the respondent engaged in a serious criminal offence in the past six years. The onus is on the person with the interest in the property to prove, on the balance of probabilities, the property was not illegally acquired. The Queensland civil and conviction-based regimes allow a six-month period after the forfeiture order is granted in which a person may seek to exclude property from the forfeiture order.

Under the SDOCO scheme, the state must apply for a serious drug offender confiscation order within six months of a serious drug offender certificate being issued. The granting of a serious

drug offender confiscation order results in the property listed on the order being forfeited to the state. The relevant provisions are included in Chapter 2A.

Forfeiture orders are subject to public-interest considerations under both the civil and conviction-based systems. Conviction-based forfeiture orders are included in Chapter 3.4 of the Act, which provides for tainted property to be forfeited upon conviction of a person guilty of a confiscation offence (which includes a broad range of serious offences).

Proceeds and pecuniary assessment orders

Civil proceeds assessment orders require an individual to pay the amount the Supreme Court determines is the amount derived from crime. Proceeds assessment order applications are made based on the value of the proceeds derived from illegal activity over the past six years. Once an application for a proceeds assessment order has been filed, the onus is on the individual to prove the proceeds were lawfully acquired.

Conviction-based pecuniary penalty orders also require an individual to pay the amount the Supreme Court determines is the amount derived from crime or equal to the benefit derived from the commission of an offence. Unless leave is granted by the Supreme Court, the application must be made within six months of the conviction. In making an assessment, the Court has discretion to determine the value of the benefits the offender derived from criminal activity.

Legal and procedural issues in Queensland

Unexplained wealth orders have only been in place in Queensland since September 2013. The Queensland Crime and Corruption Commission must manage the expectations of the Government and the public about what the legislation is able to achieve.

The Queensland civil legislation is very similar to the legislation that operates in New South Wales and was modelled on the provisions administered by the New South Wales Crime Commission. A key difference between the two, however, is that in Queensland, the Director of Public Prosecutions is responsible for the litigation (as solicitor on the record) of confiscation proceedings and proceedings are undertaken in the name of the State of Queensland. In New South Wales, however, proceedings are undertaken by a barrister instructed by the New South Wales Crime Commission. In both jurisdictions cases can be settled before they reach trial.

The Queensland Crime and Corruption Commission has developed a close working relationship with the New South Wales Crime Commission. They also have strong relationships with the Queensland Police Service, the AFP, the ACC and the ATO.

South Australia

The South Australian confiscation scheme is set out in the *Criminal Assets Confiscation Act 2005* (SA). This legislation provides the South Australian Director of Public Prosecutions with authority to confiscate the proceeds and instruments of crime. The legislation provides for:

- unexplained wealth orders;
- freezing orders;
- restraining orders;
- forfeiture orders; and
- pecuniary penalty orders.

Unexplained wealth orders

Unexplained wealth orders were established in South Australia through the *Serious and Organised Crime (Unexplained Wealth) Act 2009.* The Director of Public Prosecutions may authorise the South Australian Crown Solicitor to apply to the Supreme Court for an unexplained wealth order if the Crown Solicitor reasonably suspects that a person or an incorporated body has unlawfully acquired wealth; there is no requirement to show reasonable grounds to suspect a person committed an offence. If an unexplained wealth order is granted, the property that is the subject of the order must be surrendered to the government.

Freezing orders

The *Criminal Assets Confiscation Act 2005* (SA) provides for an authorised South Australian Police officer to make a freezing order. These orders require that the specified financial institution must not allow any person to make transfers or withdrawals from a specified account. Freezing orders are only granted if the Supreme Court is satisfied on reasonable grounds that the person has committed, or is about to commit, a serious offence, was involved in the commission of a serious offence or has derived benefit from the commission of a serious offence.

Restraining orders

The Supreme Court of South Australia can issue restraining orders over specified property. The property must then not be disposed of or dealt with by any person while criminal proceedings are ongoing. To grant a restraining order, the Court must be satisfied that a person has been convicted of a serious offence or is suspected to have committed the offence. Restraining orders can provide for certain expenses to be paid out of the restrained property, such as the property owner's reasonable living expenses or those of their dependents.

Forfeiture orders

The Supreme Court can also make a forfeiture order with respect to specified property that is the proceeds of crime or was instrumental to an offence. These orders can only be granted if a person has been convicted of a serious offence and the court is satisfied that the property in the order is proceeds of that offence, or if the property in the offence is subject to a restraining order that has been in force for at least six months and the court is satisfied that the property is proceeds of a serious offence.

Pecuniary penalty orders

The Supreme Court can also issue pecuniary penalty orders that require individuals to pay a specified amount if it is satisfied an individual committed a serious offence from which they derived benefits. When considering the value of pecuniary penalty orders, the Court must have regard to any hardship the order may be reasonably expected to cause any third parties.

Unexplained wealth procedures and issues in South Australia

South Australia first introduced unexplained wealth legislation in 2009. A key difference between the approach taken in South Australia and other jurisdictions is that, rather than amending existing proceeds of crime legislation, the laws were enacted in separate legislation. This approach caused significant issues around information dissemination in unexplained wealth investigations, and rendered the legislation ineffective.

The frameworks through which South Australia Police obtain information from other agencies were based on the premise that a criminal investigation is being conducted. As unexplained wealth orders are civil rather than criminal matters, legislative barriers and the national privacy principles prevented South Australia Police from obtaining the information necessary to progress unexplained wealth investigations; South Australia Police were not able to use data from Commonwealth or other state agencies in unexplained wealth investigations. For this reason, between August 2009 and September 2013, South Australia Police were forced to rely on open-source information and, as a result, no cases were successful. In 2013, the problem was addressed by amending the legislation with the introduction of the phrase, 'for law enforcement purposes'. Since then, data from AUSTRAC and other agencies have contributed to progressing investigations against targets and progress has been made in developing a case against a high-wealth individual involved in organised crime.

Commonwealth

The *Proceeds of Crime Act 2002* (Cth) facilitates the recovery of assets associated with Commonwealth offences, foreign indictable offences and indictable offences of Commonwealth concern. The legislation provides authority to investigate, restrain and confiscate the proceeds of crime resulting from Commonwealth and foreign indictable offences, and instruments of serious offences. In some circumstances it can also be used to confiscate the proceeds of crimes committed under state and territory law. Relevant offences include money laundering, drug importation, people smuggling and financing terrorism. The Commonwealth legislation includes both conviction-based and non-conviction-based approaches to confiscation. This legislation was preceded by the *Proceeds of Crime Act 1987* (Cth), which allowed property to be restrained while criminal proceedings were taking place to prevent the movement of assets that might be subject to confiscation. Recovery orders could only be issued after a conviction was secured.

The Criminal Assets Confiscation Taskforce (CACT) was established in 2011. The CACT is led by the AFP and comprises members of the ATO and the ACC. It coordinates Commonwealth

criminal asset confiscation and its members have operational, legal, intelligence and financial analysis experience. Its objectives include detecting, disrupting and deterring serious and organised crime by removing the proceeds and instruments of crime, debt recovery or international cooperation. These objectives are achieved by developing the most effective and appropriate enforcement strategy in each individual case, whether through criminal asset confiscation or through taxation remedies by the ATO. Since the enactment of the *Crimes Legislation Amendment Act (No. 2) 2011* (Cth), the Commissioner of the AFP has also been able to litigate proceeds of crime matters on behalf of the Commonwealth. CACT teams have been established in major capital cities around Australia.

Criminal asset confiscation matters are not litigated unless there is a reasonable prospect of success and/or where the public interest is sufficiently served by taking action. The majority of Commonwealth criminal assets confiscation matters, including both conviction-based and

non-conviction-based matters, are undertaken by litigators on behalf of the AFP Commissioner. These litigators sit within the CACT but are independent of the investigation teams. This function was transferred from the Commonwealth Director of Public Prosecutions in 2012. The Commonwealth Director of Public Prosecutions continues to take proceeds of crime actions closely connected to the prosecutions they are conducting, where restraint is not required.

Approximately $134m in assets was restrained by the Commissioner of the AFP in the 2013–14 financial year.

Cases are settled in accordance with the Proceeds of Crime Litigation Settlement Policy. In determining whether a case should be settled a number of factors are taken into account, including the public interest, the comparative cost of litigation and settlement, the deterrent value of pursuing a specific case and the disruption that could be achieved.

The AFP and AGD undertake international liaison in relation to Australian proceeds of crime matters, as well as liaison at the police-to-police and government-to-government levels.

Networks such as the CARIN and the Asset Recovery Interagency Network Asia Pacific (ARIN-AP) provide an opportunity to develop contacts and share information, and include police, lawyers, asset managers and financial investigators. These networks complement the formal mutual assistance process and facilitate more efficient collaboration.

Several orders may be obtained under the Commonwealth legislation, including:

- unexplained wealth orders;
- conviction and non-conviction based forfeiture orders; and
- pecuniary penalty orders.

Unexplained wealth orders

The *Proceeds of Crime Act 2002* (Cth) was amended to incorporate unexplained wealth provisions in 2010. In contrast with existing proceeds of crime orders, under these provisions it is not necessary to establish that a person's wealth was obtained as a result of criminal activity; the onus of proving their wealth was legitimately acquired lies with that person. Unexplained

wealth orders require a person pay the Commonwealth the proportion of their wealth they are unable to satisfy a court was legitimately acquired.

Unexplained wealth restraining orders may be made under section 20A of the *Proceeds of Crime Act 2002* (Cth), and restrict a person's ability to dispose of or otherwise deal with the property. Restraining orders are granted if there are reasonable grounds to suspect a person's total wealth exceeds the value of their wealth that was lawfully acquired and there are reasonable grounds to suspect that the person has committed a relevant offence, or the whole or any part of the person's wealth was derived from a relevant offence.

The court can compel the person to attend court and prove, on the balance of probabilities, that their wealth is not derived from one or more offences linked to a Commonwealth head of power. If they cannot demonstrate this, the court can order them to pay the Confiscation Assets Account the difference between their total wealth and their legitimate wealth.

Freezing and restraining orders

Part 2-1A and Part 2-1 of the *Proceeds of Crime Act 2002* (Cth) provide for freezing and restraining orders. A freezing order requires that a financial institution limit or prevent withdrawals from a named financial account while a court decides applications for restraining orders over those accounts. There must be grounds to suspect the funds are proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, and there is a risk the account balance will be reduced.

A restraining order requires that a person not dispose of or interfere with the property specified in the order, except under specified circumstances. The person must have been convicted of or charged with (or it is proposed they be charged with) an indictable offence, or be suspected of having committed a serious offence; the property must be the proceeds of certain offences or the instrument of a serious offence. There is no requirement to demonstrate there is a risk of the property being disposed of or otherwise dealt with.

Forfeiture orders

Part 2-2 and 2-3 of the *Proceeds of Crime Act 2002* (Cth) provides for both conviction- and non-conviction-based forfeiture of the proceeds or instruments of crime to the Commonwealth. The conviction-based forfeiture provisions are most commonly applied for at the time of sentencing.

Pecuniary penalty orders

Pecuniary penalty orders are included in Part 2.4 of the legislation and require a person pay the Commonwealth an amount equivalent to the benefits obtained from the commission of an offence. Pecuniary penalty orders seek to deprive the accused of any benefit obtained through committing an offence. Such orders may be based on a conviction for an indictable offence or obtained without conviction.

Legal and procedural issues in Commonwealth proceedings

Recent reviews of the Commonwealth unexplained wealth regime have identified a number of issues requiring resolution, although the legislation has not yet been tested in court. The principal concern relates to the extent of judicial discretion available to courts when making unexplained wealth orders. At present, and unlike other proceeds of crime orders available under Commonwealth legislation, the court has absolute discretion to grant unexplained wealth orders even where the threshold tests have been satisfied. Unexplained wealth investigations are resource intensive and highly complex, and the level of judicial discretion has proven to be a significant disincentive to progress investigations at the Commonwealth level.

Another concern relates to the possibility that restrained assets could be used by the respondent to proceedings to fund litigation. If the respondent can access restrained assets to fund their legal defence costs, this is likely to prolong a costly, complex and time-consuming litigation. Even if the litigation were successful, a significant proportion of the unexplained wealth may have been spent on legal expenses by the time the process has concluded. Other concerns relate to what may be seized as part of issuing a search warrant at a premises and the circumstances in which information may be shared with state, territory and overseas law enforcement agencies.

The *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) seeks to resolve these issues by limiting the circumstances in which a court has discretion not to make a restraining order over property suspected to be unexplained wealth and the circumstances in which restrained assets can be used to fund a defence of the unexplained wealth order, and by broadening what may be seized as part of issuing a search warrant at a premises and the circumstances in which information may be shared with state and overseas law enforcement agencies. In time, the amendments should make it easier to obtain unexplained wealth orders and facilitate litigation under the legislation.

Other states and territories

Tasmania

Tasmania's unexplained wealth legislation was modelled on the legislation established in the Northern Territory and enacted in 2013. The *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013* (Tas) amends the *Crime (Confiscation of Profits) Act 1993* (Tas). The new legislation enables the Supreme Court to make unexplained wealth declarations ordering the confiscation of unexplained wealth, and provides powers to investigate and conduct examinations and restrain property.

The unexplained wealth provisions complement the existing orders available under the *Crime (Confiscation of Profits) Act 1993* (Tas). This legislation provides for confiscation where a person is convicted of a serious offence, as well as forfeiture orders against tainted property and pecuniary penalty orders to recover benefits derived from criminal offences. The Tasmanian

Government has stated that unexplained wealth orders 'for the forfeiture of over $820,000 in cash, assets and firearms were issued in 2015-16' (Hidding & Goodwin 2016).

Victoria

Victoria is the most recent Australian jurisdiction to introduce unexplained wealth legislation, passing the *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* (Vic) to amend the *Confiscation Act 1997* (Vic) in August 2014. Under the Victorian civil confiscation scheme, the Director of Public Prosecutions can seek to have property restrained under an unexplained wealth restraining order where one of two tests are satisfied. The first is based on a suspicion on reasonable grounds that a person with an interest in the property has engaged in 'serious criminal activity'. The total value of the property restrained must be at least $50,000. The second test is a suspicion on reasonable grounds that the property to be restrained was not lawfully acquired. In this case there is no threshold value of the property.

The respondent can apply to the Supreme Court to have their property excluded from restraint by demonstrating that, on the balance of probabilities, the property was lawfully acquired. The property will be forfeited to the state after a period of six months has elapsed and applications for exclusion have been considered.

Australian Capital Territory

The *Confiscation of Criminal Assets Act 2003* (ACT) establishes the conviction-based and civil asset forfeiture scheme in the Australian Capital Territory (ACT) and is administered by the Director of Public Prosecutions. The ACT is now the only jurisdiction in Australia not to have enacted unexplained wealth legislation; it has not been introduced or debated in the ACT Legislative Assembly. The most recent public information on the prospect of the introduction of unexplained wealth legislation in this jurisdiction is a policy document released prior to the last election. The document indicates that the current Australian Capital Territory Government is aware that such legislation has been adopted in other Australian jurisdictions and is supportive of unexplained wealth legislation in general. The ACT Government has stated it intends to implement unexplained wealth legislation in the future.

Summary

As indicated above, a wide variety of procedures are available across Australian jurisdictions to allow the confiscation of unexplained wealth derived from the proceeds of crime. Table 4 summarises the principal elements of the various approches.

Different laws and procedures relating to the confiscation of assets, including unexplained wealth, exist throughout Australia. In some jurisdictions, police and Crown solicitors collaborate on unexplained wealth cases; in other jurisdictions, police and the offices of the directors of public prosecutions work together. In New South Wales and Queensland, the Crime Commission is the sole agency involved. New South Wales and the Northern Territory are the only jurisdictions that indicated they are satisfied with their current unexplained wealth legislation.

Western Australia was the first Australian jurisdiction to enact unexplained wealth provisions in 2000. Under the Western Australian model, it is not necessary to demonstrate reasonable grounds to suspect that the subject of the inquiry committed an offence, and the police and the Director of Public Prosecutions collaborate to investigate and obtain unexplained wealth orders. Unexplained wealth legislation does not appear to function effectively in Western Australia; it could be made more efficient and effective by shifting responsibility to the Crime and Corruption Commission.

The Northern Territory has been relatively successful in terms of recovering funds through unexplained wealth provisions. The legislation was introduced in 2003 and was modelled on the Western Australian provisions. While the relationship between the Solicitor for the Northern Territory and the police appears to be effective, this is arguably due to the small size of the jurisdiction, as there were problems with a dual-agency model in all other jurisdictions. Western Australia's geographic isolation may contribute to the perception of a lack of assistance from Commonwealth agencies and the private sector.

In New South Wales, the New South Wales Crime Commission recovers assets and has developed an efficient model that was praised by interviewees from other jurisdictions around Australia. Using coercive powers, unexplained wealth is identified and settlements made without the need for expensive and time-consuming litigation.

The Crime and Corruption Commission in Queensland recently adopted the New South Wales model when it implemented unexplained wealth legislation in 2013. Unexplained wealth legislation has been in place in South Australia since 2009 but, until very recently, legislative issues limited the use of certain types of evidence, and no unexplained wealth has yet been recovered.

Table 4: Summary of Australian unexplained wealth models (excluding ACT)								
Criterion	Cth	NSW	QLD	NT	SA	WA	VIC	TAS
Threshold	Reasonable suspicion that a person has wealth that was not lawfully acquired	Reasonable suspicion that a person has engaged in a serious crime-related activity	Reasonable suspicion that a person has engaged in a serious crime-related activity	None	Reasonable suspicion that a person has wealth that was not lawfully acquired	None	Reasonable suspicion that a person has engaged in serious criminal activity	Reasonable suspicion that a person has wealth that was not lawfully acquired
Agencies	AFP	Crime Commission	Crime Commission	Police, Crown Solicitor	Police, DPP	Police, DPP	Police, DPP	Police, DPP
Year established	2010	2010	2013	2003	2009	2000	2014	2014
Value confiscated	0	$2.63m	0	$3.5m	0	$2.65m	0	0
Satisfied with current approach	No	Yes	Yes	Yes	Yes	No	N/A	N/A
Key issues raised	Management of restrained assets, judicial discretion and hardship provisions (amendments before parliament)	N/A	N/A	Support from Commonwealth agencies	Initial legislation was ineffective (amended to resolve this issue in 2013)	Crime Commission would be a better approach	N/A	N/A
Views on national approach	Yes: raised resourcing issues	No: concerned about distribution of profits	No: little additional benefit	Yes: if text-based referral and coexisting state legislation	Yes	Yes: but noted it would be a matter for government	N/A	N/A

Unexplained wealth orders were introduced at the Commonwealth level in 2011. Responsibility was initially shared between the AFP and the Commonwealth Director of Public Prosecutions, but in 2012 responsibility was moved exclusively to the AFP. While proposed amendments are currently before parliament, it is unclear whether these will resolve the problems experienced and enable the successful recovery of unexplained wealth in the future. Legislation was enacted in 2014 in Victoria and Tasmania but remains in an early stage of development, and the Australian Capital Territory is currently developing unexplained wealth legislation. A strong legislative foundation for the recovery of unexplained wealth has been established in Australia, although a number of barriers still remain to successfully recovering funds from those suspected of possessing the proceeds of crime.

An attempt was made to obtain statistics from all jurisdictions in Australia on the dollar value of funds confiscated. Data were obtained from annual reports and during consultations with all jurisdictions except Tasmania, where data were unavailable. In some cases only incomplete information was available for some jurisdictions. Between 1995–96 and 2013–14 approximately $800m was confiscated, as indicated in Table 5. During this period, New South Wales was responsible for the greatest amount of assets confiscated, amounting to more than $320m; followed by the Commonwealth, which confiscated more than $260m. Assets confiscated as a result of unexplained wealth proceedings or settlements amount to only one percent of the total, comprising $8.8m since 2000–01. Western Australia alone has recovered $32.3m under declared drug trafficker legislation.

Table 5: Total value of assets confiscated in Australia, 1995–96 to 2013–14 (incomplete; $)									
Year	Cth	NSW	SA	WA	ACT	Qld	Vic	NT	Total
1995–96	7,498,130	5,105,008	238,835	-	-	-	-	-	12,841,973
1996–97	5,707,995	3,983,345	238,567	-	-	-	-	-	9,929,907
1997–98	7,048,592	10,152,292	359,261	-	-	-	-	-	17,560,145
1998–99	10,813,524	9,386,039	345,215	-	-	-	-	-	20,544,778
1999–00	4,916,905	11,015,299	520,247	-	-	-	-	-	16,452,451
2000–01	6,249,314	8,744,925	758,079	417,074	-	-	-	-	16,169,392
2001–02	6,888,411	9,411,967	678,674	779,533	44,617	-	-	-	17,803,202
2002–03	3,431,964	16,692,136	666,786	1,388,500	72,213	18,763	2,200,000	-	24,470,362
2003–04	10,350,041	15,204,694	1,502,615	1,170,275	68,995	17,22,187	-	-	30,018,807
2004–05	7,921,268	14,068,743	1,009,485	2,091,774	112,600	2,903,000	-	-	28,106,870
2005–06	18,420,556	13,125,527	807,299	2,524,917	384,902	2,905,508	6,600,000	-	44,768,709
2006–07	19,147,112	17,764,497	1,222,116	5,070,596	230,520	5,901,000	-	-	49,335,841
2007–08	24,739,937	29,654,262	1,686,520	12,618,686	48,976	5,940,000	10,000,000	-	84,688,381
2008–09	19,201,519	24,060,808	1,408,372	7,837,418	41,575	4,650,000	15,330,000	-	72,529,692
2009–10	34,998,472	44,929,650	924,728	13,438,281	174,144	6,141,430	-	-	100,606,705
2010–11	13,946,311	20,989,149	2,219,598	7,332,843	2,721,823	9,778,074	20,000,000	-	76,987,798
2011–12	45,620,000	17,088,267	2,275,170	7,520,000	549,572	7,731,058	-	-	80,784,067
2012–13	10,194,369	20,631,008	2,320,296	9,360,000	1,870,774	17.769250	-	-	44,376,465
2013–14	4,860,009	29,297,732	1,697,319	-	606,480	8740081	-	-	45,201,621
Subtotal	261,954,429	321,305,348	20,879,182	71,549,897	6,927,191	56,431,119	54,130,000		793,177,166

Table 5: Total value of assets confiscated in Australia, 1995–96 to 2013–14 (incomplete; $) cont.

Year	Cth	NSW	SA	WA	ACT	Qld	Vic	NT	Total
Unexplained wealth 2000–2014	0	2,629,000*	0	2,650,000*	0	-	0	3,500,000	8,779,000*
Drug trafficker declarations 2008–14	NA	NA	NA	32,300,000*	NA	-	NA	0	32,300,000*
Total	261,954,429	321,305,348	20,879,182	71,549,897	6,927,191	56,431,119	54,130,000	3,500,000	796,677,166

Note: The Tasmanian Government has stated that unexplained wealth orders 'for the forfeiture of over $820,000 in cash, assets and firearms were issued in 2015–16' (Hidding & Goodwin 2016). No other statistics were available for Tasmania. Only unexplained wealth statistics were available for the Northern Territory.

* These amounts are included in the confiscations recorded for individual years in the top section of the table and have not been added to the totals for New South Wales and Western Australia.

Source: NSW Crime Commission 1996–2014. NSW DPP 1996–2014. ACT DPP 2002–14. Qld DPP 2003–14. SA DPP 1996–2011. WA DPP 2001–14. OPP Vic 2003–11

The way forward

A number of issues need to be canvassed in determining how best to improve Australia's unexplained wealth regime. They include the various procedural issues identified above, questions of interagency collaboration, the effectiveness of the regime in terms of the value of assets confiscated, rights issues and the need for harmonisation of legislation and procedures. The resolution of these questions requires not only legislative reform that might require a reference of legislative power from the states and territories to the Commonwealth, but also the development of consistent policies and procedures concerning investigations, the sharing of information and the distribution of confiscated assets between all jurisdictions involved.

Exploring a whole-of-government approach will ensure that Australia's unexplained wealth regime, and its asset confiscation procedures more generally, will be able to work efficiently and have the greatest impact on those who seek to profit from crime.

Procedural, evidentiary and operational issues

Unexplained wealth legislation presents challenges for the Australian legal system due to the civil nature of the orders and the fact that they are investigated—and, in most cases, litigated—by agencies which in all other respects are involved in criminal matters and were established for that purpose.

In most jurisdictions around Australia, the vast majority of unexplained wealth matters are finalised through negotiated settlement rather than litigation. This is most evident in New South Wales, which has recovered the largest amounts of cash and assets in unexplained wealth investigations and settled more than 95 percent of its cases.

Under the New South Wales Crime Commission model, unexplained wealth cases are investigated and settled by specialists within the agency rather than the New South Wales Police Force or Director of Public Prosecutions. The New South Wales Police Force and a range of relevant Commonwealth agencies are still involved in the referral of cases, although a significant number of cases are identified internally.

During consultations conducted as part of this research, a number of law enforcement agencies around Australia identified the New South Wales model as the most effective and desirable of any of the approaches to unexplained wealth currently operating in Australia. The approach adopted by the New South Wales Crime Commission is fundamentally different to almost all

others around Australia, with the exception of the approach recently adopted by the Queensland Crime and Corruption Commission, which is based on the New South Wales model.

Unexplained wealth matters should be recognised as highly complex financial investigations of individuals who can afford the professional legal and financial advice necessary to circumvent traditional investigation practices. These investigations must be undertaken as efficiently as possible to ensure cash and assets are identified and restrained before they are moved beyond the reach of law enforcement and regulatory agencies. They require specialist skills in finance and intelligence analysis, as well as access to coercive powers of inquiry. Approaching unexplained wealth cases as traditional police investigations or legal proceedings with a financial aspect has proved to be ineffective in Australia. While there has been some success using the traditional approach in the Northern Territory this may be explained by the small size of the jurisdiction, which facilitates multiagency cooperation, and the influence of a small number of individuals in the relevant agencies who have the skills, experience and commitment to achieve relative success.

The amendments to the Commonwealth legislation that were introduced in 2014 seek to improve the regime by, for example, limiting court discretion and broadening what may be seized when enacting a search warrant at a premises. This legislation has not been tested in court. One element of the 2014 Act that is important to a future national model is the proposal to broaden the circumstances in which information about unexplained wealth proceedings may be shared with state, territory and overseas law enforcement agencies. In addition—although not an issue that could be remedied by legislative reform—measures to reduce the time and effort required to obtain information about assets held offshore by Australians would improve asset confiscation greatly (see Brown & Gillespie 2015).

Interagency collaboration

Interviewees expressed a wide range of views on the current effectiveness of interagency collaboration among state, territory and Commonwealth law enforcement, criminal intelligence, and other relevant Commonwealth government agencies in relation to unexplained wealth proceedings in Australia.

In Western Australia, where the Police and the Director of Public Prosecutions each have responsibilities for progressing unexplained wealth cases, the system is reportedly not functioning effectively and the relevant agencies accept that moving these functions into the Crime and Corruption Commission would be a better approach. This ineffectiveness has been compounded by legislative requirements that prevent restraining orders from being issued within the necessary timeframes.

There are a number of reasons why shifting responsibility for unexplained wealth orders to the Western Australian Crime and Corruption Commission would be more effective. First, consolidating the functions within a single agency would resolve the problem of an agency that was set up to prepare and run criminal cases bringing a civil matter. Secondly, coercive powers could be applied, leading to more efficient and effective investigations. Finally, the agency

would have specialist expertise in criminal intelligence matters, including financial analysis, and would be more effective in building a case than the police.

Collaboration with Commonwealth law enforcement agencies appears to be a more significant issue in the jurisdictions away from the east coast of Australia. In some cases there was a view that matters of importance to law enforcement agencies in those jurisdictions are not sufficiently important in dollar terms to warrant Commonwealth agencies investing their time and resources—including matters involving six-figure sums. This view related to both cross-jurisdictional matters within Australia and international matters. The international situation would be improved by amendments to the Commonwealth legislation that seek to improve the international information-sharing system discussed in the previous section. This view also highlights the interjurisdictional nature of unexplained wealth investigations and the need for closer cooperation, something national unexplained wealth legislation could address. Political or legislative issues relating to assets held offshore will always be complex, but a streamlined Australian approach would still be beneficial.

Interviewees expressed consistent views on collaboration with Commonwealth agencies such as the ACC and AUSTRAC. AUSTRAC data were viewed as invaluable in financial investigations like unexplained wealth cases. However, some interviewees expressed concerns about how data are provided—that this process could be refined and data provided in a format that could more easily be interrogated and manipulated according to the needs of specific investigations.

Participants supported the idea of engaging with the ACC in unexplained wealth investigations. It was noted that the ACC ceased to provide examination evidence to state prosecution agencies for use in proceeds of crime matters following the decision in *ACC v OK* [2010] FCAFC 61. By harmonising Commonwealth, state and territory unexplained wealth legislation, Australia could implement a more coherent and coordinated national approach to unexplained wealth legislation. While the details of such an arrangement would need to be carefully considered, this approach is likely to improve intelligence sharing, cooperation and mutual support and simplify access to information held by agencies such as the ATO and AUSTRAC. Asset-sharing arrangements to compensate other agencies for resources that they have used in joint investigations would be one of the more complex details to be negotiated.

Effectiveness

The effectiveness of unexplained wealth laws is framed by the debate around their validity from a rights perspective, and their promotion by government as a tough new measure against organised crime and a potential revenue source for funding crime-prevention projects.

Australia's unexplained wealth regime has yet to realise its potential. Governments must be realistic about what these laws can achieve and ensure that unexplained wealth investigations are well-coordinated and efficiently utilise the resources of all relevant state and Commonwealth agencies.

Four Australian jurisdictions have had unexplained wealth legislation in place for a significant period of time: Western Australia, the Northern Territory, New South Wales and the

Commonwealth. Acknowledging that these legislative regimes have been in place for varying periods of time, it would be fair to state that the two of these regimes—that of the Northern Territory and New South Wales—have been reasonably effective, while those of Western Australia and the Commonwealth have not.

It is clear that Commonwealth unexplained wealth legislation has not been effective. Despite operating for over three years, it has yet to recover cash or assets. The legislation's problems have been acknowledged and are addressed, in part, by the 2015 amendments. However, experience at the state and territory level indicates piecemeal legislative amendments will not be sufficient. The new approach needed at the Commonwealth level is significant in the context of proposals for a national approach to Australian unexplained wealth legislation.

The Northern Territory has had some success, but it is a reasonably small jurisdiction, and for that reason it is difficult to argue that its approach would be appropriate for broader application. Interviewees advised that, with the exception of one early unsuccessful unexplained wealth case, all eight cases since have been successful. However, it should also be noted that all of these successful cases were settled out of court and did not reach trial.

The total amount forfeited to the Northern Territory as a result of unexplained wealth cases between 2003 and 2014 is approximately $3.5m. The largest unexplained wealth proceeding in the Northern Territory resulted in $968,000 worth of assets being obtained by settlement. The Northern Territory has recovered an average of approximately $300,000 annually through its unexplained wealth legislation. This figure places the Northern Territory third after New South Wales and Western Australia in the amount of funds confiscated under unexplained wealth legislation—which is impressive when the significant differences in population are taken into account. Australia should adopt a national approach to unexplained wealth legislation that permits the Northern Territory legislation to operate alongside any future national unexplained wealth legislation enacted by the Commonwealth.

In Western Australia there were 28 applications for unexplained wealth declarations between 2001 and 2014. Twenty-four of these were successful, three unsuccessful and one is pending. A total of $6.9 million has been paid into the Confiscation Proceeds Account from unexplained wealth investigations, representing an average of approximately $500,000 annually, for a population base of approximately 2.5 million. It was clear from the consultations that the administrative arrangement for obtaining unexplained wealth orders, in which the police and Director of Public Prosecutions share responsibility, is not working effectively. The police in particular are very frustrated with the legislation and the requirements for obtaining orders.

The police identified the New South Wales model as the ideal they would like to see implemented. Both police and the Director of Public Prosecutions agree that the Western Australia Crime and Corruption Commission would be better placed to have sole responsibility for administering Western Australia's unexplained wealth legislation.

Unexplained wealth orders in New South Wales have recovered significant amounts in recent years. In 2012, two unexplained wealth orders recovered approximately $154,000; in 2013, three orders recovered approximately $1,250,000; and in 2014, five orders recovered

approximately $1,225,000—a total of $2,629,000 in three years. When orders that could only have been commenced as unexplained wealth orders, but were settled as other orders (such as assets forfeiture orders) are also counted, this total rises to $14.4m in the three-year period.

The New South Wales Crime Commission's ability to achieve settlement in short periods of time, while sacrificing little of the unexplained wealth in the negotiation process, was highlighted by a number of other jurisdictions as the most effective approach currently operating in Australia. In contrast, Western Australia Police do not have the power to negotiate or litigate. There is a perception that the Western Australian courts are more conservative than, for example, those of New South Wales, and that respondents are more likely to litigate than settle.

A key advantage of the New South Wales Crime Commission approach is the ability to issue a notice to give evidence in a star chamber. When individuals are issued with an examination notice, they often cooperate because they do not want to be examined. This stands in contrast with examinations undertaken in an open court with a judge, which are impartial and lack the power and effectiveness of the New South Wales Crime Commission approach.

In jurisdictions where more than one agency is involved in investigating unexplained wealth cases and obtaining orders, and particularly where the Director of Public Prosecutions is involved, there are issues with communication, coordination and agency functions and objectives.

Rights issues

Unexplained wealth legislation has been controversial wherever it has been introduced because of a perception that the reversed presumption of innocence breaches individual rights. The individual rights arguments must be considered, and it is important that unexplained wealth legislation is used appropriately. This research did not identify any cases where the legislation was used inappropriately and, indeed, in some cases the problem is rather that it is not being used assertively enough.

The Law Council argued in a submission to the PJC-ACC (2009) that the lack of a requirement to present evidence that there are reasonable grounds to suspect a respondent of committing an offence, or that their wealth is derived from an offence, in combination with the reversed onus of proof, places them in a position where the suspicion regarding the wealth is the only trigger for forfeiture. The High Court of Australia has found that the right to a fair trial, or the principle of due process, is fundamental to the Australian legal system; it is implicitly required in Chapter III of the Australian Constitution (*Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24). The right to a fair trial includes the fundamental right to presumed innocence, with the onus of proving the allegations on the prosecution. While the presumption of innocence is part of Australian law, it has been argued that reverse onus provisions are required to enforce certain laws, particularly where the accusation involves subject matter that is within the personal knowledge of the accused (Hamer 2011).

In *Momcilovic v The Queen* [2011] HCA 34, reverse onus provisions required a person to prove that property (illicit drugs) found on their premises was not in their possession. The reverse

onus was accepted as it was necessary in order to enforce the law. The High Court found that a statutory provision affecting the presumption of innocence should be construed to 'minimise or avoid the displacement of the presumption' but that there could be no 'construction other than that required by the clear language of that section, which places the legal burden of proof on the accused' (Momcilovic [512]).As the Police Federation of Australia outlined in a submission to the PJC-ACC (2009), the ability to gather enough evidence to prosecute the heads of criminal organisations who orchestrate criminal activities, as opposed to the lower-level members who actually commit the crimes, is a significant challenge for law enforcement agencies. It was asserted that Australian police know who is involved in organised and serious crime in Australia but cannot prove beyond reasonable doubt that they are involved directly in specific crimes. Unexplained wealth legislation is viewed as the best way of preventing further crime. It enables law enforcement to attack the profit of criminal networks without needing to demonstrate a causal connection between the offences and the proceeds. The burden of proof is eased by the fact that it is sufficient for the prosecutor to show that some sort of offence was committed. However, it is necessary to be mindful of the rights arguments related to unexplained wealth legislation, particularly if the Australian approach becomes more effective in the future.

Harmonising legislation and procedures

It appears clear that Australia should adopt a holistic approach to unexplained wealth legislation. If this is not understood and implemented, organised crime groups may be able to circumvent legislation and structure their financial affairs by moving their assets to jurisdictions in which laws are more favourable and there is less risk that assets would be confiscated.

Unexplained wealth laws cannot be effective if the legislative regime across states in close

geographic proximity within the same country is not coordinated.

The Parliamentary Joint Committee on Law Enforcement (PJCLE) Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements in 2012 recommended that a referral of powers be sought to facilitate the introduction of legislation in the states and territories and establish a national unexplained wealth scheme. In the consultation interviews conducted as part of this research project, a number of issues were raised concerning the introduction of a national approach to unexplained wealth. These included the government's reluctance to hand over powers to the Commonwealth, particularly in an arrangement where state laws could not operate alongside Commonwealth legislation; a perceived lack of consultation by the Commonwealth regarding the approach to the national laws and the legislation itself; and scepticism about the equitable sharing of profits.

There are precedents for harmonising the laws across Australia, and a national approach has been adopted in a number of related areas of the legal system. For example, in 2002 the states and territories referred terrorism laws to the Commonwealth following major incidents in the United States and Indonesia that had implications for Australia. As previously noted the states and territories that consider their unexplained wealth laws to be effective, such as New South Wales and the Northern Territory, felt they would be forced to accept what is, in their view,

inferior Commonwealth legislation that is not yet proved, or even tested, in the courts. To achieve a consistent national regime it may be necessary to adopt a new approach to Commonwealth unexplained wealth laws, based on an existing effective model and in consultation with states and territories. It is understandable that states and territories are reluctant to implement a new regime that may be less effective than that currently in place.

The interviews conducted as part of this research explored the harmonisation of unexplained wealth laws using mirror legislation. It was clear this approach was not preferred and would be very difficult to implement. A wide range of views on this were expressed. The Commonwealth would be required to consult, and be seen to consult—through, for example, a national roundtable—to arrive at an outcome that would be willingly accepted and implemented by all parties.

The significant question that remains for all states and territories is what resources they would be required to contribute, and what resources would be contributed by the Commonwealth. Unexplained wealth cases are expensive and involve resource-intensive financial investigations, and agreement on the distribution of profits is a major concern. A number of states also expressed the view that the AFP are already overburdened and may have difficulty handling additional work associated with joint operations. There are concerns that the states and territories would be required to contribute the majority of the resources, and that this would not be reflected in the distribution of profits. It was made clear in the consultations that there would be political barriers to be overcome as part of this process; the jurisdictions are likely to expect that the vast majority of the funds and assets forfeited (eg 80%) are returned to them for reinvestment in law enforcement and investigations.

Conclusions

Recovering unexplained wealth from criminals can play an important role in deterring and disrupting organised crime, and in providing additional resources for the prevention and prosecution of crime. Organised crime generates many billions of dollars annually in Australia, but only a proportion of this has been recovered from high-level organised criminals to date.

All Australian states agree there is a need for an effective unexplained wealth regime. Between 2000 and 2014, all states and territories and the Commonwealth introduced such legislation (with the exception of the Australian Capital Territory, where a regime is currently being developed), although different laws and procedures exist in each jurisdiction. In some jurisdictions, police and the Crown solicitor work together on unexplained wealth cases; in other jurisdictions police work with the Director of Public Prosecutions; and in New South Wales and Queensland, crime commissions are responsible for unexplained wealth proceedings. This is in addition to a range of other legislative measures that allow the confiscation of the proceeds of crime generally.

The complexity and practical difficulties associated with unexplained wealth investigations and the need for specialist expertise, particularly with respect to financial investigations, is widely acknowledged. More efficient processes are needed at the state, territory and Commonwealth level. Intelligence sharing and collaboration between specialist Commonwealth agencies and the states and territories must be improved.

Except for New South Wales and the Northern Territory, all jurisdictions that introduced unexplained wealth legislation between 2000 and 2012 have experienced some level of frustration with aspects of their legislation and procedure. In some jurisdictions legislation has only recently been introduced but, overall, unexplained wealth laws in Australia have resulted in the restraint of only relatively modest amounts of cash and assets—mostly through settlement prior to reaching trial rather than through court judgments.

In interviews, representatives of the jurisdictions expressed a strong preference for an approach to unexplained wealth that would allow state and Commonwealth legislation to coexist. The best way of achieving this, according to those interviewed, would be through a text-based referral of legislative power from the states to the Commonwealth to enable the Commonwealth to extend its jurisdiction to the states and territories. To achieve this, the Commonwealth legislation would need to be amended, in consultation with the states and territories.

Interviewees held the view that the New South Wales Crime Commission's approach is the most efficient and effective approach to unexplained wealth in Australia at present. They highlighted a number of positive attributes of the New South Wales Crime Commission model. These include that matters are:

- dealt with by a single agency;
- dealt with by experienced specialist financial intelligence analysts;
- settled in almost all cases without the need for costly litigation;
- settled in almost all cases for the amount determined to be 'unexplained'; and
- investigated using the agency's coercive powers to obtain information at an early stage.

Queensland has based its unexplained wealth legislation on the New South Wales model, and a similar approach is also being considered by the Western Australia Government.

Recent reviews have attributed the lack of successful unexplained wealth proceedings at the Commonwealth level to problems with existing Commonwealth legislation. Amendments have, however, been proposed to address these issues.

Many of those interviewed were concerned by how proceeds recovered under a better-coordinated unexplained wealth scheme would be shared. This was particularly concerning to the jurisdictions with the most successful unexplained wealth legislation, representatives of which expressed concern that their efforts in restraining assets would not be adequately recognised. Various payment models could be used to ensure proceeds are distributed fairly, based on the resources provided by jurisdictions to secure successful outcomes. Ideally, this question could be resolved in an agreement between the states and territories and the Commonwealth when a text-based referral of powers is undertaken.

Finally, nationally uniform data collection is needed to monitor the number of assets confiscation proceedings undertaken, including the collection and analysis of discrete data for unexplained wealth proceedings and data on the value of assets restrained, the value of property confiscated and the value of funds recovered through the use of court orders and/or negotiated settlements. Statistics should be maintained to enable disaggregation across jurisdictions and responsible agencies on an annual basis.

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Appendix 1: Interview documentation

PLAIN LANGUAGE STATEMENT

Exploring the procedural barriers to securing

unexplained wealth orders in Australia

Principal Researcher:

Project Title: Exploring the procedural barriers to securing unexplained wealth orders

Project Activity: Consultation interviews

What is the purpose of this research?

The AIC has commenced a study to examine the processes involved in obtaining unexplained wealth orders and determine how any identified impediments could be addressed through legislative or procedural reform.

How will I contribute to this research?

As an investigator or prosecutor or academic involved in unexplained wealth orders you will be asked to participate in an in-depth interview at your office that will take approximately 90 minutes of your time. You will be asked to comment on your experience in investigating or prosecuting unexplained wealth orders, and your views as to how barriers to obtaining successful orders could be addressed. Your name and any identifying information will not be sought and you must not mention individuals or organisations who have been involved in investigations by name. With your permission, your interview will be digitally-recorded.

Why have I been asked to participate?

You have been asked to participate in this research because of your knowledge or expertise as it relates to unexplained wealth orders.

What are the expected benefits and outcomes of this project?

This research will help in identifying how barriers to obtaining unexplained wealth orders could be addressed with the introduction of new legislation or improved approaches to investigation and prosecution.

Are there any risks involved?

There are no specific risks associated with this research. In the event that you feel any discomfort,

tell the researchers so that they can pause or stop the interview.

Will I be paid?

We greatly appreciate your involvement in this research but for ethical reasons participation is voluntary. You will not be offered any payment or other reward, financial or otherwise, for participating in this research.

Will there be someone available to provide me with some support if I need it?

You can obtain advice from your Manager at your agency and you can obtain counselling and support from your agency's Human Resources Section. You can also contact the Principal Researcher and Human Research Ethics Coordinator – contact details below.

What steps will be taken regarding confidentiality?

The data and information you will provide will be presented in de-identified form in any publication arising from this project. Names of individuals and organisations will not be collected or used in any publications. Your responses to the questions will not be able to be linked back to you and your agency will not know which interviewees provided the answers to questions.

Can I withdraw from the research?

Your participation in this study is entirely voluntary. You are under no obligation to participate. You may decide not to answer any question; and you may withdraw at any stage. If you decide to withdraw, you may request that any information you have already provided not be used in the research.

Where can I see the results from this research?

A confidential draft report will be submitted to the Criminology Research Advisory Council for feedback, revision of drafts and finalisation of report.

A condensed version of the report suitable for public dissemination will be made available in one of the AICs series of publications.

Who can I contact about this research?

If you would like further information or to contact the researcher about any aspect of this study, please contact the principal researcher. If you have a complaint concerning the

manner in which the research project *Exploring the procedural barriers to securing unexplained wealth orders in Australia* is being conducted, please contact the Secretariat to the AIC Human Research Ethics Committee, who is not connected with this project and who can pass on your concerns to appropriate person.

Thank you for participating in this research, your involvement is greatly appreciated.

INTERVIEW PROCESS

Exploring the procedural barriers to securing unexplained wealth orders in Australia

1. As part of the Australian Institute of Criminology's research into unexplained wealth orders, semi-structured face-to-face interviews are being conducted with relevant Commonwealth and state government agencies, and selected academics.
2. The following agencies are participating in interviews for this research project in July 2014:
    - Attorney Generals' Department
    - Australian Crime Commission
    - Australian Federal Police
    - Australian Securities and Investments Commission
    - Australian Taxation Office
    - New South Wales Crime Commission
    - New South Wales Police Force
    - Northern Territory Police Force
    - Office of the Director of Public Prosecutions for Western Australia
    - Queensland Crime and Misconduct Commission
    - Solicitor for the Northern Territory
    - South Australia Crown Solicitor's Office
    - South Australia Police
    - Western Australia Police
3. The AIC interviewer will travel to the agencies to meet the nominated participants and conduct the interviews. Each interview will be approximately 90 minutes in length. The interviewer will seek information from participants on their experiences obtaining unexplained wealth orders (where relevant) and their views on how barriers to obtaining successful orders could be addressed.
4. Participants will only be interviewed regarding unexplained wealth orders and will not be asked to reveal personal information relating to themselves or individuals the subject of investigation, or judicial processes. Responses to interviews will be recorded digitally or in handwritten notes, in agreement with interviewees.
5. Responses will be analysed and summarised in a final research report. Following the conclusion of the interviews, participants will be offered the opportunity to review transcripts or notes if they wish to do so. Views will not be attributed to individuals or

organisations.

6. Recordings and notes will be held securely on AIC premises in either locked cabinets or on AIC servers that comply with Commonwealth data security standards. On completion of the project, original recordings will be destroyed.

7. Interviews for this project will be conducted by Dr Marcus Smith, Senior Research Analyst, with oversight from Dr Russell Smith, Principal Criminologist. A summary of their qualifications, experience and contact details are available on the AIC website at http://www.aic.gov.au/ about_aic/researchprograms/staff.html

INTERVIEW QUESTIONS

Exploring the procedural barriers to securing unexplained wealth orders in Australia

1. Could you please begin by briefly describing your training and past experience, your current role in the organisation, and how long you have worked in these roles?
2. How many unexplained wealth cases have you been involved in investigating or prosecuting and what has your role been in these cases?
3. Can you provide details of the number of unexplained wealth applications in your jurisdiction that were investigated, went to trial (application made), and were successful, and the amount of money that was ordered to be recovered, and actually recovered since the relevant legislation has been in force?
4. What factors contributed to whether an unexplained wealth order case was pursued?
5. Can you a select one successful case and one unsuccessful case as representative examples, and briefly describe the facts involved in each?
6. Can you identify the key issues that contributed to the outcome of these cases, and discuss how frequently these issues arise in your jurisdiction?
7. How are individuals who are suspected of possessing unexplained wealth identified, and how might procedures to identify suspects be enhanced?
8. Can you describe, from a practical perspective, some of the barriers that exist to investigating and prosecuting unexplained wealth orders in your jurisdiction, and how these might be addressed?
9. Is there sufficient communication and cooperation between state and federal government agencies in relation to these cases, how could this be improved?
10. Is there sufficient communication and cooperation between specialist law enforcement units (e.g. financial analysis) in the investigation of these cases, how could this be improved?

11. To what extent is financial intelligence data collected by AUSTRAC used in connection with unexplained wealth proceedings. Could AUSTRAC data be used more effectively?
12. What are the implications for individuals who refuse to produce documents? To what extent does this occur in your jurisdiction?
13. To what extent are undercover operations used to investigate unexplained wealth, and what are the associated issues?
14. In your experience, what proportion of successful unexplained wealth orders result in the actual recovery of funds? How could this area be improved?
15. Can you suggest how procedures in this area could be strengthened either at the state or federal level?
16. To what extent are cases settled without going to trial? What factors lead to early settlement?
17. Are there any evidentiary issues that exist in relation to investigating or prosecuting unexplained wealth orders that could be dealt with through legislative amendment at the state or federal level?
18. In your jurisdiction does the court have a general discretion not to make an unexplained wealth order? In your experience, how frequently has a court exercised its discretion not to make an order?
19. How frequently has a court determined that assets should be excluded, or decide that an order should be discounted or dismissed due to hardship of the defendant or other persons?
20. Can you describe some of the barriers that exist from a legislative perspective in investigating/prosecuting unexplained wealth orders in your jurisdiction?
21. Can you suggest how the legislation in this area could be strengthened either at the state or federal level?
22. What geographical jurisdictional constraints exist in seeking unexplained wealth orders in your jurisdiction?
23. Have you assisted overseas jurisdictions or been assisted by overseas jurisdictions to obtain unexplained wealth orders? Can you describe the circumstances of such assistance?
24. How important is international cooperation in this area and how might it be improved?
25. Thank you for your participation. Is there anything else that you would like to discuss that has not been covered