Overview Report: Selected Writings of Dr. Natalie Skead

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Natalie Skead, "Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far" (2013) 37 Criminal Law Journal 296.

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Appendix A

Natalie Skead, “Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far” (2013) 37 Criminal Law Journal 296.

Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far

Dr Natalie Skead*

Combating drug-related crime is a key focus of proceeds of crime legislation in Australia. Despite this clear focus only three Australian jurisdictions have introduced confiscation provisions levelled specifically at those involved in drug-related crimes: New South Wales, Western Australia, and the Northern Territory. Queensland and South Australia currently have Bills before Parliament aimed at introducing specific drug-related confiscation provisions into their confiscation of proceeds of crime regimes. In New South Wales, drug-trafficker property confiscations operate in virtually the same way as other criminal property confiscations. In Western Australia and the Northern Territory, however, the drug-trafficker confiscation provisions are distinct from the other criminal property confiscation provisions and are particularly harsh. This article examines their operation; in particular, the potential impact of the provisions on the property rights of defendants and innocent third parties is analysed and critiqued. It is argued that the drug-trafficker confiscation schemes in both jurisdictions impact unjustifiably and inequitably on property rights and, in doing so, go far beyond achieving the stated objectives of the legislation.

INTRODUCTION

Proceeds of crime legislation provides for the confiscation of property in specified circumstances. These circumstances include where a person's wealth is unexplained, where property is used in the commission of a specified offence, where property is derived from the commission of a specified offence, and where property is or was owned by a declared drug-trafficker. There were, no doubt, compelling policy reasons for the introduction of this legislation across Australia from the late 1980s. 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.[1]

Deterring serious crime by denying perpetrators the benefits of their criminal activity remains an important driver in the continued development, refinement and implementation of this legislation across Australia.

There is a significant body of research on proceeds of crime legislation. In the main, however, existing scholarship focuses on the sociological and criminological aspects of the legislation, including whether such legislation operates as a successful deterrent against the commission of targeted crime, and the impact of the legislation on law enforcement practices. There is little scholarship on the impact of the legislation on the property rights of defendants and, more importantly, innocent third parties.

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[1] Commonwealth House of Representatives, *Proceeds of Crime Bill 1987* (Cth), Second Reading Speech, Lionel Bowen (30 April 1987) p 2314.

The aim of this article is to examine the potentially harsh consequences (in particular the proprietary consequences) of proceeds of crime legislation in Australia. Of the various types of confiscations currently in operation, drug-trafficker confiscations are particularly severe, and they will therefore be the focus of this article. First, the article considers the legislation in Australia generally before examining in detail the operation of drug-trafficker confiscations in Western Australia and the Northern Territory – in the form of a case study. The article next looks at the impact of the schemes on the property rights of defendants and third parties. It then examines the constitutional validity of the schemes, and discusses Crown practice in relation to drug-trafficker confiscations in Western Australia.

DRUG-TRAFFICKER CONFISCATION IN AUSTRALIA

From the initial introduction of proceeds of crime legislation in Australia, drug-related crime and the perpetrators of such crime have been the target of the legislators.[2] Indeed, the first Australian foray into the legislative realm of proceeds of crime confiscation, s 229A of the *Customs Act 1901* (Cth),[3] provided for the confiscation of property derived from specified dealings in narcotics unlawfully imported into Australia. An early stimulus for the wide-scale adoption of criminal confiscation legislation, the 1988 *United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances*, states relevantly:

> THE PARTIES TO THIS CONVENTION,
>
> DEEPLY CONCERNED by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings…
>
> DEEPLY CONCERNED ALSO … by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances …
>
> AWARE that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,
>
> DETERMINED to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,
>
> …
>
> HEREBY AGREE as follows: …
>
> Article 5
>
> Confiscation
>
> 1. Each Party shall adopt such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds derived from [the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, … importation or exportation of any narcotic drug…], or property the value of which corresponds to that of such proceeds;
>
> (b) Narcotic drugs … used in or intended for use in any manner in [the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, … of any narcotic drug].[4]

While the proceeds of crime legislation in all Australian jurisdictions is directed at combating serious and organised crime, including drug-related crime generally,[5] the legislatures in Western Australia, the Northern Territory and New South Wales considered the illicit drug trade to be a

[2] Thornton J, "The Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia: An Overview" in National Crime Authority, *National Proceeds of Crime Conference* (Sydney, 18-20 June 1993).

[3] Section 229A was inserted into the *Customs Act 1901* (Cth) pursuant to s 8 of the *Customs Amendment Act 1977* (Cth).

[4] *United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances* (United Nations Treaty Series, 1988) p 95.

[5] Australian Law Reform Commission (ALRC), *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (Cth), Report No 87 (1999); Sherman T, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002* (Cth) (July 2006); *Moffitt Royal Commission of Inquiry in Respect of Certain Matters Relating to Allegations of Organised Crime in Clubs Report* (15 August 1974); Williams Inquiry Report (1980); *Costigan Royal Commission on the Activities of the Federated*

sufficiently severe threat to the fabric of society that they introduced specific drug-trafficker confiscation provisions into their principal proceeds of crime legislative regimes.[6] Queensland and the South Australia are now following suit.[7]

In New South Wales, drug-trafficker confiscations operate in virtually the same way as other criminal benefits confiscations. In Western Australia and the Northern Territory, however, the drug-trafficker confiscation provisions are distinct from the other criminal property confiscation provisions and are particularly harsh.

OPERATION OF DRUG-TRAFFICKER PROVISIONS IN WESTERN AUSTRALIA AND THE NORTHERN TERRITORY – A CASE STUDY

The operation and impact of the drug-trafficker provisions in Western Australia and the Northern Territory are well illustrated by the case of David and Florence Davies.

In 2002 the home of Mr and Mrs Davies, a couple married for 58 years and aged 81 and 77 respectively, was the subject of a search warrant. On execution of the warrant, over 18 kilograms of cannabis was found concealed in the ceiling cavity of the couple's home. In addition, over 300 grams of cannabis was found in containers under their bed. The street value of the cannabis was between $163,000 and $264,000. Mr and Mrs Davies were charged with possession of cannabis with the intent to sell or supply it to another under s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (MDA WA).

Mr and Mrs Davies were convicted of the offences. Each was given a 16-month suspended sentence. 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. Tyssul was arrested, charged and convicted in relation to the drug find. Mr and Mrs Davies appealed their convictions. The Supreme Court of Western Australia unanimously dismissed the appeal.[8] The High Court of Australia refused the Davies' application for special leave to appeal.[9]

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, on application by the Director of Public Prosecutions (DPP), declare the person to be a drug-trafficker.[10] Following their conviction, Mr and Mrs Davies were declared drug-traffickers under the MDA WA being described by the press as "Australia's oldest traffickers".[11]

Pursuant to the drug-trafficker provisions in the CPCA WA, when a person is declared to be a drug-trafficker, 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 was made, is confiscated.[12] The confiscation is automatic. Section 9 of the CPCA WA provides further that title to confiscated real property 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.

Ship Painters and Dockers Union Report (26 October 1984); *Stewart Royal Commission of Inquiry into the Activities of the Nugan Hand Group [extension of the Royal Commission of Inquiry into Drug Trafficking 1981-1983] Report* (27 November 1985).

[6] Sections 3, 8, 111, 159 of the *Criminal Property Confiscation Act 2000* (WA) (CPCA WA); ss 3, 8, 94 of the *Criminal Property Forfeiture Act 2002* (NT) (CPFA NT); Western Australia Legislative Assembly, *Criminal Property Confiscation Bill 2000* (WA), Second Reading Speech, Daniel Barron-Sullivan (29 June 2000) p 8611; Northern Territory Legislative Assembly, *Criminal Property Forfeiture Bill 2002* (NT), Second Reading Speech, Peter Toyne (16 May 2002) Serial 61.

[7] *Criminal Assets Confiscation (Prescribed Drug Offender Assets) Amendment Bill 2012* (SA); *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012* (Qld).

[8] *Davies v Western Australia* (2005) 152 A Crim R 287; [2005] WASCA 47.

[9] *Davies v Western Australia* [2005] HCATrans 890.

[10] MDA WA, s 32A(1)(b)(i) and Sch VII. See too *Zuccala v Western Australia* [2008] WASCA 129 at [70].

[11] "Elderly Drug Users Lose their Appeal", *The Sydney Morning Herald* (15 March 2005), http://www.smh.com.au/news/National/Elderly-drug-dealers-lose-their-appeal/2005/03/15/1110649184659.html.

[12] CPCA WA, s 8(1)-(2).

In the Davies' case, anecdotal evidence indicates that, following their declaration as drug-traffickers, the Davies' family home, built by David Davies 40 years earlier and registered in the names of Mr and Mrs Davies, was confiscated by the State. Registered title to this property vested in Western Australia. The author understands, however, that the State, in consideration of the age and financial standing of Mr and Mrs Davies, agreed to lease the property to the Davies at peppercorn rent for so long as they may wish to reside there.[13]

Perhaps the most concerning aspect of the Davies' case is the apparent disparity between the relative leniency of their sentences and the eventual proprietary consequences of their convictions. There is no question that trafficking drugs is a very serious crime with potentially fatal consequences. The seriousness of drug-trafficking is reflected in the maximum penalty for conviction of an offence under s 6(1) of the MDA WA, being payment of a fine not exceeding $100,000, or imprisonment for a term not exceeding 25 years, or both.[14] However, in sentencing the Davies, the court saw fit to limit the sentence for each to 16 months imprisonment, suspended. While there may have been several factors influencing sentencing in this case, including the defendants' ages, health and that it was a first offence for both, the sentence also reflects the relatively minor role David and Florence Davies played in their son's unlawful activities. Yet, due to the inflexible and severe drug-trafficker confiscation provisions operating in Western Australia, they lost all that they owned to the State.

A stated objective of the Western Australian proceeds of crime legislation is to deprive a person of "the material gain that the criminal intends to get, or has got, from criminal activity".[15] The case of David and Florence Davies, however, demonstrates that the drug-trafficker provisions in that State go far beyond simply stripping a person of his or her ill-gotten gains: they operate to strip a person "declared to be a drug-trafficker" of all his or her gains, whether or not they are ill-gotten.

This is similarly the case in the Northern Territory where the drug-trafficker provisions in the CPFA NT largely mirror those in the CPCA WA.

OPERATION OF DRUG-TRAFFICKER PROVISIONS IN WESTERN AUSTRALIA AND THE NORTHERN TERRITORY – THE STATUTORY FRAMEWORK

The severity of the drug-trafficker provisions in Western Australia and the Northern Territory is best understood by analysing the provisions themselves. Under the drug-trafficker provisions in the CPCA WA and the CPFA NT when a person is "declared to be a drug-trafficker" or is "declared to be taken to be a drug-trafficker", all property owned or effectively controlled by that person, and all property given away by that person at any time, is confiscated.[16] There are three features of these provisions that warrant discussion: (1) the person must be declared, or be declared to be taken to be a drug-trafficker; (2) *all* the person's property is confiscated; and (3) confiscated property includes property owned, effectively controlled, or at any time given away by the person.

The person must be declared to be, or declared to be taken to be, a drug-trafficker

In keeping with the non-conviction basis of the proceeds of crime regimes in both jurisdictions, the drug-trafficker confiscation provisions target not only persons actually declared to be drug-traffickers following conviction of a drug-related offence, but also those persons simply "declared to be taken to be a declared drug-trafficker".

Declared drug-traffickers

Under the *Misuse of Drugs Acts* of both jurisdictions, a person shall be declared a drug-trafficker by the court upon application by the DPP where the person has been convicted of a drug-related offence and, in the 10 years prior to the commission of such offence, was convicted of two or more separate

[13] Author telephone conversation with Laurence Levy SC, Counsel for the Davies (7 October 2010).

[14] MDA WA, s 34(1)(a).

[15] Western Australia House of Assembly, *Parliamentary Debates, Criminal Property Confiscation Bill 2000* (WA), Antony Prince (7 September 2000).

[16] CPCA WA, s 8; CPFA NT, ss 8-9, 94(1).

drug-related offences.[17] In addition, under the MDA WA, a person shall be declared a drug-trafficker if convicted of a "serious drug offence"[18] in respect of a commercial quantity of a prohibited drug or plant.[19] In neither case does a court have any discretion in making the declaration. The constitutional validity of drug-trafficker declaration provisions in the *Misuse of Drugs Act 1990* (NT) (MDA NT) was the subject of an appeal to the Northern Territory Supreme Court of Appeal in *Emmerson v DPP*.[20] This case, together with the broader issues relating to the constitutional validity of proceeds of crime legislation, is examined below.

Persons declared to be taken to be declared drug-traffickers

Even if not convicted of a drug-related offence, a person may still be "declared to be taken to be a declared drug-trafficker" if the person is charged with a drug-related offence under the relevant *Misuse of Drugs Act*, conviction of which could result in the person being declared a drug-trafficker, and the person either absconds[21] or dies[22] before the charge is disposed of or finally determined.[23] While confiscation of property from a declared drug-trafficker convicted of a drug-related offence is clearly within the purposes of proceeds of crime legislation, the confiscation of property of a person declared to be taken to be a declared drug-trafficker arguably goes beyond achieving the fundamental objectives of the legislation.[24]

Proceeds of crime legislation in Western Australia and the Northern Territory, as in all other Australian jurisdictions besides Tasmania, is non-conviction based. A non-conviction based confiscation scheme permits the confiscation of property through civil proceedings[25] without the necessity of securing a criminal conviction against the defendant. Indeed, there is no need to establish a nexus between the property to be confiscated and any criminal conduct.[26] The civil nature of confiscation proceedings is of some concern. It is arguable that, although civil in name, confiscation proceedings are essentially criminal in nature. Not only does confiscation effectively impose a

[17] *DPP v Hennig* (2005) 154 A Crim R 550 at [30]; 192 FLR 223; *Credaro v Western Australia* [2012] WASC 317; MDA WA, s 32(A)(1)(a); MDA NT, s 36A.

[18] MDA WA, s 32(A)(3); *Palfrey v MacPhail* (2004) 149 A Crim R 542.

[19] MDA WA, s 32A(1)(b), Schs VII-VIII. In *Trajkoski v DPP (Western Australia)* (2010) 41 WAR 105 at [74], Buss JA (with whom Owen JA concurred) found that in making an application for a drug-trafficker declaration under s 32A(1)(b) of the MDA WA, the DPP bears the onus of proving the quantity of prohibited drugs or plants and that the defendant is entitled to be heard in relation to the issue.

[20] *Emmerson v DPP* (2013) 33 NTLR 1.

[21] CPCA WA, s 160(1); CPFA NT, s 162. A person "absconds in connection with an offence" where the person was arrested or a warrant for his or her 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.

[22] CPCA WA, s 160(2); *Hoddy v DPP (WA)* [2007] WASC 7.

[23] CPCA WA, s 159(2); CPFA NT, s 8(2). Section 176 of the *Criminal Organisations Control Act 2012* (WA) which is yet to commence operation proposes a number of changes to the definition of "declared drug-trafficker" in s 159 of the CPCA WA. These changes are not significant for the purposes of this article.

[24] The Preamble to the CPCA WA states that the Act provides "for the confiscation in certain circumstances of property acquired *as a result of criminal activity* and property used for *criminal activity*" (emphasis added) and CPFA NT, s 3 identifies the objective of the legislation as being "to target the *proceeds of crime* in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities" (emphasis added).

[25] *Donohoe v DPP (WA)* (2011) 215 A Crim R 1 at [89].

[26] A non-conviction based confiscation scheme permits the confiscation of property through civil proceedings and on a civil standard of proof (on a balance of probabilities) without the necessity of securing a criminal conviction against the defendant and without having to establish a nexus between the property to be confiscated and any criminal conduct. See ALRC, n 5; Freiberg A and Fox R, "Evaluating the Effectiveness of Australia's Confiscation Law" (2000) 33(3) ANZJ Crim 239; Lusty D, "Civil Forfeiture of Proceeds of Crime in Australia" (2002) 5(4) JMLC 345; Morris T, "Great Expectations – Australia's New Proceeds of Crime Bill" (2001) 73 *Platypus Magazine* 31; Sherman T, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)* (July 2006); Young S, *Civil Forfeiture of Criminal Property* (Edward Elgar Cheltenham UK, 2009).

proprietary penalty on a defendant who is alleged to have engaged in criminal conduct,[27] but in doing so it pins a badge of criminality on the defendant. That this is achieved through a civil process in which liability is established on the lesser, civil evidentiary standard is questionable.[28]

These concerns aside, confiscations, including those in Western Australia and the Northern Territory, are generally dependent upon the court finding some basis for confiscation. In the context of unexplained wealth confiscations in both jurisdictions,[29] for example, a confiscation is effected pursuant to a declaration by the court that the defendant has unexplained wealth. Such a declaration is made if the court is satisfied that the defendant has unlawfully acquired wealth.[30] While evidence that the defendant has committed a criminal offence is not required, the court is at least required to weigh up the evidence as to whether, on a balance of probabilities, the defendant's wealth was acquired lawfully.[31]

This protection, whether or not it is considered adequate, is not present in the drug-trafficker provisions. To be "declared to be taken to be a declared drug-trafficker" requires no more than charges to be laid and a warrant to be issued, or an arrest to be effected, in respect of a drug-related offence. At no time is the court required to assess the evidence as to whether or not the defendant did in fact commit the relevant offence to either a criminal or civil standard of proof. Furthermore, the court has no discretion in making the declaration.[32] This is particularly concerning in the case of a deceased defendant who clearly is not in a position to lead evidence in the proceedings. The potential exists, therefore, for all the property of an innocent deceased person to be confiscated if the deceased was charged with a drug-related offence, a warrant of arrest was issued, and he or she died before the matter was finally resolved. The resultant impact on the property rights of the deceased's testamentary or intestate beneficiaries may be significant.

All the person's property is automatically confiscated

Once a person is declared a drug-trafficker, *all* his or her property is automatically confiscated by the Crown.[33] On application by the DPP,[34] a court *must* make a declaration that the person's property has been confiscated.[35] The court has no discretion in this regard. In *Western Australia v Roth-Bierne*, 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".[36]

While a primary objective of proceeds of crime legislation is to strip a person of the profits and benefits of his or her criminal endeavours, the drug-trafficker provisions in Western Australia and the Northern Territory operate to confiscate all of a drug-trafficker's property regardless of when it was acquired and regardless of whether or not it can be linked to any criminal activity. The provisions effectively strip a drug-trafficker of the profits and benefits of his or her lawful and unlawful

[27] Bagaric M, "The Disunity of Sentencing and Confiscation" (1997) 21 Crim LJ 191 at 200.

[28] Bell R, "Civil Forfeiture of Criminal Assets" (1999) 63 *Journal of Criminal Law* 371 at 382.

[29] The Western Australian and Northern Territory proceeds of crime confiscations schemes provide for the confiscation of five categories of property: unexplained wealth, drug-trafficker property, crime-used property, crime-derived property, and criminal benefits. The provisions vary for each category.

[30] CPCA WA, s 12(1); CPFA NT, s 71(1).

[31] For a detailed discussion on unexplained wealth confiscations in Australia, see Skead N, "Unexplained Wealth: Indefeasibility and Proceeds of Crime Legislation in Australia" in Carruthers P, Mascher S and Skead N (eds), *Property and Sustainability: Selected Essays* (Thomson Reuters, 2011.

[32] *Emmerson v DPP* (2013) 33 NTLR 1 at [108].

[33] CPCA WA, s 8(1) and (2); CPFA NT, s 94.

[34] The *Corruption and Crime Commission Amendment Bill 2012* (WA) proposes that the Corruption and Crime Commission be given the standing to bring an application for a drug-trafficker confiscation declaration under s 8 of the CPCA WA.

[35] CPCA WA, s 30(2); CPFA NT, s 94(3); *Hendricks v Western Australia* [2002] WASC 86 at [18]-[19].

[36] *DPP (WA) v Roth-Bierne* [2007] WASC 91 at [20]. See also *Emmerson v DPP* (2013) 33 NTLR 1 at [111].

endeavours.[37] Apart from the argument that drug-trafficking is regarded as the more heinous of serious and organised crime targeted by the proceeds of crime legislation, there appears to be no legislative justification for such broad application of drug-trafficker confiscations in these jurisdictions.

Property confiscated includes all property owned, effectively controlled or at any time given away by the person

Property automatically confiscated pursuant to the drug-trafficker provisions in Western Australia and the Northern Territory includes all property owned or effectively controlled or at any time given away by the declared drug-trafficker. The potential net of these confiscation provisions is very far-reaching indeed.

Property effectively controlled by the defendant

Property is effectively controlled by a person if "the property is directly or indirectly subject to the control of the person or is held for the ultimate benefit of the person" whether or not the person holds the legal estate in the property.[38] In determining whether a person effectively controls property, any directorships, trusts and family, domestic and business relationships may be relevant.[39]

In the case of trust property, for example, where a drug-trafficker declaration is made against a beneficiary, the trust property, being held for the "ultimate benefit" of the declared drug-trafficker, may be confiscated. In *Curran v Western Australia (No 2)*,[40] Miffling was declared a drug-trafficker. Although Miffling was not the registered proprietor of real property, on the evidence presented, it was held that the property registered in the names of Miffling's parents was, in fact, held on a constructive trust for the benefit of Miffling and was therefore automatically confiscated under the CPCA WA. Given Miffling was the beneficial owner of the property, this confiscation was appropriate.

However, the corollary may also occur where a drug-trafficker declaration is made against the trustee of trust property. In these circumstances, is the trust property available for confiscation on the basis that it is "owned" or "effectively controlled" by the drug-trafficker trustee? In *Pearson v Western Australia*,[41] Simmonds J suggested not. His Honour reasoned that because beneficial ownership of the trust property lies with the beneficiary, the trustee could not be said to "own" the trust property. Furthermore, his Honour opined that there was no question of the trustee having effective control of the trust property as he/she is "trustee of the subject property on trust for the [beneficiary]".[42] While this reasoning leads to a just outcome in the particular circumstances, its theoretical basis is questionable. The term "owner" is not defined in the CPCA WA. In the absence of an express definition to the contrary, the ordinary meaning of "owner" necessarily extends to holders of both legal and equitable interests in property. Indeed, in the CPFA NT, "owner" is defined in s 5 as "a person who has a legal or equitable interest in the property". As a trustee is the legal owner of trust property, in the absence of an express provision to the contrary, a trustee is an owner of the trust property. Moreover, as legal owner, the trustee effectively controls the trust property. It follows that on a proper construction of the drug-trafficker provisions in Western Australia and the Northern Territory, and contrary to the finding of Simmonds J in *Pearson*, trust property is liable to automatic confiscation on declaration that the trustee is a drug-trafficker despite the fact that the trustee may have no beneficial entitlement to the property.

The provisions in the West Australian and Northern Territory proceeds of crime statutes dealing with the effect of confiscation on rights to registered real property exacerbate the potential impact of

[37] *DPP v Hennig* (2005) 154 A Crim R 550 at [13]; 192 FLR 223; *Campana v Western Australia* [2008] WASC 230; *Emmerson v DPP* (2013) 33 NTLR 1 at [109].

[38] CPCA WA, s 156(1); CPFA NT, s 7(1).

[39] CPCA WA, s 156(2); CPFA NT, s 7(2).

[40] *Curran v Western Australia (No 2)* [2012] WASC 464.

[41] *Pearson v Western Australia* [2012] WASC 102.

[42] *Pearson v Western Australia* [2012] WASC 102 at [41].

confiscations of real property. These provisions state that on the declaration and registration of confiscation of registered real property, the property vests absolutely in the Crown free from all other interests whether registered or unregistered.[43] For example, s 9 of the CPCA WA states:

> (1) Registrable real property that is confiscated … vests absolutely in the State … when–
>
> (a) the Court declares … that the property has been confiscated; and
>
> (b) a memorial … 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 …;
>
> (b) any caveat in force … is taken to have been withdrawn; and
>
> (c) the title in the property passes to the State.

The effect of s 9 and its Northern Territory analogue[44] is clear: on the registration of confiscated real property in the Crown, any mortgage, lease or other interest in the confiscated property is extinguished. This extinguishment occurs notwithstanding the registration of the mortgage, lease or other interest and the fact that the interest holder may be innocent of any wrongdoing. In the case of confiscated trust property, for example, on registration of the confiscation, the legal interest of the trustee as well as the equitable interest of any beneficiaries will be extinguished. While the deprived beneficiaries may have a right of action as against the breaching trustee, given that all the trustee's property would have been automatically confiscated pursuant to the drug-trafficker provisions, such right of action would be worthless.

Property given away by the defendant at any time

In addition to property owned or effectively controlled by a declared drug-trafficker, any property given away by that person at any time is automatically confiscated. The impact of these provisions on innocent donees is concerning. An innocent third party recipient of the gifted property may have acted to his or her detriment in reliance on the receipt of the property. In the case of a gift of a residential property, for example, on becoming the registered owner of the property the donee may sell his or her existing home intending to make the gifted property the family home. The income from the sale of the donee's previous home may be used to make improvements to the new family home. On confiscation of the gifted property the donee may well be left not only homeless, but also out of pocket with no prospect of recompense for the value added to the confiscated property. Further, the donee may have borrowed money on the security of a registered mortgage over the gifted property. On confiscation of the property not only will the donee lose the property but he or she will continue to be personally liable for the outstanding loan moneys. In addition, the lender's registered mortgage interest will be extinguished. The legislation does not provide for the compensation of these innocent victims.

Objections to confiscation and release of confiscated property

The CPCA WA and the CPFA NT both incorporate protective provisions whereby a person affected by a confiscation may object to the confiscation of property,[45] or may apply for the release of confiscated property.[46]

Objections to freezing and confiscation of property

In order to preserve property that is available for confiscation, a court may make a "freezing order" in respect of confiscable property if (a) the person has been charged with an offence, or … is likely to be charged with an offence …; (b) and the person could be declared to be a drug-trafficker.[47] While the

[43] CPCA WA, s 9; CPFA NT, s 131.

[44] CPFA NT, s 131. It should be noted, however, that this section relates only to the extinguishment of registered interests. No mention is made of unregistered interests.

[45] CPCA WA, ss 79, 84; CPFA NT, ss 59-66.

[46] CPCA WA, ss 85-87; CPFA NT, ss 119-121.

[47] CPCA WA, s 43(5); CPFA NT, ss 44(1)(a), 44(2). Once property has been frozen, dealing with that property is "a very serious" offence (CPCA WA, s 50(1); CPFA NT, s 55(1)) unless the offender did not know and could not reasonably have known that the property was restrained (CPCA WA, s 50(4); CPFA NT, s 55(3)). The onus in this regard is on the person who deals with the property and who is taken to have notice that the property is restrained (CPCA WA, s 115(1); CPFA NT; *Bennett*

legislation provides for objections to the freezing and subsequent confiscation of property, the grounds of objection are very limited. A court may only set aside a freezing order if the defendant does not own or effectively control and has not given away the property at any time.[48] However, if the defendant does not own or effectively control and has not given away the property at any time then the freezing order should not have been granted in the first place. These provisions do not go far enough in protecting innocent third parties who, as illustrated above, may be significantly affected by the freezing and subsequent confiscation of property that is owned, effectively controlled or has been given away by the declared drug-trafficker.

Release from confiscation

Frozen property that has been confiscated under the drug-trafficker provisions may be released from confiscation on application by "a person" provided that five conditions are satisfied.[49] These conditions are set out in s 87(1) of the CPCA WA and s 121(1) of the CPFA NT and drastically limit the circumstances in which a court may order the release of confiscated property. The use of the conjunctive "and" suggests that all conditions must be satisfied.

The fifth condition is arguably the most difficult for an applicant to overcome: it must be shown that each other owner (legal or equitable interest holder) of the property is an "innocent party" in relation to the confiscated property.[50] Consider the following scenario: the registered fee simple owner and the registered mortgagee of confiscated land apply for it to be released from confiscation. Both applicants are innocent parties. However, the property is leased to a declared drug-trafficker who is, therefore, not an innocent person. As the tenant has an interest in the land, he or she is an "owner". The tenant being an owner who is not innocent, it is not open for a court to order that the land be released from confiscation. The court may, however, order release of the applicants' respective shares in the land.[51] The tenant's share remains confiscated.

This scenario raises a number of difficulties. First, how does the court value the tenant's share in the land? The legislation provides no guidance. Presumably, the longer the lease, the more valuable the tenant's interest. Secondly, how is the tenant's interest severed from the applicants' interests? Where only the applicants' shares are released from confiscation, the legislation does not allow for the land itself to be released and returned to the applicants. Rather, each applicant is effectively paid out an amount that represents the proportion that the value of each applicant's share bears to the value of the whole property.[52] In the case of a mortgagee, this may not be problematic because the value of the mortgagee's share will be the amount outstanding under the mortgage. However, injustice may occur where the applicant is the registered fee simple owner. If, for example, there is only a year to go on the tenant's lease and it is the intention of the fee simple owner to retake possession of and live in the property at the expiry of the lease, he or she will not be able to do so. Regardless of the proportion of the tenant's share of the confiscated property as determined by the court, the property will remain confiscated. The fee simple owner will be paid out for his or her share but will ultimately lose the property.

& Co v DPP (WA) (2005) 31 WAR 212 at [56]; 154 A Crim R 279). Any dealing in restrained property will have no effect in law or in equity on the rights of the State (CPCA WA, s 51; CPFA NT, s 58). As noted in the Explanatory Memorandum to the *Criminal Property Confiscation Bill 2000* (WA) p 31, this section does not affect the rights of the parties inter partes. For example, if restrained Torrens system land is sold to a purchaser with no notice of the restraining order and the transfer to the purchaser is not registered due to the ultimate confiscation of the property, the purchaser retains the right to bring an action against the vendor for breach of contract.

[48] CPCA WA, s 84(2); CPFA NT, s 65(1). *Rajakovic v Western Australia* [2013] WASC 24; *Credaro v Western Australia* [2012] WASC 317; *Fogarty v Western Australia* [2012] WASC 281.

[49] CPCA WA, s 85(1) and (2); CPFA NT, s 119. The application must be brought within 28 days of the applicant becoming aware or from when the applicant ought reasonably to have become aware of the confiscation.

[50] CPCA WA, s 87(1)(e); CPFA NT, s 121(1)(e).

[51] CPCA WA, s 87(3); CPFA NT, s 121(3). See *BJF v Western Australia* (2011) 210 A Crim R 262 at [24].

[52] CPCA WA, s 87(5); CPFA NT, s 121(5). The WA Act provides that this amount is to be paid out of the confiscation proceeds account. The NT Act provides that payment is to be made from the proceeds from the sale of the property. If the property is not sold, s 121(6) allows the court to order that the property be given to the applicant and to order, further, that the applicant pay to the Crown the value of the share of the property attributable to owners who are not "innocent parties".

Pursuant to the effect of confiscation provisions, on registration of the confiscated land in the Crown, both applicants will be deprived of their interest in the land. This was the outcome, in *Permanent Trustee Co Ltd v Western Australia*.[53] In this case Mr and Mrs Ritchie were the registered joint tenants of land in Perth, Western Australia (the Perth property). Permanent Trustee had a first mortgage over the Perth property. Mrs Ritchie was charged with an offence enlivening the drug-trafficker provisions in the CPCA WA. Mr Ritchie and Permanent Trustee were innocent parties. The Perth property was frozen[54] and the DPP took over its control and management. Once property has been frozen under the CPCA WA, dealing with that property is "a very serious"[55] offence. The freezing of the Perth property constituted default under the registered mortgage. Permanent Trustee objected to the freezing notice and applied for it to be set aside. In addition, both Permanent Trustee and Mr Ritchie brought applications for control and management of the Perth property pursuant to s 91(2) of the CPCA WA which provides as follows:

> 91. Applications by owner for control and management
>
> …
>
> (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.

Permanent Trustee's application was made under s 91(2)(b). Its intention was to sell the Perth property pursuant to its power of sale and thereby satisfy the mortgage debt and discharge the mortgage. Mr Ritchie's application was made under s 91(2)(a). His intention was to rent out the Perth property and use the rental income to keep up with the mortgage payments due to Permanent Trustee.

In dismissing Permanent Trustee's application, McKechnie J confirmed that if any owner of frozen property is not an innocent party, the frozen property may not be released. His Honour stated that "[t]he provisions of s 87 cannot be short-circuited by a mortgagee exercising a right of sale"[56] and that [h]aving regard to the whole scheme of the CPCA … s 91(2) cannot be regarded as empowering a court to grant an unrestricted right of sale when such a sale would defeat the other provisions of the CPCA.[57]

McKechnie J affirmed his decision in *Permanent Trustee* four years later in *Permanent Custodians Ltd v Western Australia*.[58] While acknowledging the unfortunate inequity of the result and being "mindful that a purpose of construction which minimises the interference with legitimate third party rights should be preferred", his Honour considered that on a proper construction of the CPCA WA, a sale of frozen property by a mortgagee pursuant to its power of sale constitutes dealing with the frozen property and is an offence.[59]

Mr Ritchie's application was also dismissed. By renting out the Perth property and receiving the rental income Mr Ritchie would be dealing with the property and therefore committing an offence under the CPCA WA.

In this case the joint tenant, Mr Ritchie, and the mortgagee, Permanent Trustee, were innocent of any wrongdoing. However, because the wrongdoer, Mrs Ritchie, was a joint tenant and therefore an

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[53] *Permanent Trustee Co Ltd v Western Australia* (2002) 26 WAR 1 at [39]; 127 A Crim R 171.

[54] The property was frozen pursuant to freezing notice issued under CPCA WA, s 34.

[55] *Permanent Trustee Co Ltd v Western Australia* (2002) 26 WAR 1 at [39]; 127 A Crim R 171; CPCA WA, s 50(1).

[56] *Permanent Trustee Co Ltd v Western Australia* (2002) 26 WAR 1 at [79]; 127 A Crim R 171.

[57] *Permanent Trustee Co Ltd v Western Australia* (2002) 26 WAR 1 at [82]; 127 A Crim R 171. Compare *Re Criminal Property Confiscation Act 2000: Westpac Banking Corporation* [2001] WASC 365 in which Hasluck J ordered that control and management of frozen mortgaged property be conferred on the mortgagee under s 91 of the CPCA WA with a view to the mortgagee exercising its power of sale in respect of the property. In *Permanent Trustee Co Ltd v Western Australia* at [94] McKechnie J distinguished the earlier case on the basis that none of the parties to that application objected to the granting of the order sought; however, Mr Ritchie opposed the mortgagee's application.

[58] *Permanent Custodians Ltd v Western Australia* [2006] WASC 225.

[59] *Permanent Custodians Ltd v Western Australia* [2006] WASC 225 at [19].

owner of the confiscated property, the fifth condition for the release of the property from confiscation was not satisfied. As noted by McKechnie J, in these circumstances "[t]he most that can be ordered is the amount of the value of the innocent objector's share of the property after confiscation".[60] While the consequences for the mortgagee may not be significant if the amount owing on the mortgage is paid out, the consequences for the fee simple owner (whether joint tenant or otherwise) may be dire. He or she may not be able to replace the confiscated property with a comparable property with the money received as a payout.

It is clear that the objection provisions in the CPCA WA and CPFA NT do not go far enough in protecting the property rights of innocent third parties. The inequity inherent in the drug-trafficker provisions operating in Western Australia was alluded to by Allanson J in *Whittle v Western Australia* when he commented that "more general arguments relating to fairness and justice, are not supported by the text of the legislation. The Act is not ambiguous. Whether a confiscation is fair or just, and whether that confiscation will give rise to hardship, are not considerations to which I may have regard".[61]

ABSENCE OF JUDICIAL DISCRETION AND CONSTITUTIONAL VALIDITY

Aside from concerns regarding their operation and impact, there are several procedural aspects of the drug-trafficker provisions in Western Australia and the Northern Territory that are concerning. In particular, the absence of judicial discretion in making drug-trafficker declarations and consequent confiscation declarations raises questions as to the constitutional validity of the legislation. Chapter III of the Commonwealth *Constitution* prescribes a separation of the powers of the High Court, other Federal Courts, and State Supreme Courts exercising federal judicial powers, from the functions of the political branches of government. This separation of powers is derived from the structure of the *Constitution* including the distribution of legislative power to the Federal Parliament, executive power to the Queen for exercise by the Governor-General and judicial power to the courts.[62]

In *Kable v Director of Public Prosecutions (NSW)*, Gaudron J stated that the *Constitution* provided for "an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth" and that "Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth".[63] Toohey, McHugh and Gummow JJ similarly endorsed the principle that, in accordance with the separation of judicial powers, State Supreme Courts are judicial institutions and may not be required to act in a manner inconsistent with the requirements of Ch III of the *Constitution*.

As to the meaning of repugnancy, incompatibility and inconsistency in this context, Gummow J observed in *Fardon v Attorney-General (Queensland)* that an important indication that a law is repugnant to, or incompatible or inconsistent with, institutional integrity "is that the exercise of the power or function in question is calculated … to undermine public confidence in the courts exercising that power or function".[64]

Although *Kable* concerned the exercise of federal jurisdiction by the Supreme Court of New South Wales, the separation of judicial powers principle articulated in that case extends to the exercise by State Supreme Courts of State judicial powers.[65]

It follows that any federal or State act which purports to deprive a State or federal court of its judicial powers, or which vests the judiciary with legislative or executive power, will be incompatible

[60] *Permanent Trustee Co Ltd v Western Australia* (2002) 26 WAR 1 at [79]; 127 A Crim R 171.

[61] *Whittle v Western Australia* [2012] WASC 244 at [47].

[62] See the *Constitution*, ss 1, 61, 71, respectively.

[63] *Kable v DPP (NSW)* (1996) 189 CLR 51 at 103.

[64] *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [102]. See also *South Australia v Totani* (2010) 242 CLR 1 at [206] (Hayne J); 201 A Crim R 11; *DPP (Cth) v Kamal* (2011) 206 A Crim R 397 at [26] (Martin CJ).

[65] In *Kable v DPP (NSW)* (1996) 189 CLR 51 at 116. See also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547.

with the separation of judicial powers. In regards to depriving a court of its judicial powers, such power may be understood as being "the power which every sovereign authority must of necessity have to decide controversies between its subject, or between itself and its subject, whether the rights relate to life, liberty or property"[66] and "involves the application of relevant law to facts as found in proceedings conducted in accordance with the judicial process".[67]

In *Nicholas v The Queen*, Brennan CJ stated that while "the Parliament can prescribe the jurisdiction to be conferred on a court … it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it"[68] and further that "[a] law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid".[69]

Recently the High Court struck down as unconstitutional under the *Kable* principle State legislation in South Australia and New South Wales aimed at controlling the activities of criminal organisations and their members. In *South Australia v Totani*[70] the majority of the court held that s 14 of the *Serious and Organised Crime (Control) Act 2008* (SA) (SOCC Act) was invalid. Section 14 required a court to make a control order against a defendant on application by the Commissioner of Police if satisfied that the defendant was a member of a "declared organisation". Pursuant to s 10(1) of the SOCC SA, an organisation could be "declared" by the State Attorney-General on the basis that its members associate for criminal purposes and that it "represents a risk to public safety and order". Reflecting the views of the majority, French CJ concluded that "[s]ection 14 represents a substantial recruitment of the judicial function of the … Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action".[71] Section 14 was therefore "repugnant to, or incompatible with the institutional integrity of the court".[72]

In *Wainohu v New South Wales*,[73] a long-time member of the Hells Angels Motorcycle Club sought a declaration that the *Crimes (Criminal Organisations Control) Act 2009* (NSW) (CCOC NSW) was invalid. Much like the SOCC SA, Pt 2 of the COCC NSW empowered a judge acting in an administrative capacity as an "eligible judge" to declare an organisation to be a "declared organisation". On application by the Commissioner of Police, the members of the declared organisation may then be made subject to control orders significantly restricting their freedom of association. Although the COCC NSW required an eligible judge to be satisfied that the members of the organisation associate for criminal purposes and that it "represents a risk to public safety and order" before making the declaration, the judge was not required to give reasons for making or refusing the declaration. The majority of the High Court found the COCC NSW to be invalid on the grounds that public scrutiny of judicial decision-making is central to the judicial function and that the

[66] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

[67] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[68] *Nicholas v The Queen* (1998) 193 CLR 173 at [15]; 99 A Crim R 57.

[69] *Nicholas v The Queen* (1998) 193 CLR 173 at [20]; 99 A Crim R 57. See also *Bodruddaza v Minister for Immigration and Mutlicultural Affairs* (2007) 228 CLR 651; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37; *Thomas v Mowbray* (2007) 233 CLR 307 in which Gummow and Crennan JJ stated that "it may be accepted for present purposes that legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterized judicial activities in the past may be repugnant to Ch III"; *Liyange v The Queen* [1967] 1 AC 259 at 290 in which the Privy Council in finding certain legislation in Ceylon to be an impermissible interference with judicial powers noted that the aim of the legislation "was to ensure that the judges in dealing with these particular persons … were deprived of their normal discretion".

[70] *South Australia v Totani* (2010) 242 CLR 1; 201 A Crim R 11.

[71] *South Australia v Totani* (2010) 242 CLR 1 at [82]; 201 A Crim R 11. Heydon J dissented on the basis that "[t]he *Kable* doctrine is not infringed by legislation requiring the court to make an order if certain conditions are met. Nor is it infringed if among those conditions is a particular decision by the executive … a state legislative requirement that a state court act on the basis of a state of affairs determined by the executive cannot offend the *Kable* doctrine" (at [339]).

[72] *South Australia v Totani* (2010) 242 CLR 1 at [226] (Hayne J); 201 A Crim R 11.

[73] *Wainohu v New South Wales* (2011) 243 CLR 181; 210 A Crim R 45.

effect of Pt 2 was "to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making".[74] Such inscrutability was considered repugnant to or incompatible with the institutional integrity of the court.

In accordance with the *Kable* principle and the related High Court articulations and applications of that principle, it is arguable that, to the extent that drug-trafficker provisions in Western Australia and the Northern Territory deprive a court of any discretion in making drug-trafficker declarations and granting restraining and confiscation orders, such legislation substantially interferes with a court's powers to decide controversies between its subject, or between itself and its subject, whether the rights relate to "life liberty or property"[75] and "appl[ying] relevant law to facts as found in proceedings conducted in accordance with the judicial process"[76] and is therefore unconstitutional. Recent attempts to strike down aspects of proceeds of crime legislation on the basis of the *Kable* principle have, however, had varying success.

In *Re Criminal Proceeds Confiscation Act 2002*, the Queensland Court of Appeal unanimously found that s 30 of the *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA Qld) was "such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth" and was therefore constitutionally invalid.[77]

In essence, s 30 of the CPCA Qld, as it was then framed, directed the Supreme Court of Queensland to hear an application for a restraining order in the absence of any person other than those persons specifically mentioned. "Specified persons" were persons connected with the State: for example, a police officer and a commission officer. The effect of s 30 was to require a court to hear an application for a restraining order in the absence of the defendant and any person who may have an interest in the targeted property. In striking down s 30 as unconstitutional, Williams JA (with whom White and Wilson JJ agreed) considered that:

> Asking a judge to make a decision on such issues in those circumstances makes a mockery of the exercise of the judicial power in question … Effectively the provision directs the Court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially.[78]

The same criticism may be levelled at provisions in proceeds of crime legislation which compel a court to make the order sought.

The Queensland parliament responded to the decision in *Re Criminal Proceeds Confiscation Act 2002* by amending s 30 and incorporating a new s 30A. Although this amendment still allows a court to hear an application for a restraining order ex parte, a court "may direct the State to give notice of the application to a stated person or class of persons" and "[a] person whose property is the subject of the application, and anyone else who claims to have an interest in the property, may appear at the hearing of the application".[79]

In *International Finance Trust Co Ltd v New South Wales Crime Commission*,[80] the High Court considered the constitutionality of a "no notice ex parte" provision in the *Criminal Assets Recovery Act 1990* (NSW) (CARA NSW). Section 10 of that Act required the New South Wales Supreme Court to hear and determine, without notice to any person thereby affected, ex parte applications by the New South Wales Crime Commission for restraining orders. The majority of the High Court held that s 10 was invalid under the *Kable* principle although the reasons for such a finding differed. French CJ

[74] *Wainohu v New South Wales* (2011) 243 CLR 18 at [109]; 210 A Crim R 45.

[75] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

[76] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56].

[77] *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40 at 55.

[78] *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40 at 55.

[79] See *Criminal Proceeds Confiscation Act 2002* (Qld), s 30A(3) and (4).

[80] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319; 212 A Crim R 480.

opined that:

> [t]he power conferred on the commission to choose, in effect, whether to require the Supreme Court of New South Wales to hear and determine an application for a restraining order without notice to the party affected is incompatible with the judicial function of that court. It deprives the court of the power to determine whether procedural fairness, judged by reference to practical considerations of the kind usually relevant to applications for interlocutory freezing orders, requires that notice be given to the party affected before an order is made. It deprives the court of an essential incident of the judicial function. In that way, directing the court as to the manner of the exercise of its jurisdiction, it distorts the institutional integrity of the court and affects its capacity as a repository of federal jurisdiction.[81]

By contrast, Gummow and Bell JJ and Heydon J based their decisions not solely on the mandatory ex parte nature of the application, but also on the absence of any mechanism for the "effective curial enforcement of the duty of full disclosure on ex parte applications"[82] resulting from the failure by the legislature to provide a procedure for the court to hear an application for the "speedy dissolution"[83] of the ex parte restraining order once notice of its grant has been given. Such failure was repugnant to the judicial process.[84]

As might be expected, the New South Wales Parliament amended the CARA NSW in the aftermath of *International Finance*. The amendments, while still permitting ex parte applications for restraining orders, conferred a discretion on the court to require "the Commission to give notice of the application to a person who the Court has reason to believe has a sufficient interest in the application" and further that "[a] person who is required to be notified is entitled to appear and adduce evidence at the hearing of the application".[85] In addition, to address the reasoning of Gummow and Bell JJ and Heydon J, the CARA NSW was amended so as to allow the court to set aside a restraining order on application by a person with an interest in the restrained property if either the Commission fails to satisfy the court that there are reasonable grounds for the relevant suspicion on which the application for the order was based or, more generally, if the order was obtained illegally or against good faith.

Despite the successful application of the *Kable* principle in both *Re Criminal Proceeds Confiscation Act 2002* and *International Finance*, recent decisions of the West Australian and Northern Territory Supreme Courts have avoided the application of this principle by distinguishing previous cases on their facts.

The West Australian Supreme Court of Appeal considered the constitutionality of s 26(4) of the *Proceeds of Crime Act 2002* (Cth) (POCA Cth) in *DPP (Cth) v Kamal*.[86] Much like s 10 of the CARA NSW, s 26(4) requires a court to "consider an application for a restraining notice without notice having been given if the DPP requests the Court to do so". It was argued on behalf of Mr Kamal that s 26(4) is invalid due to it being "a legislative attempt to direct the outcome of an exercise of jurisdiction".[87] The court unanimously rejected this argument on the basis that s 42(5) of the POCA Cth included an adequate safeguard whereby the court could reconsider and revoke a restraining order if satisfied that there were no grounds on which to make the order. In 2010, following the High Court's decision in *International Finance* but before the hearing of the appeal in *Kamal*, s 42(5) was

[81] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [56]; 212 A Crim R 480.

[82] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [97]; 212 A Crim R 480.

[83] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [149] (Heydon J); 212 A Crim R 480.

[84] In a joint judgment, the minority dissented on the grounds that, in their Honours' view, the CARA NSW did not affect the court's inherent general law power in relation to an order made ex parte to reconsider the matter inter partes and set aside the order on the application of a person affected by the ex parte order if satisfied that there are no grounds on which to make the order at the time of considering the revocation application: *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [136]ff; 212 A Crim R 480.

[85] CARA NSW, s 10(A)(4).

[86] *DPP (Cth) v Kamal* (2011) 206 A Crim R 397.

[87] *DPP (Cth) v Kamal* (2011) 206 A Crim R 397 at [136].

amended[88] to include a second ground for revoking a restraining order: where "it is otherwise in the interests of justice to do so". On the basis of s 42(5) of the POCA Cth even prior to its 2010 amendment, the court in *Kamal* concluded that the POCA Cth, unlike the CARA NSW:

> [D]oes not displace, without an adequate alternative judicial remedy, the court's power to discharge any restraining order covering property that was made without notice of the application having been given to the owner. The [POCA Cth] does not require or authorise the courts with jurisdiction under the Act to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power.[89]

Section 26(4) of the POCA Cth is, therefore, constitutionally valid.

DPP (Northern Territory) v Dickfoss[90] concerned the constitutional validity of several aspects of the CPFA NT. It was argued that the practical effect of the crime-used property confiscation provisions of the CPFA NT was to compel a court to make a forfeiture order in respect of lawfully obtained property notwithstanding that the making of the order may be manifestly unjust. It was suggested that in truth the decision to make a forfeiture order of crime-used property under the CPFA NT was made by the executive and not the judiciary. As a result, the argument continued, several features of the CPFA NT operated to impair the institutional integrity of the courts and were thus unconstitutional on the authority of *Kable*.[91]

Mildren J rejected the argument of unconstitutionality. In particular, while acknowledging the harshness of many of the features of the CPFA NT, his Honour determined that "[h]arshness is not in itself an indication of invalidity".[92] His Honour considered that, in making a forfeiture order under the CPFA NT, a court acts in a manner consistent with its judicial character. Relevant to the issue of judicial discretion, Mildren J held that while a court may not appear to have any discretion in granting a confiscation order under the CPFA NT, such an order will only be granted in respect of property restrained under a restraining order and, further, that a court has an unfettered discretion to either grant or refuse a restraining order. In addition, a court is only required to make a confiscation order if certain specified conditions are met. As a result there is "nothing to suggest that this Court is to act as a mere instrument of Government policy"[93] and the decision in *International Finance* "is distinguishable".[94]

While the court in *Dickfoss* upheld the constitutionality of the particular provisions in the CPFA NT complained of, it is arguable that where a court is required to make the order sought without having to satisfy itself as to compliance with specified conditions, as is the case under the drug-trafficker provisions in the CPCA WA and the CPFA NT, the provisions may well be unconstitutional under the *Kable* principle. While there may be nothing to prevent a legislature from requiring a court to make an order provided certain clear and explicit conditions are met, thereby vesting the court with the power to determine whether such conditions have indeed been met, a legislature cannot, through the total exclusion of judicial discretion, direct a court "as to the manner and *outcome* of the exercise of"[95] its jurisdiction. Such a direction would be repugnant to and

[88] The amendment was effected under the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

[89] *DPP (Cth) v Kamal* (2011) 206 A Crim R 397 at [252] (Buss JA); see also at [111] (Martin CJ), [145] (McLure P).

[90] *DPP (NT) v Dickfoss* (2011) 28 NTLR 71; 210 A Crim R 166.

[91] *DPP (NT) v Dickfoss* (2011) 28 NTLR 71 at [106]; 210 A Crim R 166. These features were stated to include: the wide definition of "forfeiture offence"; the very broad definition of "crime-used property"; the independence of the forfeiture procedures from the sentencing procedures; the procedural and substantive restrictions on the defences available to a person with an interest in the "crime-used property"; and the absence of judicial discretion to "ameliorate disproportionality or other unfairness".

[92] *DPP (NT) v Dickfoss* (2011) 28 NTLR 71 at [110]; 210 A Crim R 166.

[93] *DPP (NT) v Dickfoss* (2011) 28 NTLR 71 at [118]; 210 A Crim R 166.

[94] *DPP (NT) v Dickfoss* (2011) 28 NTLR 71 at [118]; 210 A Crim R 166.

[95] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [50]; 212 A Crim R 480 (emphasis added).

incompatible with the exercise of judicial power and would be "calculated, in the sense of apt or likely, to undermine public confidence in the courts exercising that power or function".[96]

Such an outcome would be consistent with the statement by French CJ in *International Finance*:

> Procedural fairness or natural justice lies at the heart of the judicial function … It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it.[97]

It was this reasoning that led the majority in *Emmerson v DPP*[98] to conclude that the drug-trafficker declaration procedure set out in s 36A of the MDA NT was invalid. Section 36A provides that, on application by the DPP, the court must declare a person to be a drug-trafficker if certain conditions are met.

Riley CJ conceded in relation to s 36A that:

> The declaration of a person as a "drug trafficker" pursuant to this section does not necessarily mean that the person is, in fact, a drug trafficker as that expression is widely understood. For example, it would be sufficient if the person had been convicted on three separate occasions, over a ten-year period, of possessing 50g of cannabis on each occasion without there being any suggestion of the person actually trafficking in drugs.[99]

The respondent in *Emmerson* argued that to require the court to make a declaration of fact without proof of the fact declared and with the possibility that the fact may actually be false is "inconsistent with the subsistence of judicial decisional independence" as "[d]ecisional independence is a necessary condition of impartiality".[100] The Chief Justice rejected this argument on the basis that s 36A only requires the court to make a declaration if certain conditions are establish by the DPP. In this regard, the court acts judicially to determine whether the factual basis for the declaration has been established.[101] The majority disagreed.

Kelly J considered a legislative scheme that requires the court to make a declaration on application by the DPP and then applies the harsh consequence of confiscation to that declaration when the fact declared may not be the truth to represent:

> a substantial recruitment of the judicial function of this Court to an essentially executive process: that process being one in which the DPP decides which people … should be declared to be drug traffickers. It gives the neutral colour of a judicial decision to that executive decision by the DPP. In doing so, it authorises the executive to enlist this Court to implement decisions of the executive (the DPP) in a manner incompatible with the Court's institutional integrity.[102]

Similarly Barr J considered that because a drug-trafficker declaration is the necessary first step in the drug-trafficker confiscation process, "the overlapping legislative scheme involves the enlistment of the Supreme Court, to an impermissible extent, to give effect to legislative policy and executive decision-making".[103] While the decision of Barr J in *Emmerson* was limited in application to s 36A of the MDA NT, Kelly J found both this section as well as the consequential automatic confiscation provision in the CPFA NT to be invalid.

The majority decision in *Emmerson* on the unconstitutionality of s 36A of the MDA NT struck a fatal blow to the operation of drug-trafficker confiscations in the Northern Territory where the respondent is declared to be a drug-trafficker. However, confiscations of the property of respondents

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[96] *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [102]. See also *South Australia v Totani* (2010) 242 CLR 1 at [206] (Hayne J); 201 A Crim R 11; *DPP (Cth) v Kamal* (2011) 206 A Crim R 397 at [26] (Martin CJ).

[97] *International Finance Trust Co Ltd v NSWCC* (2009) 240 CLR 319 at [54]; 212 A Crim R 480.

[98] *Emmerson v DPP* (2013) 33 NTLR 1.

[99] *Emmerson v DPP* (2013) 33 NTLR 1 at [31].

[100] *Emmerson v DPP* (2013) 33 NTLR 1 at [32] citing French CJ in *South Australia v Totani* (2010) 242 CLR 1 at [70], [62]; 201 A Crim R 11, respectively.

[101] *Emmerson v DPP* (2013) 33 NTLR 1 at [36].

[102] *Emmerson v DPP* (2013) 33 NTLR 1 at [92].

[103] *Emmerson v DPP* (2013) 33 NTLR 1 at [133].

"declared to be taken to be a declared drug-trafficker"[104] remain unaffected. It is unlikely *Emmerson* will be the final judicial word on the validity of s 36A of the MDA NT. If it is, or if the decision of the majority is confirmed on appeal, one would expect the Northern Territory Parliament to effect legislative amendments to overcome the invalidity, as was the case in Queensland and New South Wales following the findings of unconstitutionality in *Re Criminal Proceeds Confiscation Act 2002* and *International Finance* respectively.

The difficulty in distilling clear principles underlying the invalidity of legislation under the *Kable* principle has been noted by Bagaric.[105] French CJ in *Totani* stated that each case requires a careful consideration of the particular legislation because, as held in *Kable*, "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes".[106] What the case law does suggest, however, is that legislators ought to take "a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings".[107] By requiring the court to make drug-trafficker and confiscation declarations without first having to satisfy itself that certain stated conditions have been met, the West Australian and Northern Territory legislatures did not take a prudential approach when enacting the drug-trafficker provisions of the CPCA WA and the CPFA NT. Since "there is little or no meaningful opportunity for an affected person to participate and challenge",[108] these declarations their constitutional validity is questionable.

IMPACT OF DRUG-TRAFFICKER PROVISIONS IN WESTERN AUSTRALIA AND CROWN PRACTICE

While the meaning and effect of the drug-trafficker provisions in the CPCA WA and CPFA NT is clear and unambiguous, it would appear that, at least in Western Australia, the practice of the Office of the DPP is not in accordance with that meaning and effect, as illustrated in *Pellew v Western Australia*.[109]

The relevant facts in *Pellew* can be stated simply. Mr Pellew and another were the registered owners of land in Broome, Western Australia (the Broome property). The Broome property was mortgaged to Permanent Custodians Ltd. The mortgage was registered. Mr Pellew was convicted of serious drug offences under the MDA WA, and declared a drug-trafficker under s 32A of that Act. The declaration resulted in the automatic confiscation of the Broome property.[110] In accordance with s 30 of the CPCA WA, Kenneth Martin J declared the Broome property confiscated and a memorial thereof was registered.

Under s 9 of the CPCA WA, the result of the registration of the confiscation was to vest title to the Broome property absolutely in the State "free from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates".[111] It follows, therefore, that the registered mortgage in favour of Permanent Custodians Ltd was extinguished on that registration. Notwithstanding this clear and unambiguous effect of the CPCA WA, Pullin JA noted that "[b]y some method of interpretation the State in fact does not treat [s 9 of the CPCA WA] as terminating a mortgagee's interests in property but, as in this case, allows the mortgagee's interests to continue to be recognised and paid out if there is eventually a sale of the property by the State".[112] Seemingly in continued recognition of the mortgagee's extinguished interest in the Broome property, the State requested the mortgagee to sell the property. The State agreed that, on sale of the property, the proceeds would be

[104] CPCA WA, ss 159(2), 160(1)-(2); CPFA NT, ss 8(2), 162.

[105] Bagaric M, "The Revival of Kable Doctrine as a Constitutional Protector of Rights?" (2011) 35 Crim LJ 197.

[106] *South Australia v Totani* (2010) 242 CLR 1 at [69]; 201 A Crim R 11; *Kable v DPP (NSW)* (1996) 189 CLR 51 at [104].

[107] *South Australia v Totani* (2010) 242 CLR 1 at [69]; 201 A Crim R 11.

[108] Bagaric, n 105 at 200.

[109] *Pellew v Western Australia* [2010] WASCA 103.

[110] *Pellew Western Australia* [2010] WASCA 103 at [8].

[111] CPCA WA, s 9.

[112] *Pellew v Western Australia* [2010] WASCA 103 at [11].

applied to discharge the outstanding mortgage debt and any surplus would be paid to the State.[113] Given that the property had been confiscated and, therefore, that the mortgagee no longer held an interest in the Broome property entitling it to sell the property, Pullin JA considered that, in selling the property, the mortgagee was acting as the appointed agent of the State.[114]

Pellew is an interesting case in two respects. First, while it is pleasing that it is the practice of the State to agree to discharge the debts owing by the defendant to the innocent third party mortgagee, there is no statutory obligation to do so and therefore no statutory right on which a mortgagee may rely should this practice change or not be adopted in a particular case. Any statutory property confiscation scheme should ensure the statutory protection of innocent mortgagees.

Secondly, it is unclear from the decision whether the practice of the State in recognising the rights of registered mortgagees extends to the recognition of rights arising under unregistered mortgages and other security interests. *Smith v Western Australia*[115] would suggest that it does not. In that case, the mother and sister of a declared drug-trafficker each claimed an unregistered security interest in the confiscated property of their son/brother. The security interests were alleged to have arisen from loans to him. The State successfully opposed the recognition of the security interests. In his reasons McKechnie J stated that "[t]he inevitable progress following declaration and lodging of the memorial will extinguish any equitable (or other) interest in [the property]".[116] Any State practice extending protection to third-party interest holders and any third-party statutory protections to be incorporated into proceeds of crime legislation must extend protection to all third-party interest holders not just registered mortgagees.

CONCLUSION

The Annual Reports of the Office of the DPP of Western Australia indicate that a significant proportion of property confiscated under the proceeds of crime legislation in Western Australia is from drug-trafficker confiscations.[117] Indeed, since July 2003, over $41 million has been paid into the State's confiscation proceeds account as a result of drug-trafficker confiscation.[118] This represents over 70% of all amounts received from all confiscations.[119] While details of criminal property confiscations in the Northern Territory are not publicly available, it is clear from the Western Australian experience that, from a law enforcement perspective, the drug-trafficker confiscation regime is an effective inclusion in the proceeds of crime legislation.

However, reflecting on the drug-trafficker provisions prompts one to question whether the legislation goes beyond achieving its stated objective and, in doing so, impacts unjustifiably on defendants and third parties. The CPFA NT identifies the object of the legislation as being "to target the proceeds of crime in general and drug-related crime in particular in order to prevent the unjust enrichment of persons involved in criminal activities".[120] As noted by Barr J in *Emmerson* "[m]ost people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay".[121]

While the drug-trafficker confiscation provisions in the Northern Territory and Western Australia certainly do target the proceeds of drug-related crime and thereby prevent the unjust enrichment resulting from that criminal activity, they go significantly further than that: they target the entire asset base of those caught by the provisions, depriving defendants not only of the proceeds of their criminal

[113] *Pellew v Western Australia* [2010] WASCA 103 at [13].

[114] *Pellew v Western Australia* [2010] WASCA 103 at [18].

[115] *Smith v Western Australia* [2009] WASC 189.

[116] *Smith v Western Australia* [2009] WASC 189 at [18].

[117] DPP WA, *Annual Report 2011/12*, p 33.

[118] DPP WA, n 117, p 31; DPP WA, *Annual Report 2003/04*, p 30.

[119] DPP WA, n 117, pp 31, 33.

[120] CPFA NT, s 3.

[121] *Emmerson v DPP* (2013) 33 NTLR 1 at [110].

activity but, also the proceeds of their lawful endeavours, thereby preventing both their unjust and just enrichment. As such, the schemes in question have "travelled a very long way from the principle that crime should not pay".[122]

Of further, and perhaps greater, concern is the potential impact of the schemes on the property rights of innocent third parties. In the 1999 ALRC, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987 (Cth)*[123] it was noted that "it was not the intention of legislature that there be any adverse impact on truly innocent third parties with *bona fide* interests in property". While that may have been the intention, it is clearly not the reality in the Northern Territory and Western Australia.

In their current form, the drug-trafficker confiscation schemes in these two jurisdictions are not striking the appropriate balance between achieving the social, economic and political objectives underlying the legislation, and preserving the rights of innocent third parties. Far too much emphasis is placed on ensuring effective property confiscations at all costs with scant regard being paid to the proportionality, extent and broad impact of those confiscations. This imbalance is the result of a number of striking features of the legislation. The features highlighted in this article include: an absence of meaningful judicial discretion; non-judicial confiscation procedures; stringent prohibitions against dealings in restrained or frozen property; limited objection and release provisions; confiscations extending beyond proceeds of crime; and draconian vesting provisions. Each of these features requires a careful re-examination if the drug-trafficker confiscation schemes in Western Australia and the Northern Territory and are to be regarded as legitimate, justifiable and constitutionally valid responses to the serious issue of drug-related crime.

[122] *Emmerson v DPP* (2013) 33 NTLR 1 at [110].

[123] ALRC, n 5 at [12.3].

Appendix B

Natalie Skead and Sarah Murray, “The Politics of Proceeds of Crime Legislation” (2015) 38:2 UNSW Law Journal 455.

THE POLITICS OF PROCEEDS OF CRIME LEGISLATION

NATALIE SKEAD* AND SARAH MURRAY**

I INTRODUCTION

It is estimated that crime costs Australia nearly $36 billion a year.[1] Drug-related crime represents a significant proportion of this cost[2] and is of increasing global concern.[3] At an international level, the 1987 International Conference on Drug Abuse and Illicit Trafficking and the 1988 United Nations Conference for the Adoption of a Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances responded to this concern by adopting the *Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances*[4] in 1988 to which Australia is a signatory. Article 5 of the *Convention* requires each party to 'adopt such measures as may be necessary to enable confiscation of (a) proceeds derived from [drug-related] offences'.[5] Perhaps of even greater concern than the increasingly high incidence of drug-related crime is the growing threat of terrorism across the globe. In 2012, the Financial Action Task Force, an independent intergovernmental body, recommended that '[c]ountries should adopt measures … to enable their competent authorities to freeze or seize and confiscate … property that is the proceeds of, or used in, or intended or allocated

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1 Kiah Rollings, 'Counting the Costs of Crime in Australia: A 2005 Update' (Research and Public Policy Series No 91, Australian Institute of Criminology, 2008) xi <http://www.aic.gov.au/documents/9/A/3/%7b9A333836-6275-4855-9C0B-20FB05B05992%7drpp91.pdf>.

2 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (2007).

3 United Nations Office on Drugs and Crime, *Organized Crime* <http://www.unodc.org/unodc/pt/organized-crime/index.html>.

4 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 95 (entered into force 11 November 1990) ('*Convention*').

5 Ibid art 5.

for use in, the financing of terrorism, terrorist acts or terrorists organisations'.[6] Like many countries around the world, in an effort to quell these threats Australia has introduced a raft of proceeds of crime confiscation statutes primarily aimed at stripping those involved in criminal activity of their ill-gotten gains and of the property used in carrying out that activity.[7]

Proceeds of crime statutes operate in all Australian jurisdictions and allow for the confiscation of property, both real and personal, in specified circumstances. These circumstances include where a person's wealth is unexplained; where property is used in the commission of a specified offence; where property is derived from the commission of a specified offence; and where a declared drug trafficker 'owns' property. Such confiscation regimes have been described as 'strong and drastic sanction[s]' which 'go beyond the condemnation of goods used in, or derived from, crime'.[8] For example, on introducing the Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2014 (SA), the then South Australian Attorney-General explained that 'all of [a declared drug trafficker's] property is confiscated without any exercise of discretion at all, whether or not it is lawfully acquired and whether or not there is any level of proof about any property at all'.[9]

Legislation confiscating the proceeds of crime not only stops criminals profiting from their nefarious activities but also results in the community obtaining at least some financial benefit from the scourge of crime. This, together with the simplicity and perceived effectiveness of this criminal justice tool as a means of fighting serious crime, makes the proliferation of confiscation legislation inevitable. In the current political climate, there is a strong political incentive and appetite for robust confiscation legislation.[10] In 1989, Justice David Sentelle in the United States described the newly introduced

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6 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Recommendations, February 2012) 12 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>.

7 *Proceeds of Crime Act 2002* (Cth) ('*PoCA Cth*'); *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW) ('*CARA NSW*'); *Criminal Property Forfeiture Act 2002* (NT) ('*CPFA NT*'); *Criminal Proceeds Confiscation Act 2002* (Qld) ('*CPCA Qld*'); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA) ('*CPCA WA*').

8 *A-G (NT) v Emmerson* (2014) 88 ALJR 522, 528 [15], 529 [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Emmerson*').

9 South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014, 82 (John Rau, Attorney-General).

10 See, eg, Natalie Skead, 'Drug-Trafficker Property Confiscation Schemes in Western Australia and the Northern Territory: A Study in Legislation Going Too Far' (2013) 37 *Criminal Law Journal* 296; Brent Fisse, 'Confiscation of Proceeds of Crime: Funny Money, Serious Legislation' in Brent Fisse, David Fraser and Graeme Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book, 1992) 74.

confiscation regime pursuant to the *Racketeer Influenced and Corrupt Organizations Act*, 18 USC §§ 1961–8 (1970) as 'the monster that ate jurisprudence'.[11] Justice Sentelle's concern was the apparent flouting of civil liberties and the absence of due process, natural justice and fairness inherent in such legislation. As highlighted in this article, such a concern is equally pertinent to Australian proceeds of crime legislation. Any legislation depriving a person of his or her privately owned property without compensation is to be introduced and implemented with great caution. The perceived justifications for and desired outcomes of the legislation are to be carefully weighed against the violation of civil rights that the legislation may inflict, not only on the person who is the target of the confiscation proceedings but also, and perhaps more importantly, on innocent third parties affected by the confiscation.

The challenge for legislators lies in ensuring that proceeds of crime legislation is appropriately crafted. The courts' role, while monitoring for constitutional infractions, is typically to interpret and apply the law and to leave its at times seemingly harsh operation to the outcomes of the political process. As noted by McKechnie J in relation to the Western Australian confiscation scheme: '[t]his is the scheme of the [*Criminal Property Confiscation Act 2000* (WA)]. If it is unfair, others must seek to change it. I can only declare the law'.[12]

It is in such an environment that this article argues that political vote-winning 'tough on crime' messaging should not be allowed to compromise robust legislative debate on balancing the protection of individual rights and interests with effective criminal confiscation regimes. The authors propose using the rule of law as a benchmarking framework to guide and inform that debate, thereby resulting in more defensible legislative decision-making. Part II sets out the history, rationale and operation of proceeds of crime regimes in Australia, illustrating respects in which they may be considered 'less than ideal' and the reasons why this might be the case. Part III considers the respective roles of the judiciary and legislature in ensuring the rule of law ideal. Part III(A) explores the courts' role as an umpire in tempering the application of the legislation, ultimately highlighting, however, the expectation that courts defer to executive and legislative policy unless rare constitutional breaches emerge. Part III(B) proposes a normative guide for the legislature in formulating confiscation legislation in Australia which is not only effective and constitutionally valid, but which also sets a standard modelled on rule of law considerations.

11 See Justice David Sentelle, 'RICO: The Monster that Ate Jurisprudence' (Speech delivered at RICO, Rights and the *Constitution*, CATO Institute Conference, Washington DC, 18 October 1989).

12 *Smith v Western Australia* [2009] WASC 189, [18].

II PROCEEDS OF CRIME LEGISLATION: A SHARP POLITICAL TOOL

A Brief History

The confiscation of property from those engaged in criminal activity is not a 20th century innovation. The current proceeds of crime legislation in Australia may be said to have its genesis in the ancient English common law attainder and 'corruption of blood'.[13]

Attainder is believed to have emerged in 1308[14] and became an integral part of English criminal law during the reign of King Richard II. While the processes and procedures for attainder underwent significant changes over the centuries, the purpose and effect remained constant: extinction of civil rights on sentencing for treason and/or felony.

Regarded as the most heinous crimes of all, the only punishment for treason and felony was death. In addition, on conviction of these crimes, the offender was attainted, from the Latin *attinctus*, meaning 'blackened' or 'stained'. The consequence of the attainder was that the offender's real property and hereditary titles were forfeited to the Crown. For treason, the offender's land was forfeited absolutely. For felonies, land was forfeited to the Crown for a year and a day and then, because felonies were considered a breach of the feudal bond, escheated to the Feudal Lord from whom the convict held tenure. A further consequence of attainder was the 'corruption of the blood' which rendered the convict *civiliter mortuus*,[15] unable to inherit or bequeath property. Attainder and 'corruption of blood' resulted in the deprivation of all rights and protections afforded under law.[16]

Over the centuries, attainder came to be regarded as anachronistic and unjustly harsh. Ultimately attainder was abolished in England with the passing of the *Forfeiture Act 1870* (Imp) 33 & 34 Vict, c 23.[17] The enactment of similar abolishing Acts followed in Australia.[18] While attainder is no longer of any

13 *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 85 (Kirby P). See also *Emmerson* (2014) 88 ALJR 522, 528–9 [16]–[18] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

14 L W Vernon Harcourt, *His Grace the Steward and Trial of Peers* (Longmans, Green, and Co., 1907) 388 n 3. See also J G Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge University Press, 1970) 175–205.

15 Sir Edwardo Coke, *The First Part of the Institutes of the Laws of England. Or, a Commentary upon Littleton: Not the Name of the Author Only, but of the Law Itself* (London, 1629) 130a.

16 P Brett and P Waller, *Criminal Law* (LexisNexis Butterworths, 3rd ed, 1971) 110; Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1898) vol 1, 476–7. See also *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 588 (Gibbs J); *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 85–6 (Kirby P).

17 See also C Attenborough, *Harris's Principles of the Criminal Law* (Stevens and Haynes, 7th ed, 1896) 453.

18 See, eg, *Felons (Civil Proceedings) Act 1981* (NSW); *Forfeiture for Treason and Felony Abolition Act 1878* (Vic). See also *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 86 (Kirby P).

application in Australia, it may be argued that the notion of forfeiture attendant upon attainder has been reintroduced through proceeds of crime legislation 'as part of the armoury of the State in responding to particular criminal offences'.[19]

B The Underlying Political Rationale

While proceeds of crime legislation may have its origins in attainder, the purpose and rationale underlying each scheme is quite different. The forfeiture of property under the principle of attainder was ancillary to the imposition of the death penalty for traitorous crimes against the Crown. The forfeiture of property for treason and felony '[had its] source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions'.[20] It follows that, rather than being imposed to achieve some social or political end, forfeiture of property for treason or felony occurred simply as a natural and necessary consequence of the feudal property system then in place. The inevitable execution of the traitor or felon was itself enough to achieve any desired social or political outcome, including deterrence.

By contrast, the introduction of proceeds of crime legislation from the late 20th century was seemingly premised on the worldwide effort to combat organised crime. Justice Moffitt, the then President of the New South Wales Court of Appeal, writing extra-judicially, opined:

> A primary target for attack, if syndicates and their power are to be destroyed, is the money and assets of organised crime. There are many reasons to support this view. The goal of organised crime is money. The financial rewards are very great, and they are greater because the profits are tax-free. Money generates power; it allows expansion into new activities; it provides the motive for people to engage in such crime. It is used to put the leaders in positions, superior to that of others in the community, where they are able to exploit the law and its technicalities and so on. At the same time, it is the point at which organised crime is most vulnerable.[21]

Proceeds of crime legislation was, and still is, intended to provide a four-pronged weapon in the war against organised and other serious crime. First, it aims to *deprive* a person of the financial benefits of engaging in crime. This deprivation is seen as an important aspect of the punishment levelled against persons engaged in such criminal activity.[22] Fisse and Fraser argue that the legislation makes engaging in criminal activity an expensive hobby as its confiscation of 'both capital and income' tend to make it 'unprofitable'.[23]

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19 *DPP (Cth) v Toro-Martinez* (1993) 33 NSWLR 82, 86 (Kirby P). See also *R v Saffron [No 4]* (1989) 39 A Crim R 353, 356 (Kirby P).

20 Sir James Fitzjames Stephen, *History of the Criminal Law in England* (MacMillan, 1883) vol 1, 488.

21 Athol Moffitt, *A Quarter to Midnight – The Australian Crisis: Organised Crime and the Decline of the Institutions of State* (Angus & Robertson, 1985) 143.

22 *R v Fagher* (1989) 16 NSWLR 67; *R v McDermott* (1990) 49 A Crim R 105.

23 Brent Fisse and David Fraser, 'Some Antipodean Skepticisms about Forfeiture, Confiscation of Proceeds of Crime and Money Laundering Offenses' (1993) 44 *Alabama Law Review* 737, 738.

Secondly, it seeks to *deter* reoffending by expunging the advantages of crime in keeping with the old adage 'crime doesn't pay'.[24] In the High Court case of *International Finance Trust Co Ltd v New South Wales Crime Commission*, French CJ acknowledged

> the widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity which may result in the derivation of large profits and the accumulation of significant assets.[25]

The tale of Bruce Richard 'Snapper' Cornwall is illustrative. Cornwall, having been sentenced to 23 years imprisonment for drug offences, gloated in a letter to one of his protagonists: 'I don't give a fuck what they do to me as long as we keep safe all that we have worked for'.[26] The risk of not only imprisonment but, if Snapper Cornwall is to be believed, the permanent removal of the fruits of illegal endeavour, is likely to make a life of crime far less appealing.

Thirdly, confiscating the proceeds of crime is said to *incapacitate* criminal activity by targeting its economic base and eradicating the working capital available and necessary to finance further criminal activity.[27]

Finally, through extensive information gathering provisions,[28] it aims to assist law enforcement bodies *trace* the money trail and thereby the crime chain. In 1983, Frank Costigan QC stated:

> The first thing to remember is that the organisation of crime is directed towards the accumulation of money and with it power. The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organised criminals is to follow their money trails. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities.[29]

These compelling justifications for proceeds of crime legislation have resulted in many nations worldwide employing such crime-fighting legislative

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24 See *Riggs v Palmer*, 115 NY 506, 514 (Earl J) (1889), where the view of the majority was that a person 'shall not acquire property by his crime, and thus be rewarded for its commission'.

25 (2009) 240 CLR 319, 345 [29] ('*International Finance Trust*').

26 Ian Temby, 'The *Proceeds of Crime Act*: One Year's Experience' (1989) 13 *Criminal Law Journal* 24, 30.

27 John Thornton, 'Objectives and Expectations of Confiscation and Forfeiture Legislation in Australia – An Overview' (1994) 1 *Canberra Law Review* 43, 46.

28 *PoCA Cth* ch 3; *Confiscation of Criminal Assets Act 2003* (ACT) pt 12; *Confiscation of Proceeds of Crime Act 1989* (NSW) pt 4; *CARA NSW* pt 4; *Criminal Assets Confiscation Act 2005* (SA) pt 6; *Crime (Confiscation of Profits) Act 1993* (Tas) pt 5; *Confiscation Act 1997* (Vic) pt 13; *CPCA WA* pt 5.

29 Frank Costigan, 'Organised Fraud and a Free Society' (1984) 17 *Australia and New Zealand Journal of Criminology* 7, 12. See also Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009) 98 [5.4].

tools[30] with significant historical claims.[31] Certainly, they reflect the stated underlying rationale for the introduction, and continued refinement and development, of proceeds of crime legislation in Australia. Section 3 of the *Proceeds of Crime Act 1987* (Cth), for example, sets out a clear statement of the three principal objectives of the initial Commonwealth legislation:

> (1) The principal objects of this Act are:
>
> (a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories;
>
> (b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and
>
> (c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property.

A similar but more comprehensive statement of objectives has been included in the *Proceeds of Crime Act 2002* (Cth).[32] Analogous objects provisions are also found in the statutes of a number of Australian states and territories.[33]

In addition to the much repeated punishment-, deterrence-, incapacitation- and enforcement-related policy outcomes, one cannot ignore the ancillary social benefits underlying the confiscation of proceeds of crime: the importance of confiscation to the community's perception of and confidence in law enforcement agencies and strategies; the removal of prohibited goods from the streets; compensating society for the hardship and suffering that crime inflicts on both individuals and the community;[34] and reimbursing society for the human and financial expense of fighting organised crime.[35]

A further potential benefit (or, perhaps even, objective) of proceeds of crime legislation[36] is the contribution it makes to consolidated revenue. During the

30 Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014).

31 *International Finance Trust* (2009) 240 CLR 319, 344 [25] (French CJ).

32 See *PoCA Cth* s 5.

33 *Confiscation of Criminal Assets Act 2003* (ACT) s 3; *CARA NSW* s 3; *CPFA NT* s 3; *CPCA Qld* s 4; *Confiscation Act 1997* (Vic) s 1.

34 See *R v Allen* (1989) 41 A Crim R 51, 56.

35 For a detailed discussion on the justification for proceeds of crime legislation, see David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5 *Journal of Money Laundering Control* 345, 345; Arie Freiberg, 'Confiscating the Proceeds of White-Collar Crime' (Paper presented at Australian Institute of Criminology Conference, Canberra, 20–23 August 1991) 4; Mirko Bagaric, 'The Disunity of Sentencing and Confiscation' (1997) 21 *Criminal Law Journal* 191; Thornton, above n 27.

36 In 1996, the Australian National Audit Office pointed out that when introducing the *Proceeds of Crime Act 1987* (Cth), the federal Attorney-General identified the three principal financial objectives of the legislation as being 1) to provide mechanisms to return significant revenue to the Commonwealth; 2) to provide significant financial benefit to the Commonwealth, the states and foreign countries with which Australia has mutual assistance arrangements; and 3) to return benefits which outweighed it administrative costs: see Australian National Audit Office, 'Recovery of Proceeds of Crime' (Audit Report No 23, 1996) 5; Arie Freiberg and Richard Fox, 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33 *Australia and New Zealand Journal of Criminology* 239, 244.

financial year ending 30 June 2012 alone, over $45 million was confiscated under the *PoCA Cth*.[37] Since its commencement on 1 January 2003, property in excess of $180 million has been confiscated under this statute.[38] Confiscation in the states and territories has varied dramatically.[39] Although the value of property confiscated pursuant to proceeds of crime confiscations may be considerable, it is questionable that this financial windfall is the driver of the legislation as the cost of administering, implementing and enforcing the confiscations far outweighs the financial benefits received.[40]

Given the multitude of political and social benefits of proceeds of crime legislation, it is not surprising that there has been an increasing parliamentary focus across Australia on the effectiveness of such legislation as a weapon

37 Director of Public Prosecutions (Cth), *Annual Report* (2011–12) 140, Table 5 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2011-2012.pdf>.

38 Director of Public Prosecutions (Cth), *Annual Report* (2010–11) 156, Table 5 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2010-2011.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2009–10) 156, Table 5 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2009-2010.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2008–09) 129, Table 5 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2008-2009.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2007–08) 100, Table 5 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2007-2008.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2006–07) 79 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2006-2007.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2005–06) 79 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2005-2006.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2004–05) 55, Table 6 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2004-2005.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2003–04) 45, Table 6 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2003-2004.pdf>; Director of Public Prosecutions (Cth), *Annual Report* (2002–03) 41, Table 6 <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2002-2003.pdf>.

39 At the upper end of the scale, the New South Wales Crime Commission reported over $19 million recovered under the *CARA NSW* in the financial year ending 30 June 2013: New South Wales Crime Commission, *Annual Report* (2012–13) 13–14 <http://www.crimecommission.nsw.gov.au/files/annual_report_2012-2013.pdf>. In addition, property valued at $1.1 million was confiscated under the *Confiscation of Proceeds of Crime Act 1989* (NSW): Office of the Director of Public Prosecutions (NSW), *Annual Report* (2012–13) 40 <http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2012-2013-annual-report.pdf?sfvrsn=6>. Recovery in other jurisdictions in the same period amounted to $16.98 million in Queensland: Office of the Director of Public Prosecutions (Qld), *Annual Report* (2012–13) 16 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0020/215921/ODPP-Annual-Report-2012-13.pdf>; $14.2 million in Victoria: Office of the Director of Public Prosecutions (Vic), *Annual Report* (2012–13) 19 <http://www.opp.vic.gov.au/Home/Resources/Annual-Report-2011-12>; $9.36 million in Western Australia: Office of the Director of Public Prosecutions (WA), *Annual Report* (2012–13) 4 <http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2012_13.pdf>; $2.32 million in South Australia: Director of Public Prosecutions (SA), *Annual Report* (2012–13) 26 <http://www.dpp.sa.gov.au/03/2012-2013.pdf>; and over $1.87 million in the Australian Capital Territory: Director of Public Prosecutions (ACT), *Annual Report* (2012–13) 23 <http://www.dpp.act.gov.au/__data/assets/pdf_file/0010/497377/2012-2013-Annual-Report.pdf>. Confiscation figures for Tasmania and the Northern Territory are not publicly available.

40 Vivienne O'Connor and Colette Rausch (eds), *Model Codes for Post-conflict Criminal Justice* (United States Institute of Peace Press, 2007) vol 1, 163.

against serious and organised crime.[41] To this end, the legislation in virtually all jurisdictions has been subject to ongoing scrutiny and reform. The reforms have resulted in progressively more expansive legislation. The initial conviction-based schemes of the mid-1980s have, due to their perceived inadequacy,[42] been supplemented with civil regimes which are not dependent on criminal prosecution and conviction.[43] Confiscation legislation has become an additional tool to the standard criminal justice weaponry, and is an adjunct to conviction-based legislative devices.[44]

An example of the recent expansion of proceeds of crime frameworks is the federal government's introduction on 5 March 2014 of the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth). This amendment is aimed at 'ensuring the Commonwealth has the toughest framework possible to target criminal proceeds'[45] by strengthening the operation of the unexplained wealth provisions including 'removing a court's discretion to make … orders once relevant criteria are satisfied'.[46] In introducing this Bill, the federal Minister for Justice commented that

> serious and organised crime poses a significant threat to Australian communities. The government is committed to ensuring our nation is safe and secure, and to taking tough steps to strike at the heart of organised crime … Unexplained wealth laws turn the tables on criminals who live off the benefits of their illegal activities at the expense of hardworking Australians.[47]

State examples include the Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2014 (SA) which seeks to introduce drug-trafficker confiscations into the South Australian legislative regime, and the *Criminal*

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41 See, eg, Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999); Parliamentary Joint Committee on the Australian Crime Commission, *Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 29; Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]* (2009); Tom Sherman, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)* (Attorney-General's Department, 2006); Standing Committee of Attorneys-General, Parliament of Australia, *Communiqué* (16–17 April 2009). See also Freiberg and Fox, 'Effectiveness of Australia's Confiscation Laws', above n 36; Lusty, above n 35, 345.

42 See, eg, Freiberg and Fox, 'Effectiveness of Australia's Confiscation Laws', above n 36.

43 Lorana Bartels, 'A Review of Confiscation Schemes in Australia' (Technical and Background Paper, Australian Institute of Criminology, 2010) 2.

44 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic). See Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian & New Zealand Journal of Criminology* 44, 50.

45 Michael Keenan, 'Tighter Laws to Capture Spoils of Criminal Activities' (Media Release, 5 March 2014) <http://www.ministerjustice.gov.au/Mediareleases/Pages/2014/First%20Quarter/5March2014Tighterlaws tocapturespoilsofcriminalactivities.aspx>.

46 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) 2.

47 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 March 2014, 1641 (Michael Keenan).

Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013 (Qld) which inserts unexplained wealth confiscations into the Queensland regime, with retrospective effect.

C Australian Regimes of 'Extreme[s]'

While the political and social benefits underlying proceeds of crime legislation appear irrefutable, these benefits must be viewed in light of the effect that the legislation may have on individual rights, including property rights. In particular, potential hardship can result to a defendant's innocent family members and other blameless third parties who may have an interest in the targeted property. As Barr J in *Emmerson v Director of Public Prosecutions (NT)* noted:

> Most people accept the idea that criminals should not be permitted to retain the proceeds of their criminal enterprises. Crime should not pay. If crime did pay, there would be no incentive for law-abiding members of the community not to commit crimes. However, the overlapping legislative scheme in question has travelled a very long way from the principle that crime should not pay.[48]

The operation of the legislation tends to be unremitting and notoriously complex. In *Centurion Trust v Director of Public Prosecutions (WA)*, Owen JA, in attempting to construe the Western Australian confiscation provisions, commented that

> in my time on the Bench I have seldom come across a piece of legislation as perplexing and difficult to construe as this one … The legislation has previously been described as draconian and some of the concepts that emerge from it can justifiably be described as extreme.[49]

This trend towards increasingly exacting proceeds of crime legislation is pervasive. The legislative features making this so are many and varied. Three general concerns arising from these schemes are discussed below.

First, it may be argued that, although civil in name, proceeds of crime confiscation proceedings are essentially criminal in nature.[50] Not only does confiscation effectively impose a proprietary penalty on a defendant who has engaged in criminal conduct[51] but, in doing so, it pins a badge of criminality on the defendant. This is achieved via a civil court system in which liability is established on the lesser evidentiary standard: a balance of probabilities.

48 (2013) 33 NTLR 1, 38 [110] (Barr J).

49 (2010) 201 A Crim R 324, 343 [75]. See also *R v Bolger* (1989) 16 NSWLR 115, 117–18 (Allan J).

50 R E Bell, 'Civil Forfeiture of Criminal Assets' (1999) 63 *Journal of Criminal Law* 371, 382; Freiberg, 'Criminal Confiscation, Profit and Liberty', above n 44; Liz Campbell, 'The Recovery of "Criminal" Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm' (2010) 41 *Victoria University of Wellington Law Review* 15; Carol S Steiker, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 85 *Georgetown Law Journal* 775; Anthony Davidson Gray, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15 *New Criminal Law Review: An International and Interdisciplinary Journal* 32.

51 Bagaric, above n 35, 200–1.

Regardless of the objections that may be levelled at dressing what are essentially criminal proceedings in civil robes, the inescapable fact is that all Australian jurisdictions have now adopted the recommendations of the various Royal Commissions[52] undertaken in the early 1980s and introduced non-conviction based, civil confiscation proceedings into their proceeds of crime statutes.

Being civil in nature, confiscation proceedings import a civil standard of proof and civil rules of evidence, necessarily making the Crown's job in securing a confiscation all the easier. Some statutes go even further in assisting the Crown in this regard. For example, section 136(2) of the *Criminal Property Forfeiture Act 2002* (NT) permits decisions under the Act to be based on 'hearsay evidence or hearsay information'.

Moreover, non-conviction based proceeds of crime legislation shifts the burden of proof from the Crown to the defendant. Unexplained wealth confiscations provide a useful example. As the Commonwealth Parliamentary Joint Committee on Law Enforcement stated:

> Unexplained wealth laws are controversial because they reverse the longstanding legal tradition of the presumption of innocence. Under most unexplained wealth regimes, once certain tests or thresholds have been satisfied, it is the respondent who must prove that wealth has been legitimately acquired.
>
> 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 …[53]

By way of example, under the *CPCA WA*, wealth is 'unexplained' and therefore confiscable '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'.[54] However, the onus is not on the state to establish that the defendant's wealth was not lawfully acquired. Rather, it is presumed that the wealth was not.[55] The *CPCA WA* thereby effectively shifts the onus onto the defendant to

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52 See, eg, New South Wales, Royal Commission of Inquiry in Respect of Certain Matters Relating to Allegations of Organised Crime in Clubs, *Final Report* (1974); Queensland, Tasmania, Victoria and Western Australia, Australian Royal Commission of Inquiry into Drugs, *Final Report* (1980); Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report* (1984); New South Wales, New Zealand, Queensland and Victoria, Royal Commission of Inquiry into Drug Trafficking, *Final Report* (1983); Commonwealth and New South Wales, Royal Commission of Inquiry into the Activities of the Nugan Hand Group, *Final Report* (1985).

53 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (2012), 9 [2.18]–[2.19].

54 *CPCA WA* s 12(1).

55 *CPCA WA* s 12(2). It is not clear from this section whether the burden placed on the defendant is an evidentiary burden only or whether the defendant bears the legal burden of proof. The section states that '[a]ny 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' (emphasis added). The use of the term 'establishes' would suggest that it is not sufficient for the defendant to simply lead evidence that his or her wealth was lawfully acquired, this fact must be 'established', that is, proved by the defendant. Thus analysed, the defendant has a legal burden of proof in this regard.

prove that his or her wealth was lawfully acquired. In addition, pursuant to section 28(2) of the *CPCA WA,* there is a presumption in relation to targeted property that 'the respondent effectively controlled the property at the material time, or gave the property away, unless the defendant establishes the contrary'. The burden therefore rests with the defendant to establish that the targeted property was not under his or her effective control or was not given away by him or her at any time and is consequently not liable to confiscation.

The *CPCA WA* not only casts a burden of proof on the defendant. In some circumstances, innocent third parties who are caught up in the proceedings by having the misfortune of holding an interest in property restrained under the unexplained wealth provisions may also be saddled with such a burden. Once property has been restrained under the *CPCA WA*, dealing with that property by any person is an offence[56] unless the person did not know and could not reasonably have known that the property was frozen.[57] The burden in this regard is on the person, often a third party, who deals with the property who is taken to have notice that the property is restrained.[58]

These evidence and proof features of proceeds of crime legislation may be said to fly in the face of Australia's fundamentally adversarial system of law and undermine the notion that a defendant is 'innocent until proven guilty'.

A second concern is the potential for the restraint and confiscation of property, pursuant to proceeds of crime legislation, to impact on the property rights of blameless third parties. This potential is particularly evident in relation to confiscated Torrens land. Each of the Australian proceeds of crime statutes provides for the vesting of legal title to confiscated land (or an estate or interest in land) in the Crown on compliance with registration requirements.[59] There is little, if any, uniformity in the effect of these vesting provisions. In particular, there is little, if any, uniformity on the impact of registration and vesting of the Crown's interest on pre-existing estates or interests.

In some jurisdictions, the statute expressly provides that, on registration, confiscated land vests in the Crown free 'from all interests, whether registered or not, including trusts, mortgages, charges, obligations and estates, (except rights-of-way, easements and restrictive covenants)'.[60] In these jurisdictions, the registration of the confiscation effectively extinguishes all existing estates and interests, registered and unregistered, in the confiscated land held by third parties.

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56 *CPCA WA* s 50(1).
57 *CPCA WA* s 50(4).
58 *CPCA WA* s 115(1). See *Bennett & Co (A Firm) v DPP (WA)* (2005) 31 WAR 212, 224 [56] (The Court).
59 Pending registration, title to the confiscated land will vest in the Crown in equity only, although the Director of Public Prosecutions may take other steps to protect the Crown's equitable interest in the property, including lodging a caveat over the property. See, eg, *PoCA Cth* ss 67(1), 96(1); *Confiscation of Criminal Assets Act 2003* (ACT) s 110; *Criminal Assets Confiscation Act 2005* (SA) s 90(2).
60 *CPFA NT* s 131(2); *CPCA WA* s 9.

In other jurisdictions, the legislation provides that, on registration of the confiscation, the land vests in the Crown as proprietor subject to all registered interests.[61] While existing registered interests over the land are protected, registration of the Crown as proprietor of the land operates to automatically extinguish any unregistered interests in the confiscated property held by third parties.[62]

By contrast, the vesting provisions in the *Confiscation Act 1997* (Vic) provide that, on confiscation, property vests in the Crown

> subject to every mortgage, charge or encumbrance to which [the confiscated property] was subject immediately before the order was made … and to – in the case of land, every interest registered, notified or saved under the *Transfer of Land Act 1958* …[63]

The Victorian legislation is exemplary in this regard. By using the conjunctive 'and' it effectively provides that, on vesting in the Crown, confiscated land remains subject to *all* pre-existing estates and interests, not just those that have been registered. This necessary and entirely appropriate third party protection is absent from the regimes in other jurisdictions.

It may be suggested that, while perhaps harsh, fault and responsibility for the consequences of confiscation lie squarely with the defendant rather than the legislature. It is conceded that confiscation pursuant to proceeds of crime legislation is a result of the defendant's own conduct and, therefore, it may be considered that regardless of how severe it may be, the impact of confiscation on the property rights of the defendant is his or her fault and responsibility and is,

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61 *Confiscation of Proceeds of Crime Act 1989* (NSW) s 19(1)(b); *CPCA Qld* s 215(3) read with *Land Title Act 1994* (Qld) s 184(1); *Crime (Confiscation of Profits) Act 1993* (Tas) s 17(1)(c). The proceeds of crime statutes of the Commonwealth, South Australia and the Australian Capital Territory are silent on the effect of the confiscated and vesting of Torrens land in the Crown on existing estates or interests. It is suggested that pursuant to the Torrens statutes in these two jurisdictions, the registered title of the Crown would similarly be subject to existing registered encumbrances but free from all unregistered estates and interests.

62 In *Leros Pty Ltd v Terrara Pty Ltd*, the High Court of Australia held unanimously that an unregistered and uncaveated interest will be defeated on the registration of a subsequent inconsistent dealing and, further, that '[o]nce that interest is defeated by registration of a subsequent inconsistent dealing bringing about the registration of a new proprietor, the first interest is extinguished for all purposes and cannot be asserted against any later proprietor': (1992) 174 CLR 407, 418–19 (Mason CJ, Dawson and McHugh JJ).

63 *Confiscation Act 1997* (Vic) ss 3, 41(2). The *Confiscation Act 1997* (Vic) incorporates a rather curious feature in s 42. Under this section, if a court is satisfied that a security interest over confiscated property was created to limit the effect of the confiscation order, the court may discharge that security interest. It is unclear what is meant by 'discharge' in this regard as the term is not defined in the Act. Applying its ordinary meaning, discharge refers to the right to remove the mortgage as an encumbrance over the property on paying all that is owing under the mortgage debt: see generally LexisNexis, *Halsbury's Laws of Australia* (at 29 August 2014) 295 Mortgages and Securities, '9 Right to Discharge Mortgage' [295-6390]. On this definition, it would seem that s 42 of the *Confiscation Act 1997* (Vic) requires the state to pay out the outstanding mortgage debt. However, if the security interest was created to limit the effect of the confiscation order, perhaps the legislators envisaged that the security interest be discharged without settling the security debt. Clarity is required in this regard.

therefore, justified. In this sense, one may liken confiscation to imprisonment; it is the price you pay for engaging in criminal activities. The same analogy cannot be drawn, however, with the impact of proceeds of crime confiscation on the property rights of innocent third parties. This is a direct result of the expansive operation of the legislation. There is no analogous impact on third parties resulting from imprisonment – it is the offender and the offender alone who is imprisoned. Under proceeds of crime, it may be an innocent third party's property that is affected by the confiscation.

A third concern with Australian proceeds of crime legislation is the high incidence of effectively non-judicial confiscations. A number of Australian jurisdictions incorporate *both* conviction-based and non-conviction based confiscation procedures into their proceeds of crime statutes.[64] In these jurisdictions, conviction-based confiscation is typically automatic. That is, on conviction of a specified category of criminal offence,[65] any and all crime-used property, crime-derived property and criminal benefits are automatically confiscated without the need for a court order.[66] The confiscation in these instances is mandatory and administrative, without any opportunity for argument and adjudication before a competent court. Judicial involvement is limited to making a declaratory order confirming the automatic confiscation. There is no discretion as to whether the order should or should not be made. It must be made. Given the potential consequences of a confiscation order on the property rights of a range of parties, as discussed above, it is argued in Part III(B) of this article that at every stage of the confiscation process (and particularly at the stage of final confiscation) the courts should be vested with a discretion to consider the ramifications of the confiscation and vary orders made. This should be the case regardless of whether the defendant has been convicted of the relevant offence or not. Judicial involvement and discretion in the confiscation process is not recommended only on the basis of legal principle but also for the protection of blameless family members and third parties.

The features of proceeds of crime legislation discussed above illustrate just three aspects of the legislation that has earned it the reputation of being 'extreme' and 'harsh'.[67] Others, including the retrospective operation of the legislation, the

64 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic).

65 See, eg, *PoCA Cth* s 92; *Confiscation of Criminal Assets Act 2003* (ACT) s 58(2); *CPCA Qld* s 17; *Criminal Assets Confiscation Act 2005* (SA) s 4; *Confiscation Act 1997* (Vic) pt 3 div 2, sch 2.

66 Automatic confiscation is also available under the non-conviction based scheme contained in the *CPCA WA* ss 7, 30.

67 See, eg, *Burnett v DPP (NT)* (2007) 21 NTLR 39, 67 [40] (Martin (BR) CJ); *Centurion Trust Co Ltd v DPP (WA)* (2010) 201 A Crim R 324, 343 [75] (Owen JA); *DPP (SA) v George* (2008) 102 SASR 246, 291 [214] (White J); Explanatory Memorandum, Proceeds of Crime Bill 2002 (Cth) 33; South Australia, *Parliamentary Debates,* House of Assembly, 18 May 2011, 3744 (Anastasios Koutsantonis).

absence of judicial discretion and the introduction of prosecutorial discretion, are discussed in Part III(B) below.

D Walking the Law and Order Tightrope

The 'build a better mouse-trap' approach to being 'tough on crime' is far from new. According to Freiberg:

> when a moral panic is created … when the end of civilization as we know it seems nigh, when a social object, like the elimination of organized crime or drug-trafficking seems worthy enough, the pressure to create legislation that allow fewer rights to individuals is intense and often proves irresistible.[68]

Hogg and Brown, in their classic 1998 work, described the constant law and order barrage, 'the uncivil politics of law and order', as the staple of the Australian political machine.[69] Quite apart from its utility, proceeds of crime legislation is an ideal tool for conveying a political party's community safety and drug-fighting platform.[70] Confiscating the proceeds of crime incapacitates criminals financially, destroys their business model and also allows society to recoup some of the felonious spoils. This appeal means that it is unlikely to fall off the politicians' radar any time soon.[71] As noted above, while there is considerable variation in proceeds of crime legislation around Australia, ongoing legislative reform in this area frequently sees jurisdictions keeping up with more extreme provisions introduced elsewhere.[72]

Research conducted overseas suggests that confiscation legislation, when participants are aware of it, has incredibly high levels of popular support.[73] Popular support is so high that condemnation of proceeds of crime regimes is often aligned with 'being "soft on crime"' or as showing 'more interes[t] in the civil liberties of drug dealers and criminals than in helping the Government to defend communities'.[74]

The wide gamut of proceeds of crime legislation is also favoured by justice and prosecuting agencies as its breadth, including the lower burden of proof

68 Freiberg, 'Criminal Confiscation, Profit and Liberty', above n 44, 69. For a discussion of civil forfeiture legislation as a response to a 'moral panic' focused on organised crime in Ireland, see John Meade, 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture' (2000) 10 *Irish Criminal Law Journal* 11.

69 Russell Hogg and David Brown, *Rethinking Law & Order* (Pluto Press, 1998) 1–2.

70 See, eg, Grant Wardlaw, 'Drug Control Policies and Organised Crime' in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book, 1988) 152–3.

71 Richard Fox, 'Future Directions in Criminal Law' (Paper presented at the 4th National Outlook Symposium on Crime in Australia: New Crimes or New Responses, Canberra, 21–22 June 2011) 11; Paul J Larkin, Jr, 'Public Choice Theory and Overcriminalization' (2013) 36 *Harvard Journal Law & Policy* 715, 791.

72 South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014 (John Rau, Attorney-General) 82.

73 Campbell, above n 50, 34. See also Eva Gottschalk, UK Home Office, *Public Attitudes to Asset Recovery and Awareness of the Community Cashback Scheme* (Results from Opinion Poll, September 2010).

74 Campbell, above n 50, 32.

associated with civil provisions, can make confiscations more successful and orders easier to achieve than standard criminal prosecutions.[75]

There are two obvious responses to the concern that misplaced law and order rhetoric is driving the proceeds of crime legislative machine. First, proceeds of crime regimes are recognised internationally as a valid tool to fight crime and organised criminal activities. Secondly, the Australian democratic process is designed to allow voters to elect their representatives, who in turn require majority parliamentary support for their criminal justice legislative platforms. The difficulty with these responses is that they assume that the parliamentary process will pursue crime-fighting amendments while balancing other considerations such as due process, individual rights and proportionate responses to crime. The law and order politics of criminal confiscations means that such assumptions are not necessarily accurate and that some legislative prudence guided by normative standards informed by the rule of law is required.

III A BALANCED PROCEEDS OF CRIME REGIME: A JUDICIAL OR LEGISLATIVE FUNCTION?

In a political climate in which a strong stance against crime garners the confidence of the electorate and wins votes, a defensible and lawful proceeds of crime regime is the responsibility of all arms of government. The role of the courts, however, is limited to applying the law and intervening at the margins where questions of constitutionality arise. It is the authors' view that the legislature bears the ultimate responsibility for ensuring that the politics of law and order, and the executive's policy agenda, does not compromise the integrity of confiscation legislation. In exploring the respective roles of the judiciary and legislature in this context, this Part proposes a normative guide for the formulation of proceeds of crime legislation which is not only effective and constitutionally valid, but which also sets a standard modelled on rule of law considerations.

A The Courts as Umpire

The courts are arguably the most visible part of the criminal justice process. High-profile cases are the routine diet of the news media with trials, convictions and sentences often being the subject of considerable public comment. However, the conspicuousness of the courts can lead to a perception that the courts have a substantive role to play in criminal policy. While judicial review by the courts

75 Ibid 35; Freiberg, 'Criminal Confiscation, Profit and Liberty', above n 44, 50; Tamara R Piety, 'Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process' (1991) 45 *University of Miami Law Review* 911, 924.

plays a crucial safeguarding role,[76] in most cases, rather than invalidating legislation, the courts apply and interpret the law as enacted by Parliament and as implemented by the executive. The experience of proceeds of crime legislation is no exception to the fact that courts, outside constitutional limits and established common law interpretative principles, must defer to legislative policy.[77]

For example, in the recent High Court decision in *Attorney-General (NT) v Emmerson* considering the Northern Territory confiscation legislation, the majority stated that 'whether … punishment fits the crime … is a matter for the legislature. It is irrelevant (and wrong) for the courts to attempt to determine whether any forfeiture … is proportionate to the stated objectives'.[78] Their Honours continued:

> It is within the province of a legislature to gauge the extent of the deleterious consequences of drug trafficking on the community and the soundness of measures, even measures some may consider to be harsh and draconian punishment, which are thought necessary to both 'deter' and 'deal with' such activities. The political assessments involved are matters for the elected Parliament of the Territory and complaints about the justice, wisdom, fairness or proportionality of the measures adopted are complaints of a political, rather than a legal, nature.[79]

There are several reasons for this approach.

First, constitutions in Australia, even more so at the state level, are devoid of sweeping constitutional guarantees or rights charters.[80] The framers of the *Commonwealth Constitution* favoured reliance on the common law and parliamentary process over constitutionally entrenched rights protections.[81] Even the jurisdictions of Victoria and the Australian Capital Territory, which have enacted statutory rights charters, can have the protected rights overridden by their legislatures and do not confer on the judiciary the power to invalidate enactments for rights non-compliance. Regardless, the civil nature of much confiscation legislation means that constitutional safeguards, like those that exist in the United States and Canada, are typically not of assistance against such statutory proceeds of crime machinery.[82]

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76 *Australian Communist Party v Commonwealth* (1951) 83 CLR 2, 262–3 (Fullagar J); *Thomas v Mowbray* (2007) 233 CLR 307, 387–8 [229] (Kirby J); *Momcilovic v The Queen* (2011) 245 CLR 1, 89 [156] (Gummow J).

77 See, eg, *R v Lake* (1989) 44 A Crim R 63, 64 (Kirby P); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 [32] (Gleeson CJ).

78 (2014) 88 ALJR 522, 540 [75] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

79 Ibid 541–2 [85]. See also *Magaming v The Queen* (2013) 87 ALJR 1060, 1081 [108] (Keane J).

80 Cf, eg, the operation of the *Proceeds of Crime Act 2002* (UK) c 29 and its interaction with the *Human Rights Act 1998* (UK) c 42: Edward Rees, Richard Fisher and Richard Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002* (Oxford University Press, 4th ed, 2011) 11.

81 *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J). See also George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 52.

82 Freiberg, 'Criminal Confiscation, Profit and Liberty', above n 44, 69; Stacy J Pollock, 'Proportionality in Civil Forfeiture: Toward a Remedial Solution' (1994) 62 *George Washington Law Review* 456, 458.

Secondly, the dualist approach to international law sees Australia's international rights obligations only directly become part of Australian law following domestic incorporation of such rights into parliamentary enactments.[83] While this does not make international law irrelevant,[84] it does mean that the ability to challenge Australian legislation as contrary to international human rights obligations is significantly curtailed.

Thirdly, the nature of Australia's liberal democratic tradition positions the judiciary as the 'weaker' branch of government. Within this system, the courts play a supervising role, however, 'legislative supremacy'[85] is well established and foundational. Ultimately, outside constitutional limits, the judiciary's ability to invalidate legislation is constrained. While rule of law restrictions have been floated,[86] and common law tenets such as the principle of legality permit legislation to be read down to protect established rights where drafting allows it,[87] constitutional references to laws being enacted 'for the peace, order and good government' have not been held to be a substantive limitation on legislative action.[88] As Kirby J explained in *Baker v The Queen*:

> It is a serious step for a court to hold that legislation enacted by an elected Parliament is constitutionally invalid. The *Constitution* gives expression to principles of parliamentary democracy, both federally and in the States. Normally, a law enacted by such a Parliament will be upheld by the courts. It is not their province to invalidate laws simply because such laws are regarded as bad, unjust, ill-advised or offensive to notions of human rights.[89]

Similarly, Brennan CJ noted in *Nicholas v The Queen* that 'if the law is otherwise valid, the court's opinion as to the justice, propriety or utility of the law is immaterial'.[90]

The courts therefore are 'neither the friend nor the enemy of confiscation law'.[91] It is not the place of unelected judges to unpick legislation which is validly enacted and constitutional. Even when there are grounds for striking

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83 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

84 Ibid.

85 *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister of Industrial Relations* (1986) 20 IR 19, 43 (Kirby P). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 [32] (Gleeson CJ).

86 *Momcilovic v The Queen* (2011) 245 CLR 1, 215–16 [562]–[563] (Crennan and Kiefel JJ). But see the cautionary words of Kirby P in *Building Construction Employees and Builders Labourers' Federation (NSW) v Minister of Industrial Relations* (1986) 20 IR 19, 51.

87 *Lee v New South Wales Crime Commissio*n (2013) 251 CLR 196, 202–3 [3], 230–1 [56] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31] (French CJ); Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

88 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 (The Court).

89 *Baker v The Queen* (2004) 223 CLR 513, 545 [87].

90 (1998) 193 CLR 173, 197 [37] ('*Nicholas*').

91 See Justice Chris Maxwell, 'The Role of Courts under Asset Confiscation Legislation' (Address delivered at the OPP Proceeds of Crime Conference, Melbourne, 6 October 2011) 10 <http://www.austlii.edu.au/au/journals/VicJSchol/2011/22.pdf>. See also: at 4.

down legislation, this can be the subject of legislative rebuke. Take the response to the *International Finance Trust* decision, discussed below. The 4:3 decision invalidating section 10 of the *Criminal Assets Recovery Act 1990* (NSW) was rebuked by Senator Steve Hutchins, who chaired the Parliamentary Joint Committee on the Australian Crime Commission, for a 'complete disregard for the interests of public order and justice' and demonstrating the Court's failure to 'accept that the social values underpinning our foundation document are changing along with the realities of life and social order'.[92] As Maxwell J noted at a conference some months later:

> Someone with a sharper appreciation of democratic fundamentals would have seen things rather differently. What happened was a demonstration of the separation of powers in action. It is vital for the health of our democracy that courts are ready and willing to perform their constitutional duty, by ensuring that both legislative and executive action remain within the limits of legal validity.[93]

1 Proceeds of Crime before the Courts

Notwithstanding the confined role of the judiciary, at what point can and should courts, as constitutional guardians, intervene? Are there grounds on which proceeds of crime legislation can be challenged successfully? The answer varies depending on whether the courts are dealing with state or federal proceeds of crime legislation.

Commonwealth legislation can be questioned either as not falling within a Commonwealth head of power or as infringing an express or implied constitutional limit, such as Chapter III of the *Commonwealth Constitution*. The High Court's expansive interpretation of Commonwealth legislative heads of power has made the former increasingly uncommon. Section 51(xxxi) (preventing acquisitions of property on other than just terms) of the *Commonwealth Constitution* operates as both a head of power and a limitation on power and would seem the provision most relevant to property confiscation. However, the Court's interpretation of section 51(xxxi) as not applying to contexts in which the application of just terms is illogical, such as on the levying of fines or penalties, has rendered it of little use in the proceeds of crime context.[94] Justice Gageler's strong dissent in *Emmerson* leaves open the degree to

92 Joel Gibson, 'Anger as Crime Assets Unfrozen', *The Sydney Morning Herald* (online), 18 November 2009 <http://www.smh.com.au/national/anger-as-crime-assets-unfrozen-20091117-ikfa.html>. See also Michael Pelly, 'High Court Hears the Dog Bark Again', *The Australian* (online), 4 December 2009 <http://www.theaustralian.com.au/business/legal-affairs/high-court-hears-the-dog-bark-again/story-e6frg97x-1225806773274>.

93 Maxwell, above n 91, 10.

94 See, eg, *Re DPP (Cth); Ex parte Lawler* (1994) 179 CLR 270. Note also *Emmerson* (2014) 88 ALJR 522, which saw the majority refuse to apply the Northern Territory equivalent of s 51(xxxix), *Northern Territory (Self-Government) Act 1978* (Cth) s 50(1), to proceeds of crime legislation (Gageler J dissenting).

which there may be room for a reconsideration of the role for section 51(xxxi) in this legislative setting.[95]

Chapter III of the *Commonwealth Constitution* would appear a more fertile ground for contesting confiscation laws. The federal Chapter III limitation, cemented by the High Court's seminal decision in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[96] limits the ability of federal courts to exercise non-judicial (non-incidental) powers and requires federal judicial powers to be conferred on Chapter III courts, based on the operation of section 71 of the *Commonwealth Constitution*. This principle raises constitutional complexities for federal proceeds of crime legislation to the extent that it compromises the exercise of judicial power by federal judges.[97] This might occur through the conferral of judicial powers on non-judicial bodies or requiring Chapter III judges to exercise powers which cannot be classed as properly judicial.

State parliaments are decidedly less constrained than the Commonwealth legislature. State constitutions confer plenary legislative power on parliaments to make laws 'for the peace, order and good government' of the state, but this conferral has not been found to limit 'bad' laws that might be introduced through legislative will.[98] While the *Commonwealth Constitution* imposes some limits on the states through both express[99] and implied constitutional principle,[100] Chapter III aside, these are unlikely to have much relevance in the proceeds of crime context due to the legislation's subject matter and the intention for the Commonwealth scheme to not operate to the exclusion of state-based confiscations. Through the Chapter III derived principle initially expounded in *Kable v Director of Public Prosecutions (NSW)*,[101] however, state legislation cannot require state courts to compromise their institutional integrity, or essential character as courts. This operates differently to the principle in *Boilermakers'* and is a result of the integrated role that Chapter III contemplates for state courts within the Australian judicial system, namely the vesting of state courts with

95 *Emmerson* (2014) 88 ALJR 522, 542 [91] ff.

96 (1956) 94 CLR 254 ('*Boilermakers"*); *A-G (Cth) v R; Ex parte Australian Boilermakers' Society* (1957) 95 CLR 529.

97 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580 (Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ).

98 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 408–10 (Gaudron, McHugh, Gummow and Hayne JJ).

99 See, eg, *Commonwealth Constitution* ss 92, 109.

100 See, eg, the implied freedom of political communication limits state legislatures: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. So too does the doctrine of intergovernmental immunity: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

101 (1996) 189 CLR 51 ('*Kable*').

federal jurisdiction pursuant to sections 71 and 77(iii).[102] While, until recently, this principle had rarely been activated, cases such as *Re Criminal Proceeds Confiscation Act 2002*[103] and *International Finance Trust*[104] show that Chapter III can have implications for the validity of proceeds of crime legislative provisions. However, the *Kable* principle's range of operation is not extensive. Its province is extreme cases where confiscation provisions trespass upon the integrity of the judicial process.

What is clear is that establishing that proceeds of crime legislation has divested the 'process of its judicial character' is a difficult task indeed.[105] Courts have tended to construe legislative provisions in ways that do not interfere with either the institutional integrity of state courts or, for federal courts, 'in a manner which is [not] inconsistent with the essential character of a court or with the nature of judicial power'.[106] For example, constitutional issues do not surface simply because proceeds of crime provisions capture property acquired before a regime's enactment, because statutory criteria can be readily fulfilled[107] or because the onus of proof is inverted by civil confiscation provisions.[108] Rather, the prime candidates for invalidation are provisions which usurp the judicial process by compelling a court to make the order sought, which confer the ability to punish upon non-judicial bodies or which fundamentally compromise the integrity of the courts. That said, following Justice Gageler's reasoning in *Emmerson,* whether proportionality will come to influence the operation of section 51(xxxi) remains to be seen.

The examination of two contrasting recent examples of proceeds of crime challenges[109] reveals that grounds for constitutional invalidity, especially on the basis of Chapter III, are not commonly present even if rule of law difficulties abide.

2 International Finance Trust

In *International Finance Trust*,[110] section 10 of the *CARA NSW* required the New South Wales Supreme Court to hear and determine, without notice to any person thereby affected, applications for restraining orders made ex parte by the

102 On the basis of the *Kable* principle as developed by subsequent cases such as *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45; *South Australia v Totani* (2010) 242 CLR 1.
103 [2004] 1 Qd R 40.
104 (2009) 240 CLR 319.
105 *Emmerson* (2014) 88 ALJR 522, 538 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
106 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Nicholas* (1998) 193 CLR 173, 185 (Brennan CJ).
107 *Emmerson* (2014) 88 ALJR 522, 538 [65] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
108 *Silbert v DPP (WA)* (2004) 217 CLR 181, 186 [11] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Nicholas* (1998) 193 CLR 173, 190 (Brennan CJ).
109 See also *Re Criminal Proceeds Confiscation Act* [2004] 1 Qd R 40; *Silbert v DPP (WA)* (2004) 217 CLR 181; *DPP (NT) v Dickfoss* (2011) 28 NTLR 71.
110 (2009) 240 CLR 319.

New South Wales Crime Commission. The majority of the High Court, comprising French CJ, Gummow, Bell and Heydon JJ, held that section 10 was invalid under the *Kable* principle, although the reasons for this finding differed. As it was left to the discretion of the Commission to determine whether to bring an application on notice or not, the Chief Justice considered that '[t]he court's discretion as to the conduct of its own proceedings in the key area of procedural fairness is supplanted by the Commission's judgment'[111] so as to 'distor[t] the institutional integrity of the Court and affec[t] its capacity as a repository of federal jurisdiction'.[112]

By contrast, Gummow and Bell JJ, and Heydon J, based their respective decisions not solely on the mandatory ex parte nature of the application, but also on the absence of any mechanism for the 'effective curial enforcement of the duty of full disclosure on ex parte applications'.[113] This resulted from the failure by the legislature to provide a procedure for the court to hear an application for the 'speedy dissolution'[114] of the ex parte restraining order once notice of its grant had been given. Such failure was repugnant to the judicial process in a fundamental degree and represents an instance where constitutional law concerns and rule of law infractions may overlap. This correlation between constitutional invalidity and rule of law infraction based on the absence of judicial involvement in the confiscation process is discussed in Part III(B) below.

In a joint judgment, the minority (comprising Hayne, Crennan and Kiefel JJ) dissented on the grounds that the *CARA NSW* did not affect the court's inherent general law power in relation to an order made ex parte to reconsider the matter *inter partes* and set aside the order if satisfied that there were no grounds on which to make the order at the time of considering the revocation application.[115]

As might be expected, the New South Wales Parliament amended the *CARA NSW* in the aftermath of the decision in *International Finance Trust*. The amendments included the introduction of section 10A which, despite permitting an application for a restraining order to be made ex parte, confers a discretion on the court to require notice to be given.[116] In addition, section 10C was introduced. Section 10C addresses the reasoning of Gummow and Bell JJ, and Heydon J, by allowing a court to set aside a restraining order on application by a person with an interest in the restrained property if either the Commission fails to satisfy the court that there are reasonable grounds for the relevant suspicion on which the application for the order was based or, more generally, if the order was obtained illegally or without good faith.

111 Ibid 350 [45].
112 Ibid 355 [56].
113 Ibid 366 [97] (Gummow and Bell JJ).
114 Ibid 383 [149] (Heydon J).
115 Ibid 374–6 [125]–[130].
116 *CARA NSW* s 10A(4).

The decision in *International Finance Trust* may be contrasted with that in *Director of Public Prosecutions (Cth) v Kamal*.[117] In this case, the Western Australian Court of Appeal considered the constitutionality of section 26(4) of the *PoCA Cth*. Much like section 10 of the *CARA NSW,* section 26(4) of the *PoCA Cth* requires a court to 'consider an application for a restraining notice without notice having been given if the DPP requests the court to do so'. It was argued on behalf of Mr Kamal, in accordance with the majority finding in *International Finance Trust*, that section 26(4) is 'invalid as a legislative attempt to direct the outcome of an exercise of jurisdiction'.[118] The Court unanimously rejected this argument on the basis that the *PoCA Cth* included an adequate safeguard whereby the court could reconsider and revoke a restraining order if satisfied that there were no grounds on which to make the order at the time of considering the revocation application.[119] The different results in *International Finance Trust* and *Kamal* highlight the complexity of identifying the constitutional boundaries for judicial monitoring of executive action under proceeds of crime legislation.

3 Emmerson

Emmerson[120] was an appeal against the decision of the Northern Territory Supreme Court of Appeal relating to section 36A of the *Misuse of Drugs Act 1990* (NT) and section 94 of the *CPFA NT*. By 6:1 (Gageler J dissenting), the High Court allowed the appeal, concluding that the forfeiture scheme did not violate the principle in *Kable* or section 50(1) of the *Northern Territory (Self-Government) Act 1978* (Cth), which requires Northern Territory laws 'with respect to the acquisition of property' not to be made 'otherwise than on just terms'.

The majority were of the view that these provisions were not incompatible with the institutional integrity of the Supreme Court of the Northern Territory. Their Honours recognised that the Court had inherent power to correct any abuses of process resulting from the prosecutorial discretion brought about by the scheme[121] and noted that orders were made following a hearing 'in open court, in circumstances where an affected party has a right to be heard, may have legal representation, and may make submissions and receive reasons'.[122] The majority also commented that the 'ease of proof of the [statutory] criteria' did not compromise the judicial process undertaken by the Supreme Court.[123] Even

117 (2011) 248 FLR 64 ('*Kamal*').
118 Ibid 99 [136] (McLure P), citing *International Finance Trust* (2009) 240 CLR 319, 360 [77] (Gummow and Bell JJ), 386 [157] (Heydon J); *South Australia v Totani* (2010) 242 CLR 1, 63 [133] (Gummow J).
119 *PoCA Cth* s 42(5).
120 (2014) 88 ALJR 522.
121 Ibid 538 [64] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
122 Ibid 538 [65].
123 Ibid.

assuming that the judge's discretion was significantly curtailed, the court still acts independently and undertakes an 'orthodox adjudicative processes involving the hearing of evidence and the making of a determination which is subject to the usual processes of appeal'.[124]

The majority also rejected the 'unjust terms' argument and the contention that it is the court's role to weigh up the proportionality of the confiscation. Their Honours concluded that section 50(1) was inapplicable on the familiar section 51(xxxi) *Commonwealth Constitution* basis[125] that the provision of just terms would be discordant with the nature of a forfeiture sanction.[126]

Dissenting on the 'unjust terms' issue, Gageler J noted that the discretion granted to the Supreme Court did not extend to 'limit[ing] the property restrained'[127] and that the 'property subject to a restraining order then forfeited on declaration need have no connection with those or any other criminal activities'.[128] For Gageler J, section 50(1) was activated by virtue of the disproportionate operation of the provisions which arbitrarily bring about 'statutorily sanctioned executive expropriation: the forfeiture (or not) of all (or any) property at the discretion of the DPP'.[129] His Honour also intimated that a Commonwealth Chapter III challenge to equivalent provisions might be possible on the basis that the nature of executive discretion contemplated 'to obtain civil forfeiture as a means of punishment for criminal guilt' amounts to a 'confer[ral] on the DPP part of an exclusively judicial function'.[130]

Emmerson demonstrates the fine constitutional distinctions that may be drawn in the Chapter III context; constitutional arguments are often only successful at the margins. This is particularly the case in assessing whether sufficient curial supervision of confiscation orders is prescribed in legislation.

B Drafting Proceeds of Crime Legislation: A Normative Guide

The instances in which a constitutional challenge to proceeds of crime legislation will be successful are likely to be few and far between because of the sparse constitutional arguments that can be relied upon. Justice Mildren in *Director of Public Prosecutions (NT) v Dickfoss*,[131] for instance, acknowledged the harshness of many features of the *CPFA NT*, but determined that '[h]arshness is not in itself an indication of invalidity'.[132] Without avenues for constitutional invalidity, it is the role of the judiciary to apply the law as written by the

124 Ibid 539 [68].
125 See, eg, *Re DPP (Cth); Ex parte Lawler* (1993) 179 CLR 270.
126 *Emmerson* (2014) 88 ALJR 522, 541 [84] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
127 Ibid 543–4 [99].
128 Ibid 545 [104].
129 Ibid 549–50 [135].
130 Ibid 550 [138].
131 (2011) 28 NTLR 71.
132 Ibid 108 [110].

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.

The rule of law, while not uncontested,[133] has been recognised as fundamental to the basic operation of the Australian legal framework.[134] Its conceptions vary from 'thick' notions fleshed out with detailed rights guarantees to 'thinner', more procedurally based models.[135] The risk is that the rule of law loses its utility and meaning as a concept because of its ubiquity such that to different people it means quite different things, or at least idealised versions of the same thing.[136] Its disputed content notwithstanding, there is some consensus as to a skeletal version of the rule of law doctrine encompassing a legal system governed by non-arbitrary, certain and prospective rules which apply to all and which are subject to review by the courts.[137] This article does not argue for the application of a rich conception of the rule of law to proceeds of crime legislation. Instead, it seeks to sidestep the evident jurisprudential concerns by contending that proceeds of crime legislation should respect the core elements of the rule of law, stripped down to its bare essentials. On this basis, confiscation laws should aim to be clear, avoid retrospective operation, allow for fair processes, constrain arbitrary or unrestrained power and be amenable to judicial monitoring.[138]

Australian constitutional principle, while paying heed to it, is distinguishable from the rule of law. As Evans explains, the rule of law does 'not translate directly into propositions about constitutional validity'.[139] Declared constitutional validity is, therefore, not definitive of defensible confiscation legislation: just because a law is problematic on rule of law grounds, such as through limited

133 See, eg, Simon Evans, 'The Rule of Law, Constitutionalism and the *MV Tampa*' (2002) 13 *Public Law Review* 94, 95–6; Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at The Rule of Law Series, University of Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm#_edn14>; Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2000) 74 *Southern California Law Review* 1307, 1308; Peter M Shane, 'The Rule of Law and the Inevitability of Discretion' (2013) 36 *Harvard Journal of Law and Public Policy* 21.

134 *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 175 (Dixon J).

135 Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195; Rosenfeld, above n 133, 1309.

136 See, eg, Jeremy Waldron, 'Is the Rule of Law an Essential Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; Allan C Hutchinson and Patrick Monahan, 'Democracy and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 97, 99; Judith N Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1.

137 See, eg, Raz, 'The Rule of Law and Its Virtue', above n 135.

138 See, eg, Gleeson, above n 133.

139 Evans, above n 133, 101.

judicial involvement in the confiscation process, does not necessarily mean that it is unconstitutional.

That said, in the Victorian Charter context of *Momcilovic v The Queen*, Crennan and Kiefel JJ considered the possibility of a more direct alignment between the two.[140] While not finally deciding, their Honours raised whether the rule of law, being a founding principle influencing the formulation of the *Commonwealth Constitution*, may confine state and federal parliamentary power.[141] In the proceeds of crime context, the *possibility* is that an arbitrary, retrospective and extreme property confiscation scheme could reach a point at which the courts' complicity in such a scheme has to fall away on constitutionalised rule of law grounds. At least in the immediate future, the more likely scenario is that constitutional invalidity will occur in spaces where established constitutional law grounds overlap with rule of law infractions. For example, this may arise in cases where schemes compromise the integrity of the judicial process required by Chapter III, such as in relation to the provisions struck down in *International Finance Trust*. However, as constitutional validity does not always mirror rule of law compliance, this still leaves an important role of monitoring legislation for rule of law violations to the legislature.

Legislatures have a key role to play in drafting proceeds of crime regimes before they come to be challenged before the courts. This role is to ensure that Bills are appropriate in scope and range, are based on solid policy, constitutional and criminological advice and do not compromise the backbone of the rule of law. Most simply, this can occur through the process of parliamentary debate and parliamentary committees. The Commonwealth Parliamentary Joint Committee on Human Rights, even with its notable failings,[142] has a crucial role here. This Committee, which arose out of the government's response to the Brennan Inquiry,[143] is charged with reporting to Parliament on proposed legislation's compliance with core human rights legislation.[144] This committee often has cause to turn its mind to rule of law related considerations.[145] Similarly, the Australian

140 (2011) 245 CLR 1, 215–16 [562]–[563].

141 Ibid 216 [563], citing the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *South Australia v Totani* (2010) 242 CLR 1, 155–6 [423] (Crennan and Bell JJ). See also *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 431 (Kirby J) referred to state 'laws' as being of a 'kind envisaged by the *Constitution*' and 'certain "extreme" laws … fall[ing] outside that constitutional presupposition'.

142 Williams and Hume, above n 81, 20.

143 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

144 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). See Parliament of Australia, *Parliamentary Joint Committee on Human Rights* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights>.

145 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

Capital Territory and Victoria, being the sole jurisdictions with statutory human rights charters, require legislation to be assessed for compliance with the statutorily protected rights which themselves often mirror rule of law entitlements and responsibilities.[146] Even jurisdictions without such charters should not be exempt from the necessity for detailed parliamentary review and debate respecting the importance of just laws and processes.

The challenge is how to ensure that legislatures that acknowledge rights protections do not automatically decline to include them in proceeds of crime enactments on political grounds. What is required is a genuine and transparent balancing process that weighs up the social and political benefits of confiscation legislation with the implications it may have not only for defendants, but also related and unrelated third parties. Particular attention needs to be given to avoiding the features of current Australian schemes that are inconsistent with the rule of law. These features include the absence of judicial discretion; deferral to executive discretion; retrospectivity; and atypical provisions relating to the burden and standard of proof.

1 Absence of Judicial Discretion

There are a broad range of approaches to the role of the judiciary in the implementation and operation of Australian proceeds of crime legislation: from no judicial discretion whatsoever[147] to broad, seemingly unfettered, discretion.[148] This spectrum of judicial scrutiny has significant rule of law implications.

In 1999, it was the Australian Law Reform Commission's view that, at least in relation to the confiscation of criminal profits, 'the retention by the courts of any discretion … flies directly, and unacceptably, in the face of the principal objective … of the [Proceeds of Crime] Act, namely, that a person should not be entitled to be unjustly enriched as a result of unlawful conduct' and further that 'the nature of that principle is such that it does not admit of exceptions, particularly discretionary exceptions'.[149] Respectfully, this position is untenable. Given the potentially significant consequences of confiscations under the legislation for both defendants and third parties, a key factor in striking the appropriate balance here is judicial discretion.

Concerns relating to proportionality, constitutional validity and third party protection dictate that at every stage of the confiscation process (from information gathering orders to restraining orders to final confiscation orders) the

146 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

147 Such as under the *CPCA WA*, where a court has no discretion in making an unexplained wealth order.

148 Such as under the *PoCA Cth*, where a court has a wide, seemingly unfettered discretion in making an unexplained wealth order. As to whether judicial discretion can ever be considered truly 'unfettered' or 'absolute', see Aharon Barak, *Judicial Discretion* (Yale University Press, 1989) 19; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823, 843; James Edelman, 'Judicial Discretion in Australia' (2000) 19 *Australian Bar Review* 285, 286.

149 Australian Law Reform Commission, above n 41, [3.24]–[3.25].

courts should be vested with some measure of discretion to consider the ramifications of an order before it is made.[150] While discretion may be seen as controversial, it is submitted that in order to provide an adequate and appropriate check on prosecutorial and other executive decision-making what is required is either legislatively constrained executive discretion with grounds to judicially review the exercise of that discretion, or, judicial discretion in cases where the executive's powers are not adequately constrained by statute.

From a constitutional point of view, cases like *International Finance Trust*[151] demonstrate the function of judicial discretion within the judicial process. While failed attempts to challenge statutory provisions that impose mandatory sentences have shown that the absence of judicial discretion is not necessarily unconstitutional,[152] what is clear is that if the judicature becomes nothing more than an executive or legislative pawn, constitutional roadblocks are likely. As French CJ explained in *South Australia v Totani*:

> It has been accepted by this Court that the Parliament of the Commonwealth may pass a law which requires a court exercising federal jurisdiction to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities. The Parliament of a State may enact a law of a similar kind in relation to the exercise of jurisdiction under State law. It is also the case that 'in general, a legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence'. But these powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions.[153]

Judicial discretion cannot be compromised to such an extent that the 'manner and outcome of the exercise' of a court's jurisdiction is overtaken;[154] that it unjustifiably removes core elements of the judicial process;[155] or that it requires orders to be made by legislative edict. Moreover, in cases where deeming provisions operate to remove judicial discretion, defendants may, by the operation of the provisions, be thwarted from 'proving the truth of contested matters'.[156] Aside from questions of constitutionality, such provisions offend against the rule of law and should not be included in proceeds of crime legislation.

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150 See also Stephen Odgers, 'Proceeds of Crime: Instrument of Injustice?' (2007) 31 *Criminal Law Journal* 330, 330–1.

151 (2009) 240 CLR 319.

152 See, eg, Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' (2012) 36 *Criminal Law Journal* 335, 341, 348–9.

153 *South Australia v Totani* (2010) 85 ALJR 19, 43–4 [71] (citations omitted).

154 *International Finance Trust* (2009) 240 CLR 219, 352–3 [50] (French CJ).

155 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67] (French CJ). See also in the proceeds of crime context: *Lee v New South Wales Crime Commissio*n (2013) 215 CLR 196, 263 (Kiefel J).

156 *Silbert v DPP (WA)* (2004) 217 CLR 181, 195 [44] (Kirby J).

What is required is a 'guided'[157] judicial discretion to permit judicial consideration of the proportionality between the impact of the confiscation on all interested parties on the one hand and achieving the objectives of the legislation on the other;[158] that is, balancing the public interest in achieving the objects of the legislation,[159] with the impact of the legislation on any person. Take, for example, the drug-trafficker confiscation schemes operating in Western Australia and the Northern Territory. Under these schemes, on being declared a drug-trafficker, *all* the defendant's property, whenever acquired and whether connected with criminal activity or not, is automatically confiscated. A court *must* make an order to this effect[160] and has no discretion in this regard.[161] In *Director of Public Prosecutions (WA) v Roth-Beirne*, 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'.[162] It may be considered by a court, however, that, in rendering the defendant (and his or her dependants) impecunious, such confiscation goes far beyond achieving the underlying objective of the legislation of ensuring crime does not pay by stripping a defendant of his or her ill-gotten gains. In addition to restitution, deterrence and incapacitation, the confiscation inflicts severe and, arguably, disproportionate additional punishment on not only the defendant but also his or her dependants. Introducing into these confiscation provisions a guided judicial discretion allowing the courts to take into account considerations of proportionality, hardship and public interest is desirable.

Specifically in relation to third party interests, in making restraining or confiscation orders, it is suggested that courts should be explicitly directed to consider the effect of their orders on the property rights of innocent third parties. The potentially harsh operation of the legislation on third party interest holders is illustrated in *Permanent Custodians Ltd v Western Australia*.[163] In this case, the plaintiff contested a freezing order placed against land registered in the name of two co-owners. The freezing order was issued on the sole basis that one of the co-owners might be declared a drug trafficker and was limited to that co-owner's interest in the property. The plaintiff held a first registered mortgage over the frozen property. As the co-owners had defaulted on their mortgage repayments, the plaintiff sought to enforce its rights under the mortgage by selling the property. While acknowledging the unfortunate inequity of the result and being

157 Ibid.

158 See Australian Securities Commission v Deloitte Touch Tohmatsu (1996) 70 FCR 93; Anthony Gray, 'The Compatibility of Unexplained Wealth Provisions and "Civil" Forfeiture Regimes with *Kable*' (2012) 12(2) *QUT Law & Justice Journal* 18. See also Odgers, above n 150, 330–1.

159 *DPP (SA) v Sienczewski* [2010] SASC 16, [32] (Duggan J).

160 *CPCA WA* s 8; *CPFA NT* ss 8–9, 94(1).

161 *Emmerson v DPP (NT)* (2013) 33 NTLR 1, 39 [111] (Barr J).

162 *DPP (WA) v Roth-Beirne* [2007] WASC 91, [20].

163 [2006] WASC 225.

'mindful that a purpose of construction which minimises the interference with legitimate third party rights should be preferred',[164] the Court concluded that a proper interpretation and application of the legislation necessitated a finding that resulted in the loss of mortgagee property rights by the plaintiff. Despite the plaintiff's interest in the property not being the subject of the freezing order, in dismissing the plaintiff's claim, the judge noted that '*CPCA* forbids dealing with frozen property in any way … [and] actions by a mortgagee in selling the property is a dealing with the property'.[165]

Certainly, the risk of incorporating judicial discretion into the confiscation process is that it becomes so open that judges may move away from applying legally defined standards towards a position of making decisions on policy grounds. However, members of the High Court have recognised that while inevitably policy interplays with judicial decision-making, the fluidity of this is confined by the judicial process and case method.[166]

The Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) provides the most recent example of a limited but appropriate degree of judicial discretion in the federal proceeds of crime regime. This Bill seeks to amend section 179E of the *PoCA Cth*, which provides that the court 'must' make a literary proceeds order, by adding the caveat in section 179E(6) that the court may refuse to do so 'if it is not in the public interest'.[167]

2 Unbridled Executive Discretion

As discussed above, Gageler J (in dissent) in *Emmerson* left open the possibility of a challenge to proceeds of crime regimes on the basis of overt executive discretion.[168] His Honour noted that confiscation under the *CPFA NT* did not occur by statutory provision but only if the Director of Public Prosecutions 'considers [it] in the public interest' to forfeit property 'liable' for

164 Ibid [19] (McKechnie J).

165 Ibid [14]–[15] (McKechnie J).

166 *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ), citing Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 195. See also *PoCA Cth* s 48(3)(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(1)(b); *CPCA Qld* ss 139(3), 140(5); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 20(4); *Crime (Confiscation of Profits) Act 1993* (Tas) s 16(2)(b); *Confiscation Act 1997* (Vic) s 33(5).

167 As to an uncircumscribed public interest discretion, the Full Court of the Federal Court noted in *Australian Securities Commission v Deloitte Touche Tohmatsu* (1996) 70 FCR 93, 124 that in evaluating what was or was not in the public interest 'was essentially one of fact and degree, and by its very nature it will be something that is not easily susceptible to judicial review'. The presumed meaning is that the exercise of the discretion called for encompasses such a broad purview that it will be very difficult for an appellate tribunal to decide whether or not a trial judge has made an error of law in coming to a decision as to whether or not a matter is in the public interest or not. Further, in *Queensland v Kupfer* [2003] QSC 458, 462 White J considered that the public interest does not entail considerations of proportionality between the relevant confiscation offence and the extent and value of restrained property.

168 (2014) 88 ALJR 522, 550 [138].

confiscation pursuant to an application brought under the terms of the Act.[169] Even the majority, while not pursuing Justice Gageler's point, emphasised the Court's inherent power to protect against prosecutorial discretionary abuses.[170] Justice Gageler classified the extent of the prosecutor's discretion which entails 'civil forfeiture as a means of punishment for criminal guilt' as potentially resulting in executive usurpation of the judicial function.[171] This could well present constitutional difficulties as the 'adjudgment and punishment of criminal guilt' is a well-established judicial function which cannot be assigned both federally[172] and at the state level.[173]

The unexplained wealth provisions enacted in several Australian jurisdictions[174] provide particularly extreme examples of this. Although classified as 'civil',[175] Gray notes that they 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'.[176] See, for example, section 71(1) of the *CPFA NT*, which provides that

> [t]he court that is hearing an application under section 67 must declare that the respondent has unexplained wealth if it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth.

Further, section 10(4) provides that a person who has such an order made against him or her is 'taken to be involved in criminal activities'.[177]

Perhaps of greatest concern in this regard are the automatic confiscation provisions encountered in those Australian jurisdictions that incorporate both conviction-based and non-conviction based confiscation procedures into their proceeds of crime statutes.[178] As noted in Part II above, in these jurisdictions

169 Ibid 549 [134], 550 [136].

170 Ibid 538 [64].

171 Ibid 550 [138].

172 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Magaming v The Queen* (2013) 87 ALJR 1060, 1072 [61]–[62], 1077 [82] (Gageler J dissenting).

173 *South Australia v Totani* (2010) 242 CLR 1, 50–1 [76] (French CJ), 67 [147] (Gummow J).

174 *PoCA Cth*; *CARA NSW*; *CPFA NT*; *CPCA Qld*; *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *CPCA WA*.

175 See, eg, Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth) 9.

176 Gray, 'Unexplained Wealth Provisions and "Civil" Forfeiture Regimes', above n 158, 34.

177 By comparison, the recently amended *CPCA Qld* only allows unexplained wealth orders to be made on the basis of a reasonable suspicion that a person has engaged in 'serious crime related activities', 'has acquired, without giving sufficient consideration, serious crime derived property' and 'any of the person's current or previous wealth was acquired unlawfully': *CPCA Qld* s 89G, inserted by the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

178 See *PoCA Cth*; *Confiscation of Criminal Assets Act 2003* (ACT); *CPCA Qld*; *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic).

conviction-based confiscation is typically automatic without the need for a court order.[179]

It is submitted that such non-judicial confiscation procedures are not appropriate. As Freiberg and Fox contend:

> The minimum prerequisite of expropriation of property as direct or indirect punishment for crime should be a judicial order pursuant to a finding of guilt, or conviction of an offence. Property should not be liable to be permanently confiscated simply upon the 'commission' of an offence, or for allegations of crime proven to non-criminal standards.[180]

In light of Justice Gageler's comments, the executive discretion that is a feature of many Australian proceeds of crime regimes may well be the subject of future challenge before the courts. 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.[181] To ensure fair mechanisms, proceeds of crime regimes ought to involve the courts in each stage of the confiscation process. In addition, courts ought to be vested with, at the very least, a guided discretion to ensure a fair and proportionate outcome in each case.

3 Retrospective Operation of Legislation

A number of Australian proceeds of crime statutes are retrospective in operation;[182] that is, they attach 'new consequences to an event that occurred prior to [their] enactment'.[183] This retrospectivity generally relates to two aspects of the legislation: first, the legislation extends to criminal activities engaged in both before and after the statute was introduced; and, secondly, the legislation renders confiscable property acquired or received before or after the commencement of the statute.

179 Automatic confiscation is also available under the non-conviction based scheme contained in the *CPCA WA* s 30.

180 Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in Brent Fisse, David Fraser and Graeme Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book, 1992) 106, 143.

181 Brent Fisse, 'The *Proceeds of Crime Act*: The Rise of Money-Laundering Offences and the Fall of Principle' (1989) 13 *Criminal Law Journal* 5, 23.

182 See, eg, *PoCA Cth* s 14; *Confiscation of Criminal Assets Act 2003* (ACT) s 5; *CPFA NT* s 10(5)(b)(ii); *Criminal Assets Confiscation Act 2005* (SA) s 10; *Confiscation Act 1997* (Vic) s 157; *CPCA WA* s 5(1).

183 Elmer A Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264, 276.

There is a long history of opposition to retrospective legislation.[184] Retrospectivity is generally regarded as 'trespass[ing] unduly on personal rights and liberties'[185] and therefore falls within the terms of reference of the Commonwealth Senate Standing Committee for the Scrutiny of Bills, a committee tasked with 'assess[ing] legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary propriety'.[186] Despite the undesirability of introducing laws ex post facto, the High Court has confirmed, with some remaining uncertainty,[187] the Australian legislatures' power to do so,[188] provided the intention to legislate retrospectively is explicit, clear and unambiguous.[189] It remains a presumption of statutory interpretation that, in the absence of such an intention, statutes do not operate retrospectively.[190] Regardless of its general validity, however, it is submitted that if a retrospective law goes so far as to usurp, and effectively remove, the judicial function, its constitutional validity may be called into question.[191]

While there is a general opposition to retrospective legislation, legislation that retrospectively declares previously lawful conduct committed prior to the commencement of the legislation to be a crime, or that imposes more severe legal punishment that follows from a criminal act, is generally considered the most repugnant[192] and offensive to rule of law principles. It is acknowledged, however,

184 Thomas Hobbes, *Leviathan* (J M Dent & Sons, 1914) 166. See also Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765, 1966 ed) vol 1, 45–6, cited in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ), 611 (Deane J), 642 (Dawson J), 718 (McHugh J). For a detailed discussion on the criticisms of retrospective law-making, see Charles Samford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006) ch 3. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

185 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 37th Parliament* (1993–96) ch 2. This is also acknowledged in Explanatory Notes, Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Qld) 5.

186 See Parliament of Australia, *Senate Standing Committee for the Scrutiny of Bill*s <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills>.

187 James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (LexisNexis Butterworths, 2010) 214; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 3rd ed, 2010) 234; Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 172.

188 *R v Kidman* (1915) 20 CLR 425; *Millner v Raith* (1942) 66 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (but see Deane and Gaudron JJ dissenting).

189 *Wilson v Moss* (1908) 8 CLR 146; *Moss v Donohoe* (1915) 20 CLR 615; *Commissioner of Stamps (Qld) v Wienholt* (1915) 20 CLR 531.

190 *DPP (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

191 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ); *Nicholas* (1998) 193 CLR 173, 186 (Brennan CJ); Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart, 2009).

192 Stephen Argument, 'Retrospective Legislation: Not So "Super"' (1993) 10 *Australian Bar Review* 57, 61. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 642 (Dawson J).

that there are arguments that in some cases the introduction of retrospective legislation is justified. Woozley, for example, stated in relation to retrospectivity that 'while it may be true that playing unfair is always bad, it does not follow that it is always wrong; and it will not be wrong in the case where, even if playing unfair is bad, playing fair is even worse'.[193] It may be argued that proceeds of crime legislation is a 'necessary evil'[194] being the only alternative to 'an evil of even greater magnitude'.[195]

Proceeds of crime legislation is a crucial weapon in the government's armoury against serious and organised crime. It is, however, a long-term solution. The future success of the legislation will not be significantly increased by retrospectively targeting conduct committed and property acquired before the legislation was first introduced. Rather, legislation that retrospectively exposes those who previously engaged in criminal conduct to more severe pecuniary consequences through the confiscation of property including property acquired well before the relevant criminal activity[196] may be seen as an indefensible infringement of a defendant's civil rights, particularly of his or her property rights, and therefore inconsistent with the rule of law.

If incorporated, at the very least, retrospectivity should be limited to a reasonable period prior to the commencement of the legislation. For example, the *Criminal Proceeds Confiscation Act 2002* (Qld) replaced Queensland's inaugural proceeds of crime statute, the *Crimes (Confiscation) Act 1989* (Qld), which commenced operation on 12 May 1989. Consequently, the confiscation provisions in the *CPCA Qld* apply to confiscation offences committed on or after that date.[197] Despite the *CPCA Qld* only having come into operation on 1 January 2003, this limited retrospective operation is entirely appropriate: it simply operates to extend a person's liability for confiscation under the later statute to include his or her liability arising under the earlier repealed statute. Limiting the retrospective operation of the current legislation in this way seems a sensible alternative. More expansive retrospective provisions are unjust in view of the shifting of the onus of proof and evidentiary presumptions operating in civil confiscation procedures in some jurisdictions.[198] It is unjust and unreasonable to expect a defendant to lead evidence relating, for example, to the acquisition, accumulation or use of assets where that acquisition, accumulation or use may have occurred many years, even decades, before the assets were liable to confiscation under proceeds of crime legislation.

193 A D Woozley, 'What Is Wrong with Retrospective Law?' (1968) 18 *Philosophical Quarterly* 40, 53.
194 Samford, above n 184, 230.
195 Ibid 229.
196 See, eg, *Davies v Western Australia* (2005) 30 WAR 31.
197 *CPCA Qld* ss 95, 96(1).
198 See, eg, under the *CARA NSW*; *CPFA NT*; *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *CPCA WA*.

4 Standard and Burden of Proof

The policy underlying the imposition of a civil standard of proof and shifting the burden of proof onto the defendant in proceeds of crime confiscation cases is clear: confiscations will be far easier to secure, resulting in a more effective crime-fighting regime.[199] As pointed out by the Legal and Constitutional Affairs Legislation Committee, such features 'represen[t] a departure from the axiomatic principle that those accused of criminal conduct ought to be presumed innocent until proven guilty'.[200] In a similar vein, the Law Council of Australia stated in its submissions to the Committee that '[b]y reversing the onus of proof the proposed unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property'.[201] However, constitutionally, the alteration in the burden is unlikely to be challengeable in and of itself. In *Nicholas*, Brennan J drew on an earlier decision by Isaacs J[202] to distinguish a shift in the burden from a legislative determination of guilt and concluded that '[t]he reversal of an onus of proof affects the manner in which a court approaches the finding of facts but [it] is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates'.[203]

Much of the concern with Australian proceeds of crime legislation stems from the 'civil' nature of the legislation which belies its insoluble criminal yoke and punitive impact.[204] An open acknowledgement that this is the case is required, accompanied by the consequential instatement of criminal law-like protections for defendants and third parties.[205] There are significant practical concerns with shifting the burden of proof onto defendants in non-conviction based civil confiscation cases. First, proceedings may be brought against a defendant simply on the basis of a suspicion with the defendant bearing the burden of dispelling the suspicion.[206] Secondly, there is the risk of a defendant having to lead evidence on a matter which may have occurred many years previously and in relation to which the defendant may not have any records or

199 As pointed out by the Parliamentary Joint Committee on the Australian Crime Commission, *Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 29, [5.50], these inclusions result in 'a greater likelihood that the assets of crime will be confiscated'. See also Senate Legal and Constitutional Affairs Legislation Committee, above n 41, [2.55]–[2.57].

200 Senate Legal and Constitutional Affairs Legislation Committee, above n 41, [6.4].

201 Ibid [2.59], quoting Law Council of Australia, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, August 2009, 16.

202 *Williamson v Ah On* (1926) 39 CLR 95, 103–20.

203 (1998) 193 CLR 173, 190 (Brennan CJ). At the state level see also *Fardon v A-G (Qld)* (2004) 223 CLR 575, 600–1 [41] (McHugh J).

204 *Emmerson v DPP (NT)* (2013) 33 NTLR 1, 18–19 [41] (Riley CJ).

205 See, eg, Freiberg and Fox, 'Forfeiture, Confiscation and Sentencing', above n 180, 143.

206 See, eg, the shift in evidentiary onus in *CPFA NT* s 71(2); *CPCA WA* s 12(2).

recollection. This is particularly concerning in the context of retrospective proceeds of crime legislation discussed above.

Thirdly, even if the defendant is ultimately successful in discharging the onus, the cost (both financial and personal) that may be sustained as a result of effectively having to prove one's innocence are likely to be considerable. Fourthly, the Law Council of Australia has highlighted, drawing on *Lee v New South Wales Crime Commission*,[207] the clear risk to the privilege against self-incrimination through encroachments on the 'accusatorial system of criminal justice'.[208] Non-conviction based unexplained wealth regimes may present a defendant with the unenviable choice of risking forfeiture of his or her property or compromising the fairness of a possible future trial by giving the prosecution information that they would not otherwise have in relation to charges yet to be prosecuted.[209]

Finally, it is not good practice for a blameless third party to be required to discharge a burden of proof in relation to any matter arising in proceedings in which he or she has no involvement other than having the misfortune of holding an interest in property that is the subject matter of the proceedings.[210] This is the effect of the exclusion, objection and 'third party order' provisions in a number of Australian proceeds of crime statutes.[211]

IV CONCLUSION

Significant and compelling social, economic and political considerations underpinned the initial adoption of proceeds of crime legislation into Australia and continue to drive reform in this law and order arena. These considerations are all principally directed at a single overarching objective: providing an effective legislative weapon with which to fight serious and organised crime. The legislative schemes seek to achieve this through confiscation provisions aimed at punishment, deterrence, incapacitation and law enforcement. An examination of the Annual Reports of the Director of Public Prosecutions of each Australian jurisdiction indicates that the law enforcement agencies largely regard proceeds of crime legislation as an important and successful weapon in Australia's crime

207 (2013) 251 CLR 196.

208 Ibid 208–9 [14] (French CJ).

209 Law Council of Australia, Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*, 2 April 2014, 4.

210 Australian Law Reform Commission, above n 41, [12.15].

211 See, eg, *Confiscation of Criminal Assets Act 2003* (ACT) s 76(4); *CPFA NT* s 59(1); *CPCA Qld* s 165; *Criminal Assets Confiscation Act 2005* (SA) s 34(1)(b); *Confiscation Act 1997* (Vic) ss 20, 49, 51, 53; *CPCA WA* s 79(1).

fighting armoury.[212] It is this success that continues to spur on parliaments to introduce increasingly robust and expansive legislative amendments and reforms.

In many cases, however, the success of the legislation comes at a significant cost. Most commonly, this cost is borne by third parties who are unconnected with any criminal activity or other wrongdoing. The analysis undertaken in this article reveals several features of Australian proceeds of crime legislation that bring into question, at times, its constitutionality, but also its conformity with basic rule of law tenets.

Clearly, it is appropriate for proceeds of crime legislation to capture property acquired nefariously. In tempering proceeds of crime regimes in Australia the baby need not be thrown out with the bath water. Instead, prudent drafting, fair and considered parliamentary debate, and public consultation and discussion should ensure that Australian legislation adequately balances valid legislative goals against other fundamental interests, including the rights of defendants and innocent third parties. The inevitability of law and order politics must not exclude, in the drafting of confiscation provisions, constitutional and broader rule of law considerations, including the importance of judicial discretion, monitored executive power, the avoidance of excessive retrospectivity, and awareness of the risks associated with shifting standards and burdens of proof.

Within Australia's liberal democratic framework, it is not the role of the courts to invalidate statutory provisions simply because they may be perceived as 'unfair' or 'too wide'. It is the responsibility of the executive and legislative arms to ensure that legislation is appropriately targeted, just and not a 'law and order' overreach. While the operation of provisions needs to be understood within the wider context of a particular jurisdiction's crime confiscation scheme, the mix of retrospective punishment-like provisions, severed from the establishment of clear criminal wrongdoing and the narrowing of judicial discretion may present a dangerous legislative cocktail which should be eschewed.

212 See above nn 37–9.

Appendix C

Natalie Skead, “Crime-Used Property Confiscation in Western Australia and the Northern Territory: Laws Befitting Draco’s Axones?” (2016) 41:1 The University of Western Australia Law Review 67.

CRIME-USED PROPERTY CONFISCATION IN WESTERN AUSTRALIA AND THE NORTHERN TERRITORY: LAWS BEFITTING DRACO'S AXONES?

NATALIE SKEAD*

CONTENTS

I INTRODUCTION

On 15 March 2010, the following report appeared in *The West Australian:*

> **TEST CASE FOR CONFISCATION LAWS**
>
> CHRISTIANA JONES - The West Australian, March 15, 2010, 2:35 am
>
> WA's property confiscation laws are set to be tested by the High Court, with plans by a criminal to fight the State's bid to seize his wife and children's home as a "substitute" for the shed where he had sex with an underage girl.
>
> In one of two landmark property seizure cases handed down last Friday, the WA Court of Appeal ruled the Director of Public Prosecutions should be allowed to confiscate the Bassendean family home of sex offender Aaron Bowers because the property he had "used" in his crime could not be seized because it belonged to the victim's family.
>
> The move means Bowers' cancer-stricken wife and two children could be thrown out of their home unless the decision is overturned.

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> Three appeal judges said a previous judge had "erred in law" when he found the Beechboro property housing the shed in which Bowers' admitted committing his sex crime had not been "used" in the offence and only acted as "something to stand on".
>
> The previous judge had also found the State should not be allowed to take Bowers' property as a substitute because an innocent spouse lived in it.
>
> But the appeal judges said the safeguard only applied if the property being frozen was the one used in the crime and not in cases where it was being targeted as a "substitute".[1]

The report refers to the facts in *Director of Public Prosecutions (WA) v Bowers*,[2] and illustrates a legislative mechanism introduced into the confiscation of proceeds of crime legislative schemes of every Australian jurisdiction, including the federal scheme.

Australian proceeds of crime statutes allow for the confiscation of property, both real and personal, in four specified circumstances: where a person's wealth is unexplained; where property was used in the commission of a specified offence; where property was derived from the commission of a specified offence; and where property is or was owned by a declared drug trafficker. *Bowers* involved the second circumstance: the confiscation of 'crime-used' property.

In 1987, the then Deputy Prime Minister and Federal Attorney-General, Mr Lionel Bowen, outlined the broad objectives of proceeds of crime legislation in his second reading speech on the first Commonwealth Proceeds of Crime Bill 1987 (Cth):

> 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.[3]

Crime-used property confiscations have the more specific aim of 'depriv[ing] a person of property used, or intended by an offender to be used, in relation to

[1] Christiana Jones, 'Test case for confiscation laws', *The West Australian* (online), 15 March 2010 <https://au.news.yahoo.com/thewest/wa/a/6931750/test-case-for-confiscation-laws/>.
[2] *DPP (WA) v Bowers* [2010] WASCA 46 ('*Bowers*'); Transcript of Proceedings, *Bowers v DPP (WA)* [2010] HCATrans 277 (21 October 2010).
[3] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2314 (Lionel Bowen).

the commission of an offence … and … prevent[ing] the person from using the property to commit other offences'.[4]

This article uses a case study to provide a detailed comparative examination and analysis of the crime-used property confiscation regimes operating in Western Australia and the Northern Territory, jurisdictions with analogous statutory regimes. Particular focus will be placed on the impact of the regimes on the security and certainty of real property rights. While limited to these two jurisdictions, much of the analysis and commentary provided herein is equally applicable to the schemes operating in other Australian jurisdictions.

II CRIME-USED PROPERTY DEFINED

The term 'crime-used property' is only used in the proceeds of crime statutes of Western Australia and the Northern Territory.[5] However, the concept of crime-used property is incorporated into the definitions of 'tainted property'[6] and 'instrument of crime'[7] in the statutes of the remaining jurisdictions. For convenience and consistency, the term 'crime-used property' will be used in this article.

In all jurisdictions, crime-used property includes 'property that was used in, or in connection with, the commission of a serious offence'.[8] The meaning of 'used in connection with' was considered by Underwood J in *Director of Public Prosecutions (Tas) v Devine*.[9] His Honour identified two approaches to interpreting the phrase. The first broad approach attributes a wider meaning to 'used in connection with' than simply 'used in', raising issues of proximity and

[4] *Confiscation of Criminal Assets Act 2003* (ACT) s 3(d). See also *Proceeds of Crime Act 2002* (Cth) s 5(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 3(b); *Confiscation Act 1997* (Vic) s 1(d); *Criminal Property Forfeiture Act 2002* (NT) ss 10(2)-(3).

[5] *Criminal Property Forfeiture Act 2002* (NT); *Criminal Property Confiscation Act 2000* (WA).

[6] The term 'tainted property' is used in the *Confiscation of Criminal Assets Act 2003* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Proceeds Confiscation Act 2002* (Qld); *Confiscation Act 1997* (Vic); *Crime (Confiscation of Profits) Act* 1993 (Tas); *Criminal Assets Confiscation Act 2005* (SA).

[7] The terms 'instrument' and 'instrument of crime' are used in the *Proceeds of Crime Act 2002* (Cth); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act* 1993 (Tas).

[8] *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4. See also *Proceeds of Crime Act 2002* (Cth) s 329(2)(a); *Criminal Assets Confiscation Act 2005* (SA) s 7(b)(i); *Crime (Confiscation of Profits) Act* 1993 (Tas) s 4.

[9] [2001] TASSC 8 ('*Devine*').

degree.[10] In *R v Hadad*,[11] McInerney J, with whom Enderby and Allen JJ agreed, adopted this expansive approach and stated:

> the intention of the legislature is that a wide scope be given to the concept of tainted property. I do not accept that the legislature intended the courts to construe the section by requiring a substantial connection between the commission of the crime and the alleged tainted property.[12]

By contrast, the second, narrower approach requires a 'substantial connection' 'in a very real sense' between the property and the commission of the offence.[13]

On the facts in *Devine,* Underwood J was not required to reconcile the inconsistency between the two approaches. It is submitted, however, that where the language of a statute is unclear, any doubt as to the meaning of any term is to be 'resolved in favour of the owner [of] the property or, by analogy, in favour of the claimant to the remedy against forfeiture' in accordance with the principle that there is a rebuttable presumption that legislation does not interfere with vested property interests.[14] Therefore, the narrow meaning of 'in connection with' requiring a 'substantial connection' is to be preferred. This narrow construction was adopted unanimously by three members of the Court of Appeal in *Director of Public Prosecutions (WA) v White*.[15]

In some jurisdictions the definition of crime-used property includes 'property *intended* to be used in, or in connection with, the commission of an offence'.[16] In Western Australia and the Northern Territory the definition of

[10] *R v Polain* (1989) 52 SASR 526; *R v Hadad* (1989) 16 NSWLR 476; *R v Sultana* (1994) 74 A Crim R 27; *R v Minienou* (1989) 46 A Crim R 211; *R v Zerafa* [2003] NSWCCA 101; *DPP (NSW) v King* (2000) 49 NSWLR 729; *Taylor v A-G (SA)* (1991) 52 A Crim R 166; *DPP (SA) v George* (2008) 102 SASR 246 (Doyle CJ, White J agreeing).

[11] (1989) 16 NSWLR 476.

[12] *R v Hadad* (1989) 16 NSWLR 476, 482.

[13] *Re Application Pursuant to the Drugs Misuse Act 1986* [1988] 2 Qd R 506; *Ward, Marles and Grahan v The Queen* [1989] 1 Qd R 194; *DPP (Cth) v Jeffrey* (1992) 58 A Crim R 310; *R v Rintel* (1991) 52 A Crim R 209; *DPP (SA) v George* (2008) 102 SASR 246 (Vanstone J).

[14] *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 681; *DPP (WA) v A* [2008] WASC 258, [44]; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547. See also Jennifer Corrin, 'Australia: Country Report on Human Rights' (2009) 40(1) *Victoria University of Wellington Law Review* 37, 41-2.

[15] [2010] WASCA 47 ('*White*').

[16] *Criminal Assets Confiscation Act 2005* (SA) s 7(b)(ii); *Proceeds of Crime Act 2002* (Cth) s 329(2)(b); *Confiscation of Criminal Assets Act 2003* (ACT) s 10(1)(a); *Criminal Property Forfeiture Act 2002* (NT) s 11(1)(a); *Criminal Proceeds Confiscation Act 2002* (Qld) s 104(1)(a); *Confiscation Act 1997* (Vic) s 3; *Criminal Property Confiscation Act 2000* (WA) s 146(1)(a) (emphasis added). *DPP (Vic) v Ali* [2008] VSC 167, [34]–[36].

crime-used property is very wide.[17] Section 11 of the *Criminal Property Forfeiture Act 2002* (NT) ('*CPFA* NT'), for example, defines crime-used property as including:

> **11. Crime-used property**
>
> (1) For 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 forfeiture offence or in or in connection with facilitating the commission of a forfeiture offence; or
>
> (b) the property is or was used for storing property that was acquired unlawfully in the course of the commission of a forfeiture offence; or
>
> (c) an act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a forfeiture offence.

The expansiveness of this definition is illustrated in *Bowers* and *White.* As reported in *The West Australian* article extracted above, in *Bowers* the first respondent pleaded guilty to three counts of sexually penetrating a child in contravention of the *Criminal Code Act Compilation Act 1913* (WA). The offences were committed at the complainant's home which was owned by the complainant's father. McLure P, with whom Owen and Buss JJA agreed, found the home at which the offences were committed to be crime-used property.[18] Although the property was crime-used property it was not owned by the respondent but by the complainant's father and therefore could not be confiscated. The legislation deals with this situation via *in personam* confiscation discussed below.

As noted, McLure P in *White* adopted a narrow construction of 'used in connection with':

> 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.[19]

[17] Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 68.

[18] *Bowers* [2010] WASCA 46. On 21 October 2010 the High Court of Australia granted the respondent special leave to appeal against the decision of the Supreme Court of Western Australia as to the construction of 'crime-used property' and 'criminal use' under the *CPCA WA*. The author understands the matter was settled before the appeal was heard. See Transcript of Proceedings, *Bowers v DPP (WA)* [2010] HCATrans 277 (21 October 2010). See also *White* [2010] WASCA 47; *White v DPP (WA)* [2011] HCA 20.

[19] *White* [2010] WASCA 47. See, also, *DPP (NT) v Mattiuzzo* [2011] NTSC 60.

Her Honour found the property in question fell within this definition. In *White*, the respondent was found guilty of wilful murder following a jury trial. 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 at its entrance that were padlocked on the respondent's instructions, to prevent the deceased from leaving the property. The respondent shot several times at, and injured, the deceased while both men were on the property. Trying to escape from the respondent, the deceased ran towards and climbed up the gates. The respondent caught up with the deceased and shot him '"straight up" in the buttocks'[20] while he was on top of the gates. The deceased, still alive, fell off the gates onto the ground outside the property. The respondent unlocked the gates, walked out of the property and shot the deceased six times. The deceased died shortly after. The respondent dragged the deceased's body back onto the property before removing and incinerating it.[21] 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'.[22] The property was, therefore, crime-used and the respondent had made 'criminal use' of it for the purposes of the *Criminal Property Confiscation Act 2000* (WA) ('*CPCA WA*'). The respondent's appeal on this issue was dismissed unanimously by the High Court.[23]

The expansiveness of the definition of crime-used property in Western Australia and the Northern Territory demonstrates the extensive nature of the proceeds of crime legislation applying in those, and other, Australian jurisdictions.

III Crime-Used Property Confiscation

A In rem *and* in personam *confiscation*

All Australian jurisdictions allow for the *in rem* confiscation of crime-used property in the first instance. *In rem* confiscation is confiscation of specific identified items of crime-used property: *in rem* confiscations operate against

[20] *White* [2010] WASCA 47, [5].
[21] Ibid [3]-[5]; *White v DPP (WA)* [2011] HCA 20, [4].
[22] *White* [2010] WASCA 47, [39].
[23] *White v DPP (WA)* [2011] HCA 20.

nominate objects. In some jurisdictions *in personam* confiscation is authorised as an alternative where *in rem* confiscation is not possible.[24] *In personam* confiscation is the confiscation of property equal in value to the assessed value of the crime-used property: *in personam* confiscations operate against specified persons rather than things.[25]

In personam confiscation is generally only available if, for one or other specified reason, the nominate item is not available for confiscation. Where authorised, *in personam* confiscation of property equal in value to unavailable crime-used property is achieved by way of what are termed alternatively 'crime-used property substitution declarations', 'instrument substitution declarations', 'tainted property substitution declarations'.[26]

B *Case study:* Director of Public Prosecutions (Vic) v Le

In *Director of Public Prosecutions (Vic) v Le,*[27] the High Court undertook a detailed discussion of the crime-used property confiscation provisions operating in Victoria. Because of the range of property interests raised in *Le*, it provides a useful and instructive fact and issue construct on which to analyse the crime-used property confiscation regimes operating in Western Australia and the Northern Territory.

Mr Le was the sole registered proprietor of an apartment. The apartment was subject to a registered mortgage. On 23 June 2003, Mr Le was charged with several drug-related offences. Shortly after, on 29 August 2003, Mr Le transferred title in the apartment to himself and his wife, Mrs Le, as joint tenants. The mortgagee consented to the transfer. The consideration for the transfer was 'natural love and affection'.[28] On 1 February 2005, Mr Le was

[24] *Criminal Proceeds Confiscation Act 2002* (Qld) ch 3 pt 4 div 2A, *Confiscation Act 1997* (Vic) pt 3 div 1A; *CPCA WA* pt 3 div 3; *CPFA NT* pt 6 div 3.

[25] See David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345, 346; Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in Brent Fisse, David Fraser and Graeme Coss (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (Law Book, 1992) 106, 141-3; and John Thornton, 'Confiscating Criminal Assets: The New Deterrent' (1990) 2(2) *Current Issues in Criminal Justice* 72.

[26] 'Crime-used property substitution declaration' is used in Western Australia and the Northern Territory; 'tainted property substitution declaration' in Queensland and Victoria; and 'instrument substitution declaration' in South Australia.

[27] *DPP (Vic) v Le* (2007) 232 CLR 562 ('*Le*').

[28] Ibid 567-8

convicted of 'trafficking in not less than a commercial quantity' of heroin.[29] He was sentenced to four years imprisonment.

After the transfer of the property but before Mr Le's conviction, the apartment, which the High Court considered to have been used by Mr Le in the commission of his crime, was made the subject of a restraining order[30] and automatically confiscated.[31] Mrs Le brought an application under s 52 of the *Confiscation Act 1997 (*Vic) for her interest in the apartment to be excluded from confiscation.

C *The position under the* CPCA WA *and the* CPFA NT

The crime-used property confiscation schemes embedded in the *CPCA WA* and the *CPFA NT* are non-conviction based: crime-used property is confiscable whether or not any person has been charged with or convicted of a confiscation offence.[32] The statutes operate retrospectively, targeting crime-used property regardless of when the alleged crime in respect of which the property was used was committed.[33] All proceedings are civil proceedings[34] importing a civil standard of proof.[35]

Crime-used property is defined in the *CPCA WA* and the *CPFA NT* by reference to a 'confiscation' or 'forfeiture' offence which is defined in both statutes as including 'any offence against a law in force anywhere in Australia that is punishable by imprisonment for two years or more'.[36] While the initial introduction of the proceeds of crime legislation in Australia was predicated on combating serious and organised crime, by incorporating crimes punishable by

[29] Ibid 568.
[30] Ibid 569.
[31] Ibid 570.
[32] *CPCA WA* ss 4(c), 5, 146(2)(d); *CPFA NT* ss 10(1)(b), 11(2)(d), 140(b).
[33] *CPCA WA* s 5(2)(d); *CPFA NT* s 10(b)(ii).
[34] *CPCA WA* s 102(1); *CPFA NT* s 136(1). See also *DPP (WA) v A* [2008] WASC 258, [21].
[35] *CPCA WA* s 102(2)(d); *CPFA NT* s 136(2)(d). A decision as to the existence of grounds for doing or suspecting anything may be based on hearsay evidence or information (*CPCA WA* s 109; *CPFA NT* s 143. The Explanatory Memorandum for the Criminal Property Confiscation Bill 2000 (WA) indicates the admissibility of hearsay evidence in this regard 'is fundamental to the operation of the Act as it ensures that the State can take action at an early, and is not required to expend vast resources in strictly proving evidence before the Court.': Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 56. For a discussion on these features of proceeds of crime legislation see Natalie Skead and Sarah Murray, 'The Politics of Proceeds of Crime Legislation' (2015) 38(2) *University of New South Wales Law Journal* 454.
[36] *CPCA WA* s 141(a); *CPFA NT* s 6(a).

no more than a two year term of imprisonment within the ambit of the *CPCA WA* and *CPFA NT,* the confiscation net in these jurisdictions has been cast much wider than initially intended or anticipated. Indeed, in *Director of Public Prosecution (NT) v Green*, Mildren J commented that 'the sheer breadth of the definition of "forfeiture offence" [in the *CPFA NT*] is 'breathtaking'.[37]

By way of example, under s 74 of the *Criminal Code Act Compilation Act 1913* (WA) if a person threatens to injure a residence with the intention of annoying another, that person is guilty of a misdemeanour. However, if the offence was committed at night, the offender is guilty of a crime and liable to up to two years imprisonment[38] and, therefore, is subject to crime-used property confiscation under the *CPCA WA*. While threatening to injure another's home is not condoned, subjecting the offender to criminal confiscation laws is arguably going well beyond the objectives those laws were intended to achieve. In this respect '[t]his legislation is cast more widely than the evil to which it is directed'.[39]

Both the *CPCA WA* and the *CPFA NT* provide for *in rem* and *in personam* confiscations.

D In rem *confiscation*

1 *Restraint of crime-used property*

Long-term preservation of crime-used property pending confiscation is achieved by restraining dealings in the property.[40] An order restraining dealings in crime-used property may be made if there are reasonable grounds for

[37] *DPP (NT) v Green* [2010] NTSC 16 ('*Green*'), [21].
[38] *Criminal Code Act Compilation Act 1913* (WA) s 74.
[39] Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 935 (Jim McGinty).
[40] The *CPCA WA* and *CPFA NT* permit the identification and short-term preservation of suspected crime-used property by authorising the seizure by a police officer of property reasonably suspected of being crime-used property: *CPCA WA* s 33(1)(a); *CPFA NT* s 39(1); Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 18. The seized property may be removed and retained or guarded *in situ* for no longer than 72 hours without law enforcement bodies taking further action in respect of that property: *CPCA WA* s 33(3); *CPFA NT* s 39(3).

suspecting that the property is crime-used.[41] If registered land is restrained, a memorial thereof is to be lodged with the Registrar[42] and registered.[43]

In keeping with a non-conviction based scheme, a finding that there are reasonable grounds for suspecting that property is crime-used is not dependent on a finding that a particular confiscation offence has been committed, but rather that, on the balance of probabilities,[44] some confiscation offence has been committed,[45] regardless of whether anyone has been charged with or convicted of the offence.[46] More significantly, property may be found to be crime-used whether or not the identity of the person who owns or effectively controls the property is known.[47]

It is 'a very serious'[48] offence to deal with restrained property[49] unless the offender did not know and could not reasonably have known that the property was restrained.[50] The onus in this regard is on the person who deals with the property and who is taken to have notice that the property is restrained.[51] In the case of land, notice is presumed following the registration of a restraining order.[52] Any dealing in restrained property will have no effect in law or in equity on the rights of the State.[53] The meaning of dealing is cast widely and includes selling, gifting or otherwise disposing of the property, moving or using the property, accepting the property as a gift, taking any profit, benefit or proceeds from the property, creating, increasing or altering any legal or

[41] *CPCA WA* ss 43(8), 34(1), (2); *CPFA NT* ss 41, 43(1). See *DPP (WA) v Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61.
[42] *CPCA WA* s 36(2); *CPFA NT* s 53(1)(a).
[43] *CPCA WA* s 113(1); *CPFA NT* s 131(1).
[44] *CPCA WA* s 102(2)(d); *CPFA NT* s 136(2)(d).
[45] *CPCA WA* s 106(a); *CPFA NT* s 140(a). See *DPP (WA) v Gypsy Jokers Motorcycle Club Inc* [2005] WASC 61, [65].
[46] *CPCA WA* s 106(b); *CPFA NT* s 140(b).
[47] *CPCA WA* s 106(c); *CPFA NT* s 140(c).
[48] *Permanent Trustee Co Ltd v Western Australia* [2002] WASC 22, [39].
[49] *CPCA WA* s 50(1); *CPFA NT* s 55(1).
[50] *CPCA WA* s 50(3); *CPFA NT* ss 55(3), (4).
[51] *CPCA WA* s 115(1); *CPFA NT* s133(1). See *Bennett & Co (a firm) v DPP (WA)* [2005] WASCA 141, [56].
[52] *CPCA WA* s 115(1); *CPFA NT* s 133.
[53] *CPCA WA* s 51; *CPFA NT* s 58. This does not affect the rights of the parties *inter partes*. For example, if restrained Torrens system land is sold to a purchaser with no notice of the restraining order and the transfer to the purchaser is not registered due to the ultimate confiscation of the property, the purchaser retains the right to bring an action against the vendor for breach of contract: Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 31.

equitable right or obligation in relation to the property; and effecting a change in the effective control of the property.[54]

The potential impact of a restraining order on innocent third party interest-holders could be severe. Consider, for example, the mortgagee in *Le*. On the grant of a restraining order, no dealing is permitted in respect of the apartment. Given the imprisonment of Mr Le and likelihood of the apartment ultimately being confiscated by the State, there may be little incentive for Mr Le to continue making mortgage repayments. Furthermore, he and Mrs Le may not be in a financial position to do so. However, for so long as the apartment remains restrained, the mortgagee, which on registration of the restraining order is presumed to have notice that the apartment is restrained, would not be permitted to exercise many of its remedies against the defaulting mortgagor. The mortgagee would not be entitled, for example, to take possession of the property or appoint a receiver to manage the property as this would effect a change to the effective control of the property. Nor could the mortgagee exercise its power of sale and dispose of the property. What is a mortgagee to do in this instance? Even if the restrained property is later released from restraint, it may be too late for the mortgagee to fully recoup the amount then owing under the mortgage: interest would have accrued in the interim, often at an increased rate; there is a risk the owners may have neglected the property knowing it is either to be confiscated or sold at a mortgagee's sale; the real estate market may have fallen significantly. As regards the co-owner, Mrs Le, by continuing to reside in the apartment, she may be regarded as 'using' it.

As Malcolm CJ commented in *Bennett & Co (a firm) v Director of Public Prosecutions (WA)*, '[f]reezing orders are a very significant interference with the rights of all those having an interest in the restrained property, even if that property is not ultimately confiscated'.[55]

[54] *CPCA WA* s 151; *CPFA NT* s 56.
[55] *Bennett & Co (a firm) v DPP (WA)* [2005] WASCA 141, [58].

2 *Objections to confiscation of restrained crime-used property*

One option for relief available to a third party who may be adversely affected by a restraining order over crime-used property is to object to the confiscation of that property.[56]

There are a number of grounds on which a person might object to the restraint and confiscation of crime-used property.[57] First, property may be released from restraint if the objector establishes on the balance of probabilities that the property is not crime-used.[58] A Court may also release restrained crime-used real 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 [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'.[59]

This protective provision is an appropriate measure for ensuring that the dependants of those involved in crime-related activities are not left without a residence. If she were able to show that she has no alternative accommodation, such a provision may well assist a person in the position of Mrs Le in *Le*. The requirements are, however, somewhat onerous. Not only are they conjunctive so that all seven must be established,[60] they have also been strictly applied by courts.

[56] *CPCA WA* s 79(1); *CPFA NT* s 59(1).
[57] The objection is to be brought within 28 days of being service notice of, or otherwise becoming aware of, the restraint: *CPCA WA* ss 79(2), (3); *CPFA NT* ss 60(1)-(2).
[58] *CPCA WA* s 82(1); *CPFA NT* s 63(1)(c).
[59] *CPCA WA* s 82(3); *CPFA NT* s 63(1).
[60] *DPP (NT) v Mattiuzzo* [2011] NTSC 60, [37].

In *Lamers v Western Australia*,[61] Mr Lamers was declared a drug trafficker under s 32A(1) of the *Misuse of Drugs Act 1981* (WA) ('*MDA WA*'), resulting in the automatic confiscation of his property, including his home, under s 8(1) of the *CPCA WA*.[62] At the relevant time, Mr Lamers lived 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 the hardship provision in s 82(3)(f). Templeman J rejected Ms Willis' objection. His Honour considered that s 82(3) of the *CPCA WA* only applied to the release of restrained crime-used property.[63] The property the subject of Ms Willis' objection was confiscated on the basis that its owner was declared a drug trafficker. His Honour stated, however, that even if the hardship provisions in s 82(3) did apply, despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, there was no evidence that they would not be able to obtain alternative rental accommodation. In so finding, his Honour stated 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'.[64]

Crime-used property may also be released from restraint if the court is satisfied on the balance of probabilities that the objector is the, or an, owner of the property; the person who made criminal use of the property is not in effective control of the property;[65] and the objector and all other owners were

[61] [2009] WASC 3 ('*Lamers*').

[62] For a detailed discussion of the drug-trafficker confiscation provisions in Western Australia and the Northern Territory see Natalie Skead, 'Drug-trafficker property confiscation schemes in Western Australia and the Northern Territory: A study in legislation going too far' (2013) 37(5) *Criminal Law Journal* 296.

[63] See also *Bowers* [2010] WASCA 46, [14] Cf *DPP (WA) v A* [2008] WASC 258, [5], in which Hasluck J indicated that 'although s 82 is ostensibly concerned with and possibly confined to the release of crime-used property … the scheme of the Act arguably suggests that it might have a wider application' and, further, s 82 is ambiguous and where there is such ambiguity the principles of statutory interpretation require a purposive approach to interpretation. On this approach, '[w]here an interpretation advanced by a party would lead to extraordinary and draconian result, it is unlikely that the legislature would have intended the act to operate in that way': *Palfrey v MacPhail* [2004] WASCA 257'=.

[64] *Lamers* [2009] WASC 3, [77]-[78].

[65] Under *CPCA WA* s 16 and *CPFA NT* s 7(1), a person has 'effective control' over 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 the ultimate benefit of the person'. In *Solicitor-General v Bartlett* [2008] 1 NZLR 87, Stevens J considered that the respondent effectively controlled property

innocent parties in relation to the relevant confiscation offence.[66] Once again, the conditions are conjunctive such that all must be satisfied,[67] the burden of proof being on the objector.[68]

The requirement that all owners of the property be innocent parties would present difficulties for objectors such as the mortgagee, or indeed, Mrs Le in *Le*. As Mr Le remained a co-owner of the apartment and was not an innocent party, an objection to confiscation by the mortgagee or co-owner would be unsuccessful. However, while the apartment may not be released in this instance, the court may order that, when the apartment is sold after confiscation, the objector, be it the fee simple co-owner or the mortgagee, is to be paid out an amount equal to the objector's proportionate share in the property.[69] This provision suggests that it is the physical crime-used thing –in *Le*, the apartment itself – rather than the respondent's interest in that thing that is confiscated. Although this payout is likely to satisfy the mortgagee who will be paid out the amount outstanding on the mortgage, it may not satisfy the fee simple co-owner, Mrs Le. It may not have been in her plans to sell the property in the short-term. It may, for example, have been part of her retirement plans, which are not easily substituted.

In the Northern Territory, where an owner of restrained property is not an innocent party, the court has the option of setting aside the order provided it also orders the innocent objector to pay the Territory the value of the share of the property held by the party who is not innocent.[70] Although this may go some way to protecting the proprietary interests of innocent third party interest-holders, it does not go far enough. On reimbursing the Territory for

that he or she had the capacity to treat as his or her own. In *Harrison v Commissioner of Police* [2012] NTSC 45, [28], Mildren J citing *Connell v Lavender* (1991) 7 WAR 9, 22, affirmed that '[t]he expression contemplates control that is practically effective, in the sense that the person concerned has in fact the capacity to control possession, use, or disposition of the property'. For a detailed discussion on the far-reaching implications of this requirement see Skead, above n 62.

[66] *CPCA WA* s 82(4); *CPFA NT* s 63(1)(b). An innocent party is comprehensively defined 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: *CPCA WA* ss 153(1)-(2); *CPFA NT* (NT) s 66(1)).

[67] *DPP (NT) v Mattiuzzo* [2011] NTSC 60, [37].

[68] *Pearson v Western Australia* [2012] WASC 102, [39].

[69] *CPCA WA* s 82(5); *CPFA NT* s 63(2)(a).

[70] *CPFA NT* s 63(2)(b).

the value of the interest of the non-innocent party in the crime-used property, the statute does not provide for the innocent third party to thereby acquire the interest of the non-innocent party. The net result is that the Territory gets the value of the non-innocent party's interest in the crime-used property; the non-innocent party retains his or her interest in the property which is no longer at risk of confiscation; but the innocent third party is out of pocket with no *in rem* claim to the interest of the non-innocent party, the value of which he or she paid out. While the benefits of this provision to the Territory are evident, the benefits to the innocent third party are not.

3 *Confiscation of crime-used property*

In Western Australia, restrained crime-used property is automatically confiscated if an objection to its confiscation is not filed within the prescribed time[71] or, if an objection is filed, the objection is finally determined and the restraining order is not set aside.[72] On application by the Director of Public Prosecutions ('DPP'), the court must declare the property confiscated.[73]

By contrast, in the Northern Territory, a court must order that property restrained on suspicion of being crime-used is confiscated if satisfied that it is crime-used,[74] regardless of whether the owner or person with effective control of the property has been identified.[75] In both jurisdictions the court has no discretion.[76] The difference between the two schemes reflects the status of the Northern Territory as a Territory and the consequent constitutional restrictions against the confiscation of property other than on just terms.[77]

[71] *CPCA WA* s 7(1). See also *White* [2010] WASCA 47, [50].
[72] *CPCA WA* s 7(2). See also *Centurion Trust Co Ltd v DPP (WA)* [2010] WASCA 133, [217], [239].
[73] *CPCA WA* s 30.
[74] *CPFA NT* s 96(1).
[75] *CPFA NT* s 96(2).
[76] In *A-G (NT) v Emmerson* (2014) 88 ALJR 522, the majority of the High Court comprising French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ upheld the constitutional validity of an analogous provision in the Northern Territory scheme. Despite the curtailment of judicial discretion, the court is required to undertake an 'orthodox adjudicative process involving the hearing of evidence and the making of a determination which is subject to the usual processes of appeal' [68]. See Skead and Murray, above n 35. In *DPP (SA) v Alexander* (2003) 86 SASR 577, when considering analogous legislation in South Australia, Debelle J was critical of the fact that judicial discretion is available in relation to the making of restraining orders but not on confiscation.
[77] *Commonwealth Constitution* s 51(xxxi). Gageler J's strong dissent in *A-G (NT) v Emerson* (2014) 88 ALJR 522 left open the possibility of a reconsideration of whether the confiscation of property under *CPCA NT* may be unconstitutional under s 51(xxxi).

In relation to confiscated real property, a memorial of the confiscation must be lodged with the Registrar[78] who must register the memorial.[79] On registration, the Registrar is to endorse on the Certificate of Title that the property is no longer subject to any pre-existing interests other than easements and restrictive covenants.[80] It is somewhat peculiar that the West Australian and Northern Territory legislatures saw fit to protect restrictive covenants and easements while expressly endorsing the extinguishment of other, arguably more valuable and significant, proprietary interests such as the rights of beneficiaries under trusts, leases and mortgages. This extinguishment occurs regardless of the prior registration of the mortgage, lease or other interest and of the fact that the interest holder may be innocent of any wrongdoing. In *Le* the interest of both the registered mortgagee and the co-owner, Mrs Le, would be extinguished.

The decision of McKechnie J in *Smith v Western Australia*[81] provides an illustration of the potential inequity of these extinguishment provisions. In *Smith*, the plaintiff was declared a drug trafficker resulting in the automatic confiscation of all property owned by him.[82] The confiscated property included the plaintiff's share in land that he co-owned as joint tenant with his wife. The plaintiff's mother and sister claimed to have lent money to the plaintiff in circumstances conferring on each of them an equitable interest in the confiscated land. The mother and sister sought to assert their equitable interests against the confiscated land. The State opposed the assertions claiming absolute title to the confiscated land.

McKechnie J dismissed the mother and sister's claims. His Honour found that, under the State's drug-trafficker confiscation regime, on the plaintiff being declared a drug trafficker, the property had been automatically confiscated. As a result, his Honour made a confiscation declaration.[83] McKechnie J then stated that the DPP was obliged to lodge a memorial for registration with the Registrar, which the Registrar was obliged to register. On such registration, McKechnie J continued, even if the plaintiff's mother and sister did have equitable interests in the confiscated land, which claims his Honour rejected,

[78] *CPCA WA* s 31(1); *CPFA NT* s 102(1).
[79] *CPCA WA*s 113(1); *CPFA NT* s 131(1).
[80] *CPCA WA* s 113(2); *CPFA NT* s 131(2)(e).
[81] [2009] WASC 189 ('*Smith*').
[82] *CPCA WA* s 8(1).
[83] *Smith* [2009] WASC 189, [16].

'[t]he inevitable progress following declaration and lodging of the memorial will extinguish any equitable (or other) interest in [the property]'.[84] His Honour concluded that '[t]his is the scheme of the [*CPCA WA*]. If it is unfair, others must seek to change it. I can only decide the law'.[85]

The extinguishment of all rights, interest and title in confiscated property is particularly harsh given the stringent requirements that must be met before a court can release property from confiscation.[86]

Despite the apparently clear operation of the confiscation provisions in the *CPCA WA*, however, where real property that is subject to a registered mortgage has been confiscated, it appears that it is the practice of the DPP in Western Australia not to treat the mortgagee's registered interest as extinguished. In *Pellew v Western Australia*,[87] the State authorised the registered mortgagee to sell the confiscated land, agreeing that the proceeds would be applied firstly to settling the mortgage debt, with any surplus being paid over to the State. Pullen JA stated in this regard that '[b]y some method of interpretation the State in fact … allows the mortgagee's interests to continue to be recognised and paid out if there is eventually a sale of the property by the State'.[88]

E In personam *confiscation*

1 *Unavailability of crime-used property*

There may be circumstances in which crime-used property is not available for *in rem* confiscation. These circumstances include, for example, where the person who made criminal use of the property is not an owner or part owner or does not effectively control the property;[89] where a restraining order made in respect of the property has been set aside on application by the spouse, de facto partner or a dependant of the respondent under the hardship provisions; or where the property has been sold, disposed of or cannot be found.[90] In these

[84] Ibid [18]. See also *Koushappis v Western Australia* [2015] WASC 64.
[85] *Smith* [2009] WASC 189, [18].
[86] *CPCA WA* s 87; *CPFA NT* s 121(1). See eg *Koushappis v Western Australia* [2015] WASC 64.
[87] [2010] WASCA 103.
[88] Ibid [11]. See Skead, above n 62.
[89] See, eg, *DPP (WA) v McPherson* [2012] WASC 342 ('*McPherson*'); *Bowers* [2010] WASCA 46; *White* [2010] WASCA 47, [3]-[5]; *White v DPP (WA)* [2011] HCA 20.
[90] *CPCA WA* s 22; *CPFA NT* s 82.

cases, 'to ensure that [the offender] does not benefit from using someone else's property in a crime, or in disposing of his property prior to it being restrained,'[91] the respondent is required to account for the value of the unavailable crime-used property by way of a crime-used property substitution declaration. As noted by EM Heenan J in *McPherson*:

> If an offender makes use of some other person's property, who is not in any way involved in the commission of those offences, then the [*CPCA WA*] provides for the confiscation of the property of the offender, even though that property was not involved in the commission of the offences.[92]

In *Bowers,* for example, as the crime-used property at which the first respondent committed the sexual offences was owned and controlled by the complainant's father, it was not available for confiscation. In the circumstances, the DPP sought a substitution declaration against the first respondent.

In *White*, the respondent was the lessee of the crime-used property that 'facilitated'[93] the murder. The litigation proceeded on the basis that all parties accepted that the crime-used property was unavailable for confiscation because it was leased, rather than owned, by the respondent.[94] The respondent was, therefore, required to account for the full value of the property pursuant to a substitution declaration. This view accords with that of Riley J in *Director of Public Prosecution (NT) v Green*, that the crime-used property to be restrained and ultimately confiscated 'is the physical entity, the crime-used land, and not some legal interest in that land'.[95]

However, the Full Court, answering a reference from Riley J as to the correctness of his Honour's findings, unanimously held that they were incorrect. Instead, it was held that, because 'property' and 'land' are both defined in the *CPFA NT* as including a legal or equitable interest in land, 'the expression "crime-used property" refers equally to the physical land … as well

[91] Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 12.
[92] *McPherson* [2012] WASC 342, [12].
[93] *White* [2010] WASCA 47, [39].
[94] *DPP (WA) v White* [2011] HCA 20, [3].
[95] *DPP (NT) v Green* [2009] NTSC 21, [28]-[29]. In this case, Riley J held that the crime-used land was not available for confiscation as it was only leased and not owned by the convicted respondent and the owner was an innocent party. His Honour did not, however, consider the meaning of 'owner' as defined in *CPFA NT* s 5, which includes any person holding a legal or equitable interest in the property. Riley J's decision on this point was overturned unanimously by the Full Court in *Green* [2010] NTSC 16. See also *White v DPP (WA)* [2011] HCA 20, [5]-[12]; *Le* (2007) 232 CLR 562, 584-90.

as the legal or equitable interest in [the land]'.[96] Further, an 'owner' is a person with a legal or equitable interest in property. A lessee holds a legal or equitable interest in the leased land and is, therefore, an owner for the purposes of crime-used property confiscations. It followed, according to their Honours, that crime-used property of which the respondent was a lessee is available for confiscation – it is the leasehold estate that it confiscated.[97] In *Le* this would mean that it was only the residual interest Mr Le held in the apartment, after taking into account Mrs Le's part interest as well as the security interest of the mortgagee, that was crime-used and confiscable.

On a strict interpretation of the *CPFA NT*, and in particular the definitions found therein, this decision may be correct. However, thus analysed and applied, curious anomalies may result. In *Green*, the value of the crime-used property was around $1.5 million. It was a rural block. Being a lessee, Green's leasehold interest in the block was confiscated as crime-used property. There are insufficient facts available to even hazard a guess as to the value of the leasehold interest, but it is unlikely to have been significant. Green had two residential properties elsewhere and was therefore likely to have had alternate accommodation.

Consider what the position might have been had the facts in *Green* been slightly different and Green had been a trespasser or mere licencee, rather than a lessee.[98] As a trespasser, he would have been on the property unlawfully. As a licencee, he would have occupied the property pursuant to a revocable licence. In neither case would Green have acquired a proprietary interest in the property.[99] Not having a legal or equitable interest, he would not have been an owner of the property. It would, therefore, not have been available for confiscation. Instead, Green would have been required to account for $1.5 million, the value of the unavailable crime-used property, under a crime-used property substitution declaration. The author doubts the Northern Territory legislature intended such fortuitous variance in application of the legislation.

The extinguishment provisions alluded to above are seemingly inconsistent with the construction of crime-used property adopted by the Full Court in

[96] *CPFA NT* s 5; *Green* [2010] NTSC 16, [31].
[97] *Green* [2010] NTSC 16, [37]-[40].
[98] The High Court has distinguished a lease from a licence on the basis that a lessee has exclusive possession of the leased property. A licencee does not: *Radaich v Smith* (1959) 101 CLR 209.
[99] Ibid 222.

Green. As noted, the *CPCA WA* and *CPFA NT* provide that on registration of the confiscation of real property any pre-existing interests, other than easements and restrictive covenants, are automatically extinguished.[100] This extinguishment provision provides strong evidence that it was intended that it is the physical land that is confiscated rather than an interest in the land. An easement is a right that attaches to land itself. It does not exist in relation to an interest in land. The reference to the continued existence of easements in the extinguishment provisions suggests that the legislation contemplates that it is the land itself that is confiscated rather than an interest in land. The interpretation in *Green* that it is the interest in land that is confiscated would render the easements exception in the extinguishment provisions in the *CPCA WA* and *CPFA NT* otiose.

2 *Making a substitution declaration*

On hearing an application for a substitution declaration, if satisfied that the crime-used property is not available for confiscation and that the respondent made criminal use of the unavailable property, the court is 'obliged to assess the value of the crime-used property'[101] and make an order declaring other property to that value owned by the respondent is available for confiscation.[102]

If the respondent has been convicted of the relevant offence or, in the absence of a conviction, if the 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 he or she did not make criminal use of the property.[103] The rationale for this shifting of the onus is said to be that 'it is easier for the respondent to prove that he did not make criminal use of the property than for the State to prove the contrary'.[104]

These deeming provisions reflect a common feature of Australian proceeds of crime legislation generally and are reflective of the underlying legislative

[100] *CPCA WA* s 113(2); *CPFA NT* s 131(2)(e).
[101] *McPherson* [2012] WASC 342, [6].
[102] *CPCA WA* s 22(1); *CPFA NT* s 81(2).
[103] *CPCA WA* s 22(3)-(4); *CPFA NT* s 83.
[104] Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 13.

policy of making confiscations easier to secure.[105] However, this shifting of the onus of proof in criminal confiscation proceedings through the use of evidentiary presumptions 'removes the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property'.[106]

On making a substitution declaration, the respondent becomes liable for the value of the crime-used property as assessed and specified by the court.[107] The value of crime-used property for the purposes of a substitution declaration is the 'full value' of the property[108] 'not just the value paid by the respondent in obtaining the use of the property'.[109]

3 *Recovering the debt under a substitution declaration*

A debt arising under a substitution declaration may be recovered through the restraining and confiscation of property owned, effectively controlled, or, in Western Australia, at any time given away by the respondent.[110] It follows that property may be confiscated to satisfy a substitution declaration against a respondent even though the respondent is not the owner of the property. In Western Australia, this would include property that was, at some time in the past, given away by the respondent, as occurred in *Le,* regardless of whether the property was given away years before the respondent engaged in the relevant unlawful conduct. The potential impact of this feature of the confiscation regime on an innocent donee and current owner of property, such as Mrs Le, is concerning. A donee may act in reliance upon the receipt of the gift of property to their detriment. For example, on becoming registered proprietor of the gifted property, a donee may sell his or her existing home intending to make the gifted property their family home. The income from the sale of the previous home may be invested in making improvements to the new family home. On

[105] As pointed out by the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009), these inclusions result in 'a greater likelihood that the assets of crime will be confiscated': [5.50]. See also Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]* (2009) [2.55]-[2.57].
[106] Senate Legal and Constitutional Affairs Committee, above n 105 [2.59].
[107] *CPCA WA* s 22(6); *CPFA NT* s 81(4).
[108] *CPCA WA* s 23(2); *CPFA NT* s 85(2).
[109] Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) 13.
[110] *CPFA WA* ss 26(2), 43(3)(b); *CPFA NT* ss 88(2), 44(1)(b), 44(2).

confiscation of the gifted property, the donee may well be left not only homeless, but also out of pocket with no prospect of recompense for the value added to the gifted, but now confiscated, property.

In *Le*, Mrs Le applied for her interest in the apartment to be excluded from the confiscation. In considering whether the conditions for the exclusion of Mrs Le's interest in the property had been met, the Court examined whether Mrs Le had provided sufficient consideration for her interest or whether it had been gifted to her. Kirby and Crennan JJ, with whom Gleeson CJ agreed, held that 'natural love and affection' is 'sufficient consideration' for conveyancing purposes.[111] On this interpretation, it could not be said that Mr Le has 'given away an interest in the apartment to Mrs Le and her interest in the apartment could not be confiscated to satisfy a substitution declaration.

However, following the decision in *Le,* the Victorian legislature effected significant amendments to the *Confiscation Act 1997* (Vic). One such amendment inserted a definition of 'sufficient consideration', which now must 'reflect the market value of the property' and expressly does not include 'consideration arising from love and affection' and consideration arising from 'the fact of a family relationship between the transferor and the transferee'.[112] Similarly, in Western Australian and the Northern Territory, property transferred for consideration that is significantly less than the market value of the property is construed as a gift.[113] Clearly, the intention of the legislature is to provide no relief for a third party who has not given monetary, market-related consideration for his or her interest in the restrained or confiscated property. It follows, therefore, that Mrs Le's interest in the apartment, falling within the definition of a 'gift' would be confiscable.

4 *Objection to restraint of property under a substitution declaration*

A Court may only set aside a restraining order pursuant to a substitution declaration if it is more likely than not that the property is not owned or effectively controlled and has not at any time been given away by the

[111] *Le* (2007) 232 CLR 562, 594. Gummow and Hayne JJ dissented on this point stating at 576-7 that '[w]hen used elsewhere in the general law, the term "sufficient consideration" imports a notion of tangible benefit or advantage conferred by the promisor upon the promisee ... or the conferral of some other form of practical benefit. However, natural love and affection imports no such benefit'.
[112] *Confiscation Act 1997* (Vic) s 3.
[113] *CPCA WA* Glossary; *CPFA NT* s 5.

respondent.[114] These objection provisions would have been of little assistance to Mrs Le in *Le*. It is true that confiscation pursuant to a substitution declaration is not directed at the nominate thing, the apartment in *Le*, as the crime-used property but rather as security for the value of the crime-used property.[115] However, as Mr Le was a co-owner of the apartment and had given away that part of which he was not owner to Mrs Le, the whole of the fee simple interest in the apartment was available as security for the debt Mr Le owed under the substitution declaration.[116]

It should be noted that in *Bowers*, the Western Australian Court of Appeal unanimously found that the hardship provisions safeguarding a respondent's innocent spouse, de facto partner or dependants apply only to objections to and the release of crime-used property and not property restrained or confiscated pursuant to an *in personam* substitution declaration.[117]

IV CONCLUSION

EM Heenan J noted in relation to the *CPCA WA* that the confiscation scheme 'exhibits the clearest intention by the legislature to interfere with, by means of confiscation, what would otherwise be fundamental property rights of a person whose property becomes liable to confiscation'.[118] Of course, this applies to the proceeds of crime confiscation regimes operating across Australia generally. However, Gray has commented that

> a process which provides for the rights of *all parties claiming an interest in targeted assets* to be protected by court supervision is appropriate and necessary if the longer term viability and acceptance of confiscatory regimes is to be achieved.[119]

The foregoing analysis of the *in rem* and *in personam* crime-used property confiscation regimes in the proceeds of crime statutes of Western Australia and

[114] *CPCA WA* s 84(1)s 26(2); *CPFA NT* s 65(2).
[115] *McPherson* [2012] WASC 342, [17].
[116] *Permanent Trustee Co Ltd v Western Australia* [2002] WASC 22; *Permanent Custodians Ltd v Western Australia* [2006] WASC 225.
[117] *Bowers* [2010] WASCA 46 [12]. See also *McPherson* [2012] WASC 342, [15].
[118] *McPherson* [2012] WASC 342, [11].
[119] David 'Earl' Gray, 'Confiscating the Proceeds of Crime in Victoria Australia: Recent Developments' (Paper presented in Wellington, New Zealand, 12 February 2008) available at <http://www.opp.vic.gov.au/wps/wcm/connect/8dad2680404a17c1b469fff5f2791d4a/CONFISCATING_THE_PROCEEDS_of_CRIME_in_VIC_AUS.pdf?MOD=AJPERES> (emphasis added).

the Northern Territory reveals that these regimes do not have a process that fits that description.

While some legislative steps have been taken to afford protection to innocent third parties affected by the confiscation of crime-used property in these jurisdictions, they do not go far enough. Using *Le* as a case study, it has been demonstrated that there are circumstances in which the property rights of third parties, such as the mortgagee and co-owner in that case, may be 'unfair[ly], if not cruel[ly]'[120] affected.

Mildren J, commenting in *Green* on the scheme operating in the Northern Territory, stated: '[t]he Act has been described by both counsel as draconian in its reach. I doubt whether even Dracos himself would have conceived of a law so wide reaching'.[121] This most certainly applies equally to the Western Australian scheme. While this article has focused on crime-used confiscations in these two jurisdictions, similar accusations may be directed at the crime-used confiscation schemes in other Australian jurisdictions, albeit to varying degrees.

[120] *DPP (SA) v George* (2008) 102 SASR 246, [233].
[121] *Green* [2010] NTSC 16, [22].

Appendix D

Natalie Skead, Tamara Tulich, Sarah Murray and Hilde Tubex, “Reforming Proceeds of Crime Legislation: Political Reality or Pipedream?” (2019) 44:3 Alternative Law Journal 176.

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Reforming proceeds of crime legislation: Political reality or pipedream?

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Abstract
In recent decades, Australian states and territories have introduced a raft of legislation aimed at stripping those involved in criminal activity of their ill-gotten gains. However, in doing so, this far-reaching legislation has the potential to undermine legal principles and protections. We recently completed a study into proceeds of crime legislation in Western Australia, New South Wales and Queensland. From our findings it is clear that Western Australia's legislation is the most far-reaching and potentially the most inequitable. In this article, we provide a critique of Western Australia's legislation informed by our research, and identify pressing areas for reform.

Keywords
Proceeds of crime, law reform, confiscation legislation, Western Australia

Annie's story

> I can understand that if [the drugs] was done from the home, but I never, ever dealt with that stuff.... I just think it's unfair that they're coming after me for something I've not done. (Interviewee)

Annie[1] and her husband were married for about 24 years. The couple had three children, but the marriage was fraught with problems largely fuelled by Annie's husband's alcohol abuse and gambling. Annie threw her husband out of the family home in 2008. However, she did not have the resources to finalise the divorce and property distribution. Although the family home was registered in both her and her husband's names, Annie and her sons continued to live in the house, paying the mortgage and attending to the necessary repairs and maintenance.

Five years ago, one of her sons came across a newspaper article reporting that his father had been arrested with 63 kilograms of cannabis, with a street value of around $500,000. Annie's husband was convicted, declared a drug trafficker and imprisoned. The family home became – and, due to the protracted nature of Western Australian confiscation proceedings, five years later remains – the subject of confiscation proceedings under the drug trafficker provisions of the *Criminal Property Confiscation Act 2000* (WA) (*CPCA WA*). Annie contacted a lawyer. The lawyer charged Annie $36,000 for his services but ultimately advised that he was not able to assist her as 'he couldn't win the case'.

Annie and her sons are still at risk of losing their home. As a result of his father's crime, one of the sons lost his job in the import/export business and has been unable to find other stable work because background checks reveal his chequered family history. Annie is

[1]Name has been changed to protect the identities of the people involved.

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suffering debilitating emotional distress, is dependent on sleeping medication, and is currently battling a serious illness, which she also imputes to stress.

Background

Confiscation of proceeds of crime legislation is a key weapon in the fight against serious drug-related and organised crime. Over the past two decades Australian states and territories have introduced a raft of legislation aimed at stripping those involved in criminal activity of their ill-gotten gains. However, in doing so, this far-reaching legislation has the potential to undermine accepted legal principles and protections, including fundamental property rights and natural justice.

In 2017 and 2018 we undertook a study into the attitudes to, and impact of, proceeds of crime legislation in three Australian jurisdictions – Western Australia (WA), New South Wales (NSW) and Queensland.[2] We conducted 40 interviews sampling the views, expertise and experiences of police, members of the judiciary, legal practitioners, departments of the Attorney-General and other government agencies, politicians, academics and individuals directly or indirectly involved in, or impacted by, the operation of confiscation legislation. From our findings it is clear that WA's legislation, the *CPCA WA*, is the most far-reaching and potentially the most inequitable. Annie's story is one of many examples demonstrating the harshness of the WA scheme. In this article, we provide a critique of the WA legislation informed by our research, and identify pressing areas for reform.

In September 2018, the Attorney-General of Western Australia announced a review of the *CPCA WA* to be conducted by former Chief Justice of the Supreme Court of WA, the Hon Wayne Martin AC QC. This review is welcome and long overdue. However, our research has revealed that broad-based support is needed if there is to be legislative reform, as there is a high risk that moves to temper the overreach of confiscation legislation will be met by strong political opposition attendant with 'soft on crime' rhetoric as a ploy to gain electoral favour.

Australian proceeds of crime legislation

Australia's first confiscation regime was introduced into the *Customs Act 1901* (Cth) in 1979. Division 3 of Part XIII of the Act established a confiscation regime permitting the imposition of civil pecuniary penalties against those who engaged in unlawful prescribed narcotic dealings.

The widescale introduction of comprehensive proceeds of crime legislation in Australian jurisdictions followed from the mid-1980s as part of concerted efforts to curb the drug trade and organised crime in Australia, and in response to international efforts to counter transnational organised crime and a series of domestic Royal Commissions into drug trafficking and organised crime.[3] This legislation authorised the confiscation of the proceeds of crime *following* a criminal conviction. 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.[4]

The Commonwealth, states and territories all introduced their own set of conviction-based proceeds of crime schemes, leading to a highly complex and unsatisfactory web of legislation. The complexity of these regimes has only increased with subsequent reforms.[5]

From the late 1980s onwards, most Australian jurisdictions augmented their criminal confiscation regimes with non-conviction-based civil confiscation schemes after a number of inefficiencies were identified with conviction-based regimes.[6] Non-conviction-based confiscation schemes allow for the confiscation of property without a criminal conviction, on the civil standard of proof, and 'on the basis of "unlawful" rather than "criminal" conduct'.[7] All Australian jurisdictions now provide for some form of non-conviction-based confiscation.

The most recent innovation in proceeds of crime legislation, first introduced in WA in 2000, is *unexplained wealth* confiscation – a form of non-conviction-based confiscation that goes a step further.[8] Unexplained wealth provisions require a person who is suspected of

[2]The research process involved comparative legal analysis of proceeds of crime legislation in the three target jurisdictions; a review of existing criminological and legal literature; and a qualitative research phase involving a range of semi-structured interviews with key stakeholders in each target jurisdiction. Ethics Approval was obtained from The University of Western Australia (UWA) on 20 February 2017, in accordance with the requirements of the *National Statement on Ethical Conduct in Human Research* and the policies and procedures of UWA.

[3]See, eg, Arie Freiberg and Richard Fox, 'Evaluating the Effectiveness of Australia's Confiscation Laws' (2000) 33(3) *Australian and New Zealand Journal of Criminology* 239; Natalie Skead and Sarah Murray, 'The Politics of Proceeds of Crime Legislation' (2015) 38(2) *University of New South Wales Law Journal* 455.

[4]Parliament of Australia, *Parliamentary Debates*, House of Representatives, 30 April 1987, 2314 (Lionel Bowen).

[5]Skead and Murray, above n 3, 463.

[6]See, eg, Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987, Report No 87* (1999); Freiberg and Fox, above n 3.

[7]Freiberg and Fox, above n 3, 242.

[8]Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (2012), 9.

having wealth that exceeds their lawfully acquired wealth to pay to the Crown the value of that excess wealth. Typically, unexplained wealth provisions *reverse the onus of proof* by requiring 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'.[9] Unexplained wealth confiscation now exists in all Australian jurisdictions save for the Australian Capital Territory.

Generally speaking, Australian proceeds of crime legislation enable confiscation of property in four circumstances:[10]

1. *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.
2. *Crime derived and criminal benefits property confiscation (conviction 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.
3. *Unexplained wealth confiscation (non-conviction-based)* – where a person's wealth exceeds the value of his or her lawfully acquired property.
4. *Drug trafficker confiscation (conviction and non-conviction-based)* – where a person is declared or taken to be a declared drug trafficker.

Controversial laws

Since the inception of confiscation legislation, judges and legal commentators have raised concerns that Australian proceeds of crime laws do not strike the right balance between crime prevention and deterrence on the one hand, and the recognition and maintenance of legal principles and protections on the other. Concerns have been specifically raised about the impact of proceeds of crime legislation on the principle of proportionality in sentencing; access to legal representation, in particular the lack of access to confiscated funds for engaging legal representation; and on the rights of innocent third parties.[11]

While it is expected and accepted that proceeds of crime legislation will affect the property rights of criminals, by divesting them of title to their property there is a risk that confiscation of such property will also affect the rights of innocent third parties who had no knowledge of or involvement in the unlawful activity.[12] Such third parties may include dependent children, spouses, partners and beneficiaries (like Annie and her sons), as well as unrelated third parties with an interest in the targeted property, such as mortgagees, lessees, lessors and co-owners.

Australian proceeds of crime legislation may also result in the confiscation of legitimately acquired property – a concern ventilated in recent case law. In the Northern Territory case of *Emmerson v Northern Territory*, for example, 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. . . . forfeiture may take place of property which is unrelated to any criminal activity . . .

There is therefore a risk that the purpose of the legislation is compromised by failing to target only those engaged in serious drug-related and organised crime, and that the legislation undermines accepted legal principles and protections. At the same time, there is a paucity of empirical research into the impact and effectiveness of proceeds of crime legislation. Some research has been undertaken in Australia, most notably a recent study looking at the effectiveness of unexplained wealth confiscation.[13] 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. Our study sought to fill this critical gap.

Empirical study

We undertook a combination of a comparative doctrinal legal analysis, a review of the criminological and legal literature, and a qualitative study involving semi-structured interviews with a broad range of key stakeholders in each target jurisdiction to capture their attitudes to, and experience with, proceeds of crime legislation. The overall aim of the project was 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. It emerged from our study that WA legislation is the most far-reaching of the three schemes.

[9]Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009), 109 [5.50].

[10]*Proceeds of Crime Act 2002* (Cth); *Confiscation of Criminal Assets Act 2009* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act 2002* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA).

[11]See, eg, Natalie Skead, 'Drug-trafficker Property Confiscation Schemes in Western Australia and the Northern Territory: A study in legislation going too far' (2013) 37 *Criminal Law Journal* 296, 296; Brent Fisse, 'Confiscation of Proceeds of Crime: Funny Money, Serious Legislation' (1989) 13 *Criminal Law Journal* 368; Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *Australian and New Zealand Journal of Criminology* 44; Sebastian De Brennan, 'Freezing Notices and Confiscation Powers: New punitive roles for police?' (2011) 35(6) *Criminal Law Journal* 345.

[12]Skead, above n 11; Skead and Murray, above n 3.

[13]Marcus Smith and Russell Smith, 'Procedural Impediments to Effective Unexplained Wealth Legislation in Australia': *Trends and Issues in Crime and Criminal Justice* No 523 (Australian Institute of Criminology, 2016) 1.

It is both alarming and, in some instances, ineffectual in its operation.

Harsh, unjust and draconian legislation in Western Australia

Although there are several others, below we detail three key difficulties with the WA scheme in comparison with its NSW and Queensland equivalents: the breadth of the prescribed offences triggering confiscation; the inadequacy of third-party protections; and the absence of judicial discretion.

Offences triggering confiscation

Without exception, Australian confiscation of proceeds of crime legislation was introduced to address serious drug-related and organised crime. Western Australia's scheme, however, casts the confiscation net far wider, potentially capturing lower level criminal activity. Under s 141(1)(a) of the *CPCA WA*, a 'confiscation offence' includes 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more.'

By way of example, 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) of the same Act if, for example, '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 liable to imprisonment for three years and a fine of $36,000 and, therefore, is 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 those laws were intended to achieve.

Queensland has adopted a higher threshold in the *Criminal Proceeds Confiscation Act 2002* (Qld) (*CPCA Qld*). A 'serious criminal offence' under s 17(1) *CPCA Qld* is 'an indictable offence for which the maximum penalty is at least 5 years imprisonment'. Assuming similar sentencing norms, this would arguably, on the face of it, limit confiscation to more serious targeted offences. However, this may not always be the case. Under s 75 of the *Criminal Code 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. If the offence is committed at night the offender is liable to imprisonment for five years and the confiscation provisions are triggered.

In comparison, confiscation under the NSW equivalent, the *Criminal Assets Recovery Act 1990* (NSW) (*CARA NSW*), targets more serious criminal activity including, in s 6, activity relating to drug trafficking, sexual servitude, firearms, child prostitution and abuse, arson or other offences 'punishable by imprisonment for 5 years or more' and 'involv[ing] 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'. This is a preferable approach, specifying both the term of imprisonment and the categories of offences targeted, and is more in keeping with the objectives of confiscation legislation.

Concerns regarding the breadth of the legislation also exist specifically in relation to drug trafficker confiscations. In our empirical study, 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 enlivened by a series of three drug possession offences involving as little as two grams of a dangerous drug, including heroin, cocaine and methylamphetamine.[14] In WA, 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 per cent pure, you're not going to lose your property. If you're not so smart, you'll have 28.1 grams of 30 per cent 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. (Interviewee)

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. (Interviewee)

Inadequate third-party protections

In recognition of the importance of protecting third-party rights, it was noted in the ALRC Report 1999 that:

[14] *Criminal Proceeds Confiscation Act 2002* (Qld) ss93A, 93F(2)(a)(i); See further *Drugs Misuse Act 1986* (Qld) s 9; *Drugs Misuse Regulations 1987* (Qld) sch 3.

> [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.[15]

It is clear from our legal analysis that such a test has not been formulated. However, while the third-party protection provisions in NSW and Queensland are complex and inconsistent, they seem to be largely effective. This is not the case under the WA scheme, where in addition to being very limited in scope, even within their actual scope the provisions fail to adequately protect third-party interests. Significant concerns in this regard, particularly in relation to the impact of confiscation on innocent partners and dependent children, emerged from our empirical study and were expressed in many, although not all, the WA interviews. For example,

> 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 consequence to them is extraordinarily serious. (Interviewee)

Like Annie, all but one of the members of the public interviewed in WA were third parties caught up in confiscation proceedings and faced the very real prospect of losing their family home. This threat was as a result of the nefarious activities of others, in which they had no involvement, and was devastating for the interviewees and their families.

In a radio interview on 20 September 2018, following his announcement of a review of the WA confiscation legislation, the Attorney-General, the Hon John Quigley, provided the following illustration:

> 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 mom raising a couple of kids working as 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.[16]

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, and is, at least in part, a result of inadequate provisions for the release of third-party interests in restrained or confiscated property.

The *CPCA WA* allows for the release of restrained and/or confiscated property provided a number of conditions are met.[17] The conditions drastically limit the circumstances in which property will be released. Not only must the applicant be an owner of the property and innocent of any wrongdoing, in addition, each other owner, including the respondent, must be innocent. In *Permanent Trustee Co Ltd v Western Australia*,[18] 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, 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 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 restraint. The conditions for s 82(3) to apply are, however, onerous and difficult to establish. In *Lamers v The State of Western Australia*,[19] 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). Justice Templeman rejected Ms Willis' objection under s 82(3) for various 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, despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, there was no evidence that they would not be able to obtain alternative rental accommodation.

[15] Australian Law Reform Commission, above n 6, [12.30].
[16] Radio 6PR, 'Criminal Confiscation Laws to be Reviewed', *Mornings with Gareth Parker,* 19 September 2018 (John Quigley) https://www.6pr.com.au/podcast/criminal-confiscation-laws-to-be-reviewed/.
[17] *Criminal Property Confiscation Act 2000* (WA), ss 82(4), 83(2), 87(1).
[18] [2002] WASC 22.
[19] [2009] WASC 3.

The absence of judicial discretion

A key concern emerging from the literature[20] and from the empirical data was the unworkability of the legislation without the possibility of judicial relief in at least some circumstances. While for some interviewees the harsh operation of the legislation was the appropriate, albeit high, price of the respondent engaging in criminal activity, the majority of legal practitioners interviewed expressed the need for greater protection of third parties. It was considered that this is best addressed through the exercise of judicial discretion.

Western Australia, again, does not fare well in this regard. At least some judicial avenues for relief are imperative on rule of law grounds to appropriately supervise prosecutorial and executive confiscation discretion, protect innocent third parties and balance the impact of the legislation against its clear purposes.

Take, for example, the drug trafficker confiscation scheme operating in WA. Under this scheme, on being declared a drug trafficker, *all* the defendant's property, whenever acquired and whether connected with criminal activity or not, is automatically confiscated. The court *must* make an order to this effect and has no discretion in this regard.[21] In *Western Australia v Roth-Bierne*, 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'.[22] There is no judicial discretion, even if the Court considers that, in rendering the defendant impecunious, such confiscation exceeds the underlying objective of the legislation of ensuring crime does not pay. In addition, despite concerns that the confiscation may severely impact innocent family members, as was the case in Annie's story, the Court must make the declaration.

Queensland and NSW, by comparison, incorporate third-party protections for all categories of confiscation. In 2011, the then Attorney-General of WA, acknowledged this anomaly but indicated that it was being addressed through the exercise of executive discretion.[23] The Shadow Attorney-General at the time, John Quigley, recommended legal amendments and said that, '[i]f you allowed a discretion to exist within the courts to look at justice, I think the problem could be largely alleviated.'[24]

Political realities for reform of confiscation legislation

The WA Attorney-General's recently announced review into the *CPCA WA* suggests that there is political appetite for reform of the scheme in that state. This need was widely acknowledged in our empirical study. However, it is also clear from the research that achieving legislative reform will be difficult. It requires broad-based and bipartisan political support. But the political reality is that, even if the case for reform is compelling and underpinned by clear rule of law and natural justice imperatives, self-interest and electoral gain can pose a bar to achieving bipartisan consensus and necessary law reform. Interviewee comments included, by way of example:

> 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. (Interviewee)
>
> I understand both sides of politics think the drug trafficker regime is a bit harsh; yet neither side will blink. (Interviewee)

We hope the many stories like Annie's that abound in the WA confiscation landscape will provide the evidence necessary to fuel this brave political move.

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[20]Skead and Murray above n 3; Stephen Odgers, 'Proceeds of Crime: Instrument of Injustice?' (2007) 31 *Criminal Law Journal* 330–1.
[21]*Criminal Property Confiscation Act 2000* (WA) s 8.
[22] [2007] WASC 91, [20].
[23]Western Australia, *Parliamentary Debates,* Legislative Assembly, 8 September 2011, 7082 (Christian Porter, Attorney-General).
[24]'Calls for Changes to Confiscation Laws', *ABC News* (online), 27 June 2011 http://www.abc.net.au/news/stories/2011/06/27/3254153.htm.

Appendix E

Sarah Murray, Natalie Skead, Hilde Tubex and Tamara Tulich, *Submission: Review of the Criminal Property Confiscation Act 2000 (WA).*

Submission

Review of the *Criminal Property Confiscation Act 2000* (WA)

Sarah Murray, Natalie Skead, Hilde Tubex and Tamara Tulich*

Introduction

We commend the Attorney General of Western Australia, The Hon John Quigley MLA, on commissioning a Review of the *Criminal Property Confiscation Act 2000* (WA) (***CPCA WA***) and welcome the opportunity to provide this submission to the Review. This is a joint submission from academics from the Law School at The University of Western Australia and is based on a comprehensive comparative legal, criminological and empirical study into confiscation of proceeds of crime legislation in Western Australia (WA), New South Wales (NSW), and Queensland. The study, 'Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences', was supported by a grant from the Australian Institute of Criminology (**AIC**) through the Criminology Research Grants Program.[1] The views expressed are the responsibility of the authors and are not necessarily those of the AIC.

A number of common themes emerged from the AIC study. 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.

Below, we identify the areas of particular concern. In relation to some areas we highlight the need for urgent legislative revision, to ensure the scheme achieves its legitimate objectives in an effective and fair manner.

Non-conviction-based civil proceedings (Issues 11 and 13)

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, importing a civil standard of proof and civil rules of evidence, necessarily making the Crown's job in securing a confiscation all the easier. Some jurisdictions go a step further by diluting ordinary rules of evidence, permitting hearsay and some opinion evidence.[2]

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, which wrap essentially criminal sanctions in civil jackets:

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[1] CRG 27/16-17: Pocketing the Proceeds of Crime: The Legislation, Criminological Perspectives and Experiences.

[2] See *Criminal Property Confiscation Act 2000* (WA) ss 105 and 109.

> 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...[3]

Similar criticisms were also reflected in the empirical data we collected.

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 and raises issues relating to both the substantive risk of double punishment and the investigative process.

Of particular note, the Office of the Director of Public Prosecutions (**ODPP**) *CPCA WA* Guidelines state that 'where the confiscation of property is potentially a mitigating factor', then the Director of Public Prosecution (**DPP**) should act promptly and prior to conviction and/or sentence.[4] This suggests an inextricable and impermissible link between the two proceedings. This is despite 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.

In regards to investigations, concerns were also expressed as to the cross-pollination of information between the civil and criminal investigations. As the Law Council of Australia has pointed out, the separation of the criminal and civil proceedings poses a threat to the privilege against self-incrimination where civil confiscation proceedings precede criminal proceedings.[5]

Unexplained wealth confiscations, which in WA do not require a link with any identified criminal activity, present a particularly extreme example. Wealth can be targeted simply if it is 'more likely than not that the total value of the respondent's wealth is greater than the value of the respondent's lawfully acquired wealth'.[6] There is a presumption that the wealth is not lawfully acquired and the burden is on the respondent to demonstrate to a civil standard that their wealth was lawfully acquired.[7] 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'.[8]

Despite the criticism leveled at non-conviction-based civil proceedings, generally the addition of non-conviction-based confiscation to the early conviction based schemes is considered necessary for their effective operation. While in our empirical study this view was expressed mainly in relation

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[3] Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25(1) *Australian and New Zealand Journal of Criminology* 44, 51.
[4] Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines*, (1 September 2018) Office of the Director of Public Prosecutions for Western Australia <https://www.dpp.wa.gov.au/_files/publications/Statement-of-Prosecution-Policy-and-Guidelines.pdf> app 2 [5].
[5] Law Council of Australia, Submission No 5 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*, 2 April 2014, 4.
[6] *Criminal Property Confiscation Act 2000* (WA) s 12(1).
[7] Anthony Davidson Gray, 'Forfeiture Provisions and the Criminal/Civil Divide' (2012) 15(1) *New Criminal Law Review* 32, 35.
[8] Anthony Davidson Gray, The Compatibility of Unexplained Wealth Provisions and "Civil" Forfeiture Regimes with *Kable*' (2012) 12(2) *QUT Law & Justice Journal* 18, 34.

to unexplained wealth confiscations, non-conviction-based proceedings were also considered necessary in the initial freezing and restraint stages of other confiscations.

Even within the bounds of a non-conviction-based scheme, although there was little concern expressed as to the civil nature of the proceedings, there was considerable concern with applying the lower civil standard of proof and shifting the onus to the defendant in proceedings. As noted by the Law Council of Australia in its submissions to the Senate Legal and Constitutional Affairs Legislation Committee, '[b]y 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'.[9]

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.[10]

Recommendations:

Retain non-conviction-based civil 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 civil scheme for other categories of confiscation but the legal burden of proof remains with the Crown.

Executive Discretion (Issues 4, 13, 16)

As in NSW and Queensland, there is no provision in the *CPCA WA* mandating the institution of confiscation proceedings. Rather, the decision on whether to confiscate property lies with the relevant enforcement agency – the Police, DPP, or Crime Commission, as the case may be.

In *Attorney-General (Northern Territory) v Emmerson*,[11] Justice Gageler (in dissent) expressed concern at this common feature in the Australian criminal property confiscation landscape and left 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:

[9] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]* (September 2009) [2.59].
[10] Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25(1) *Australian and New Zealand Journal of Criminology* 44, 53.
[11] (2014) 253 CLR 393.

> 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.[12]

His Honour classified the extent of the prosecutor's discretion which entails 'civil forfeiture as a means of punishment for criminal guilt' potentially resulting in executive usurpation of the judicial function, as a 'confer[ral] on the DPP part of an exclusively judicial function'.[13] Perhaps of greatest concern in this regard are the WA provisions (which are also found in Queensland) that provide for automatic confiscation in certain circumstances. In these instances, final confiscation is a matter of executive discretion, the role of the judiciary being simply to declare as an historical fact that the property is confiscated.

Justice Gageler did, however, take some comfort in the fact 'that the DPP will exercise the discretion with the utmost propriety'.[14]

In our empirical study there was some suggestion that this is not the case in all instances.

The risk of the abuse of the confiscation legislation is heightened where confiscation metrics are reflected in enforcement agency performance measures. For example, one WA Auditor General's Report, identifies '[t]he gross value of restrained (frozen) assets' and the '[n]et proceeds from confiscated assets' as Key Performance Indicators for both the ODPP and the Police.[15] The Report notes concerns by both agencies with these performance measures. Further, competing agency priorities can result in conflicting interests in exercising prosecutorial discretion.

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.[16] In 2011 the President of the then 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…[17]

In a similar vein, in an interview on ABC Radio barrister Shash Nigam commented 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'.[18]

Recommendations:

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[12] *Attorney-General (Northern Territory)* v *Emmerson* (2014) 253 CLR 393 [135].
[13] *Attorney-General (Northern Territory)* v *Emmerson* (2014) 253 CLR 393 [138].
[14] *Attorney-General (Northern Territory)* v *Emmerson* (2014) 253 CLR 393 [136].
[15] WA Auditor General, *Western Australian Auditor General's Report 2018- Confiscation of the Proceeds of Crime*, Report 5 (2018) 19.
[16] Brent Fisse, 'The Proceeds of Crime Act – The Rise of Money-laundering Offences and the Fall of Principle' (1989) 13(6) *Criminal Law Journal* 5, 23.
[17] Hylton Quail, 'President's Report' (2011) 38(7) *Brief* 2, 4.
[18] Damien Carrick, Interview with Shash Nigam, (ABC Radio), 7'32" <https://www.abc.net.au/radionational/programs/lawreport/2018-10-30/10442770>.

Provide for executive discretion as to whether to institute confiscation proceedings to be guided by considerations of public interest.

Adjudication by courts should be integrated into each stage of the confiscation process, including specifically at the final stage of confiscation.

Judicial Discretion (Issues 1-4, 7, 19)

The effectiveness of confiscation legislation is often recognised as bound up with the absence of judicial discretion.[19] This position was echoed in our empirical study.

A key concern, however, emerging from the literature[20] and from the empirical data was the unworkability of the legislation without the possibility of judicial relief in at least some circumstances. Many instances were raised where third parties were significantly affected by confiscation schemes. For some interviewees this was the appropriate, albeit high, price of the respondent engaging in criminal activity. For others, there was seen to be a need for greater protection of third parties who were implicated through no fault of their own. It was considered that this is best done through the exercise of juridical discretion.

There was also concern at the powers vested in Justices of the Peace in WA, introduced to facilitate confiscations in regional areas.

While not all interviewees, however, supported the introduction of a broad open judicial discretion because of the ambiguity and uncertainty which it might introduce, it is clear that some judicial avenues for relief are imperative on rule of law grounds, to appropriately supervise prosecutorial and executive confiscation discretion and balance the impact of the legislation against its clear purposes.

The *Criminal Proceeds Confiscation Act 2002* (Qld) for example, includes a 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 forfeiture orders, s 93ZZB(2) in relation to a serious drug offender confiscation orders, and s 89G(2) in relation to unexplained wealth orders. Similar provisions exist in the *Criminal Assets Recovery Act 1990* (NSW) (***CARA NSW***).

By contrast, under the drug trafficker confiscation scheme operating in WA, on being declared a drug trafficker, *all* the defendant's property, whenever acquired and whether connected with criminal activity or not, is automatically confiscated. The court *must* make an order to this effect and has no discretion in this regard.[21] In *Director of Public Prosecutions (Western Australia) v Roth-Beirne* 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'.[22] This is despite the fact that the court may consider that, in rendering the defendant (and his or her dependants) impecunious, such confiscation is unduly harsh and goes beyond achieving the

[19] Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [3.24]-[3.25].
[20] Natalie Skead and Sarah Murray, 'The Politics of Proceeds of Crime Legislation' (2015) 38(2) *University of New South Wales Law Journal* 455; Stephen Odgers, 'Proceeds of Crime: Instrument of Injustice?' (2007) 31(6) *Criminal Law Journal* 330.
[21] *Criminal Property Confiscation Act 2000* (WA) s 8.
[22] *Director of Public Prosecution* (*Western Australia) v Roth-Beirne* [2007] WASC 91, 5 [20].

underlying objective of the legislation of ensuring crime does not pay. In addition the confiscation inflicts severe additional punishment on not only the defendant but also his or her dependants.

While there is a limited hardship provision incorporated into the crime-used property confiscation provisions in the *CPCA WA*,[23] there is no judicial discretion embedded in the other confiscation categories of unexplained wealth; crime-used substitution orders; crime-derived property, criminal benefits and drug trafficker confiscations. While this omission is seemingly intentional, the inclusion of a hardship provision for crime-used property confiscations but not for crime-used substitution confiscations is capricious and arbitrary.

We note that in the case of *Bowers v Director of Public Prosecutions (Western Australia)*[24] which concerned this discrepancy, special leave to appeal before the High Court was granted but the matter was settled before the appeal was heard.

In 2011, the then Attorney General of WA, acknowledged this anomaly but indicated that it was being addressed through the exercise of executive discretion.[25] The Shadow Attorney General at the time, John Quigley, recommended legal amendments and said that '[i]f you allowed a discretion to exist within the courts to look at justice, I think the problem could be largely alleviated'.[26]

While the inclusion of a hardship provision into each stage of the confiscation process is desirable, it must be noted that:

> 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.[27]

Recommendation:

Introduce at every stage of the confiscation process and into all categories of confiscation, a guided judicial discretion taking into account excessive disproportionality and serious hardship, and the public interest.

Offences triggering confiscation (Issue 3, Terms of Reference (e))

Without exception, Australian confiscation of proceeds of crime legislation was introduced to address *serious drug-related* and *organised* crime. However, the WA scheme casts the confiscation net far wider, potentially capturing lower level criminal activity. For example, a 'confiscation offence' includes 'an offence against a law in force anywhere in Australia that is punishable by imprisonment for 2 years or more'.[28]

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[23] *Criminal Property Confiscation Act 2000* (WA) s 82(3).
[24] Transcript of Proceedings, *Bowers v Director of Public Prosecution* (*Western Australia)* [2010] HCATrans 277 (21 October 2010).
[25] Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 2011, 7083 [3] (Christian Porter, Attorney-General).
[26] 'Calls for Changes to Confiscation Laws', *ABC News*, 27 June 2011 <http://www.abc.net.au/news/stories/2011/06/27/3254153.htm>.
[27] *R v Lake* (1989) 44 A Crim R 63, 66-7 (Kirby P).
[28] *Criminal Property Confiscation Act 2000* (WA) s 141(1)(a).

By way of example, 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, for example, '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 liable to imprisonment for three years and a fine of $36 000 and, therefore, is 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 those laws were intended to achieve. In this respect '[t]his legislation is cast more widely than the evil to which it is directed'.[29]

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, arson and other offences that are:

> [P]unishable by imprisonment for 5 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…[30]

Specifically as regards drug trafficker confiscations, interviewees in our empirical study expressed concerns about the quantity of prohibited drugs triggering a drug trafficker declaration and consequent confiscation. In WA the weight threshold for a single offence of 28.0 grams was considered too low and out of touch with the quantity of drugs that may be consumed for individual use. Similar concerns were expressed in relation to the arbitrariness of the provisions regulating cannabis and the drug trafficker definition.

Recommendations:

Limit offences triggering confiscation to 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 in *CARA NSW.*

Review the quantities of prohibited drugs enlivening the drug trafficker confiscation provision.

Definition of crime used property (Issues 10 and 22)

'Crime-used property' under the *CPCA WA* is broadly defined:[31]

> Only half in jest, Laurie Levy SC, 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

[29] Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 935 [22] (Jim McGinty).
[30] *Criminal Assets Recovery Act 1990* (NSW) s 6.
[31] *Criminal Property Confiscation Act 2000* (WA) s 146(1)(a).

> is sufficiently connected (facilitating the commission of the offence) to the basis of a property-substitution value calculation.[32]

While the actual crime used property is targeted in the first instance, if the respondent does not have a confiscable interest in that property, the value thereof may be confiscated from the respondent under substitution provisions.

In *White v Director of Public Prosecutions (Western Australia)*,[33] the High Court of Australia dismissed an appeal from a decision of the WA Court of Appeal, in which the Court of Appeal adopted a narrow interpretation of crime-used property, requiring that:

> 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.[34]

Despite this apparently narrow construction of crime used property, it is capable of very broad application. In *White*, the respondent was found guilty of wilful murder of Anthony Tapley (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. Mr 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. President McLure 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'.[35] The property was, therefore, crime used.

As the respondent in *White* did not own the crime used property in question, the value of that property was confiscated from White pursuant to a substitution order.

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.

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[32] Hylton Quail, 'President's Report' (2011) 38(7) *Brief* 2, 3.
[33] (2011) 243 CLR 478.
[34] *Director of Public Prosecution* (*Western Australia) v White* (2010) 41 WAR 249, 259 [39] (McLure P).
[35] *Director of Public Prosecution* (*Western Australia) v White* (2010) 41 WAR 248, 259 [39] (McLure P).

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 (Issues 1, 2, 3, 5, 8, 10)

Common themes emerging from our legal analysis and the empirical data collection were the potential disproportion, arbitrariness, and lack of parity in the *CPCA WA*.

Crime used property confiscations provided a stark illustration of the potentially 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 bearing on the severity of that 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 dinghy, a prison term plus a $500 fine is sufficient. With all due respect, I believe this makes a mockery of our legal system.[36]

In Queensland and NSW, these confiscation provisions are tempered by a public interest discretion. This is not the case in WA.

The drug trafficker confiscation provisions provide another compelling illustration of the potentially disproportionate, arbitrary and harsh operation of the *CPCA WA*. For example, in *Davies v Director of Public Prosecutions (Western Australia)*,[37] 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 and convicted with possession of cannabis with the intent to sell or supply it to another under s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (***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. The Davies were each handed 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 the *MDA WA* 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 DPP. As a result, on conviction, Mr and Mrs Davies were declared drug traffickers under the *MDA WA*. 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

[36] Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 2011, 7081 [1] (Peter Abetz).
[37] [2005] WASCA 47.

was made is confiscated. The confiscation in these circumstances is automatic: there is no need for an application to be made to effect the confiscation.

Following their declaration as drug traffickers, the Davies' family home, their primary asset, built by David Davies 40 years earlier and financed legitimately through many years of hard work, was confiscated by the State. Perhaps the harshest aspect of the Davies' case is the disparity between the severity of the offences and the proprietary consequences of their 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',[38] the Davies case demonstrates that the drug trafficker confiscation 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 his or her gains, whether ill-gotten or not.

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.

Amend WA drug trafficker confiscation provisions to require a substantial connection between the drug-trafficking and the confiscable property, whether as crime-used property, crime derived property or as criminal benefits.

Constitutional validity (Issue 2, Terms of Reference (d))

In *Silbert v Director of Public Prosecutions (Western Australia)*[39] the majority of the High Court disagreed that s 6 of the *Crimes (Confiscation of Profits) Act 1988* (WA) amounted to a legislative determination of guilt in providing that a person was 'taken to have been convicted of a serious offence' if they had absconded[40] (see also s 157 of the *CPCA WA*). Similarly, Kirby J, while noting it 'attach[ed] serious consequences to a deemed "conviction"'[41] he found that there are no 'criminal consequences' which flow and the 'legislative fiction'[42] is a 'devic[e] used to identify persons of a class against whom applications under the Act may be made'.[43] The provisions carried the 'normal hallmarks of judicial assessment, discretion, judgment and reconsideration'[44] and they were therefore valid. His Honour did note that a 'deeming provision' which precluded an individual 'from proving the truth of contested matters'[45] may receive different constitutional treatment.

One provision which may depart too greatly from the judicial process is s 157(1)(d) of the *CPCA WA* which 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' (s 160 defines 'absconds' to include the situation where the person dies). There is no

[38] Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 September 2000, 934 [21] (Antony Prince).
[39] (2004) 217 CLR 181. See, also, *DPP (WA) v Smith as administrator of the estate of Leslie Thomas Hoddy (Dec)* [2008] WASC 141.
[40] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [13] and [31].
[41] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [37].
[42] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [42].
[43] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [45].
[44] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [48].
[45] *Silbert v Director of Public Prosecution (Western Australia)* (2004) 217 CLR 181, [44].

standard of proof to be met in relation to commission of the offence, which is deemed.[46] 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' (cf: 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').

Recommendations:

Allow a party to lead evidence to refute what has been deemed.

Amend the burden of proof in deeming a person to have been convicted of an offence to be at the criminal or, at the very least, at the civil standard.

Implementation of Unexplained Wealth (Issue 13)

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 NSW has referred the necessary powers to join the Scheme, to work alongside the Commonwealth, the Northern Territory and the Australian Capital Territory.

What clearly emerged from our empirical study 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 in which there is a dedicated and independent expert team, such as in NSW, with the NSW Crime Commission. For example, in WA, where unexplained wealth confiscations have historically been enforced by the Police and/or the DPP, there were no unexplained wealth confiscations in the period 2010 to 2015. By contrast, in the same period close to $12m was confiscated by the Crime Commission in NSW.

Despite this, while supported by some interviewees, the transferral of unexplained wealth jurisdiction to the Corruption and Crime Commission of Western Australia (**CCC WA**) in 2018 was received with some cynicism by others. This was primarily because of concerns of insufficient resourcing and expertise and the extent of the powers conferred on the CCC WA.

Recommendations:

Expand the National Cooperative Scheme on Unexplained Wealth to incorporate all Australian States and Territories and to include a:

[46] cf: *Criminal Property Confiscation Act 2000* (WA) ss 5(1)(d), 16(b).

- **dedicated and adequately resourced multi-disciplinary and independent expert body; and**

- **fair and transparent mechanism for the allocation of confiscated wealth across jurisdictions**

Until then, while WA is not currently part of the Scheme, appoint and adequately resource a dedicated, multi-disciplinary independent expert body to implement, investigate and enforce the existing schemes.

Third party interests (Issues 5-9)

In recognition of the importance of protecting third party rights, it was noted in the 1999 Australian Law Reform Commission Report 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.[47]

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 NSW 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 are ineffective to adequately protect third party interests.

Significant concerns in this regard, particularly in relation to the impact of confiscation on innocent partners and dependent children, emerged from the empirical study and were expressed in many, although not all, the WA interviews.

Bar one, all the members of the public interviewed in WA were third parties caught up in confiscation proceedings and faced with the very real prospect of losing their family home as a result of the nefarious activities of others, often with long-lasting devastating effects for the interviewees and their families.

While some participants from politics and government considered such consequences to be acceptable, the overriding impression was that this potential harshness was a flaw in the legislation that must be addressed.

Concern as to the impact of the legislation on third parties is also evidenced in the case law and commentary. Again, this is particularly the case under the WA confiscation scheme which, unlike the schemes in Queensland and NSW, generally does not afford the court discretion to refuse to make a confiscation order.

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[47] Australian Law Reform Commission, *Confiscation That Counts—A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999) [12.30].

Indeed, in a radio interview following his announcement a review of the WA confiscation legislation, the Attorney General of WA, John Quigley, provided the following illustration:

> 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 mom 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 … that gets seized and no discretion in the courts to weigh the justice of this or not, that 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.[48]

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 and is, at least in part, a result of a) inadequate provisions for the release of third party interests in restrained or confiscated property; and b) 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 a number of conditions are met.[49] The conditions drastically limit the circumstances in which property will be released. Not only must the applicant be an owner of the property and innocent of any wrongdoing, in addition, each other owner, including the respondent, must be innocent. In *Permanent Trustee Co Ltd v Director of Public Prosecutions (Western Australia)*,[50] referred to in Issue 7, 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 restraint. The conditions for s 82(3) to apply are, however, onerous and difficult to establish. In *Lamers v Director of Public Prosecutions (Western Australia)*[51] Mr Lamers was declared a drug trafficker resulting 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). Justice Templeman rejected Ms Willis' objection under s 82(3) for various 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-

[48] Gareth Parker, Interview with John Quigley, Attorney General of Western Australia (Radio 6PR), 20 September 2018, 4'20" <https://www.6pr.com.au/podcast/criminal-confiscation-laws-to-be-reviewed/>.
[49] *Criminal Property Confiscation Act 2000* (WA) ss 82(4), 83(2) and 87(1).
[50] [2002] WASC 22.
[51] [2009] WASC 3.

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, despite Ms Willis and her daughters having lived in the confiscated property for seven years and having no other place of residence, there was no evidence that they would not be able to obtain alternative rental accommodation. 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'.[52]

Failure to identify correctly the 'property' that is the subject of an order.

While the legislation in WA, Queensland and NSW define 'property' as meaning any legal or equitable estate or interest in property,[53] simply including estates and interests in property in the definition of 'property' 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 such failure are threefold.

First, the legislation reveals little conceptual understanding of the legal nature of 'property'. In *Yanner* v *Eaton*[54] the majority of the High Court of Australia, comprising Gleeson CJ, 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, rather, 'it is a description of a legal relationship with a thing'.[55] It is trite that 'any particular thing can be subject to a number of [legal and equitable] property rights at any given time'.[56]

Second, establishing an equitable interest in property can be difficult. For example, in *Smith v Director of Public Prosecutions (Western Australia)*[57] the plaintiff was declared a drug trafficker resulting 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 conferring on them an equitable interest in the property. Justice McKechnie dismissed the mother and sister's claims, doubting that they had an equitable interest in the property.

Third, while the definition of 'property' in the legislation allows for the restraint and confiscation provisions to be directed at interests in property held by defendants only, 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*, French CJ, Crennan and Bell JJ referring to the definition of 'property' in the *CPCA WA* stated that '[t]he definition is more

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[52] *Lamers v Director of Public Prosecution* (*Western Australia)* [2009] WASC 3, [77]-[78] (emphasis in original).
[53] *Criminal Assets Recovery Act 1990* (NSW) ss 4, 7; *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4; *Criminal Proceeds Confiscation Act 2002* (Qld) ss 3, 19, sch 6; *Criminal Property Confiscation Act 2000* (WA) s 3, glossary.
[54] (1991) 201 CLR 351.
[55] *Yanner* v *Eaton* (1991) 201 CLR 351, 365-6.
[56] John Tarrant, 'Property Rights to Stolen Money' (2005) 32(2) *University of Western Australia Law Review* 234, 234.
[57] [2009] WASC 189.

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'.[58]

The result of this lack of clarity is that any and all persons having an interest in the restrained and/or confiscated 'thing' will be adversely affected thereby.

Under the *CPCA WA*, the lack of clarity is exacerbated by s 9 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)…'. In *Smith*, McKechnie J stated that even if the mother and sister succeeded in proving that they did have an equitable interest in the property, such interests would be extinguished by operation of s 9 of the *CPCA WA*.[59]

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 beneficiary's rights in the property are extinguished. So, too, if the defendant borrowed 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, as being the defendant's proprietary interests in the physical item/s of property concerned, rather than 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 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 (Terms of Reference (d))

The use of restrained funds for engaging legal representation has been an ongoing concern in the literature.[60] This was confirmed in our empirical study.

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[58] *White v Director of Public Prosecution (Western Australia)* (2011) 243 CLR 478, 483 [5].
[59] *Smith v Director of Public Prosecution (Western Australia)* [2009] WASC 189, 7 [13].
[60] Brent Fisse, 'Confiscation of Proceeds of Crime: Funny Money, Serious Legislation' (1989) 13(6) *Criminal Law Journal* 368; Ian Temby, 'The Proceeds of Crime Act – One Year's Experience' (1989) 13(1) *Criminal Law Journal* 24; Arie Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25(1) *Australian and New Zealand Journal of Criminology* 44; David Edwards, 'Confiscation that Counts' (1999) 75 *Reform* 47; Richard Carew and Emily Ollenburg, 'Convicted by Confiscation? The Proceeds of Crime Act 2002' (2006) 72 (January/February) *Precedent* 33.

Each confiscation regime studied differs in its approach on this issue. However, all require court proceedings to release restrained property to cover legal expenses.[61] A similar provision to s 43(6) of the *CPCA NSW* existed in WA's inaugural Proceeds of Crime Act but was not retained in the *CPCA WA*. However, in *Mansfield v Director of Public Prosecutions (Western Australia),*[62] the High Court held that the Court, when making or varying a freezing order, may provide that certain property or funds is exempt from a freezing order on condition it is used for legal expenses.[63] In practice, however, this approach has proven problematic because of the difficulty of the Court assessing the likely costs and the fact that it requires legal tactics and potential defence arguments to be disclosed in open court.

The federal Legal Aid mechanism was endorsed by one interviewee over the state approaches of releasing property for legal costs.

Other interviewees expressed further concerns with costs in the confiscation regimes and the implications of the costs regime on innocent third parties, and their ability to bring applications.

Recommendation:

Provide means tested Legal Aid funding through an administrative rather than a judicial process, assessed disregarding the value of the restrained assets.

[61] *Criminal Proceeds Confiscation Act 2002* (Qld) s 93V(f); *Confiscation of Proceeds of Crime Act 1989* (NSW) s43(6).
[62] (2006) 226 CLR 486.
[63] *Mansfield v Director of Public Prosecution* (*Western Australia)* (2006) 226 CLR 486, 504 [53]-[54].