



**Australian Government**

**Australian Institute of Criminology**

# A review of confiscation schemes in Australia

Lorana Bartels

**AIC Reports**  
Technical and  
Background Paper **36**



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# Acronyms

<b>ACC</b>	Australian Crime Commission
<b>ACO</b>	Asset Confiscation Operations
<b>AFP</b>	Australian Federal Police
<b>AIC</b>	Australian Institute of Criminology
<b>CARA</b>	<i>Criminal Asset Recovery Act 1990</i> (NSW)
<b>CDPP</b>	Commonwealth Director of Public Prosecutions
<b>COPOCA</b>	<i>Confiscation of Proceeds of Crime Act 1989</i> (NSW)
<b>CPCA</b>	<i>Criminal Proceeds Confiscation Act 2002</i> (Qld)
<b>CRC</b>	Criminology Research Council
<b>DOJ</b>	Department of Justice
<b>DPP</b>	Director of Public Prosecutions
<b>IFTC v NSWCC</b>	<i>International Finance Trust Company Limited v New South Wales Crime Commission</i>
<b>MCPEMP</b>	Ministerial Council for Police and Emergency Management—Police
<b>NSWCC</b>	New South Wales Crime Commission
<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>OPP</b>	Office of Public Prosecutions
<b>PJC-ACC</b>	Parliamentary Joint Committee on the Australian Crime Commission
<b>POCA</b>	<i>Proceeds of Crime Act</i> (Cth)
<b>QCMC</b>	Queensland Crime and Misconduct Commission
<b>SCAG</b>	Standing Committee of Attorneys General
<b>SOG on OC</b>	Senior Officers' Group on Organised Crime

# Executive summary

Confiscation of illegally obtained proceeds of crime is a key strategy for disrupting criminal activity, especially serious and organised crime. Confiscation of this nature serves a number of purposes. First, it seeks to deter crime by reducing its profitability, as well as diminishing offenders' ability to finance further criminal activity. In addition, compensation schemes aim to redress imbalances by compensating society for the adverse impacts of criminal activity and reimbursing the state for the costs of incurred in fighting crime. Finally, there is public utility in demonstrating to the community that crime 'does not pay'.

In Australia, there are two means by which proceeds of crime can be recovered: *conviction based recovery*, which enables the recovery of assets associated with a crime after a conviction for that crime has been secured; and *non-conviction (or civil) based recovery*, which allows the restraint and recovery of assets suspected of criminal origins without the necessity of securing a criminal conviction. All Australian states and territories, except Tasmania, have legislation allowing for both conviction and non-conviction based recovery.

This report presents the findings of research undertaken on confiscation schemes and the impact of such provisions on behalf of the Criminology Research Council. The paper sets out the background to confiscation schemes and key developments in this context. There have been recent national developments to examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with such groups. In 2009, the Standing Committee of Attorneys General agreed to support a comprehensive national response to organised crime to ensure a coordinated effort to target the proceeds of organised crime groups.

The report provides an overview of the operation of key legislation in each jurisdiction, with particular emphasis on the operation of the *Proceeds of Crime Act 2002* (Cth). Available data on each jurisdiction's confiscation legislation are presented and discussed but the report calls for more systematic processes for recording and reporting information of this nature. The need for ongoing data collection and dissemination is also highlighted.







# Introduction

This paper presents the findings of research undertaken on behalf of the Criminology Research Council (CRC) on confiscation schemes and the impact of such provisions. The paper sets out the background to confiscation schemes and recent and future developments in this context. The paper then details the regimes currently in place in each Australian jurisdiction and provides some data about the impact of such schemes, in the form of numbers of applications and/or monies recovered. The related issue of unexplained wealth provisions will not be explored in detail in this paper as it will be the subject of a separate publication to be published by the Australian Institute of Criminology (AIC) (see Bartels forthcoming).

The information presented in the paper is drawn from relevant annual reports and supplemented by unpublished data from key agencies. Representatives of each jurisdiction were also provided with the opportunity to provide additional information and commentary. The paper predominantly relies on publicly available data, as well as including contributions from the following key agencies:

- New South Wales—Office of the Director of Public Prosecutions; Crime Commission;
- Victoria—Office of Public Prosecutions; Asset Confiscations Office, Department of Justice;
- Queensland—Office of the Director of Public Prosecutions; Crime and Misconduct Commission;
- South Australia—Office of the Director of Public Prosecutions;
- Western Australia—Office of the Director of Public Prosecutions;
- Tasmania—Crown Law, Department of Justice;
- Australian Capital Territory—Office of the Director of Public Prosecutions;
- Northern Territory—Solicitor for the Northern Territory; and
- Commonwealth—Attorney-General's Department.

There are two key aims to Australia's assets confiscation regime:

- reducing criminals' motivation for offending by providing specific and general deterrent effects; and
- reducing the capital available to perpetrators of future criminal ventures (AIC 2008).

Lusty (2002: 345) notes the justification for such laws is at least sixfold, namely, to:

- deter crime by reducing actual and expected profitability;
- prevent crime by diminishing the capacity of offenders to finance further criminal activity;

- redress the unjust enrichment of those who profit at society's expense;
- compensate society for the harm, suffering and human misery caused by crime;
- reimburse the state for the ever-increasing cost of fighting crime; and
- engender public confidence in the administration of justice by demonstrating to the community that crime does not pay.

There are two means by which the proceeds of crime can be recovered in Australia, namely, *conviction based recovery*, which enables the recovery of assets associated with a crime after a conviction for that crime has been secured; and *non-conviction based recovery*, which allows the restraint and recovery of assets suspected of criminal origins without the necessity of securing a criminal conviction. The burden of proof required for non-conviction based forfeiture (on the balance of probabilities) is lower than that of conviction based recovery (beyond reasonable doubt).

All jurisdictions introduced conviction-based laws around the same time:

- *Crimes (Confiscation of Profits) Act 1985* (NSW);
- *Crimes (Confiscation of Profits Act) 1986* (Vic);
- *Crimes (Confiscation of Profits) Act 1986* (SA);
- *Proceeds of Crime Act 1987* (Cth);
- *Crimes (Confiscation of Profits) Act 1988* (WA);
- *Crimes (Forfeiture of Proceeds) Act 1988* (NT);
- *Crimes (Confiscation of Profits) Act 1989* (Qld);
- *Proceeds of Crime Act 1991* (ACT); and
- *Crimes (Confiscation of Profits) Act 1993* (Tas).

Freiberg and Fox (2000: 239) observed that these schemes were regarded by prosecutorial authorities as a 'measured response' to organised crime, but were seen by civil libertarians as evidence of a 'new despotism' in criminal law. They suggest that since the introduction of these laws, they have been made 'progressively more severe' and have been 'amended, repealed and replaced...with disconcerting frequency' (Freiberg & Fox 2009: 241). As Sherman (2006: 5) noted in his independent review of the *Proceeds of Crime Act 2002* (Cth) (POCA 2002), with the passage of time, conviction based laws were found to be ineffective and so jurisdictions increasingly introduced non-conviction based forfeiture laws.



# Recent national developments

On 17 March 2008, the Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) initiated an inquiry into the legislative arrangements to outlaw serious and organised crime groups pursuant to s 55(1)(b) of the *Australian Crime Commission Act 2002* (Cth). The terms of reference for the committee are to examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups, with particular reference to:

- international legislative arrangements developed to outlaw serious and organised crime groups and association to those groups, and the effectiveness of these arrangements;
- the need in Australia to have legislation to outlaw specific groups known to undertake criminal activities and membership of, and association with, those groups;
- Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups and membership of, and association with, those groups, and the effectiveness of these arrangements;
- the impact and consequences of legislative attempts to outlaw serious and organised crime groups and membership of, and association with, these groups on:

- society;
- criminal groups and their networks;
- law enforcement agencies; and
- the judicial/legal system; and
- an assessment of how legislation which outlaws criminal groups and membership of, and association with, these groups might affect the functions and performance of the Australian Crime Commission (ACC).

The PJC-ACC delivered its report on 17 August 2009 and much of the discussion in this paper is based on the committee's findings. In particular, the committee reiterated the importance 'not only of having strong legislative measures to prevent serious and organised crime, but also of having a suite of legislation and administrative and policy arrangements to support those measures' (PJC-ACC 2009: 118). One of the issues the committee explored in this context was financial intelligence, recommending that the enforcement of registration obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) be strengthened (Recommendation 4) and that the Commonwealth examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency, such as the ACC (PJC-ACC; Recommendation 6).

The PJC-ACC (2009: 130) also identified a number of administrative, policy and legislative approaches critical to supporting Australia's response to serious and organised crime, including:

- a coordinated law enforcement approach through the development of national priorities, the harmonisation of legislation and political will;
- improved information and intelligence sharing arrangements;
- improved international partnerships;
- a supportive suite of law enforcement capabilities; and
- adequate levels of resourcing.

Developments in this area are also significantly influenced by the Standing Committee of Attorneys General (SCAG), which agreed in April 2009 to a set of resolutions for a national response to combat organised crime, involving both legislative and non-legislative measures. In summary, the Ministers:

- noted that the Commonwealth was developing an Organised Crime Strategic Framework;
- noted the Commonwealth's intention to consider the introduction of a range of reforms including:
  - strengthened assets confiscation provisions, including unexplained wealth;
  - consorting laws;
  - enhanced police powers;
  - facilitating greater access to telecommunications interception; and
  - addressing the joint commission of criminal offences.
- agreed that states and territories would consider these legislative issues if they had not already done so and implementing model provisions for cross-border investigative powers;
- agreed to arrangements to ensure cooperation between jurisdictions in relation to organised crime, including coordinated law enforcement priorities; and
- agreed to establish a SCAG officers' group to undertake work on legislative, interoperability and information-sharing measures.

These resolutions were endorsed at the Ministerial Council for Police and Emergency Management – Police (MCPEMP) meeting on 19 June 2009.

A Senior Officers' Group on Organised Crime (SOG on OC), comprising senior officers from justice departments and police services, was established to progress the agreed measures and report back to SCAG, with development and implementation of a national response to involve both Attorneys General and Police Ministers (C Barker personal communication 21 Aug 2009).

The SOG on OC first met on 5 June 2009 and agreed to establish short-term focus groups to prioritise information and intelligence sharing and interoperability issues and examine:

- institutional arrangements to identify, prioritise and respond to organised crime threats;
- issues associated with criminal asset confiscation;
- ways to improve law enforcement capabilities—including police powers and offences; and
- ways to prevent organised crime, including through target hardening.

Final papers on each issue were provided to the SOG on OC representatives prior to their next meeting which was held on 17 July 2009. At that meeting, the SOG on OC agreed on recommendations to be put forward to Ministers for consideration.

In relation to criminal asset confiscation, SCAG agreed on 7 August 2009 that:

- criminal asset confiscation regimes in each jurisdiction include provision for:
  - conviction based confiscation of proceeds of crime;
  - non-conviction based confiscation of proceeds of crime;
  - mutual recognition of judicial proceeds of crime orders; and
  - agreements for sharing recovered assets with other jurisdictions that have made a significant contribution to the recovery of proceeds or the investigation or prosecution of the relevant unlawful activity; and
- criminal asset confiscation regimes in each jurisdiction may also include unexplained wealth provisions and mutual recognition of unexplained wealth orders.

The rationale behind this agreement is essentially that national consistency is desirable to prevent

organised criminals from exploiting gaps in coverage in different jurisdictions to avoid confiscation action. The SOG on OC considered the benefits of a national scheme implemented at the Commonwealth level, but agreed that consistency across jurisdictions would be more achievable, and therefore more effective, in the short to medium term. Mutual recognition of proceeds of crime orders was included to help ensure that movement of assets is not a barrier to confiscation. It is anticipated that the inclusion of asset-sharing provisions will encourage increased cooperation across jurisdictions in confiscation action. There is a divergence in approaches in relation to provisions targeting unexplained wealth, so it was agreed that such provisions would be an optional component.

The SCAG communiqué for 6–7 August 2009 relevantly states:

*National response to organised crime*

Ministers agreed to arrangements to support the comprehensive national response to organised crime discussed by the Commonwealth, States and Territories at SCAG in April 2009. These arrangements will ensure a coordinated national effort to effectively prevent, investigate and prosecute organised crime activities and target the proceeds of organised criminal groups (SCAG 2009: np).

The Australian Government recently finalised the Commonwealth Organised Crime Strategic Framework, the key elements of which are:

- the development of an organised crime threat assessment;

- the development of an organised crime response plan; and
- the implementation of multi-agency responses (Australian Government 2009).

Five capabilities are identified as necessary to the successful implementation of the strategy:

- intelligence, information sharing and interoperability;
- targeting the criminal economy;
- investigation, prosecution and offender management;
- preventative partnerships with industry and the community; and
- international, domestic and Commonwealth partnerships (Australian Government 2009).

The Attorney-General stated at the recent inaugural meeting of the Quintet of Attorneys General, which comprises the United Kingdom, United States, Australia, Canada and New Zealand, that the Framework

will aim to achieve a whole of government approach to combating organised crime by drawing together combined criminal intelligence and law enforcement capacity and prioritising operation target areas and groups (McClelland 2009: np).

The Framework lists 25 agencies, including the AIC, as responsible for responding to organised crime.

# The operation of jurisdictional confiscation schemes

All Australian states and territories, except Tasmania, have legislation allowing for both conviction and non-conviction based recovery, as set out in Table 1.

## Commonwealth

Before discussing the impact of the state and territory schemes, the Commonwealth experience will be considered.

The Commonwealth Director of Public Prosecutions (CDPP) is the agency responsible for applying for

orders for seizure and confiscation under all of the federal avenues for recovering the proceeds of crime. There are a variety of means of recovery, both conviction and non-conviction based. Table 2 sets out the amount recovered by the CDPP for 1995–2009. As can be seen, the quantum of recovered money under *POCA 2002* increased each year up to 2007–08, as did the total amount of money recovered by the CDPP. Interestingly, civil remedies no longer appear to be utilised, with no such cases since 2003–04. This is in marked contrast to the data analysed by Freiberg and Fox (2000), which indicated that such remedies accounted for a

**Table 1** State and territory proceeds of crime legislation, responsible agency and means of recovery

Jurisdiction	Legislation	Agency	Conviction/non-conviction
NSW	<i>Criminal Assets Recovery Act 1990</i>	NSWCC	Non-conviction
	<i>Confiscation of Proceeds of Crime Act 1989</i>	Drugs: NSWCC; Other: DPP	Conviction
Vic	<i>Confiscation Act 1997</i>	DPP	Conviction and non-conviction
Qld	<i>Criminal Proceeds Confiscation Act 2002</i>	QCMC (civil); DPP (conviction)	Conviction and non-conviction
SA	<i>Criminal Assets Confiscation Act 2005</i>	DPP	Conviction and non-conviction
WA	<i>Criminal Property Confiscation Act 2000</i>	DPP	Conviction and non-conviction
Tas	<i>Crimes (Confiscation of Profits) Act 1993</i>	DPP	Conviction
NT	<i>Criminal Property Forfeiture Act 2002</i>	DPP	Conviction and non-conviction
ACT	<i>Confiscation of Criminal Assets Act 2003</i>	DPP	Conviction and non-conviction

Note: NSWCC: NSW Crime Commission, DPP: Director of Public Prosecutions, QCMC: Queensland Crime and Misconduct Commission

**Table 2** Recovered proceeds of crime, 1995–2008 (\$) (Commonwealth)

Year	POCA 2002	POCA 1987	<i>Customs Act 1901</i>	Civil remedies	Total
1995–96	n/a	4,353,855	1,597,962	1,546,313	7,498,130
1996–97	n/a	4,043,566	174,526	1,489,903	5,707,995
1997–98	n/a	4,600,487	137,250	2,310,855	7,048,592
1998–99	n/a	8,713,747	147,250	1,952,527	10,813,524
1999–2000	n/a	4,699,489	86,255	131,161	4,916,905
2000–01	n/a	5,306,316	0	942,998	6,249,314
2001–02	n/a	5,814,649	31,717	1,042,045	6,888,411
2002–03	162,826	3,124,789	60,851	83,498	3,431,964
2003–04	3,436,440	6,422,189	491,412	0	10,350,041
2004–05	6,544,935	1,371,363	4,970	0	7,921,268
2005–06	14,691,198	3,713,398	15,960	0	18,420,556
2006–07	16,542,391	2,604,721	0	0	19,147,112
2007–08	19,554,349	5,185,588	0	0	24,739,937
2008–09	18,313,516	888,003	0	0	19,201,519
Total	79,245,655	60,842,160	2,748,153	9,499,300	152,335,268

Note: n/a=not applicable

Source: AIC 2008, based on CDDP annual reports for 1995–2007; CDDP 2008; 2009

quarter of all assets recovered by the CDDP for 1992–98. In that period, *Customs Act* proceedings also accounted for 8.5 percent of recovered assets.

## POCA 2002

POCA 2002 came into force on 1 January 2003, due in part to criticisms by the Australian Law Reform Commission (1999) that the 1987 Act and *Customs Act*, discussed further below, had ‘fallen well short of depriving wrongdoers of their ill-gotten gains’ (1999: [4.142]). As noted by Carew and Ollenburg (2006: 33), the Act

allows law enforcement authorities with a ‘suspicion’ only to commence proceedings in a civil court to restrain and then forfeit assets without conviction or charge.

There are currently three types of final confiscation orders available under POCA 2002:

- *forfeiture orders*—where the court orders that property which is the proceeds, or an instrument, of crime be forfeited to the Commonwealth;

- *pecuniary penalty orders*—where the court orders an offender to pay an amount equal to the benefit derived by the person from the commission of an offence; and
- *literary proceeds orders*—where the court orders an offender to pay an amount calculated by reference to benefits the person has derived through commercial exploitation of his or her notoriety resulting from the commission of an offence.

Statutory or automatic forfeiture, that is, forfeiture of restrained property without express order of the court, is also available where a person has been convicted of a ‘serious offence’ within the meaning of POCA 2002 and involves the forfeiture of restrained property, after a waiting period, without further order of the court. As noted in the most recent CDDP annual report (CDDP 2009), in order to preserve property pending the outcome of confiscation proceedings, POCA 2002 provides for restraining orders over property to be made early on in an investigation.

Applications for orders under POCA 2002 are made by the CDPD to the relevant state or territory court, which can make an order if it is satisfied, on the balance of probabilities, that the proceeds of the subject of the application are the proceeds of crime. Automatic forfeiture follows conviction, but acquittal does not affect a court's power to make a forfeiture order if it is satisfied that it could have made a forfeiture order under s 47 or 49 of POCA 2002 in relation to the offence for which a person's conviction was quashed.

An independent review of the Act in 2006 (the Sherman report) found that POCA 2002 was more effective than POCA 1987, but that there was room for improvement (Sherman 2006).

In its review, the PJC-ACC (2009: 101):

heard that there are a number of weaknesses in the Commonwealth's existing proceeds of crime legislation, which could be strengthened by:

- (i) reversing the onus of proof in criminal assets confiscation proceedings; and
- (ii) greater interaction and cooperation between different agencies in proceeds of crime investigations and the appropriate responsibilities of different agencies involved in proceeds of crime matters.

Sherman (2006) raised a number of areas for improving the effectiveness of the Act, especially in the context of:

- the use and dissemination of information between agencies;
- damages and costs;
- tension between orders of different jurisdictions;
- orders in relation to terrorism offences;
- improving data collection;
- unexplained wealth provisions;
- interim restraining orders or freezing orders; and
- resources for investigations.

The Sherman review made a number of recommendations for amendments to the Act and in its 2007 report, the PJC-ACC 'urged the Government to implement the recommendations made in the Sherman report' (see PJC-ACC 2007: 55). In its 2009 report, PJC-ACC (2009: 101) noted that the government had not yet responded to the Sherman review, but in September 2009, the Federal Attorney-General introduced the Crimes

Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth), which proposes to amend POCA 2002 'to strengthen the Commonwealth criminal assets confiscation regime' and respond to the Sherman report (Explanatory Memorandum: 2).

The legislation was passed in February 2010. The majority of the Act came into effect on assent on 19 February 2010; the balance will come into effect on 19 May 2010.

The amendments will:

- make tests for exclusion and recovery of property fairer and more consistent, including by strengthening protections for third parties;
- improve the operation of examination provisions;
- increase the effectiveness of information gathering tools under POCA;
- clarify the operation of orders ancillary to restraining orders;
- address technical recommendations with respect to the admission of evidence;
- ensure the correct calculation of pecuniary penalty orders;
- expand and clarify definitions used in the POCA; and
- make minor and technical amendments to POCA, including to enhance the effectiveness of the Confiscated Assets Account (see Explanatory Memorandum).

It should also be noted that in February 2010, the Australian Government passed the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth), which includes unexplained wealth provisions in POCA 2002 (see Bartels forthcoming for discussion). The Act, which has not commenced in its entirety, will also:

- remove the limitation period for civil confiscation action;
- allow for non-conviction based restraint and forfeiture of instruments of serious offences;
- improve the operation of the legal aid provisions in the Act; and
- streamline the Act's information disclosure provisions.

Since its introduction, almost \$61m has been recovered under the Act, with the amount recovered increasing each year. However, this does not



represent the total value of monies. As Sherman (2006: 16) stated in his report:

some of the statistics can be an unreliable guide to results. Statistics on the value of restrained or forfeited properties are a good example. An asset may be restrained but not ultimately forfeited. An asset forfeited may not realise its estimated value when sold. Further, it is not clear whether agencies use consistent methods of valuing property. An unencumbered property has a higher value than if it were encumbered, for example, by a mortgage. But it is not clear to what extent the statistics on restrained values take all encumbrances into account.

Freiberg and Fox (2000) note that forfeited amounts realised do not generally vary widely from the amounts ordered to be forfeited, because the restrained property is usually in hand, but the costs of realising the property at market value and costs of holding will diminish the returns.

Based on figures provided by the CDPP, Sherman (2006: 16) found that as at July 2006, ‘the value of properties restrained under the Act is \$184 million involving a total of 416 orders’. Data presented in the report also indicated that fraud was of increasing importance, while drug forfeitures were declining in importance (Sherman 2006). It was also found that the Act was being used appropriately in the social security area, namely, ‘that small fry were not being targeted inappropriately’ (Sherman 2006: 21).

The CDPP’s most recent annual report indicates that 52 new restraining orders were obtained under POCA 2002, compared with 75 in 2007–08 and 73 in 2006–07 (CDPP 2009). There were 134 restraining orders in force at 30 June 2009, with a value of \$91,833,401, compared with 173 in the previous year and 182 in 2007. There was a ‘significant’ increase in respect of forfeiture applications in connection with equipment used in the commission of online child exploitation offences, with 57 applications in 2008–09. Other outcomes for 2008–09 were:

- 20 pecuniary penalty orders obtained (vs 17 in 2007–08);
- 111 forfeiture orders obtained (vs 62 in 2007–08);
- automatic forfeiture occurred in 17 matters (same as 2007–08); and
- 33 compulsory examinations were undertaken (vs 43 in 2007–08) (CDPP 2008; 2009).

The total estimated value of confiscation orders (including automatic forfeiture) obtained was \$18.82m and the total amount recovered as a result of litigation under POCA 2002 was \$18.31m. It should be noted, however, that the fact that a pecuniary penalty order has been made against a person does not necessarily mean that all the money involved will be recovered by the CDPP, as the order may be made for an amount that exceeds the value of the person’s property (CDPP 2009).

Table 3 presents the breakdown of new orders in 2008–09 by type of order. As can be seen, restraining orders are likely to be the greatest source of revenue.

Table 3 New forfeiture orders in 2008–09 (Commonwealth)	
Type of order	Value (\$)
Restraining orders	26,170,307
Pecuniary penalty order	7,632,881
Forfeiture order	9,937,821
Automatic forfeiture	1,119,985
Literary proceeds order	128,800
Total	44,989,794

Source: CDPP 2009

Table 4 sets out the type of offence for which restraining orders were obtained in 2008–09, with drug cases accounting for the largest number and value of all matters.

Table 4 Restraining orders obtained by offence type (Commonwealth)		
Referring agency	Number of orders	Value (\$)
Corporations	2	1,181,019
Drugs	27	17,093,486
Fraud	13	2,988,985
Money laundering	6	2,525,654
Other	4	2,381,163
Total	52	26,170,307

Source: CDPP 2009

Table 5 sets out the money recovered in 2008–09 by type of order, with pecuniary penalty orders accounting for over half of the monies recovered.

**Table 5 Money recovered by type of order (Commonwealth)**

Type of order	Value (\$)
Pecuniary penalty order	10,045,090
Forfeiture order	4,843,392
Automatic forfeiture	3,280,406
Literary proceeds order	126,628
Money recovered but no formal orders made	18,000
<b>Total</b>	<b>18,313,516</b>

Source: CDDP 2009

Table 6 sets out the number of new matters opened by the CDDP in the first three years of POCA, by source agency. As Sherman (2006) noted, although not all of these matters actually commenced, it indicates that POCA 2002 is impacting across a wide range of agencies. In 2009, 45 of the 52 orders obtained were referred by the Australian Federal Police (AFP) (CDDP 2009), which may suggest there has been a change in practices or the way data are reported.

### *Proceeds of Crime Act 1987*

POCA 1987 was the first legislation in Australia specifically for the purpose of securing the forfeiture of assets used for, or derived from, crime. It is still in use for conviction-based confiscation proceedings which commenced before 1 January 2003, with over \$5m recovered in 2007–08 and \$0.89m in 2008–09. Unlike *POCA 2002*, *POCA 1987* does not have non-conviction forfeiture provisions and allows for the restraint of assets during criminal proceedings to prevent dissipation of assets.

### *Customs Act 1901 (Cth)*

The *Customs Act 1901* only allows confiscation of assets for activities associated with certain narcotics. The Act has provisions for pecuniary penalty orders and non-conviction based confiscations that do not rely on convictions. However, it does not contain provisions for automatic forfeiture in the event of a conviction. It is now rarely used to recover proceeds of crime, with no funds secured in this way in 2006–09.

**Table 6 New matters by source agency (Commonwealth)**

Agency	Number of orders
AFP	544
Australian Taxation Office	224
Australian Customs Service	114
Centrelink	92
ACC	46
Australian Securities and Investments Commission	35
State police <sup>a</sup>	29
Medicare	21
Australia Post	19
Attorney-General's Department	15
Department of Defence	12
Department of Immigration and Multicultural Affairs	10
State commissions <sup>a</sup>	8
Insolvency and Trustee Service Australia	6
Commonwealth Director of Public Prosecutions	2
Aboriginal and Torres Strait Islander Commission	7
Department of Employment and Workplace Relations	5
Department of Veterans' Affairs	3
Austrade	2
Australian Broadcasting Commission	2
Comcare	2
Australian Prudential Regulation Authority	1
Australian Quarantine Inspection Service	1
Air Services Australia	1
Australian Mint	1
State DPP <sup>a</sup>	1
Treasury	1
<b>Total</b>	<b>1,204</b>

a: denotes new matters referred by all states and territories collectively

Source: Sherman 2006

## Civil remedies

There is also scope under the *Director of Public Prosecutions Act 1983* (Cth) for the CDPP to pursue civil proceedings to recover liabilities to the Commonwealth, especially in the context of tax evasion and Medicare and social security fraud. Civil remedies can only be used in conjunction with a (proposed) prosecution but this form of remedy has not been used in the last six years.

It should also be noted that the CDPP can obtain orders to confiscate the superannuation of Commonwealth employees under the *Crimes (Superannuation Benefits) Act 1989* (Cth) and there were four such orders in 2008–09. The CDPP can also apply for similar orders in respect of police officers under the *Australian Federal Police Act 1979* (Cth) but there were no such orders made in 2008–09 (CDPP 2009).

## New South Wales

The New South Wales Crime Commission (NSWCC) recovers assets associated with indictable drug offences under the *Confiscation of Proceeds of Crime Act 1989* (NSW) (COPOCA), while the Director of Public Prosecutions (DPP) recovers assets associated with other offences under that Act. The NSWCC also undertakes non-conviction based recovery of assets under the *Criminal Assets Recovery Act 1990* (NSW) (CARA). Both Acts were substantially amended in 2005. Changes to COPOCA included broadening the definition of tainted property and providing for the issuing of freezing notices in order to create a more efficient system for the seizure, restraint, management and disposal of tainted property. Changes to CARA included expanding the definition of serious crime-related activities (Roth 2006). The NSWCC (2008: 13) noted in its 2007–08 annual report:

Confiscation of assets remains one of the most effective tools in addressing money laundering. The combination of criminal investigation and civil litigation action is a potent tool in this regard. Most of the funds being laundered and/or confiscated are the proceeds of drug crime.

## Criminal Assets Recovery Act 1990 (NSW)

The NSWCC may apply to the Supreme Court for the following orders under CARA:

- *restraining orders*—which prevent dealings with the property of persons reasonably suspected of having engaged in serious crime-related activity or of persons whose interests in property are reasonably suspected of being property derived from serious crime-related activity;
- *assets forfeiture orders*—for the forfeiture of property subject to a restraining order;
- *proceeds assessment orders*—assessing the value of proceeds derived by a person from illegal activities of that person or another person; and
- *search warrants, production orders and monitoring orders*—to allow property, documents and information to be obtained, so that property and the sources of that property can be located and identified.

There were 126 restraining orders under CARA in 2008–09, with 2,173 such orders obtained since CARA's introduction. The NSWCC also completed 63 applications for assets forfeiture orders, with 1,071 such orders since 1990.

Overall, the NSWCC obtained orders that property valued at over \$24m be forfeited to the Crown, including 60 proceeds assessment orders, resulting in orders totalling \$11,120,600. Between 1990 and 2009, the NSWCC completed 1,071 assets forfeiture orders and 584 proceeds assessment orders (NSWCC 2009). These orders were generally by way of negotiated settlement, with Lusty (2002: 353) noting that 'approximately 99 per cent of all cases under CARA settle with defendants and third parties agreeing to the forfeiture of the restrained property'.

Table 7 sets out the realisable confiscation orders obtained under CARA in 2008–09 by investigating agency. Not surprisingly, the NSW Police accounted for the vast majority of matters.

**Table 7** Referral agencies for confiscation orders (New South Wales)

Referring agency	Value (\$)
NSW Police	17,839,335
Independent Commission Against Corruption	1,898,065
NSW Police/NSWCC	1,796,233
NSWCC	1,585,575
ACC	500,000
Queensland Police/AFP	289,100
AFP	152,500
Total	24,060,808

Source: NSWCC 2009

Table 8 sets out the value of orders under CARA. As can be seen, there has been a dramatic increase in the value of orders in the last two years (ie 2007–09).

Fox and Freiberg (2000: 249) noted that the NSWCC ‘has been very active in seeking confiscation and has obtained more orders than the Commonwealth and all of the other states combined’. It is not entirely clear if this remains the case, but it would appear that the NSWCC remains very active and generally exceeds the Commonwealth’s recoveries.

The 2007–08 NSWCC annual report also sets out the value of the realisable confiscation orders, against the cost of the confiscation litigation function (see NSWCC 2008). In 2007–08, the NSWCC received realisable confiscation orders totalling \$32,711,908. Since CARA’s commencement, the confiscation orders have amounted to \$194,726,886, with the cost of the litigation function accounting for \$41,194,847 (ie 21%). Significantly, the latter costs have been steadily decreasing as a proportion of monies recovered. By way of comparison, Freiberg and Fox (2000: 256) earlier

**Table 8** Value of assets forfeiture and proceeds assessment orders, 1990–2009 (New South Wales)

Year	Assets forfeiture orders (realisable amount) (\$)	Proceeds assessment orders (realisable amount) (\$)	Total realisable confiscation orders (\$)
1990–91	118,515	Nil	118,515
1991–92	650,000	500	650,500
1992–93	2,673,528	450,000	3,123,528
1993–94	1,298,000	230,000	1,528,000
1994–95	3,031,739	344,900	3,376,639
1995–96	3,567,890	1,537,118	5,105,008
1996–97	3,193,943	789,402	3,983,345
1997–98	7,500,712	2,651,580	10,152,292
1998–99	4,681,108	4,704,931	9,386,039
1999–2000	8,916,853	2,098,446	11,015,299
2000–01	7,937,925	807,000	8,744,925
2001–02	6,895,958	2,516,009	9,411,967
2002–03	12,961,349	3,730,787	16,692,136
2003–04	10,015,578	5,189,116	15,204,694
2004–05	3,950,146	10,118,597	14,068,743
2005–06	5,472,793	7,652,734	13,125,527
2006–07	14,182,417	3,582,080	20,968,061
2007–08	25,866,752	3,787,510	32,711,908
2008–09	12,880,208	11,120,600	24,060,800
Total	135,795,414	61,311,310	218,787,686

Source: NSWCC 2008; 2009

found that it cost the Commonwealth DPP \$22m to recover \$55m, which they described as 'cost effective'; the Queensland DPP's costs at that stage were estimated as being around 28 percent.

### **The decision in *International Finance Trust Company Limited v New South Wales Crime Commission***

On 12 November 2009, the High Court handed down its decision in *International Finance Trust Company Limited v New South Wales Crime Commission* (IFTC v NSWCC), which concerned the constitutional validity of s 10 of CARA, which provides for the making of restriction orders. French CJ held at [4] that:

the section impermissibly directs the Court as to the manner of the exercise of its jurisdiction and restricts the application of procedural fairness in the judicial process and conditions its full application upon a discretion exercised by the Executive branch of the government of New South Wales. It is not to the point that the restriction is temporary, nor that the scope of the order may subsequently be varied by an exclusion order, which can only be made if the party affected shows, on the balance of probabilities, that the affected property was not illegally acquired. In my opinion the section is invalid.

Gummow, Bell and Heydon JJ also found the appellants had succeeded in establishing the invalidity of s 10 (Hayne, Crennan and Kiefel JJ dissenting). A leading defence barrister, Phillip Boulten SC described the decision as 'one of the most important judgments from the High Court in a very long time' and said the decision was 'a complete disaster for the Crime Commission' (Pelly 2009: np).

Responding to the decision, the NSW Police Minister, Michael Daley, said that the government would be 'plugging any anomalies in this legislation' and that 'criminals can take no comfort from [the] finding' (Pelly 2009: np). In fact, only two weeks after the decision was handed down, the NSW Government passed the *Criminal Assets Recovery Amendment Act 2009* (NSW), which came into effect on 26 November 2009 and ameliorated the effect of the decision, as well as extending the powers of the NSWCC (Gibson 2009c). The key changes were to:

- amend ex parte proceedings for restraining orders under COPOCA and CARA, as a consequence of the invalidity of s 10 of CARA in IFTC v NSWCC, conferring a discretion under CARA on the Supreme Court to notify an affected person of ex parte proceedings, conferring on a notified person the right to be heard in proceedings and providing for and confirming the right of the Supreme Court to set aside restraining orders under both Acts;
- enable the NSWCC to apply for, and to be granted, an assets forfeiture order under CARA without first applying for or obtaining a restraining order;
- exclude the state and those acting on its behalf from liability and claims for compensation and relief in relation to invalid restraining orders or assets forfeiture orders founded on invalid restraining orders under CARA; and
- preserve current assets forfeiture orders under CARA that were founded on invalid restraining orders (Explanatory Memorandum).

Immediately after the decision, it was variously reported that the ruling was not expected to affect the Commonwealth and other states with similar legislation, but which 'offer a fairer process for challenging orders' (Pelly 2009: np) and that it 'may also affect assets frozen and confiscated by other states and the Commonwealth, which have similar laws and argued unsuccessfully in favour of the NSW legislation' (Gibson 2009a: np). It may therefore be some time before the full implications of the decision are known. Senator Hutchins, who recently chaired the joint parliamentary inquiry into the ACC, 'condemned the High Court for being out of touch' and told the federal council of the Police Federation of Australia that Chief Justice French had acted 'with a complete disregard for the interests of public order and justice' (Gibson 2009b: np). Responding to Senator Hutchins' comments, John Corcoran, the President of the Law Council of Australia, defended the High Court's decision and described Hutchins' position as 'extraordinary', noting that many of the measures aimed at tackling serious and organised crime had been 'introduced at the request of, and on the advice of, law enforcement agencies, with little room allowed for voices of dissent or caution' (Law Council of Australia 2009: np).

## *Confiscation of Proceeds of Crime Act 1989 (NSW)*

The NSWCC can also take proceedings for restraint and forfeiture of tainted property in indictable drug matters under the *Drug Misuse and Trafficking Act 1985* (NSW). Each matter referred to the Commission for assessment of confiscation action under CARA is also assessed for confiscation action under the COPOCA. No restraining orders were obtained by the NSWCC under COPOCA in 2007–08; nor do there appear to have been any such orders in 2008–09.

As noted above, the NSW DPP has responsibility for non-drug related matters under COPOCA. Unfortunately, the DPP does not currently disseminate information on the amount of money recovered in this way, although personal communication with DPP staff indicates that the office anticipates doing so again in the future (G Rees personal communication 22 May 2009). Finally, it should be noted that the NSW Sentencing Council recently recommended that consideration be given to amending the relevant legislation to provide that where an offender is subject to confiscation orders, the court be precluded from regarding such confiscation as extra-curial punishment (NSW Sentencing Council 2009: Recommendation 10).

## Victoria

The *Confiscation Act 1997* (Vic) repealed the *Crimes (Confiscation of Profits) Act 1986* (Vic) and introduced non-conviction based recovery in Victoria. In 2003, the Auditor General conducted a review of the scheme and highlighted a number of administrative concerns, which have reportedly been addressed by Victoria Police and the Asset Confiscation Operations (ACO) of Victorian Department of Justice (DOJ). Victoria Police and ACO have reportedly also introduced a system of regular reviews of outstanding orders as a result of the Auditor General's report.

In 2003, Victoria passed a number of reforms to strengthen the *Confiscation Act 1997* and the Act was amended again in 2007 to clarify that successful applicants for exclusion of property can only have their interest in the property excluded (not the whole property) and that an applicant cannot claim to have acquired the property for 'sufficient consideration'

when it has been transferred as a gift or for natural love and affection. The 2007 amendments also introduced a new category of 'derived property', which includes property that is (substantially) derived or realised from an unlawful activity. In addition, amendments under the *Justice Legislation (Further Amendment) Act 2006* (Vic) enabled assets to be seized on suspicion of criminal activity, before criminal charges had been laid.

The DPP may apply for both conviction and non-conviction based recovery orders. As set out in the 2006–07 annual report of the Victorian Office of Public Prosecutions (OPP) (Victorian OPP 2007), 436 cases were opened and there was a tripling in revenue obtained from confiscating assets from \$2.2m in 2002–03 to \$6.6m in 2005–06. Confiscation of proceeds of crime was one of two areas of prosecution which 'grew rapidly in 2007/8' (Victorian OPP 2008: 17). The report unfortunately does not provide any comprehensive data in this context, but notes that more than \$10m was confiscated and that there were several large pecuniary penalty orders, some in excess of \$1m. Between 2002 and 2008, the confiscation section of the office increased from one to 10 solicitors, with 'a "big leap forward"...in 2004, when the OPP received substantial additional funding from the Victorian Government to expand its work in the confiscations area' (Victorian OPP 2008: 33). This trend appears to have continued, with the most recent annual report indicating that \$15.3m was surrendered to the state in 2008–09 (Victorian OPP 2009). Although the Victorian OPP annual reports provide some case studies, there are no more detailed statistics on outcomes under the legislation, but it was recently reported that 'Victoria's tough asset confiscation laws have led to more than \$53 million in assets being seized from suspected criminals last year' (Brumby 2010: 1). Of this, \$45m was in real estate, some of which is owed to bank mortgages. Confiscated cash, cars, boats and other assorted property used in the commissioning of crime were worth an estimated \$6.7m and there was a further \$1.5m in shares (Brumby 2010).

The most recent DOJ annual report (Victorian DOJ 2009) states that at the end of the 2009 financial year, there was \$14.17m in the 'Asset Confiscation Office Retained Monies Trust Account'; this was down from \$17.23m the previous year. The following unpublished data have been provided by the ACO within the Department of Justice.



**Table 9 Property managed by ACO (Victoria)**

Property type	Number of properties
Real property restrained	559
Bank accounts	219
Motor vehicles	312
Cash seized by police	110
Other	966

Note: 'Other' includes furniture, whitegoods, memorabilia, racing winnings and caravans

Source: Victorian DOJ ACO unpublished data 2008

**Table 10 Revenue collected 1998–2008 (Victoria)**

Year	Revenue (\$m)
1998–99	0.77
1999–2000	0.39
2000–01	1.47
2001–02	2.16
2002–03	2.20
2003–04	4.29
2004–05	4.81
2005–06	6.62
2006–07	3.50
2007–08	9.08
Total	35.29

Source: Victorian DOJ ACO unpublished data 2008

Table 10 presents information on the moneys recovered by the ACO between 1998 and 2008. As can be seen, there has been a general increase in revenue, peaking in 2007–08, the most recent year for which figures are available.

Table 11 presents information on cases with restraining orders, as at the end of 2008. About three-quarters of cases included forfeiture, with pecuniary penalty orders attached in about two-thirds of all cases. Table 12 sets out information on restraining orders, exclusion orders and hearings. By the end of the 2007 financial year, there had been 958 restraining orders obtained, following over 4,700 hearings.

## Queensland

The *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA) came into effect on 1 January 2003 and was recently amended by the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld), which came into effect on 22 June 2009. The amendments create a statutory presumption that the unexplained portion of a person's wealth is derived from illegal activity, subject to a finding that the person engaged in 'serious crime related activity' and evidence of unexplained wealth. Serious crime-related activity is defined in the CPCA as '[a]nything done by a person that was, when it was

**Table 11 Restraining orders (Victoria)**

Year	Total cases	Includes compensation	Includes automatic forfeiture	Includes forfeiture	Includes pecuniary penalty order
1998	10	5	2	5	2
1999	32	6	19	28	22
2000	41	15	16	21	15
2001	62	18	34	33	28
2002	90	29	48	55	39
2003	165	54	93	113	93
2004	197	59	135	158	141
2005	190	76	117	149	129
2006	154	54	91	115	95
2007	113	57	81	84	82
Total	1,054	373	636	761	646

Source: Victorian DOJ ACO unpublished data 2008

**Table 12** Restraining orders, exclusion orders and hearings (Victoria)

Year	Number of restraining orders obtained	Number of exclusion and variation applications	Total number of hearings	Number of real properties under restraint
1998–99	6	5	36	36
1999–2000	14	8	71	38
2000–01	45	11	109	50
2001–02	58	19	142	89
2002–03	128	81	275	154
2003–04	189	117	492	203
2004–05	172	174	845	165
2005–06	205	410	1,388	198
2006–07	141	300	1,383	n/a
Total	958	1,125	4,741	933

Source: Victorian DOJ ACO unpublished data 2008

done, a serious criminal offence (s 16). The onus then falls upon the respondent to rebut that presumption by satisfying the court that the increase in wealth was not related to illegal activity (s 83). These amendments align the forfeiture provisions with the proceeds assessment provisions insofar as requiring the state to establish a threshold level which then causes the onus of proof to shift to the respondent to prove the legitimacy of his wealth.

The criminal recovery process (under Chapter 3 of the CPCA—Confiscation after Conviction) is administered by the Office of the Director of Public Prosecutions (ODPP). For Chapter 3, there is a direct connection between the property and criminal charges and proceedings are administered by the DPP. For Chapter 2 proceedings, by contrast, there is no requirement for the property to have any correlation with the criminal offence. It is only necessary for there to be a ‘trigger’ offence; this being the suspicion that a person has committed an offence for which the penalty is five years or more imprisonment. This could simply mean one charge of supplying a dangerous drug.

The non-conviction based recovery process (under Chapter 2 of the CPCA—Confiscation without Conviction) is administered by the Queensland Crime and Misconduct Commission (QCMC), with DPP legal officers acting for the QCMC (Qld DPP 2008: 19).

The advantages of this separation are said to be that:

- ‘proceeds of crime recovery is separated from the law enforcement investigation function, so that allegations of trade-offs between criminal charges and asset forfeiture do not arise;
- asset confiscation is separated from the DPP’s criminal prosecution function, thus removing the potential for plea bargaining to seek lesser sentences or charges in exchange for asset forfeiture; and
- various levels of accountability are achieved through the bodies that oversee our work, ensuring that powers are used and investigations conducted in an appropriate way’ (QCMC 2009a: np).

Tables 13 and 14 set out the most recent data on this issue. According to the DPP’s 2007–08 annual report, which is the most recent available, there were 55 new confiscation proceedings commenced and 78 new restraining orders obtained in 2007–08, representing the highest number of orders to date. The restrained property was valued at \$18.56m, while forfeited assets amounted to \$4.245m. Although precise data for 2008–9 are not yet available, it was recently reported that the value of property restrained in 2008–9 was greater than that in 2007–8 and that this is attributable to the increase in the number of proceeds of crime referrals to the QCMC (QCMC 2009c: 6). By way of comparison, Freiberg and Fox (2000) report that \$2.73m was recovered between 1994 and 1997. It would also appear that matters are generally settled out of court,



**Table 13** Chapter 2 proceedings, 2002–08 (Queensland)

	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	Total
New matters	10	33	38	30	43	55	209
Restraining orders	10	34	44	38	50	78	254
Value of restrained assets (\$m)	7.129	10.547	8.088	10.879	11.743	18.56	66.946
Value of forfeited assets (\$m)	0.188	0.768	1.622	1.999	4.245	4.245	12.898
Estimated net value of assets forfeited (\$m)	–	0.768	1.622	2	4.245	4.675	13.31
Number of matters finalised	–	2	15	25	26	27	95

Source: Qld DPP 2008; QCMC 2008

**Table 14** Chapter 3 proceedings, 2003–08 (Queensland)

	2003–04	2004–05	2005–06	2006–07	2007–08	Total
Pecuniary penalty orders (\$)	343,285	321,983	323,892	282,806	1.272m	2.544m
Forfeiture orders (\$)	610,588	959,753	582,615	1.373m	179,445	3.705m
Monies collected (\$)	953,873	1.281m	906,508	1.656m	1.452m	6.249m

Source: Qld DPP 2008

with only one matter having proceeded to trial by the end of the 2007–08 financial year (Qld DPP 2008).

The QCMC is able to call upon a person with apparent wealth beyond their means who is shown on the balance of probabilities to have been engaged in criminality to explain their wealth, although the legislation requires a suspicion of serious criminal activity as a trigger to initiate any confiscation action. Once an ‘authorised commission officer’ forms a suspicion that a respondent has engaged in ‘serious crime-related activity’, and the court is satisfied that there are reasonable grounds for that suspicion, then the court must make a restraining order (see ss 28–31). The state may then make an application for either a forfeiture order or a proceeds assessment order. In the case of an application for a forfeiture order, the court must make the order if it is satisfied on the balance of probabilities that the person has engaged in ‘serious crime-related activity’ (s 58). Advice from the Director of Financial Investigations at the QCMC indicates that ‘effectively the legislation reverses the onus of proof making it incumbent upon the respondent to prove the acquisition of property

by lawful means’ (J Richardson personal communication 28 May 2009).

The most recent information indicates that in 2008–09, the QCMC:

- obtained 78 restraining orders over property valued at \$24.374m;
- finalised 23 matters, resulting in the forfeiture of property valued at \$3.304m;
- finalised 23 civil confiscation matters; and
- obtained two proceeds assessment orders for the recovery of \$1.7m of criminally-derived proceeds (QCMC 2009b).

In December 2009, it was reported that the QCMC had seized \$100m in six years of operation (Dick 2009).

## South Australia

The *Criminal Assets Confiscation Act 2005* (SA) came into effect on 2 April 2006. Table 15 sets out the amount deposited from the confiscation of assets of crime into the Victims of Crime Fund,

**Table 15** Monies deposited into Victims of Crime Fund 2005–08 (South Australia)

Year	2005–06	2006–07	2007–08	2008–09	Total
Amount deposited (\$)	807,299	1.222m	1.686m	1.408m	5.123m

Source: SA DPP 2005–09

**Table 16** Confiscation applications (South Australia)

Year	Number	Proportion of applications (%)
Forfeiture	8	2.8
Interstate	1	0.3
Literary proceeds	2	0.7
Oral	132	46.3
Pecuniary penalty order	27	9.5
Restraining order	41	14.4
Other	74	26.0
Total	285	100.0

Source: SA DPP 2009

**Table 17** Application outcomes (South Australia)

Year	Granted	Refused	Discontinued/not pursued	Proceedings not commenced	Other	Total
Forfeiture	9	0	1	0	0	10
Interstate	1	0	2	0	0	3
Oral	46	2	45	1	6	100
Pecuniary penalty order	9	0	13	2	2	26
Restraining order	37	0	4	0	2	43
Other	53	5	11	0	5	74
Total	155	7	76	3	15	256

Note: 'Other' includes one matter which was returned to police because it had been incorrectly referred

Source: Adapted from SA DPP 2009. 'Other' includes one matter which was returned to police because it had been incorrectly referred

amounting to over \$5m in four years. It is not clear how this figure accords with Freiberg and Fox's (2000) finding that between 1991 and 1996, South Australia recovered \$929,303 under previous legislation.

The 2008–09 annual report of the SA DPP for the first time set out additional information about the legislation, as extracted in Tables 16 and 17. As can be seen in Table 16, oral applications accounted for the highest proportion of all confiscation applications. Restraining and pecuniary penalty orders were sought in 14 and 10 percent of cases respectively. The data on outcomes demonstrates

that a high proportion of applications in South Australia are discontinued or not pursued, especially for oral applications. Restraining, forfeiture and 'other' orders have high rates of success, with nine out of the 10 forfeiture orders sought granted.

## Western Australia

Under the *Criminal Property Confiscation Act 2000* (WA), the police and DPP can apply to obtain freezing notices and freezing orders to prevent property from being disposed of while investigation

or prosecutions are carried out and/or until the conclusion of confiscation. In addition, the DPP can apply to a court for an unexplained wealth declaration against a person and the court must declare that the person has unexplained wealth if it is more likely than not that the total value of the respondent's wealth is greater than the value of the person's lawfully acquired wealth. The effect of such an order is that the subject person then becomes liable to pay the amount of their unexplained wealth to the state (see Bartels forthcoming). As Lusty (2002: 355) notes, citing the parliamentary speeches when the legislation was introduced, the Act is 'squarely aimed at "those people who apparently live beyond their legitimate means of support"'. Whereas the non-conviction based recovery standard required at the federal level (and in most jurisdictions) requires proof on the balance of probabilities that the assets in question are tainted, unexplained wealth requires the respondent to establish that the wealth was lawfully obtained. The burden of proof therefore lies with the respondent and not the state.

In addition to unexplained wealth declarations, under the Western Australian legislation, the court can make:

- *criminal benefit declarations*—that declare that certain property is more likely than not to have been derived from a specific forfeiture offence committed by the suspect or that the property was more likely than not unlawfully acquired; and
- *crime-used property substitution declarations*—that are available when the actual property used in the crime is not available for seizure, for example, when they are no longer in the suspect's possession. They enable the state to declare equivalent property that is in the suspect's possession as a substitute.

Orders of this nature may also be made against declared drug traffickers.

Table 18 sets out the number of freezing notices and orders obtained since 2000–01. It should be noted that multiple freezing notices may be issued for one person, which is said to account for some variations between reporting periods (WA DPP 2009). As can be seen, there has been a significant increase in the number of matters in the last two years. Since 2000,

there have been 1,178 freezing notices and 57 freezing orders obtained.

**Table 18** Freezing notices and orders obtained (Western Australia)

	Freezing notice	Freezing order	Total
2000–01	41	2	43
2001–02	115	9	124
2002–03	58	7	65
2003–04	68	6	74
2004–05	133	0	133
2005–06	152	3	155
2006–07	117	5	122
2007–08	231	9	240
2008–09	263	16	279
Total	1,178	57	1,235

Source: WA DPP 2009

**Table 19** Outcomes of freezing notices and orders (Western Australia)

	Freezing notice	Freezing order
Total issued	1,178	57
Total finalised	745	32
Number cancelled	212	2
Number leading to confiscation	442	24
Number of objections received	1,480	116
Objections dismissed	408	33
Objections successful	461	32

Source: WA DPP 2009

Table 19 sets out the outcomes and objections of freezing notices and orders obtained. The data indicate that 31 percent of objections received for freezing notices were successful, compared with 28 percent for freezing orders.

According to data obtained by Clarke (2004), more than \$39m had been frozen by September 2003. It should be noted that the analysis does not take into account the fact that some of the notices and orders

are still on foot. Another issue which was pointed out by a representative of the WA DPP is that

a number of the cancelled [freezing notices] were cancelled because of ‘administrative’ errors, which makes it difficult to gain the true picture from these figures. As to the number of objections that are successful it must be remembered that the freezing of property also includes the freezing of ‘non target’ interests...while the State may recognise those interests at the outset, there will still be an objection that is successful. Therefore the figure relating to successful objections does not actually reflect the number of persons who successfully ‘fought’ the State’s application (M Rakich personal communication 11 Sept 2009).

Table 20 shows the total amount arising from all confiscations paid into the Confiscation Proceeds Account since January 2001. There was an unprecedented amount recovered in 2007–08, at nearly \$13m, accounting for almost as much as 2001–07 together. This figure was boosted by increased property prices and the resolution of at least one substantial old matter (M Rakich personal communication 11 Sept 2009). By way of comparison, \$2.45m was recovered between 1992 and 1997 (Freiberg & Fox 2000).

Although there has been much discussion of unexplained wealth provisions (eg see Clarke 2004), they do not appear to have been used extensively in Western Australia, as set out in Table 21. As at 30 June 2009, there had been 24 unexplained wealth declarations made and 17 finalised over nine years of the legislation’s operation, eight of which were made in the first year. Although this number is small, it exceeds that of criminal benefits

**Table 20** Amount paid into Confiscations Proceeds Account (Western Australia)

Year	Amount (\$)
2000–01	417,074
2001–02	779,533
2002–03	1,388,500
2003–04	1,170,275
2004–05	2,091,774
2005–06	2,524,362
2006–07	5,070,596
2007–08	12,618,686
2008–09	7,837,418
Total	33,898,218

Source: WA DPP 2009

**Table 21** Number and types of applications made (Western Australia)

Year	Unexplained wealth declaration	Criminal benefits declaration	Crime used property substitution declaration	Total
2000–01	8	2	0	10
2001–02	4	2	1	7
2002–03	3	2	2	7
2003–04	2	4	1	7
2004–05	0	0	0	0
2005–06	0	1	0	1
2006–07	0	0	2	2
2007–08	2	0	2	4
2008–09	5	1	3	9
Total made	24	12	11	47
Total finalised	17	8	7	32
No. leading to confiscation	14	7	4	25

Source: WA DPP 2009

**Table 22** Proceedings finalised where a declaration of confiscation made (Western Australia)

	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	Total
Declared drug trafficker	0	9	19	17	25	32	60	61	88	311
Crime-used or Crime-derived	1	16	3	2	7	9	16	8	19	81
Crime-used property substitution	0	0	1	0	1	0	0	2	0	4
Unexplained wealth	0	0	0	1	1	3	0	2	2	9
Criminal benefits	0	0	0	0	1	0	1	0	1	3
Examination order	0	0	0	0	0	0	1	0	0	1
Total declarations	1	25	23	20	35	44	78	73	110	409

Source: WA DPP 2009

and crime-used property substitution declarations. As at September 2009, approximately 15 percent (or \$5.4m) of the total amount paid into the Confiscation Proceeds Account came from unexplained wealth-related matters (M Rakich personal communication 14 Sept 2009).

Table 22 sets out the proceedings finalised where a declaration of confiscation was made. It should be noted that s 8 of the WA legislation confiscates everything belonging to a declared drug trafficker and so removes the need to commence or proceed by way of unexplained wealth proceedings. As a result of the way that drug trafficker matters are handled, there is no statistical information on whether a drug trafficker could have been the subject of an unexplained wealth application, although it is probable that a number would have been.

It should also be noted that the DPP manages matters pursuant to the *Misuse of Drugs Act 1981* (WA), which resulted in revenue of \$284,981 being paid into the state's Consolidated Fund in 2008–09. The annual report notes that there has been a decline in the number of such applications and money forfeited as a result of applications now being made under the *Criminal Property Confiscation Act* (WA DPP 2009).

The 2007–08 annual report notes that the average cost per matter in 2007–08 was \$3,951. According to the 2008–09 report, however:

Confiscation proceedings vary greatly as to the type of application, complexity and length of time required to resolve them. Some proceedings can be dealt with relatively quickly, such as where there is no objection to the application for confiscation. Some proceedings are, by virtue of the underlying factual matrix or by virtue of the type of application, for example, applications for unexplained wealth declarations, complex in nature. Proceedings may also take considerable time where the criminal charges must be finalised first, including the trial and appeals processes, which can take a number of years and, accordingly, can be very demanding of resources.

Given these factors, it is difficult to provide an entirely meaningful average cost per confiscations matter reflective of the practice of the section and a ratio of cost to return may be more illustrative (WA DPP 2009: 58).

In 2008–09, 122 confiscation declarations for confiscations were filed. Receipts for the period totalled \$7,837,417 and the cost of the confiscations function was \$3,143,202. The ratio of cost to return was therefore assessed at 40 percent (WA DPP 2009).

## Tasmania

Tasmania is the only jurisdiction that does not have a non-conviction based confiscation scheme. The *Crime (Confiscation of Profits) Act 1993* (Tas) requires that a person is convicted or has absconded after being charged with a serious crime in order for the assets derived from that criminal activity to be confiscated by the state. There are no details on the operation of the Act in the DPP's annual reports. Information provided by Tasmanian Crown Law indicates that there were 48 matters in 2008–09 and \$60,673 was recovered. There were 31 pecuniary penalty orders made, valued at \$468,870 and 24 forfeiture orders, valued at \$122,884 (K Dillon personal communication 24 Aug 2009). The manager of Crown Law provided the following further advice:

Confiscation matters in Tasmania represent a small percentage of our overall indictable criminal matters. Trends are not readily discoverable given the small size of the sample. Secondly, confiscation matters tend to closely follow police activity—[that is,] in the past 12 months we have had a number of drug task forces operating on the north west coast resulting in a larger than normal number of drug related convictions in that region. In other years, the focus has been abalone poaching, or fisheries matters generally.

I can discern no particular trends other than that our numbers closely mirror levels of police resources allocated to specific task forces. There are very large movements in the number and size of orders depending on the nature of police activity. For example, an abalone matter might net an order for millions of dollars in pecuniary penalties whilst a drug matter might net a forfeiture order of \$200 (K Worsley personal communication 31 Aug 2009).

\$154,000 in cash, four vehicles and various sundry items had been forfeited. Property then under restraint, and pending forfeiture, included approximately \$214,000 in cash, 15 vehicles, pieces of real estate and other sundry items. The DPP's annual report for 2004–05 (NT DPP 2005) noted that the DPP was unsuccessful in attracting government funding for a dedicated team for forfeiture matters. That report included details of the numbers of forfeiture matters conducted for 2003–05 and observed that:

Completed matters in the Court of Summary Jurisdiction have doubled with mentions of them occupying many court (and prosecutor) hours. In the Supreme Court there are presently five matters outstanding. They are not consistently identified separately in the table above. A total of 22 forfeiture mentions are partly included in the general classification (NT DPP 2005: 43).

The 2007–08 Northern Territory DPP annual report (NT DPP 2008) notes that it cost \$0.76m to action matters under the *Criminal Property Forfeiture Act 2002* (NT). It was recently reported that the government had forfeited property, goods and cash under the Act valued at over \$1.5m in 2009. The figure for 2008 was \$852,935 (Lawrie 2010).

Since February 2006, all confiscation matters have been undertaken by the Solicitor for the Northern Territory on behalf of the DPP. Advice from the office of the Solicitor for the Northern Territory indicates that, in practice, the evidence used to initiate such proceedings is often as a result of an examination of a particular criminal target, conducted by the ACC and/or investigations carried out by the NT Police (K Gleeson personal communication 14 Aug 2009). To date, all unexplained wealth matters have been settled, that is, by consent agreement to forfeiture, or have not been contested, so there have not been any unexplained wealth matters determined by the Supreme Court.

## Northern Territory

The Northern Territory introduced unexplained wealth laws based on the WA legislation in 2003. The 2003–04 DPP annual report (NT DPP 2004) noted that since the commencement of the legislation, 48 matters had been completed and there were then 32 active files. Approximately

## Australian Capital Territory

The *Confiscation of Criminal Assets Act 2003* (ACT) came into effect on 15 August 2003. According to the DPP's 2008–09 annual report, in the relevant period there were 25 applications to restrain property

**Table 23** Data on applications and money forfeited 2003–08 (Australian Capital Territory)

	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	Total
Application to restrain property	n/s	12	13	16	9	25	75
Application for conviction forfeiture order	n/s	10	10	10	6	8	44
Unclaimed tainted property applications	n/s	5	2	0	0	3	10
Application for civil forfeiture orders	n/s	5	0	0	0	n/s	5
Application for buy back order	n/s	0	0	2	0	0	2
Amount forfeited (\$)	68,995	99,300	384,902	230,520	48,976	2,100	834,793

Note: n/s=not stated

Source: ACT DPP 2004–09

and eight applications for a conviction forfeiture order under the Act (ACT DPP 2009: 19). As at the end of June 2009, there was almost \$1.4m in the Confiscated Assets Trust Fund (Andrews 2009).

There were 17 matters referred to the ACT DPP by the AFP in 2008–09, with a value of \$110,656. Property valued at \$39,475 was also restrained. The value of property forfeited in 2008–09 was only \$2,100, but this was an unusually inactive period, as the data in Table 23 from earlier annual reports indicate. It was noted in the report that:

During [2008–09], neither this Office nor the AFP has been particularly proactive in pursuing such

matters. With the change of management in the Office, the problems were identified and addressed. The AFP too have taken steps to ensure that priority is given to these matters in the future (ACT DPP 2009: 19).

A representative from the ACT DPP advised that this was due to staffing issues and anticipated ‘that the 09–10 figures will be substantially improved’ (M Hunter personal communication 28 Aug 2009). This is confirmed by media reports that 19 matters were recently brought before the court, ‘with a slew of items either restrained or forfeited’ (Andrews 2009: np).

# Conclusion

In Lusty's (2002) analysis of confiscation schemes, he argued that conviction-based laws are insufficient to deprive criminals of their ill-gotten gains; civil forfeiture is not only necessary in practice, but justifiable in principle and that reverse onus provisions are necessary in practice justifiable in principle and consistent with the presumption of innocence.

Freiberg and Fox (2000) suggested, however, that there are many obstacles to successful implementation of confiscation laws, due in part to the fact that asset confiscation is not seen as a core function of law enforcement agencies. Furthermore, it is not clear that such laws are having their desired, and at times, stated effect in terms of adversely impacting on criminal activity, especially in the context of organised crime. Sherman (2006: 23) noted in his report:

It is difficult to evaluate the effectiveness of the Act in a precise way. The extent to which criminals are deprived of their assets can be assessed to some degree from the statistics above. But the extent to which criminals are deterred from committing further crime is harder to measure.

Although Sherman was commenting specifically on POCA 2002, the same could arguably said in relation to any confiscation scheme. He went on to say:

It is clear, however, that depriving criminals of their assets can have a greater punitive effect on many of them than going to prison. Being sent to prison can provide a break from the wife and kids, an opportunity to catch up with old friends, and many comforts can be acquired. On the other hand, the professional criminal (like any other member of the community) don't (sic) like seeing their pension funds taken away (Sherman 2006: 24).

Freiberg and Fox (2000: 242) submitted that 'an assessment of the effectiveness of the confiscation laws is crucial to policy decisions regarding their future', but that 'little has been done empirically to test whether the promises of the confiscation legislation have been realised'. They estimated that total recoveries averaged \$10–13m per year and that the laws 'appear to have had a negligible effect upon the amount of serious profitable crime in the community' (Freiberg & Fox 2000: 255, 260).

The more recent figures presented in this paper suggest that the regimes are now having a greater impact, although it is difficult to create an accurate picture of how much was ultimately realised. In particular, it is vital to minimise duplication of counting; for example, double-counting restrained and realised assets. In 1995, the National Crime Authority Working Party called for information to be



systematically collected to permit a comprehensive evaluation of the manner in which confiscation legislation operates. Writing in 2000, Freiberg and Fox observed that 'little has occurred on this front' (Freiberg & Fox 2000: 244). They also noted that at the state level, information as to amounts received is 'not readily available'; as with the present paper, the authors drew on figures 'included inconsistently' in DPP' reports (Freiberg & Fox 2000: 262).

Nearly a decade later, with the majority of jurisdictions operating under new legislative regimes, it appears that some information is collected in each jurisdiction, but it is not sufficient to undertake a comprehensive evaluation of the different regimes in operation. Indeed, it is difficult from the available data to even compare different jurisdictions. It is unfortunately not possible to aggregate the data presented in this paper to draw any firm conclusions about the number of confiscation matters initiated or finalised each year, let alone present a clear figure on the quantum of monies recovered in this way.

This paper presents an overview of the operation and impact of confiscation schemes in Australia. It is conceded that focusing only on the effects on crime

of special confiscation laws may be too narrow (Freiberg & Fox 2000) and the relevance of taxation recovery avenues should also be examined. With the exception of the recent decision in *IFTC v NSWCC*, which may have broader implications for confiscation schemes generally, the paper does not consider the existing case law under the legislation discussed in this paper. The jurisprudence in this area should be the subject of further research to examine the principles which underpin the courts' decisions to order confiscation of property.

Representatives of key agencies in each jurisdiction were provided with an opportunity to confirm and comment on the information drawn from their annual reports and publicly available data, but more is required to ensure that there is a systematic means of recording and reporting this information. In addition, data should be recorded on an ongoing basis, in order to determine trends in the impact of confiscation schemes. As Freiberg and Fox noted (2000: 261), what is required is 'better evaluative measures to monitor better resourced application of the...powers against better focussed targets'.

# References

URLs correct at 26 February 2010

Andrews L 2009. Crime does pay...the police. *The Canberra Times* 6 September. <http://www.canberratimes.com.au/news/local/news/general/crime-does-pay-the-police/1615749.aspx>

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2009. *Annual report 2008–2009*. [http://www.dpp.act.gov.au/pdf/AR2008\\_2009.pdf](http://www.dpp.act.gov.au/pdf/AR2008_2009.pdf)

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2008. *Annual report 2007–2008*. [http://www.dpp.act.gov.au/pdf/AR2007\\_2008.pdf](http://www.dpp.act.gov.au/pdf/AR2007_2008.pdf)

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2007. *Annual report 2006–2007*. [http://www.dpp.act.gov.au/pdf/AR2006\\_2007.pdf](http://www.dpp.act.gov.au/pdf/AR2006_2007.pdf)

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2006. *Annual report 2005–2006*. [http://www.dpp.act.gov.au/pdf/AR2005\\_2006.pdf](http://www.dpp.act.gov.au/pdf/AR2005_2006.pdf)

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2005. *Annual report 2004–2005*. [http://www.dpp.act.gov.au/pdf/AR2004\\_2005.pdf](http://www.dpp.act.gov.au/pdf/AR2004_2005.pdf)

Australian Capital Territory Director of Public Prosecutions (ACT DPP) 2004. *Annual report 2003–2004*. [http://www.dpp.act.gov.au/pdf/AR2003\\_2004.pdf](http://www.dpp.act.gov.au/pdf/AR2003_2004.pdf)

Australian Government 2009. *Commonwealth Organised Crime Strategic Framework: Overview*. [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Organised+Crime+Strategic+Framework+Overview.PDF/\\$file/Organised+Crime+Strategic+Framework+Overview.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Organised+Crime+Strategic+Framework+Overview.PDF/$file/Organised+Crime+Strategic+Framework+Overview.PDF)

Australian Institute of Criminology (AIC) 2008. Confiscation of the proceeds of crime: Federal overview. *Transnational Crime Brief* no. 1. <http://www.aic.gov.au/publications/current%20series/tcb/1-20/tcb001.aspx>

Australian Law Reform Commission (ALRC) 1999. *Confiscation that counts: A review of the Proceeds of Crime Act 1987*. ALRC report 87. [http://www.alrc.gov.au/inquiries/title/summary\\_alrc87.htm](http://www.alrc.gov.au/inquiries/title/summary_alrc87.htm)

Bartels L forthcoming. Unexplained wealth laws in Australia. *Trends & Issues in Crime and Criminal Justice*. Canberra: Australian Institute of Criminology

Brumby J 2010. More than \$53 million seized from suspected criminals. *Media release*. 24 February

Carew R & Ollenburg E 2006. Convicted by confiscation? The Proceeds of Crime Act 2002. *Precedent* 72: 33–35

Clarke B 2004. 'A man's home is his castle'—or is it? *Criminal Law Journal* 28: 263–286

Commonwealth Director of Public Prosecutions (CDPP) 2009. *Annual report 2008–09*. Canberra <http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2008-2009.pdf>

Commonwealth Director of Public Prosecutions (CDPP) 2008. *Annual report 2007–08*. Canberra <http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2007-2008.pdf>

Dick C 2009. CMC effort to seize proceeds of crime hits \$100m. *Media release* 13 December. <http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=67857>

- Freiberg R & Fox R 2000. Evaluating the effectiveness of Australia's confiscation laws. *Australian and New Zealand Journal of Criminology* 33: 239–265
- Gibson J 2009a. High court declares frozen assets law illegal. *Sydney Morning Herald* 12 November. <http://www.smh.com.au/national/high-court-declares-frozen-assets-law-illegal-20091112-icfz.html>
- Gibson J 2009b. Anger as crime assets unfrozen. *Sydney Morning Herald* 18 November. <http://www.smh.com.au/national/anger-as-crime-assets-unfrozen-20091117-ikfa.html>
- Gibson J 2009c. Crime Commission given extra powers to seize assets. *Sydney Morning Herald* 26 November. <http://www.smh.com.au/national/crime-commission-given-extra-powers-to-seize-assets-20091126-js1t.html>
- Law Council of Australia 2009. Law Council labels attack on High Court unwarranted and unfounded. *Media release* 20 November. <http://www.lawcouncil.asn.au/media/news-article.cfm?article=0FA0E468-1E4F-17FA-D2B2-1AB8D6E16DBA>
- Lawrie D 2010. More than a \$1 million forfeited from proceeds of crime. *Media release* 10 January. [http://newsroom.nt.gov.au/adminmedia/mailouts/6453/attachments/100114%20Lawrie\\_Criminal%20Forfeiture.pdf](http://newsroom.nt.gov.au/adminmedia/mailouts/6453/attachments/100114%20Lawrie_Criminal%20Forfeiture.pdf)
- Lusty D 2002. Civil forfeiture of proceeds of crime in Australia. *Journal of Money Laundering Control* 5: 345–359
- McClelland R 2009. *Remarks at the first international quintet meeting of Attorneys General*. [http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2009\\_FourthQuarter\\_10November2009-RemarksattheFirstQuintet\\*MeetingofAttorneys-General](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_10November2009-RemarksattheFirstQuintet*MeetingofAttorneys-General)
- New South Wales Crime Commission (NSWCC) 2009. *Annual report 2008/09*. [http://www.crimecommission.nsw.gov.au/files/Annual\\_Report\\_08-09.pdf](http://www.crimecommission.nsw.gov.au/files/Annual_Report_08-09.pdf)
- New South Wales Crime Commission (NSWCC) 2008. *Annual report 2007/08*. [http://www.crimecommission.nsw.gov.au/files/Annual\\_Report\\_07-08.pdf](http://www.crimecommission.nsw.gov.au/files/Annual_Report_07-08.pdf)
- New South Wales Sentencing Council 2009. *Reduction in penalties at sentence*. [http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll\\_scouncil.nsf/vwFiles/ReductioninPenaltiesatSentence.pdf/\\$file/ReductioninPenaltiesatSentence.pdf](http://www.lawlink.nsw.gov.au/lawlink/scouncil/ll_scouncil.nsf/vwFiles/ReductioninPenaltiesatSentence.pdf/$file/ReductioninPenaltiesatSentence.pdf)
- Northern Territory Director of Public Prosecutions (NT DPP) 2008. *Annual report 2007–2008*. <http://www.nt.gov.au/justice/documents/depart/annualreports/DPP%20Annual%20Report%202007-2008.pdf>
- Northern Territory Director of Public Prosecutions (NT DPP) 2005. *Annual report 2004–2005*. [http://www.nt.gov.au/justice/docs/depart/annualreports/dpp\\_annrep\\_0405.pdf](http://www.nt.gov.au/justice/docs/depart/annualreports/dpp_annrep_0405.pdf)
- Northern Territory Director of Public Prosecutions (NT DPP) 2004. *Annual report 2003–2004*. [http://www.nt.gov.au/justice/docs/depart/annualreports/dpp\\_annrep\\_0304.pdf](http://www.nt.gov.au/justice/docs/depart/annualreports/dpp_annrep_0304.pdf)
- Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) 2009. *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*. [http://www.aph.gov.au/senate/Committee/acc\\_ctte/laoscg/index.htm](http://www.aph.gov.au/senate/Committee/acc_ctte/laoscg/index.htm)
- Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) 2007. *Inquiry into the future impact of serious and organised crime on Australian society*. [http://www.aph.gov.au/Senate/committee/acc\\_ctte/completed\\_inquiries/2004-07/organised\\_crime/report/index.htm](http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/organised_crime/report/index.htm)
- Pelly M 2009. Proceeds of crime laws take beating. *The Australian* 12 November. <http://www.theaustralian.com.au/business/story/0,1,26343470-17044,00.html>
- Queensland Crime and Misconduct Commission (QCMC) 2009a. *Proceeds of crime*. <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10754&cid=5301&id=245>
- Queensland Crime and Misconduct Commission (QCMC) 2009b. *Annual report 2008–09*. <http://www.cmc.qld.gov.au/data/portal/00000005/content/21904001257988830100.pdf>
- Queensland Crime and Misconduct Commission (QCMC) 2009c. *Money laundering and organised crime in Queensland: A strategic assessment*. Crime bulletin no. 11. <http://www.cmc.qld.gov.au/data/portal/00000005/content/69545001263261764818.pdf>
- Queensland Crime and Misconduct Commission (QCMC) 2008. *Annual report 2007–08*. <http://www.cmc.qld.gov.au/data/portal/00000005/content/70345001225066480724.pdf>
- Queensland Office of the Director of Public Prosecutions (Qld DPP) 2008. *Annual report 2007–2008*. [http://www.justice.qld.gov.au/\\_\\_data/assets/file/0018/18702/ODPP\\_Annual\\_Report\\_2007\\_08.pdf](http://www.justice.qld.gov.au/__data/assets/file/0018/18702/ODPP_Annual_Report_2007_08.pdf)
- Roth L 2006. *Law and order legislation in the Australian states and territories: 2003–2006*. Briefing paper no. 12/06. Sydney: NSW Parliamentary Library Research Service
- Sherman T 2006. *Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*. Canberra: Commonwealth of Australia
- South Australian Director of Public Prosecutions (SA DPP) 2009. *Annual report 2008–09*. <http://www.dpp.sa.gov.au/03/2008-2009.pdf>
- South Australian Director of Public Prosecutions (SA DPP) 2008. *Annual report 2007–08*. <http://www.dpp.sa.gov.au/03/AR2007-2008.pdf>

South Australian Director of Public Prosecutions (SA DPP) 2007. *Annual report 2006–07*. <http://www.dpp.sa.gov.au/03/2006-2007.pdf>

South Australian Director of Public Prosecutions (SA DPP) 2006. *Annual report 2004–06*. <http://www.dpp.sa.gov.au/03/2005-2006.pdf>

South Australian Director of Public Prosecutions (SA DPP) 2005. *Annual report 2004–05*. <http://www.dpp.sa.gov.au/03/2004-2005.pdf>

Standing Committee of Attorneys General (SCAG) 2009. National response to organised crime. *Communique 6–7 August*. [http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_ThirdQuarter\\_6-7August2009-Communique-StandingCommitteeofAttorneys-General](http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_6-7August2009-Communique-StandingCommitteeofAttorneys-General)

Victorian Department of Justice 2009. *Annual report 2008–09*. [http://www.justice.vic.gov.au/wps/wcm/connect/0e341580404a8963a0a7fbf5f2791d4a/DOJ\\_AR\\_200809\\_00\\_full\\_reportweb2.pdf?MOD=AJPERES](http://www.justice.vic.gov.au/wps/wcm/connect/0e341580404a8963a0a7fbf5f2791d4a/DOJ_AR_200809_00_full_reportweb2.pdf?MOD=AJPERES)

Victorian Office of Public Prosecutions 2009. *Annual report 2008/09*. [http://www.opp.vic.gov.au/wps/wcm/connect/bc97ef0041588ae6afd6af7a70ff7e44/OPP\\_Annual\\_Report\\_200809\\_Full\\_Report.pdf?MOD=AJPERES](http://www.opp.vic.gov.au/wps/wcm/connect/bc97ef0041588ae6afd6af7a70ff7e44/OPP_Annual_Report_200809_Full_Report.pdf?MOD=AJPERES)

Victorian Office of Public Prosecutions 2008. *Annual report 2007/08*. [http://www.opp.vic.gov.au/wps/wcm/connect/e1215680404a1693b142fbf5f2791d4a/OPP\\_DPP\\_AR\\_2007-2008.pdf?MOD=AJPERES](http://www.opp.vic.gov.au/wps/wcm/connect/e1215680404a1693b142fbf5f2791d4a/OPP_DPP_AR_2007-2008.pdf?MOD=AJPERES)

Victorian Office of Public Prosecutions 2007. *Annual report 2006/07*. [http://www.opp.vic.gov.au/wps/wcm/connect/499c1380404a1653b0abfbf5f2791d4a/OPP\\_Annual\\_Report2006-07-fullreport.pdf?MOD=AJPERES](http://www.opp.vic.gov.au/wps/wcm/connect/499c1380404a1653b0abfbf5f2791d4a/OPP_Annual_Report2006-07-fullreport.pdf?MOD=AJPERES)

Western Australian Office of the Director of Public Prosecutions (WA DPP) 2009. *Annual report 2008/09*. [http://www.department.dotag.wa.gov.au/\\_files/DotAG\\_2008\\_09\\_Annual\\_Report.pdf](http://www.department.dotag.wa.gov.au/_files/DotAG_2008_09_Annual_Report.pdf)

Western Australian Office of the Director of Public Prosecutions 2008. *Annual report 2007–2008*. [http://www.department.dotag.wa.gov.au/\\_files/DotAG\\_AnnualReport08.pdf](http://www.department.dotag.wa.gov.au/_files/DotAG_AnnualReport08.pdf)

## Cases

*International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 261 ALR 220

## Legislation

*Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)

*Australian Crime Commission Act 2002* (Cth)

*Australian Federal Police Act 1979* (Cth)

*Confiscation Act 1997* (Vic)

*Confiscation of Criminal Assets Act 2003* (ACT)

*Confiscation of Proceeds of Crime Act 1989* (NSW)

*Crimes (Confiscation of Profits Act) 1986* (Vic)

*Crimes (Confiscation of Profits) Act 1985* (NSW)

*Crimes (Confiscation of Profits) Act 1986* (SA)

*Crimes (Confiscation of Profits) Act 1988* (WA)

*Crimes (Confiscation of Profits) Act 1989* (Qld)

*Crimes (Confiscation of Profits) Act 1993* (Tas)

*Crimes (Forfeiture of Proceeds) Act 1988* (NT)

*Crimes (Superannuation Benefits) Act 1989* (Cth)

*Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth)

Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth): Explanatory Memorandum

*Criminal Assets Confiscation Act 2005* (SA)

*Criminal Assets Recovery Act 1990* (NSW)

*Criminal Assets Recovery Amendment Act 2009* (NSW)

*Criminal Assets Recovery Amendment Act 2009* (NSW): Explanatory Memorandum

*Criminal Proceeds Confiscation Act 2002* (Qld)

*Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld)

*Criminal Property Confiscation Act 2000* (WA)

*Criminal Property Forfeiture Act 2002* (NT)

*Customs Act 1901* (Cth)

*Director of Public Prosecutions Act 1983* (Cth)

*Drug Misuse and Trafficking Act 1985* (NSW)

*Justice Legislation (Further Amendment) Act 2006* (Vic)

*Proceeds of Crime Act 1987* (Cth)

*Proceeds of Crime Act 1991* (ACT)

*Proceeds of Crime Act 2002* (Cth)



# Appendix

# Appendix A

**Table 24** Legislative tools for combating serious and organised crime—Australian jurisdictions

	Cth	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Search warrants	✓	✓	✓	✓	✓	✓	✓	✓	✓
Telecommunications interception	✓	✓	✓	Proposed	✓	✓	✓	✗ <sup>a</sup>	✓
Controlled operations	✓	✓	✓	✓	✓	✓	Proposed	✓	✓
Assumed identities	✓	✓	✓	✓	✓	Proposed	Proposed	✓ <sup>b</sup>	✗ <sup>c</sup>
Witness identity protection	✓	✓	✓	✓	✓	Proposed	Proposed	Proposed	✗ <sup>c</sup>
Surveillance devices	✓	✓	✓	✓	✓	✓	Proposed	✓ <sup>d</sup>	✓
Coercive powerse	✓	✓	✓	✓	✓	✗	✗	✗	✗
Control orders	✓ <sup>f</sup>	✓	✗ <sup>g</sup>	Proposed	Proposed	✓ <sup>h</sup>	✗	✗	Proposed
Anti-fortification	✗	✓	✗	Proposed	✓	✓	✓	✗	✗
Proceeds of crimei	✓	✓	✓	✓	✓	✓	✓ <sup>j</sup>	✓	✓
Unexplained wealth	✓ <sup>k</sup>	✗	✗	✗	✓	✓ <sup>l</sup>	✗	✗	✓

a: There is no ACT specific legislation. The Commonwealth legislation applies in the ACT to offences committed against the Commonwealth

b: The *Crimes (Assumed Identities) Act 2009* (ACT) is awaiting commencement

c: See however *Witness Protection (Northern Territory) Act 2002* (NT)

d: Listening devices only. The Commonwealth legislation applies in the ACT to offences committed against the Commonwealth. See also the Crimes (Surveillance Devices) Bill 2010 (ACT), which is currently before the Parliament

e: Coercive powers are contained in the *Australian Crime Commission Act 2002* (Cth) and the mirror ACC legislation of the States and Territories. In addition, legislation in New South Wales, Victoria, Queensland and Western Australia gives certain state agencies coercive powers in relation to serious organised crime

f: A person can be subject to a control order if the order substantially assists in preventing a terrorist attack or if the person has trained with a terrorist organisation

g: See however *Terrorism (Community Protection) Act 2003* (Vic) in respect of prohibited contact orders

h: Control orders can be issued against members of a 'declared organisation', former members of such organisations and others who engage in serious criminal activity

i: There are provisions in Western Australia and Northern Territory (and proposed in South Australia) allowing for more severe recovery action to be taken where a person has been declared a drug trafficker on the basis of certain conditions (eg a number of convictions for drug offences, or being convicted of a certain category of drug offence). For example, in Western Australia all property of a declared drug trafficker may be forfeited regardless of whether it is the proceeds of crime

j: Criminal confiscation only

k: See *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth)

l: The *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) passed the Legislative Council on 30 October 2009. It is not yet clear when it will come into effect

Note: Shaded items indicate variation from that document

Source: Attorney-General's Department (Cth), answer to question on notice, 6 November 2008 (received 23 December 2008), Appendix A, extracted in PJC-ACC 2009: Appendix 5



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